

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 25TH DAY OF MARCH 2015/4TH CHAITHRA, 1937

Arb.A.No. 2 of 2014 ()

AGAINST THE ORDER/JUDGMENT IN OPARB 431/2011 of II ADDL.DISTRICT
COURT,ERNAKULAM DATED
APPELLANT(S)/PETITIONER:

UNION OF INDIA
REPRESENTED BY ITS CHIEF ENGINEER NAVAC, EZHIMALA
KOCHI, NOW UNDER THE CHIEF ENGINEER (NW), KATARI BAGH
NAVAL BASE, KOCHI.

BY ADV. SRI.S.KRISHNAMOORTHY, CGC

RESPONDENT(S)/RESPONDENT:

M/S. SARAVANA CONSTRUCTION PRIVATE LIMITED
REPRESENTED BY MANAGING DIRECTOR L.SAMBASIVA REDDY
NO.155 B, 4TH MAIN DEFENCE COLONY, BANGALORE
PIN-560 088.

R1 BY ADV. SRI.MEIJO KURIAN PUVATHINGAL
R BY ADV. SRI.K.V.JAYADEEP MENON

THIS ARBITRATION APPEALS HAVING BEEN FINALLY HEARD ON
30/1/2015, ALONG WITH CO. 53/2014, THE COURT ON 25/3/2015 DELIVERED
THE FOLLOWING:

**T.R. RAMACHANDRAN NAIR &
P.V. ASHA, JJ.**

ARB. Appeal No.2/2014 & C.O.No.53/2014

Dated this the 25th day of March, 2015

JUDGMENT

Ramachandran Nair, J.

This appeal is filed against the order dated 14.8.2013 in O.P. (Arb.) No.431/2011 of the II Addl. District Court, Ernakulam. The said petition was filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 (for short 'the Act'). The petition was dismissed and the only modification made is with regard to the interest payable and the rate of interest is fixed as 9% till realisation. Interest at 18% was provided in the award, after the expiry of three months from the date of the award.

2. Cross Objection No.53/2014 is filed by the respondent in the appeal challenging the refixation of the rate of interest at 9%.

3. We heard learned Standing Counsel for the appellant Shri S. Krishnamoorthy and learned counsel for the respondent, Shri Meijo Kurian.

4. The sole Arbitrator was Mr. Justice K.T. Thomas, retired Judge of the Honourable Supreme Court of India, who was appointed as Arbitrator in Civil Appeal No.619 of 2009 (S.L.P.(C) No.12940/2006).

5. The appellant is Union of India represented by the Naval Academy, Ezhimala through its Chief Engineer. The respondent was entrusted with certain works for expansion of Ezhimala Naval Academy. The contract was executed on 25/1/2001. It was for external water supply, electrification, sewage disposal and roads to Ezhimala. It was executed between the Chief Engineer, Navy, Naval Base, Kochi and the respondent. The work was to start on 12.2.2001 and the period provided was two years and the work had to be completed by 12.2.2003. The amount of tender was nearly Rs.16 crores (Rs.15,88,78,815/-). The work consisted of two segments containing 12 parts.

6. The appellant by letter dated 13.2.2003 cancelled the contract with effect from 28.2.2003, by invoking the power under Condition No.54 of the General Conditions of Contract and the contract was

retendered at the risk and cost of the respondent.

7. When steps for retender was undertaken by the appellant, the respondent initiated legal proceedings by approaching this Court and the Madras High Court. These details are clear from the pleadings of the parties and from paragraphs 6 to 8 of the award. The writ petition was filed before the Madras High Court for necessary relief by way of a direction to issue copy of fresh tender form to the respondent. After the tender procedure was over, the appellant demanded a sum of Rs.62.50 lakhs as the difference in the two contracts which was also challenged before the High Court of Madras and the demand was quashed.

8. W.P.(C) No.14238/2003 was filed before this Court by the respondent challenging cancellation of the original tender and consequential relief was sought. In the judgment this Court directed the party to avail the remedy to initiate arbitration proceedings. The respondent sent a letter dated 20.11.2003 seeking appointment of Arbitrator and the appellant appointed one Chief Engineer as the sole Arbitrator. The respondent approached this Court seeking appointment

of another person as Arbitrator from the panel of names submitted by them and the original petition was disposed of directing the respondent to appoint one from the panel which was challenged before the Apex Court and finally the Apex Court appointed the Arbitrator as agreed to by the parties.

9. At the outset, Shri S. Krishnamoorthy, learned counsel for the appellant submitted that the learned Arbitrator went wrong in finding that the time is not the essence of the contract. It is pointed out that even though in the judgment in W.P.(C) No.14238/2003 the respondent was allowed to participate in the retender, they did not submit any tender. The terms of reference have been marked as Annexure A5 along with the appeal. According to the learned counsel, the cancellation of the contract is not at all a point included in the reference, going by Annexure A5. Therefore, it could not have been considered by the learned Arbitrator. But the Arbitrator passed a preliminary order overruling the said contention. By referring to the schedule of work, it is submitted there are certain provisional items which may vary. Even though the terms of agreement provides for a clause for extension,

certain grounds of extension are specifically provided which alone can be considered. Therefore, the learned Standing Counsel submitted that the view taken by the Arbitrator that the time is not the essence of the contract, is not correct. As the parties agreed to a specified time for execution of the work, the same had to be adhered to. There is gross failure on the part of the contractor to meet the time limit as he had completed within the period only 18% of the work and therefore the contract had to be terminated. The award thus passed is beyond the jurisdiction.

10. In this context, learned Standing Counsel referred to the findings of the learned Arbitrator at paragraphs 37 and 39 of the award. It is submitted that the finding as against the appellant concerning the rejection of the request for extension, is not correct. The respondent had no right to have an extension and the authority was competent to reject the application for extension also.

11. It is also submitted by referring to the findings of the learned Arbitrator in paragraph 26, that it has been found that there is a proper notice as evidenced by Ext.GC-17 to the respondent before

cancellation of the contract. As the learned Arbitrator has accepted the contention of the appellant that the same amounts to a notice contemplated under Clause 54 of the General Conditions of the Contract, the finding thereafter in favour of the respondent is totally contradictory. Thus, learned Standing Counsel submitted that the cancellation of the contract is for valid and justifiable reasons and in tune with the relevant clauses in the General Conditions of the contract. Learned counsel further explained that there was no breach of contract or obligations under the contract on the part of the appellant. He submitted that the rejection of application and the non extension is well supported by reasons.

12. Much argument has been raised with regard to the award of the claim towards expected loss on the profit which the respondent could have obtained if the work was completed. It is submitted that the same is only anticipatory and as far as actual loss due to cancellation, there is no evidence also. Hence, compensation cannot be quantified in terms of loss of profit.

13. Learned counsel therefore submitted that as cancellation of

contract is not a part of the terms of reference and as the authority found that the contractor cannot do the work also, while considering the application for extension, the cancellation as well as the steps taken for fresh tender are fully justified and the finding to the contrary is beyond the terms of the contract. Consequently, it is submitted that the finding that there is a breach of contract as against the appellant is also beyond the terms of reference and illegal in the light of the principles stated in **ONGC v. SAW Pipes Ltd.** {(2003) 5 SCC 705}.

14. Learned counsel further submitted that even though this Court permitted the respondent to participate in the fresh tender proceedings, they did not apply for tender form. Therefore, when the fresh tender was invited at the risk and cost of the respondent, the said factor should have been found in favour of the appellant. He explained various aspects by referring to the terms of the contract and the findings in the award.

15. According to the learned Standing Counsel, permission was granted by this Court in the writ petition filed wherein the cancellation order was specifically under challenge. Therefore, learned Standing

Counsel explained that the finding by the Arbitrator that there is breach of contract on the part of the appellant, cannot be justified. The said factor, therefore, should have been found in favour of the appellant.

16. In support of various contentions, he relied upon the following decisions:

Associated Engineering Co. v. Government of Andhra Pradesh (AIR 1992 SC 232), **Dwaraka Das v. State of M.P. and another** {(1999) 3 SCC 500}, **Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and another** (AIR 2007 SC 817), **ONGC Ltd. v. SAW Pipes Ltd.** (AIR 2003 SC 2629 = (2003) 5 SCC 705), **MSK Projects India (JV) Ltd. v. State of Rajasthan and another** {(2011) 10 SCC 573}, **Food Corporation of India v. Anupama Warehousing Establishment** (2004 (1) KLT SN 6, Case No.7), **Raghul Construction Engineers & Contractors v. NTPC** (2005 (4) KLT 629) and **Superintending Engineer, Kottarakkara and another v. M.P. Varghese** (2015 (1) KHC 191).

He also objected to the quantum of interest awarded.

17. Associated Engineering Co. v. Government of Andhra Pradesh (AIR 1992 SC 232) is referred to, to advance the argument that the Arbitrator cannot act arbitrarily. That was a case under Section 30 of the Arbitration Act, 1940. The Apex Court in paragraph 26 held that “the Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.” In paragraph 27 it was further held that “an arbitrator who acts in manifest disregard of the contract acts without jurisdiction.”

18. Dwaraka Das v. State of M.P. and another {(1999) 3 SCC 500} is referred to in the context of award of damages for breach of contract under Section 73 of the Contract Act. The relevant principles regarding award of damages have been discussed in the said judgment

at page 506. The Apex Court relied upon **A.T. Brij Paul Singh v. State of Gujarat** ((1984) 4 SCC 59 = AIR 1984 SC 1703). In that decision it was specifically held that “where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party.” The following aspects were also discussed therein:

“What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by a way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

Now if it is well-established that the respondent was

guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."

Shri Krishnamoorthy relied upon the latter part to contend that going by the facts of this case, the appellant cannot be said to be guilty of breach of contract and therefore the award of damages in this case is illegal.

19. **Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and another** (AIR 2007 SC 817) is relied upon only for the purpose of fixation of rate of interest. Therein, paragraph 11 will show that the interest awarded at the rate of 18% for pre-arbitration, pendente lite and post-award period, was held as not proper, as interest rate has gone down after economic reforms. Finally, the interest awarded at 18% was reduced to 9%. This is relied upon by Shri

Krishnamoorthy to support the order passed by the learned Addl. District Judge.

20. Regarding the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, Shri Krishnamoorthy relied upon the decisions of the Apex Court in **Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.** {(2003) 5 SCC 705} and **MSK Projects India (JV) Ltd. v. State of Rajasthan and another** {(2011) 10 SCC 573}. In paragraph 31 of the decision in **ONGC's case** {(2003) 5 SCC 705} the grounds for setting aside the award have been laid down. We extract the same hereunder:

“Therefore, in our view, the phrase 'public policy of India' used in S. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence,

in our view in addition to narrower meaning given to the term 'public policy in *Renusagar's case (supra)*, it is required to be held that the award could be set aside if it is patently illegal. Result would be - 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, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

21. Food Corporation of India v. Anupama Warehousing Establishment (2004 (1) KLT SN 6, Case No.7) is relied upon to contend that even if time is not the essence of the contract, the contract has to be performed within a reasonable time, if not party affected is entitled to put an end to it. But therein, the Division Bench has held that it is question of fact. We extract the following portion of the said judgment:

“So far as the question whether time is the essence of the contract is concerned, there can be no rigid rule. It depends upon the facts and circumstances of each case. It cannot be argued that merely because time is proved to be not the essence of the contract, the contract could be performed at any time. Performance of a contract by the promisee at a very late stage cannot be accepted, if it does not achieve the purpose for which the contract was entered into.”

But the said dictum will not apply to the facts of this case.

22. Raghul Construction Engineers & Contractors v. N.T.P.C.

(2005 (4) KLT 629) is by a Division Bench of this Court. Therein, it was held that the Arbitrator cannot pass orders beyond the terms of the contract. That was a case where clause 52 of the General Conditions of the Contract specified that after submission of the final bill, no further claim can be submitted. Therefore, the Bench was of the view that if the claim cannot be submitted, the dispute with regard to the same cannot be subjected to arbitration. The said decision also will not apply here.

23. Superintending Engineer, Kottarakkara and another v.

M.P. Vaghese (2015 (1) KHC 191) is one with regard to the interest which could be decreed under Section 34 of the C.P.C. In respect of an irrigation contract with the Government the issue was considered. It was held that the same is not a commercial transaction as the Government is not engaged in any industry, trade or business while establishing the project. Therefore interest at 6% alone was awarded. Such is not the case herein.

24. Learned counsel for the respondent, Shri Meijo Kurian contended that the nature of the work is laying of internal water supply, internal electrification, external water supply, construction of drainage, etc. The total amount covered by the contract was Rs.15.88 crores and the period provided is 24 months. He referred to the General Conditions of the Contract particularly Clause 7 of CS 7 which provides that deviation should not exceed 10% of the total. It is also specified that a particular item shall not exceed 25% of that work. The work commenced on 10.2.2001, within three months and on 18.5.2001 by CS 3, there was a deletion of work amounting to 14.68 crores. Therefore, the balance work amounted to 1.20 crores alone. By CS 4

and 5 communications dated 14.1.2002 and 31.7.2002 17 items were added valuing 14.69 crores and only 7 months remained for completion of the work, the date of completion being February, 2003. The work executed upto that period by the final bill is of above Rs.4 crores. It is the said circumstances which required submission of extension application under clause 11 of the General Conditions of the Contract. Under the said clause, or any other cause reasonable extension can be granted. Therefore, in proportion to the total work time had to be extended. But no reply was given and arbitrarily the contract was terminated.

25. The contention raised by the learned Standing Counsel for the appellant that the Arbitrator has no power to go into the validity of termination order, was objected to by the learned counsel for the respondent by relying upon clause 70 of the General Conditions of Contract. It is submitted that it was a case of no response by the appellant when extension was sought. The disputes leading to cancellation resulted in filing the arbitration request for appointment of learned Arbitrator and ultimately the Arbitrator was appointed as

ordered by the Apex Court. It is therefore submitted that the entire disputes were subjected to arbitration rightly by the appointment of Arbitrator. It is submitted that even from the earlier proceedings it is clear that the parties were at dispute with regard to all these aspects and therefore the contention that the Arbitrator has travelled beyond the terms of reference is not correct. No such terms have been fixed by the Apex Court. According to the learned counsel, the termination of contract is not excluded from arbitration. It is also submitted that the parties were at issue on all these points and separate points have been framed by the Arbitrator while considering each of the items of claims. Ext.CS 9 clearly shows that under sub-heading “cancellation of contract” has been raised as a dispute.

26. Since the legality of the termination was a point raised before the Arbitrator, the Arbitrator had to consider the sustainability of the reason for refusal to extend the time. According to the learned counsel, the rearrangement also took 22 months for doing the balance work by the subsequent contractor.

27. He relied upon the judgment of the Apex Court in **Dwaraka**

Das v. State of M.P. and another {1999(3) SCC 500} in support of his arguments. Learned counsel submitted that the Arbitrator has considered various aspects. It is well settled that the reasonableness of the reasons made by the Arbitrator are not matters on which the court can go into under Section 34 of the Act. The award is a well reasoned one and all the legal points have been discussed apart from factual aspects by referring to all relevant documents.

28. It is submitted that the District Court therefore has rightly refused to interfere with the award passed by the Arbitrator. But it is submitted that the adoption of interest at 9% throughout is not justified and the same has been challenged in the cross objection. It is submitted that the Arbitration and Conciliation Act , 1996 provides ample power to award interest pre litigation, pendente lite and future. 18% cannot be said to be excessive or punitive also.

29. Shri Meijo Kurian, learned counsel for the respondent relied upon the decisions in **K.V. Mohammed Zakir v. Regional Sports Centre** {(2009) 9 SCC 357}, **Ravindra and Associates v. Union of India** {(2010) 1 SCC 80}, **Navodaya Mass Entertainment Ltd. v.**

J.M. Combines (2014 (3) Arb. LR 460 - SC) and **Swan Gold Mining Ltd v. Hindustan Copper Ltd.** (2014 (11) SCALE 33) to support his argument that if the arbitrator acts within jurisdiction, the reasonableness of the reasons cannot be a matter for scrutiny by this Court.

30. In the first of the decisions in **K.V. Mohammed Zakir's case** {(2009) 9 SCC 357}, in paragraph 6 the following dictum was laid down:

“9. It is equally well settled, where the arbitrator acts within jurisdiction, “the reasonableness of the reasons” given by the arbitrator is not open to scrutiny by courts. However, if the reasons are such as no person of ordinary prudence can ever approve of them or if the reasons are so “outrageous in their defiance of logic” that they shock the conscience of the court, then it is a different situation. And in an appropriate case the court may interfere. However, the degree of such unreasonableness must be greater than the standard in a certiorari proceeding.”

In paragraph 5 it was held that the court should not substitute its own view for the view taken by the arbitrator while dealing with the

proceedings for setting aside an award.

31. **Ravindra and Associates's case** {(2010) 1 SCC 80} also reiterated the position that the High Court cannot act as a court of appeal.

32. In **Navodaya Mass Entertainment Ltd.'s case** (2014 (3) Arb.L.R. 460) it was held that the scope of interference is very limited. In paragraph 5 the legal position has been explained and we reproduce the same hereinbelow:

“5. In our opinion, the scope of interference of the court is very limited. Court would not be justified in re-appraising the material on record and substituting its own view on place of the arbitrator's view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, the court cannot re-appraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail.”

33. In **Swan Gold Mining's case** (2014 (11) SCALE 33) also, in

paragraph 12 the scope of jurisdiction has been examined. It was held that the court shall not ordinarily substitute its interpretation for that of the Arbitrator. The Arbitrator's decision, generally considered, is binding between the parties. The ground for interference will be rare, going by the above dictum. Only if it is patently illegal or in contravention of the provisions of the Act and like reasons, it can be interfered with.

34. Learned counsel for the appellant replied to these arguments. According to the learned counsel for the appellant, the deletion of certain works and adding up is only a technical thing. It amounts to an adjustment in the papers concerned. The communication by adding of certain items has no importance according to the learned counsel. He referred to the general conditions of the contract in that regard. It is submitted that provisional items are already provided and it can be added at any appropriate time. It is also submitted that in the extension application no mention has been made about the omitted and added matters. No proper conclusion has been made by the Arbitrator on this aspect. Annexure 5 alone is the terms of reference and going by

Section 23(3) any amendment can only be made within the terms of reference and the Arbitrator cannot go beyond that. It is therefore submitted that since the validity of the cancellation could not have been gone into the award is arbitrary and illegal.

35. Learned counsel for the respondent explained that the total work done was for Rs.5.81 crores at the time of termination and there is no incompetency of the contractor. As far as formation of roads is concerned, the lay out was delayed and minor items were granted for doing the work. He referred to paragraph 27 of the award in this context. According to the learned counsel, the time is not the essence of the contract.

36. First we will go to the relevant details in the award. The issues framed by the learned Arbitrator are the following:

- “i) Whether the Arbitrator appointed U/s. 11 of the Arbitration and Conciliation Act 1996 is competent to deal with the question regarding the validity of the termination of contract?
- ii) Whether the claims or any of them in the claim statement are non-arbitrable?
- iii) Has the contract been validly terminated?

- iv) Whether there was default on the part of respondent in performing the contract?
- v) Whether there was default on the part of the claimants in the performance of the contract?
- vi) Whether the claimant is entitled to get all or any of the claims enumerated in the claim statement? If so, to what extent?
- vii) Whether the respondent is entitled to the claims raised in the Counter statement, if so, to what extent?
- viii) Whether interest is awardable on any amount found payable? If so, at what rate?
- ix) Reliefs and costs?"

In the light of the contention by the learned counsel for the appellant that the Arbitrator appointed under Section 11 of the Act is not competent to deal with the question regarding validity of termination of the contract, issue No.3 was decided at the preliminary stage. After hearing arguments on both sides, an order was passed on 14.5.2008 holding the view that the Arbitral Tribunal is competent to decide the dispute involved in issue No.3 as well.

37. Learned Arbitrator relied upon clause 70 of the General

Conditions of Contract and a reference was also made about the different stages of the litigation between the parties before this Court and the Apex Court. It was finally held that as the Arbitrator has been appointed by invoking the arbitration clause under clause 70, the appointment is to decide “all disputes between the parties to the contract.”

38. Learned Additional District Judge also has held by relying upon clause 70 of the General Conditions of Contract that the Arbitrator is competent to decide the question regarding validity of the cancellation of the contract.

39. We extract hereinbelow clause 70 of the General Conditions of Contract:

“All disputes, between the parties to the contract (other than those for which the decision of the C.W.E. or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a serving officer having a degree in Engineering or equivalent or having passed final/direct final examination of sub-division II of Institution of

Surveyors (India) recognized by the Government of India to be appointed by the authority mentioned in the tender documents”

The said clause clearly indicate that “all disputes between the parties be referred for arbitration” except those covered by the exception clause, which do not have application here. The pre condition is the written notice by either party to the contract to the other of them.

40. After the termination of the contract by the Chief Engineer on 13.3.2003 with effect from 28.2.2003, the same was challenged in W.P. (C) No.14238/2003. There were serious contentions between the parties on various aspects including the one whether the question regarding the validity of the order of termination could be referred for arbitration. The writ petition itself was filed by the respondent herein challenging the cancellation of the contract and the contention raised was that the cancellation is illegal. One of the aspects considered by this Court is as to the scope of clause 70 of the agreement and whether the cancellation of the contract can be a matter for consideration by the Arbitrator. Clauses 54 and 70 were considered.

41. The learned Single Judge has taken the view that in the light

of clause 70 of the General Conditions of Contract, all disputes between the parties to the contract other than those are specifically excluded shall, after written notice by either of the party to the contract to the other of them, be referred to the sole arbitrator. Therefore, in paragraph 8 it was held as follows:

“8.....Therefore, I am unable to agree with the contention raised by the petitioner that cancellation of the contract by Ext.P44 invoking the powers under Condition No.54 is not arbitrable. I find that the termination of the contract being under Condition No.54 is not excluded from arbitration clause as contended. On the other hand, the point of time of reference alone is deferred till alternate arrangement for completion of the work is made by the Government.”

We also refer to the first sentence in paragraph 9 which is to the following effect:

“When there is a specific provision providing for arbitration, the parties to the contract has to abide by the terms contained therein and seek a reference for arbitration and cannot seek the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for resolution of their dispute.”

Paragraph 10 will show that in the light of the above finding, this Court was of the view that “it will not be appropriate to enter a finding on the merits of the contentions regarding such termination and as and when a reference is made to the arbitrator, the first and foremost question that arises for consideration is regarding the validity or otherwise of the contract under Condition No.54. When the petitioner is entitled to raise all contentions available to him in law, including the contention as to whether there are any good reasons for invoking the power under Condition No.54 or only a purported exercise of the power under Condition No.54, it is open to him, to seek a reference of the dispute regarding the validity of the termination as well by invoking Clause 70 of the Arbitration clause. If the petitioner seeks any such reference the same shall be referred to the arbitrator in accordance with the provisions contained under Clause 70 of the General conditions of the contract soon after the finalisation of the arrangements to be made for completion of the work which shall be done within a period of three months from the date of the judgment, unless such finalisation could not be done by any intervention of any order of a court of law.” This is

a binding judgment between the same parties.

42. Therefore, categorically there is a finding that the dispute regarding termination can also be a subject matter of arbitration. Finally, this Court also directed issuance of tender forms to the contractor to participate in the fresh tender. But according to us, the finding as regards the referability of the dispute regarding termination or cancellation is binding on the appellant also. We find no reason to agree with the contention of the appellant that the validity of the termination of contract cannot be a subject matter of arbitration. The effect of clause 70 cannot be whittled down. We therefore agree with the view taken by the learned Arbitrator in the interim order that the Arbitrator is competent to decide the dispute involved in issue No.3 also. The decision of the learned Arbitrator is not without jurisdiction, as contended.

43. The finding on the invalidity of the termination order is under attack for the reason mainly that the time was the essence of the contract. From paragraph 16 onwards of the award, the said point has been answered by the learned Arbitrator. The letter issued by the Chief

Engineer cancelling the contract has been marked as CS 6. The main reason attributed is that the contractor has “miserably failed to complete the work within the scheduled period as agreed upon” by them. The General Conditions of the Contract has been produced as C7. In clause 11 thereof, it is clearly mentioned that “time is the essence of the contract and is specified in the contract documents or in each individual Works Order... If the work be delayed by any of the six contingencies or causes enumerated thereunder or by reason of any other cause which, in the absolute discretion of the Accepting Officer, is beyond the contractor's control, then, in such cases the Officer concerned may make a fair and reasonable extension in the completion date.” After relying upon Section 55 of the Contract Act and the decision of the Apex Court in **M/s. Arosan Enterprises Ltd. v. Union of India** (AIR 1999 SC 3804) the learned Arbitrator took the view that time was not the essence of the contract. The view taken is that when the contract itself provides for extension of time that cannot be treated as one in which time is made the essence of the contract. This is the view taken in **M/s. Arosan Enterprises Ltd.'s case** (supra) also. The

Apex Court, in the said decision, had observed that such a clause will have to be read along with the other clauses under the contract and the agreement must be read as a whole.

44. The very same view was taken by a three Judge Bench of the Apex Court in **M/s. Hind Construction Contractors by its sole Proprietor Bhikamchand Mulchand Jain v. State of Maharashtra** (AIR 1979 SC 720). It was held in paragraph 8 as follows:

“Even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular late was intended to be fundamental, for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provisions relating to the time being of the essence of contract.”

The purport of the above paragraph is to the effect that if the contract

includes clauses providing for extension of time in certain contingencies, the provision relating to the time being of the essence of contract is ineffective. Relying upon the said judgment, a Division Bench of this Court in **K. Abdulkhadar v. The Plantation Corporation of Kerala Ltd., Kottayam** (AIR 1983 Ker. 1), held that when special conditions are provided for damages for delayed completion of work and also for extension of time in certain circumstances, time was not the essence of the contract.

45. In **Mc.Dermott International Inc v. Burn Standard Co. Ltd. and others** {(2006) 11 SCC 181} this question was considered in paragraph 85. Finally, in paragraph 86 the Apex Court has held that “in construction contracts generally time is not of the essence of the contract unless special features exist therefor.” Their Lordships relied upon the judgment of the Apex Court in **Hind Construction's case** (AIR 1979 SC 720).

46. As far as the present case is concerned, the following are the enumerated conditions for extension under clause 11:

“(i) by force majeure, or

- (ii) by reason of abnormally bad weather, or
- (iii) by reason of serious loss or damage by fire, or
- (iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or
- (v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or
- (vi) by reason of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contract, or
- (vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control.”

Even though learned counsel for the appellant Shri Krishnamoorthy submitted that the extension is purely at the discretion of the authority concerned, the true test will be, going by the decision of the Apex Court, whether there are clauses providing for extension of time. In that view of the matter, we find that the finding rendered by the learned Addl. District Judge that the time was not the essence of the contract is perfectly justified. Apart from the same, this is a point on which the

learned Arbitrator has relied upon the provisions of the Contract Act and the principles enunciated by the Apex Court and has interpreted the relevant clauses in the contract between the parties. For this reason also, we find that the said conclusion of the learned Arbitrator cannot be said to be totally arbitrary or illegal.

47. Much arguments have been advanced on the conclusion made by the learned Arbitrator that the obligations under the contract have not been fulfilled by the appellant also. This had arisen for consideration while referring to the validity of the termination order. Paragraph 22 onwards of the award deals with this issue. There is a detailed discussion about the various correspondences from among the documents produced before the learned Arbitrator. Of course, the learned Arbitrator in paragraph 26 found that GC 17 must be treated as the notice contemplated in clause 54 of the General Conditions of the Contract. The said provision gives power to cancel the contract. The point raised whether the contractor had failed to execute the work as alleged, was examined by the learned Arbitrator from paragraph 27 onwards. In this context reliance was placed on CS 3, viz. the

communication dated 18.5.2001 after the land was handed over on 9.2.2001, informing that parts 2 to 11 of the contract have been deleted from the scope of execution. These parts were restored only on 31.7.2002 as per CS Nos.4 and 5. On the basis of this communication the learned Arbitrator has found that as the period of completion was on 9.2.2003, the Contractor was given a period of six months only for completing the major part of the work. The same covers the major share, viz. Rs.14 crores.

48. In this context, the argument raised by Shri S. Krishnamoorthy is that there will be several provisional items to be performed which can be deleted and added up at any time. When the agreement provides for a specific term for completion of the work and the provisional items are shown in the agreement itself, the contractor cannot complain of the same. In fact, learned counsel for the respondent submitted that since the added items were given much less period for completion, going by the period originally fixed, the contractor could not have completed the work in time and therefore the proceedings issued cancelling the contract for non completion of the

contract within the stipulated time of two years cannot be upheld. Shri Krishnamoorthy tried to explain that such is not the finding of the learned learned Arbitrator. But as we have already observed, the learned Arbitrator in paragraph 27 has clearly entered a finding in favour of the contractor on this aspect, that is based on the added up items amounting to Rs.14 crores.

49. The learned Arbitrator thereafter proceeded to consider whether the contractor can be attributed with lack of diligence. The incidental question whether the obligations under the contract were performed by the appellant, was further considered. Reference was made to clause 38 of the General Conditions of the Contract in paragraph 30 which provides that “no work shall commence till the setting out is approved by the Engineer in Charge” which acts as a prohibition. Two letters, viz. CS 14 dated 5.3.2001 and CS 19 dated 2.3.2001 sent by the respondent to the Garrison Engineer informing about the arrangements carried out by them and to take necessary follow up action and also the fact that the establishment and machineries are lying idle, have been relied upon by the learned

Arbitrator in paragraph 30 of the award. The reply by the Garrison Engineer is dated 15.3.2001 (Ext.CS 21) informing that necessary drawings/clarifications will be made available shortly. It is noted in paragraph 32 by the learned Arbitrator, after referring to Ext.CS 28 that, through the said letter, the contractor sought permission to continue the work. It was followed by letter, Ext.CS 51 dated 24.8.2002. Series of letters issued thereafter have also been referred to in paragraph 34. Finally, it was concluded in paragraph 35 that the time between 9.9.2001 till 3.1.2002 was lost simply due to the non approval of the design of the layout, etc. by the appellant. It is also noted in that paragraph that by Ext.CS 58 letter dated 29.4.2002 the appellant forwarded five drawings and on 24.8.2002 the respondent brought the attention of the appellant that 82 drawings were supplied only much later and hence prayed for extension of time, but there was no response to the said request.

50. The learned Arbitrator thereafter considered the principles under Sections 54 and 67 of the Contract Act, and Ext.C7 providing for many obligations to be performed by the appellant. The

communication dated 24.8.2002 by the contractor requesting for extension of time was also considered. After referring to all these, in paragraph 41 it was concluded that the time should and ought to have been extended at least to cover the period of the delay which has been occasioned on account of the non approval of the settings by the respondent. It was found that the provision under Clause 38 of Ext.C7 contract enabled the appellant to grant extension. Finally, it was held as follows:

“It is unfortunate that respondent did not extend the time even for the delay caused by themselves - why it could not be granted is not understood from the evidence in this case. The lack of diligence thus looms large on the part of the respondent in performing their obligations in the contract.

For all the aforesaid reasons I hold that the unilateral cancellation of the contract by the respondent is invalid and cannot be upheld. In other words, the termination of the contract is illegal.”

51. Even though vehement arguments have been raised against the above finding, as rightly pointed out by the learned counsel for the respondent, the reasonableness of the reasons in the award cannot be

gone into by this Court. We find from the discussion above that the award is a well reasoned one and the relevant conclusions arrived at by the learned Arbitrator are based on the provisions of the Contract Act, relevant clauses in the agreement as well as the inter-se communications between the parties. After an analysis of the law and the factual position, findings have been rendered. Evidently, the learned Addl. District Judge cannot sit in appeal over the reasons of the learned Arbitrator and this Court also cannot have the jurisdiction to re-evaluate every items of evidence in the light of the principles stated by the Apex Court in **McDermott International Inc's case** {(2006) 11 SCC 181}. It was a case of construction contract and in paragraphs 112 and 113 it was held that “The conduct of the parties would also be a relevant factor in the matter of construction of a contract and correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. Once it is held that the arbitrator had the jurisdiction, no further question shall be

raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.” In the light of the above pronouncement of law also, we find it difficult to agree with the contention raised by the learned counsel for the appellant that the conclusions arrived at by the learned Arbitrator to hold that the cancellation of contract is invalid, arbitrary or illegal. We, therefore, concur with the said view and reject the said contention. The learned Additional District Judge has discussed these points in paragraphs 22 and 23, and held against the appellant.

52. The remaining contention raised by Shri S. Krishnamoorthy, learned counsel for the appellant as regards this point is that the reference letter does not contain any item concerning the validity of the cancellation of contract. Therefore, it is contended that the Arbitrator could not have gone into the said question. He referred to, in this context, the letter forwarded by the authority, Annexure 5 which was forwarded when the Arbitrator was initially appointed. According to him, the contents of Annexure 5 alone are the terms of reference before the Arbitrator. We have already found that Clause 70 of the General

Conditions of the Contract enables reference of all the disputes. The communication referred to and relied upon by the learned counsel for the appellant is the one before the Apex Court appointed the Arbitrator. In the order passed by the Apex Court appointing the Arbitrator, no particular directions have been given as regards the terms of reference. Obviously, what was referred to the learned Arbitrator, are the disputes between the parties. We have already referred to the judgment in O.P.No.14238/2003 wherein it was held that the dispute regarding termination will also be a subject matter of arbitration. Therefore, Annexure 5 is not conclusive on all these aspects and we reject the said contention also.

53. As far as the adjudication of the claims are concerned, initially the learned Arbitrator considered claim No.5, viz. losses and damages on account of breaches in performance of contract by the department. The total demand was for Rs.2.82 crores. The first component was relating to claim for Rs.1.75 crores due to drop of his business as a consequence of the wrongful termination of the contract. The said part was rejected by the learned Arbitrator for want of any

evidence. The second one is the claim for Rs.1.07 crores being 10% of the profit which the respondent would have earned from the works remained to be done. In this context reliance was placed on the decision of the Apex Court in **M/s. A.T.Brij Paul Singh and Bros. v. State of Gujarat** (AIR 1984 SC 1703). The contention raised by the learned counsel for the appellant is that the grant of 10% profit on the work excluded to be done, as profit, cannot stand legal scrutiny. When the termination of contract is there for non completion of the work within the time, learned counsel submitted that the respondent cannot expect any profit on the remaining item of the work to be done. But according to us, as the learned Arbitrator has found that the termination itself was illegal, the quantification of profit at 10% cannot be held to be so unreasonable.

54. We find that herein also, proper reasons have been shown by the Arbitrator. The same cannot be said to be illegal for any reason. The learned Addl. District Judge also found that the principle underlying Section 73 of the Contract Act was applicable to arbitration proceedings also. In **MSK Projects India (JV) Ltd. v. State of Rajasthan**

and another {(2011) 10 SCC 573}, in paragraphs 38 to 41 the relevant principles have been reiterated. We extract hereinbelow paragraph 38 for convenience:

“38. In common parlance, “reimbursement” means and implies restoration of an equivalent for something paid or expended. Similarly, “compensation” means anything given to make the equivalent. (See *State of Gujarat v. Shantilal Mangaldas* (1969) 1 SCC 509), *TISCO Ltd. v. Union of India* (2001) 2 SCC 41), *GDA and HUDA v. Raj Singh Rana* (2009) 17 SCC 199). However, in *Dwaraka Das v. State of M.P.* (1999) 3 SCC 500), it was held that a claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.”

Hence, no interference is called for on the said aspect also.

55. The learned Additional District Judge observed that regarding claim Nos.1, 3(a) and 3(b) there is not much resistance. From paragraph 51 onwards claim No.1 was considered, in the award. Out of the said claim, the balance amount due for the work done was assessed

at Rs.3,02,91,406/-, in paragraph 55. The value of materials have been assessed at Rs.1,80,19,907/- which are lying at the site. The discussion on these aspects are clear from paragraphs 51 to 57 of the award. Finally, after hearing the parties, the total amount payable has been fixed at Rs.4,80,81,010/- by adding value of materials also. After deducting the amount paid at Rs.4,36,48,510/-, the balance payable has been fixed at Rs.44,32,500/-. There is no scope for variation of the amount under this item and there cannot be no valid dispute on this aspect also. Claim No.2 was rejected. Claim No.3 was relating to Rs.24.76 lakhs as value of the building and materials confiscated by the department. The appellant assessed the value only at Rs.3.65 lakhs being the amount assessed by the appellant as value of building and materials but payment could not be proved by them. The argument was that it was adjusted against the risk and cost factor due from the respondent which contention was rejected. Rs.2.5 lakhs represented the value of Electronic Data Machine. Rs.6.15 lakhs was thus awarded. We find no reason to interfere with the said item, as the learned Arbitrator found that there is not even an oral evidence to show

that the contractor was permitted to take back the EDM from the site.

56. After considering the counter claims, all those have been rejected by the learned Arbitrator. We concur with the said view, as the termination of contract has been held illegal. As regards payment of interest, the Arbitrator has refused to grant interest at the rate of 18% relying upon Section 31(7) (a) of the Act.

57. Interest awarded is at the rate of 9% per annum from 16.7.2007, the date of presentation of claim statement till the date of award and future interest has been specified at the rate of 9% per annum from the date of award till the expiry of three months. It is further ordered that if the amount is not paid within the said period, interest rate shall escalate to 18% per annum from the date of expiry of the said period of three months. The learned Addl. District Judge has interfered with the last portion providing for 18% interest and ordered to grant interest at 9% throughout.

58. The Cross Objection filed by the respondent is to restore the interest portion of the award in full. Learned counsel for the cross objector relied upon two decisions of the Apex Court in this context;

one is **Food Corporation of India v. A.M. Ahmed & Co. and another** {(2006) 13 SCC 779} and the other one is **Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.** {(2007) 8 SCC 466}.

59. The Apex Court in **Food Corporation of India's case** {(2006) 13 SCC 779}, in paragraph 33 found that it would be just and proper to award interest at 9% per annum throughout instead of 12% as awarded by the arbitrator for the period in question. Thereafter, it is directed that the balance amount together with interest at 9% per annum shall be paid by the FCI within two months from the date of the order passed by the Apex Court, failing which the said balance amount shall carry interest at 12% from the date of its being due till realisation. Therefore, learned counsel for the Cross Objector submitted that 18% interest granted if the amount awarded is not paid within three months, was perfectly within the jurisdiction and the discretion of the learned Arbitrator.

60. In the subsequent decision in **Numaligarh Refinery Ltd.'s case** {(2007) 8 SCC 466} the rate of interest granted by the Arbitrator was considered in paragraphs 28 and 29 of the judgment. In that case

the Arbitrators had awarded interest at the rate of 12% pendente lite and post pendente lite at the rate of 18%. The Apex Court held that the grant of interest is discretionary and the majority of the Arbitrators have rightly granted interest at the rate of 12% pendente lite and at the rate of 18% post pendente lite and therefore, no exception can be taken to grant of such interest. In paragraph 29, after directing payment of the amounts within a period of six months from the date of the order passed by the Apex Court, it was held that if there is any failure it will carry interest at the rate of 15%. Therefore, Shri Meijo Kurian, learned counsel for the respondent submitted that the decision of the Arbitrator with regard to the grant of future interest at 18% for the period after three months was perfectly justified.

61. Shri Krishnamoorthy, learned counsel for the appellant relied upon the judgment of the Apex Court in Civil Appeal No.2005 of 2007. That was a case which arose under the provisions of Arbitration Act, 1940. The case law concerning the power of the Arbitrator to grant interest was examined therein. At internal page 17, it was observed that “where the agreement between the parties does not

prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest pendente lite.” Shri Krishnamoorthy tried to impress upon the fact that herein the agreement does not provide for grant of interest.

62. As far as Arbitration and Conciliation Act, 1996 is concerned, Section 31(7) confers power to award interest. Herein, the learned Arbitrator has awarded interest purely in tune with the above provision. The learned Addl. District Judge, in the impugned judgment, was of the view that Section 31(7)(b), even though permits to claim interest at 18%, when the rate of interest is fixed by the learned Arbitrator, the said provision has no application. It was ordered that once interest at 9%, is held reasonable, the same should apply throughout.

63. Thus, we find that this is a case where the learned Arbitrator granted interest at 18% on default to pay the awarded amount with 9% interest within three months and the learned Addl. District Judge was of the view that once interest is found to be reasonable at 9%, the same can be made throughout. Of course, Section 31(7)(b) provides for

interest at 18% when the award does not specify it. The party cannot have a claim for a particular rate of interest and it is the discretion of the Arbitrator or the Court. In paragraph 87 of the award the learned Arbitrator held that in the present rates of interest in banking institutions the rate of 18% would not be reasonable and adopted the maximum rate of 9% on fixed deposits given by the Nationalised Banks. Herein, by reducing the rate of interest from 18% to 9%, it cannot be said that the learned District Judge has acted in violation of the law also. Therefore, we find no reason to interfere with that part of the order of the learned District Judge.

For all these reasons, we find no reason to interfere with the judgment of the learned Addl. District Judge and the appeal is accordingly dismissed. The parties will suffer their costs in the appeal and cross objection.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(P.V. ASHA, JUDGE.)

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