

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 22nd March, 2016
Judgment pronounced on : 8th July, 2016

+ **O.M.P. 16/2013**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through Ms.Gunjan Sinha Jain, Adv.

versus

MBL INFRASTRUCTURE LIMITED Respondent
Through Ms.Anusuya Salwan, Adv.with
Ms.Renuka Arora & Mr.Kunal
Kohli, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the objections by way of filing the present petition under Sections 34 of the Arbitration & Conciliation Act, 1996 for setting aside the award dated 28th August, 2012.
2. The petitioner has challenged the award only to the limited extent of claims No.A-2(b), A-2(c)(iii), A-2(f) and findings arrived on counter claim R-2 which is decided in favour of the respondent. The remaining claims and counter claims have not been challenged.
3. M/s. MBL Infrastructure Limited (hereinafter referred to as the 'respondent') had entered into a contract with the petitioner vide agreement dated 24th August, 2006, for the execution of the work of 'short term improvement and routine maintenance of NH-5 from

Chilakaluripet to Eluru (km 355.00 to km 81.600) the contract price being valued at Rs.31,44,10,141.65/-.

4. As per the terms of the contract, the respondent was required to execute the work as detailed in the "Scope of Works". According to Clause 27.1, the Engineer shall issue the Indents of the works in stages and the respondent shall submit the program to the Engineer for its approval. The language of the Clause 27.1 reads as *"The Engineer shall issue the Indent of work in stages specifying the time limit for the same as and when required and the Contractor shall submit to the Engineer for approval a programme showing the general methods, arrangements, order, and timing for all the activities in the works, along with monthly cash flow forecasts."*

5. The respondent was to execute the works in accordance with the Indents issued to him by the Engineer from time to time within the time prescribed for completing the Indent. After execution of the Contract dated 24th August, 2006, the letter to proceed with the work was issued by the petitioner to the respondent on 29th August, 2006. It is relevant to submit that in accordance with Clause 27.1 of Part-I of GCC read with the Implementation Manual and Maintenance Intervention Levels (Section-6), under clause 6.3.1 that the maintenance programme planning shall be in two stages, and it is the primary responsibility of the Contractor to submit the first stage program within 28 days of issuance of the letter of commencement by the employer.

6. It is the case of the petitioner that despite of the said requirement under the contract, the respondent failed to give any programme to the petitioner within the stipulated period of 28 days. On 11th September, 2006, the Engineer after joint inspection and in

consultation with the respondent, issued the First Indent to the respondent.

7. Indents Nos. 2 to 6 were issued as per approved Work Programme as detailed here as under:

Indent No.2 dated 22nd November, 2006 (Start date 1st December, 2006 and End date 30th April, 2007).

Indent No.3 dated 28th November, 2006 (Start date 1st December, 2006 and End by Feb-07).

Indent No.4 dated 20th December, 2006 (start by 20th December, 2006 end by 11th March, 2007)

Indent No.5 dated 12th March, 2007 (start by 12th March, 2007 and end by 11th June, 2007).

Indent No.6 dated 12th June, 2007 (start by 12th June, 2007 and end by 11th September, 2007).

8. It was the case of the petitioner that right from the date of commencement of work, the respondent exhibited a lethargic attitude in executing the work, despite repeated notices and reminders of the Engineer/petitioner on numerous occasions. The petitioner vide its letter dated 4th December, 2006 requested the respondent to expedite the work mentioned therein.

9. In a nut shell, it was alleged by the petitioner that the respondent failed to execute the work from the beginning and the lapses were brought to its notice from time to time in various platforms, like management meetings, etc. In all the notices issued vide letters dated 18th December, 2006, 7th February, 2007, 18th April, 2007 and 11th December, 2007, the termination clause was mentioned and the respondent was cautioned to take all necessary steps to complete the work within the scheduled time. The

respondent requested in each and every occasion and promised that he will complete the balance works within the agreement period and extended the same assurance during the extended period. However, the respondent failed to complete the work as promised and also did not seek any further time for completion of the balance works. Hence, the petitioner had no other alternative than to terminate the contract and accordingly, the contract was terminated on 31st December, 2007.

10. In view of the termination of the contract, the respondent raised disputes with NHAI claiming a total amount of Rs.17,32,85,075/- *inter alia*, under 14 main claims and 7 sub-claims before the Tribunal.

Since the Bank Guarantees furnished by the respondent against Performance Security of Rs.3,14,41,014/- and liquidated damages of Rs.3,14,41,014/- had lapsed prior to the commencement of arbitral proceedings, which were not renewed by the respondent despite demands from the petitioner, the petitioner had claimed for recovery of the said amounts from the final bill payable to the respondent. However, since the payment under the Final Bill was also one of the disputes raised by the respondent, for due adjudication and regularization of the proposed deductions in respect thereof, Counter Claims for Performance Security of Rs.3,14,41,014/- and Liquidated Damages of Rs.3,14,41,014/- were raised by the petitioner before the Tribunal, besides costs of arbitration.

11. The Tribunal published the Award in the matter on 28th August, 2012. Out of the total 21 claims raised by the respondent, 10 claims have been rejected and against 5 claims, no award has been made

as in 4 cases nil amounts were claimed and one claim was not pressed by the respondent. Details of the six claims allowed by the Arbitral Tribunal for a total amount of Rs.5,73,54,018/- are as under:

- (i) Claim No A-2 (a) (i): Work done accepted, certified but not paid as per IPC-8: Rs. 1,63,07,725/-
- (ii) Claim No A-2 (a) (ii): Work done, accepted, certified but not paid as per IPC-9: Rs. 1,58,54,841/-.
- (iii) Claim A-2(b): Deductions effected by NHAI for noncompliance of in respect of median maintenance, route patrol vehicle and ambulance: Rs.33,92,964/-. The Ld. Tribunal has awarded Rs. 29,38,671/- after upholding certain recoveries made by the Petitioner for reasons stated in para 2.4 of the Award.
- (iv) Claim A-2(c): Recoveries made by NHAI Rs. 12,57,462/- under five heads i.e., (i) non-lettering of Distance Measuring Stones (Rs. 833.72), (ii) surface unevenness of bituminous concrete (Rs. 4963.20), (iii) casualties of median plants(Rs. 9,53,215.10), (iv) photographs & videography (Rs. 18,000/-) and (v) non performance of roughness measurements (Rs. 2,50,400/-). Ld. Tribunal has awarded Rs. 4,76,607/- after upholding most of the recoveries made by the Petitioner for reasons stated in para 2.4.4 of the impugned Award.
- (v) Claim No A-2 (f): Deduction in IPC-9 on account of 20% of balance work to be done: Rs. 1,77,51,022/-. AT has erroneously awarded this amount in full for the reasons recorded in paras 2.8.1 to 2.8.4 of the impugned Award holding that the termination of the Contract effected by the Petitioner is invalid.
- (vi) Claim No A-3: Retention Money/Security Deposit: Rs.53,62,518/-. The Ld. Tribunal has awarded an amount of Rs. 40,25,152/- after allowing the Petitioner's recoveries of Rs. 4,90,749 (as per para 15.1 of the impugned Award) towards seigniorage charges and Rs. 8,46,617/- (as per para 16.1 of the impugned Award) against Labour Cess.

12. Both of the counter claims raised by the petitioner viz., counter claims for Performance Security of Rs.3,14,41,014/- and

Liquidated Damages of Rs. 3,14,41,014/- were rejected by the Arbitral Tribunal.

13. It is submitted by the petitioner that the impugned Award is erroneous, and clearly beyond the terms of the contract insofar as the findings qua Claims No. A-2(b), A-2(c)(iii), A-2(f) and counter-claim R-2 are concerned and have been decided in favour of the respondent. Only to this extent impugned award is challenged.

14. Now, I shall deal with the submissions of both the parties claimwise.

15. Claim No. A-2(b): Deductions effected by NHAI for non-compliance of in respect of median maintenance, route patrol vehicle and ambulance: Rs.33,92,964/-. The Tribunal has awarded Rs.29,38,671/- after upholding certain recoveries made by the petitioner.

15.1 The said claim relates to the recoveries made for median maintenance, route patrol vehicle and ambulance. Though it is admitted by the petitioner that recoveries were made for a total amount of Rs.33,92,964/- from IPC-1 to 9 for non-compliance of BOQ items 2.1 (median maintenance), 4.2 (route patrolling vehicles) and 4.3 (provision of ambulance). It is alleged by the petitioner that the Arbitral Tribunal did not appreciate the evidence produced by the petitioner in support of its contention that the amounts were correctly recovered from the various IPCs due to the respondent and erred in awarding a sum of Rs. 20,98,671/- to the respondent against the three items in the said claim. The findings of the Tribunal qua Claim no. A-2(b) are incorrect. Various grounds are mentioned in the objections.

16. After having gone through the award as well as the record it appears that the Arbitral Tribunal after considering the evidence on record have come to a finding of fact that in none of the evidence filed by the petitioner NHA I it was mentioned that plants and shrubs had withered due to lack of watering and manuring. The Arbitral Tribunal, on the other hand relied upon letters dated 4th August, 2007 and 29th December, 2007 whereby the respondents had intimated that the plants were flourishing and blooming. The Arbitral Tribunal has considered evidence on record. Appreciation of evidence is within the domain of the Arbitral Tribunal and the award cannot be substituted on the ground that the Arbitral Tribunal would come to a separate finding.

(i) Route Petrol Vehicle -less frequency and two shifts instead of three shifts for the staff.

The Arbitral Tribunal has interpreted Clause 4.4.1 and 4.8.1 of the terms of the contract between the parties and have held that "to and fro" or up and down 'journey' and stretch means both the carriage ways and not one way. It is well settled that interpretation of the contract is within the domain of the Arbitrator. Moreover the evidence on record i.e. Log Books maintained clearly showed the frequency of the route petrol vehicle. Improper maintenance of two shifts instead of three shifts of the staff.

Improper Maintenance of shifts- 2 shifts instead of 3 shifts for the staff.

The Arbitral Tribunal has given detailed reasons for holding the recovery unjustified. The Arbitral Tribunal

has rightly held that there was no provision in the contract agreement that shifting of route petrol vehicle is to be provided in three shifts per day of 24 hours. Moreover all Log Books were available which were duly considered. This Court will not re-examine and reassess the evidence lead before the Arbitrator.

(ii) Ambulance - Less qualification of paramedical staff and less number of shifts.

The Arbitral Tribunal has on the face of the record have come to a finding of fact that the contractual requirement is that the Ambulance has to reach the incident spot within 30 minutes of occurrence of the incident and it is for the claimant to ensure that the Ambulance with staff is in a state of readiness round the clock to be available.

17. The Tribunal has rightly held that there is no document to establish that the Ambulance did not reach on time. The Arbitral Tribunal has considered the evidence on record and this Court would not sit as a Court of appeal over the award of the Arbitral Tribunal. The said view cannot be interfered with. The objections are accordingly rejected.

18. Claim No. A-2(c)(iii): Recovery towards casualties of median plans: The Tribunal has awarded Rs.4,76,607/- after upholding certain recoveries made by the petitioner.

19. The Claim raised by the respondent relates to recoveries made towards casualties of median plantation. It is alleged by the petitioner that the Tribunal erred in awarding a sum of Rs.4,76,607/- against the petitioner and in favour of the respondent as regards the said claim and the award qua the same deserves to be set aside

mainly on the following grounds that the recoveries were made towards casualties of median plantation based on survey report. The survey report was prepared and submitted to the petitioner by the Consultant after termination of the contract vide Exhibit R98 Vol-19, which were placed on record before the Tribunal. The recoveries are within the powers of the Engineer and the same are in accordance with the Contract. Thus, no interference is called for.

20. Claim No A-2 (f): Deduction in IPC-9 on account of 20% of balance work to be done.

21. The claim was based on termination of the Contract. It was the case of the petitioner that the contract had been validly terminated and that under Clause 54.1 of the Contract, it was the case of the petitioner before the Arbitral Tribunal that the petitioner was entitled to payment upon termination of the contract for the reason of a fundamental breach of the contract by the respondent. However, it was the respondent's case that the contract had not been validly terminated, and therefore, no recovery could have been made.

22. The Tribunal held the termination itself to be invalid and accordingly held that as the termination of the contract has been held to be invalid, Clause 54.1 of the contract for recovery of 20% of the cost of balance work cannot be invoked. The petitioner submits that findings of the Tribunal in this regard are not correct on the various grounds.

23. The discussion of the said claim, evidence produced by the parties and finding arrived by the Arbitral Tribunal have been mentioned in para 2.8.1. to 2.8.5. The extract of the same have been reproduced herein below:-

**"2.8. Claim No.A-2(f): Deduction in IPC 9 Rs.1,77,51,022.00
on account of**

**20% of the balance
work to be done**

2.8.1. The claim has arisen because of termination of contract by the respondent. Relevant provisions of clause 54 at page 20 of the contract agreement relating to 'payment upon Termination' are as under:

'54. Payment upon Termination

54.1. If the contract is terminated because of a fundamental breach of contract by the contractor, the Engineer shall issue a certificate for the value of the work done and materials ordered less advance payment received upto the date of the issue of the certificate and less the percentage to apply to the value of work not completed, as indicated in the Contract Data. Additional liquidated damages shall not apply. If the total amount due to the employer exceeds any payment due to the Contractor, the difference shall be a debit payable to the Employer' [Emphasis supplied]

The 'percentage to apply' as referred above has been specified at Sl.No. 16 in the Contract Data at page 28 of the contract document as reproduced below:

'The percentage to apply to the value of work not completed representing the Employer's additional cost for completing the work shall be 20%'.

2.8.2. In IPC-9 [Page 129 of AOC Book 19], deduction of Rs.1,77,51,022/- has been worked out at the rate of 20% of the balance work to be completed. The calculations for 'Recovery on Balance' work appearing at page 1242 of exhibit R-78 are as under:

'a) Total value of revised work programme	-	Rs.19,60,38,117.00
b) Total value of work done upto 31.12.2007	-	Rs. 10,72,83,006.00
c) Balance work (a-b)	-	Rs. 8,87,55,111.00
d) 20% of balance work	-	Rs. 1,77,51,022.20

sd/-

Team Leader

Scott Wilson India Pvt. Ltd'

2.8.3. From the calculations reproduced in para above, it is evident that for operation of clause 54.1, the Team Leader considered the total value of work to be done as per the 'Revised Work Programme, which is Rs.19,60,38,117/- and not the total value of work to be done as per the contract agreement which is Rs.31,44,10,141/-. In Exhibit R-50/A (Amendment 2) filed by the respondent vide letter 938 dated 10.10.2011, the respondent has considered a recovery of Rs.4,14,31,956/- which is based on the contract amount of Rs.31,44,10,141/- less the amount of Rs. 10,72,83,006/- which is the work done upto 31.12.2007. The recovery under clause 54.1 has been considered by the respondent in IPC-9 and also in exhibit R-50/A [amendment].

2.8.4. Termination of Contract

- a) The claimant vide its letter 28.12.2007 [Exhibit C-59] intimated the Engineer and the respondent that all possible works at site would be completed by 31.12.2007 and requested for release of its contractual dues. The said letter dated 28.12.2007 of the claimant is shown to have been received by the office of the Project Director on 31.12.2007 at 6.00 pm. The receipt of the said letter has been admitted by the respondent in para (xx) at page 49 of 'Synopsis' dated 30.07.2012.
- b) The respondent vide its letter dated 31.12.2007 [Exhibit: C-66] by referring to the show-cause notice dated 07.02.2007 [Exhibit: C-4] terminated the contract. The reasons for termination as stated in the aforesaid letter dated 31.12.2007 are as under:
 - i) Indent No.1/2006 issued on 12.09.2006 but work not completed by the due date of 11.12.2006
 - ii) Breach of clause 53.2(h) by not achieving thirty percent progress in half of the completion period.
 - iii) non-setting up of the field laboratory within 30 days as per clause 53(i).
- c) All the three reasons stated by the respondent in its letter dated 31.12.2007 are obsolete. For non-completion of work on indent No.1 by the due date of

11.12.2006, the respondent ought to have terminated the contract in December 2006/January 2007 and not a year later in December 2007. As per clause 53.2(h) action to terminate the contract is to be taken if 30% progress could not be achieved upto half of the completion period which ended on 11.03.2007. Action to terminate the contract as per clause 53(h) was to be taken in March/April 2007 but it was taken in December 2007 after a lapse of nearly nine months. For non-setting up of field laboratory as per clause 53(i), the action to terminate the contract was to be taken within 30 days of issue of 'Notice to Proceed'. It is a matter of record that field laboratory was set up in January 2007 as per letter dated 08.01.2007 [Exhibit: C 46]. Thus as against 30 days, the claimant took more than 4 months to set up the laboratory. For non-setting up of field laboratory, the respondent would have been well within its rights to terminate the contract in October 2006 itself but this plea of non-setting up of laboratory does not hold good for termination of Contract in December 2007. Thus all the three reasons stated in the letter dated 31.12.2007 of termination of contract had become totally irrelevant and meaningless at the time of termination of contract on 31.12.2007.

- d) In the termination letter dated 31.12.2007, the respondent has also referred to a show-cause notice dated 07.02.2007 [Exhibit:C-42] in which it is stated as under:

'In view of the above, please explain why your contract shall not be terminated on 11th March, 2007 on your default and fundamental breach of contract, as explained above as per clause 53.1 of General Condition of Contract' [Emphasis supplied]

The only conclusion that can be drawn from the above extract of show-cause notice is that the respondent on its own had inserted the expiry date of 11.03.2007 for termination of contract. Thus the show-cause notice relied upon by the respondent in its termination letter dated 31.12.2007 was an expired one.

- e) The respondent in para (xxii) at page 47 of the 'Synopsis' dated 30.07.2012 has considered exhibit R-55 dated 11.12.2007 as the notice for termination of contract but the said letter dated 11.12.2007 is not referred to in the termination letter dated 31.12.2007. However, in the said letter dated 11.12.2007, action under clause 53 of the contract agreement for termination of contract was contemplated in the event of failure to complete the balance work as per revised indent by 31.12.2007 but non-completion of balance work as per revised indent is not amongst the reasons stated in the termination letter dated 31.12.2007. Hence, the said letter dated 11.12.2007 of the respondent cannot be treated as valid notice for termination of contract under clause 53 of the agreement.
- f) It is thus obvious that the contract was terminated by the respondent on 31.12.2007 without issuing any valid show cause notice which is bad in law. It is settled by a catena of judicial pronouncements that a penal action cannot be taken against the party without giving an opportunity to the party to defend itself. Hence it is held that termination of the contract by the respondent was illegal and therefore, invalid.

2.8.5 As the termination of the contract has been held invalid as per para 2.8.4(f) above, clause 54.1 of the agreement for recovery of 20% of the cost of balance work cannot be invoked. Hence, the recovery of Rs.4,14,31,956/- shown in exhibit R-50A (amendment 2) is held as untenable. The aforesaid amount of Rs.4,14,31,956/- includes recovery of Rs.1,77,51,022/- considered in IPC-9. Since the 'Net Payable Amount' of Rs.1,58,54,841/- awarded in para 2.2.1 against claim No.A-2(a)(ii) is after taking into consideration the recovery of Rs.1,77,51,022/- (Ref : page No.129 of AOC Book 19), an amount of Rs.1,77,51,022/- has now become payable. Accordingly, a sum of Rs.1,77,51,022/- is awarded by the arbitral tribunal to the claimant."

24. While awarding the said claim, the Arbitral Tribunal had considered the evidence on record, it was observed that the petitioner has not prepared any joint inventory of the median plants soon after the commencement of the work. It was held that both parties are equally responsible for non recording of inventory at the commencement of the work and therefore the burden of casualty of median plantation should be taken equally by both, therefore, the Arbitral Tribunal has upheld 50% of the recovery towards casualty of median plants. In fact the Arbitral Tribunal has assessed the evidence on record, the said findings were arrived on the basis of facts and evidence, the Court cannot re-assess the evidence as per settled law. Thus, it is rightly held by the Arbitral Tribunal after considering the evidence on record that the termination of contract was not proper. The reasons for termination as given in the termination letter dated 31st December, 2007 were not correct and were irrelevant at the time of the termination of the contract on 31st December, 2007. In the termination letter dated 31st December, 2007 the respondent referred to a show cause notice dated 7th February, 2007 but the said show cause notice itself stated as to why the contract should not be terminated on 11th March, 2007 and therefore, the show cause notice relied upon by the respondent was an expired one.

25. Clause 54.1 of the agreement could not be invoked and recovery of Rs.4,14,31,956/- was untenable as the 'contract' value itself had been reduced. The Arbitral Tribunal has considered the entire documents on record. Appreciation of evidence is not within the domain of this Court and this is not to be re-examined and re-assess the evidence even if it comes of different findings than that

by the Arbitral Tribunal. The objections are in the nature of an appeal and the same are therefore, dismissed.

26. Counter-Claim No.2: in lieu of Bank Guarantee submitted as security for liquidated damages. It is stated by the petitioner that the respondent was unable to complete the intended works covered in indent No. 1 to 4 by the respective indented dates of completion and therefore, compensation amounting to Rs.3,09,31,000/- as per provisions of Clause 45 of the contract agreement was adjusted by the Team Leader from IPCs 1 to 4. In view of the financial constraints, the petitioner at the request of the respondent released an amount of Rs.3,09,31,000/- against Bank guarantees of Rs.3,14,41,014/- submitted by the respondent as security for liquidated damages. The Bank Guarantee was extended by the respondent up to 28th January, 2009 and not beyond. Since the Bank Guarantee had lapsed, the petitioner had raised a counter-claim of Rs.3,14,41,014/-.

27. The Arbitral Tribunal had rejected the counter-claim of the petitioner solely on account of the arbitrariness and unauthorized revision of the contract value to Rs. 19,60,38,117/- sought to be carried out suo moto by the Team Leader in his letter dated 31st October, 2007. It is submitted on behalf of the petitioner that the said findings of the Tribunal in this regard are incorrect and the award qua counter-claim No. 2 is liable to be set aside on the grounds that the Tribunal did not reject the counter-claim of the petitioner merely on account of the arbitrary and unauthorized damages at the relevant point of time and suo moto submitted bank guarantee for Rs.3,14,41,014 in lieu thereof due to cashflow problems.

28. The petitioner sought to levy liquidated damages on the ground that the respondent had failed to complete the indented works covered in indents No. 1 to 4 by the respective indented dates of completion and therefore compensation amounting to Rs.30931000/- as per provisions of Clause 45 of the agreement was levied. It is not denied by the petitioner that Indents No. 1 to 4 issued earlier were revised at the time of granting approval of extension upto 31st December, 2007 by petitioner by its letter dated 11th December, 2007 (Exh.C-27). The action to levy liquidated damages with reference to indented dates of completion of earlier indents cannot form the basis for adjustment of liquidated damages in IPC No. 1 to 4, as admittedly, all the earlier indents were revised and the corresponding indented dates of completion of the work covered in indents No.1 to 4 were extended upto 31st December, 2007.

29. The said counter claim No.2 was rejected by the Arbitral Tribunal as it considered exhausted evidence on record which included documents CD-6 and CD-7 filed by the respondent vide letter dated 4th June, 2009 that the whole stretch of road between Chilakalurikte to Gundugalanu was proposed to be six laning, and this was admitted by the Team Leader in its letter dated 31st October, 2007 (Exh.C-57).

The revised scope of work had to be done as per the revised programme issued by the Team Leader. In the present case, admittedly the contract was revised and the contractual value from Rs.314410142/- was reduced to Rs.196038117/- and all earlier indents were revised. The proposal of six laning was under active consideration and therefore many works for execution as per indents

No. 1 to 4 were not required to be done. The evidence on record would reveal that the Arbitral Tribunal has examined all aspect in this regard. The same cannot be reviewed and re-assessed at this stage. There is no merit in the objections in this regard.

30. Lastly, it is alleged by the petitioner that the award is against the public policy as held by the Supreme Court in the case of ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.***, (2003) 5 SCC 705 and therefore is patently illegal and deserves to be set aside.

31. Having gone through the finding arrived by the Arbitral Tribunal and pleadings of the parties before the Tribunal, it is evident that it is well reasoned award, where on the basis of evidence plausible view is taken. All relevant clauses of the contract have been interpreted by speaking order. The said reasons cannot be flouted if the same are considered in a meaningful manner. There is hardly any scope to interfere with the findings once the award has been passed on facts.

32. It is settled law and not necessary to repeat that the Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. Even if the additional grounds under Section 34 of the Act, as laid down by the Supreme Court in the case of ***Oil and Natural Gas Corporation Ltd.*** (supra) are considered, which are patent illegality arising from statutory provisions or contract provisions or that the award shocks the conscience of the Court, no such facts are narrated in the petition. The endeavor of the petitioner is thus to convert the challenge to the arbitral award into an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and

which endeavor as per the consistent dicta of the Supreme Court is impermissible in law.

33. A recent observation of the Supreme Court in the case of **P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited and Others**, (2012) 1 SCC 594, is apposite in this regard and has been reproduced as under:

"21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at".

34. The Supreme Court has further expounded the said scope in the case of **Markfed Vanaspati and Allied Industries v. Union of India**, (2007) 7 SCC 679, wherein it was observed as under:

"17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honour and support the award as far as possible".

35. The limited scope of interference under Section 34 of the Act has also been succinctly elucidated by a Learned Single Judge of this Court in the case of **Bhagwati Contractors v. Union of India (UOI) and Anr.** 2009 Indlaw Del 3647 wherein it was held as under:

"7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an award is in no sense an appeal.

The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand the decision under review only may be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process."

36. It is evident that in the award, Arbitral Tribunal has not acted arbitrarily, irrationally or independently of the contract who had travelled outside the bounds of the contract and without jurisdiction thus, the submissions of the petitioner has no force.

37. In view of the abovementioned reason, there is no merit in the objections filed by the petitioner. The same are dismissed.

38. No costs.

(MANMOHAN SINGH)
JUDGE

JULY 08, 2016