

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P. No.150 of 2013

Ballarpur Industries Limited,
through M.S.Pradeep,
DGM-Law

.. Petitioner

-VS-

1.Karapara Project Engineering
by its P.O.A Mr.Hariharan Potti

2.Justice Mr.K.P.Sivasubramaniam

.. Respondents

Prayer: Petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 to set aside the award dated 29.12.2011 made by the second respondent herein.

For Petitioner

: Mr. M.S.Krishnan,
Senior Advocate for
Mr. S. Sampath

For Respondents

: Mr.B.Ravi for
R.Subramanian

ORDER

This challenge under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'Act'), seeks to set aside award dated 29.12.2011 passed by the second respondent. The first respondent (R1) is a

partnership firm engaged in the erection of boilers and power plants. One Enmas Technologies (in short 'Enmas'), facilitated the supply, erection and commissioning of a boiler unit to the petitioner on turnkey basis. At the instance of Enmas, the services of R1 were engaged for the dismantling of the existing boiler, fabrication of the main erection work and erection and commissioning of the new boiler in the premises of the petitioner.

2. A work order was raised by the petitioner direct upon R1 dated 19.01.1993. The consideration was initially fixed at a sum of Rs.50,00,000/-restricted thereafter to Rs.40,80,000/-.

3. Admittedly, the execution of the work was postponed at the instance of the petitioner. Also admittedly, certain extra works carried out by R1 are to be reckoned for the purpose of pricing on a man-hour basis.

4. Disputes arose between the parties in regard to the transaction that led to litigation. The brief sequence of relevant dates and events is as follows:

(i) The petitioner entered into an agreement with R1 facilitated by Enmas for certain works in relation to an existing boiler and for erection and commissioning of a new boiler.

(ii) On 19.01.1993, a work order was issued by the petitioner in favour of R1 for carrying out various works in connection with dismantling and transfer of existing boiler and fabrication, erection and commissioning of a new boiler.

(iii) In the course of execution of the said work certain disputes arose as between the parties.

(iv) C.S. No.626 of 1997 thus came to be filed by R1 as against the petitioner and Enmas for recovery of a sum of Rs.62,66,790/- with interest. The petitioner did not contest the suit and the same was decreed ex parte as against the petitioner on 17.07.2001

(vi) As against Enmas, the third defendant in the suit, the suit was dismissed.

(vi) The petitioner filed an application for setting aside the exparte decree on 17.07.2001 and the said application came to be dismissed on 31.01.2003.

(vii) O.S.A. Nos.39 and 40 of 2005 were filed by the petitioner against order dated 31.01.2003.

(viii) O.S.A. No.113 of 2004 was filed by R1 against the judgment and decree dismissing its claim as against Enmas.

(ix) In the meanwhile, a Company Petition in C.P. No.8 of 2006 was filed by R1 against the petitioner seeking its winding up based on exparte decree dated 17.07.2001.

(x) An order of publication was made in the Company Petition and an appeal preferred against the same in Company Appeal No.5 of 2007 on 28.03.2007. An order was passed by the Nagpur Bench of the Bombay High Court directing the petitioner to deposit Rs.65,00,000/- to the credit of Company Appeal No.5 of 2007.

(xi) Thereafter, a Memorandum of Understanding (MOU) was entered into between both parties, the petitioner and R1, agreeing to refer the plaint in C.S. No.623 of 2007 to Arbitration.

(xii) R1 was permitted to withdraw Rs.25,00,000/- from out of the amount deposited and the petitioner permitted to withdraw the balance. The MOU provided that in the event of the claim of R1 being dismissed by the learned Arbitrator, the amount of Rs.25,00,000/- shall be re-funded by it.

(xiii) On 17.06.2010, the Division Bench of the Madras High Court referred the plaint in C.S. No.623 of 2007 for arbitration in terms of the MOU entered into by the parties.

(xiv) On 28.02.2011, O.S.A. No.113 of 2004 filed by the respondent challenging judgment and decree in C.S. No.623 of 1997 was dismissed.

(xv) The parties appeared before the Learned Arbitrator who, upon consideration of the submissions made, passed an Award dated 29.12.2011 allowing the claim in part.

5. This petition is filed by the petitioner, the respondent in arbitration, challenging the aforesaid Award passed by the Learned Arbitrator and arraying him as the second respondent herein.

6. Mr. S.Sampath appearing for the petitioner and Mr.R.Subramanian appearing for R1 have advanced detailed submissions that have been carefully considered in passing this order.

7. Mr.Krishnan learned senior counsel for the petitioner raises the following objections to the award, all of which have been explored before the Learned Arbitrator. They are:

- (i) That the reference to arbitration by this Court was restricted to only the plaint and as such, the learned Arbitrator ought to have considered solely the plaint for adjudication. Permitting the claimant, R1, to file a claim petition that deviated from the plaint, and adjudicating upon the same rendered the award erroneous in law for excess of jurisdiction assumed by the learned Arbitrator.
- (ii) That R1 was guilty of approbating and reprobating in making the claims as against the petitioner and Enmas differentially and had, at different stages, taken contradictory stands as to which party to proceed against. This was impermissible in law and as such the Learned Arbitrator erred in entertaining and allowing the claims.

- (iii) That the learned Arbitrator has not decided upon the claims in a proper manner, approximating and assuming various parameters in awarding payment under the heads claimed.
- (iv) That in determining the rights of a party, there is no scope for approximation and the Learned Arbitrator, according to the petitioner ought to have determined the amount awarded precisely and on a scientific basis.
- (v) That there were discrepancies in the oral and documentary evidences of R1 and the award had glossed over such defects overlooking the same without any reasoning.

8. The first objection raised relates to the alleged violation of the order of the Division Bench dated 17.06.2010. According to the petitioner, the Division Bench had referred only the plaint for Arbitration and as such the learned Arbitrator ought not to have permitted the respondent to file a new claim which was inconsistent in many ways with the averments made in the plaint.

9. Reliance is placed on the following judgments for the proposition that the learned Arbitrator is bound by the four corners of the contract and the terms of reference:

- (i) Associated Engineering Co. vs. Government of Andhra Pradesh and another (1991) 4 SCC 93

'The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in

terms 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.

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see *Mustill & Boyd's Commercial Arbitration*, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see *Halsbury's Laws of England*, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. As stated by Lord Parmoor:

".....It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which on the true construction of the submission was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties"

Attorney-General for Manitoba v. Kelly & Others, [1922] 1 AC 268, 276.

Evidence of matters not appearing on the face of the award would be admissible to decide whether the arbitrator travelled outside the bounds of the contract and thus exceeded his jurisdiction. In order to see what the jurisdiction of the arbitrator

is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties; the Court can look at the agreement itself. Bunge & Co. v. Dewar & Webb, [1921] 8 L1. L.Rep. 436(K.B.).'

(ii) MSK Projects India (JV) Limited vs. state of Rajasthan and another (2011) 10 SCC 573:

'15. The issue regarding the jurisdiction of the Arbitral Tribunal to decide an issue not referred to is no more res integra. It is a settled legal proposition that special Tribunals like Arbitral Tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference made to them. Thus, it is not permissible for such Tribunals/ authorities to travel beyond the terms of reference. Powers cannot be exercised by the Tribunal so as to enlarge materially the scope of reference itself. If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award.'

10. My attention was drawn to the plaint in C.S. No.623 of 1997 filed by R1, arraying three defendants. The first defendant is the petitioner herein, the second defendant, the Branch Manager of the first defendant and the third defendant, Enmas Process Technologies Limited. The prayers in the plaint are for a judgment and decree to recover a sum of Rs.62,66,790/- from the defendants jointly and severally.

11. Thus, according to Mr.Krishnan, the demand had been made as against both the respondents in the plaint and if at all any demand could be made as against it, it would have to be restricted to the value of that

portion of the work contracted to it alone and no more. Thus, the claim against the petitioner would have to be restricted to only a sum of Rs.40,80,000/- insofar as the parties had agreed that would be the value of the work awarded to the petitioner. The plaint filed by the respondent raised a claim for a sum of Rs.62,66,790/- jointly and severally as against the petitioner and Enmas of which only a sum of Rs.40,80,000/- had been bifurcated specifically in relation to the petitioner herein.

12. The petitioner points out differences between the plaint and the claim petition that, according to it are vital.

13. Mr.Krishnan would also highlight the fact that while R1 had filed the suit as against both itself as well as Enmas, no action was taken by it thereafter to pursue the claim in the manner in which it had been originally instituted. Great emphasis was placed on the conduct of R1 in not impleading Enmas to the proceedings for Arbitration. Taking me through the sequence of dates and events, he would point out that the dismissal of the suit as against Enmas was carried in appeal by R1 in OSA No.113 of 2004 wherein, both the petitioner as well as Enmas were parties.

14. Pointed reference was then made to the fact that the petitioner and its Branch Manager in Chennai, arrayed as respondents 1 and 2 in the suit had been 'given up' by R1 and the suit not pursued as against them as reflected in order dated 28.02.2011. This was, according to

Mr.Krishnan, by devious design and an order obtained from this Court behind the petitioners' back leading to significant jeopardy to it.

15. Moreover, the order in OSA was been passed on 28.02.11, after the reference of the disputes to Arbitration on 17.06.2010 in O.S.A Nos.39 & 40 of 2005, wherein, Enmas was not a party. He would submit that it would have been in the fitness of things for R1 to have ensured that Enmas was also a party to the arbitration instead of doing just the reverse, and pursuing the arbitration consciously and specifically only as against the petitioner.

16.Mr.Krishnan would thus urge that the respondent not be permitted to approbate and reprobate and take inconsistent positions in Court. To that end, he would rely upon the following decisions:

- (i) Mumbai International Airport Private Limited vs. Golden Chariot Airport and another 2010) 10 SCC 422

'45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also.

50. Justice Ashutosh Mookerjee speaking for the Division Bench of Calcutta High Court in Dwijendra Narain Roy vs. Joges Chandra De, (AIR 1924 Cal 600), held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.'

(ii) Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd

'This is an attempt to blow hot and cold, as Lord Esher used to say, or to approbate and reprobate, in the language of others. A quantity of margarine belonging to the appellants was dispatched from Holland on board the respondents' vessel consigned to one Beilin in Manchester. For some good reason the appellants desired that this margarine should not reach Beilin, so they instructed the respondents, who were acting as carriers of the goods, to hold them at Hull and await further orders. The respondents acknowledged and accepted this order, but nevertheless they delivered the goods to Beilin. When the appellants discovered this they had a right to elect; they might refuse to recognise the action of the respondents in delivering the goods to Beilin and sue them for conversion or breach of duty, or they might recognize and adopt the act of the respondents and sue Beilin for goods sold and delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorized delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act. The judgment of Bailhache J. was right and this appeal must be dismissed.'

17. According to Mr. Krishnan, a party is to consciously elect its remedies and the parties as against which it chooses to pursue the same. He relies upon the doctrine of election, a well-settled doctrine that, to quote Maitland is the following:

'That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.'

(see Maitland's Lectures on Equity, Lecture 18)

18. The principle is also set out in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows :

"Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both..... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument.

19. He places reliance, in this regard, upon the judgment of the Supreme Court in C.Beepathumma and others vs. Velasari Shankaranarayana Kadambolithaya and others (AIR 1965 SC 241) as follows:

18. The Indian Courts have applied this doctrine in several cases and a reference to all of them is hardly necessary. We may, however, refer to a decision of the Madras High Court in Ramakottayya v. Viraraghavayya where after referring to the passage quoted by us from White and Tudor, Coutts Trotter, C.J. observed that the principle is often put in another form that a person cannot approbate and reprobate the same transaction and he referred to the decision of the Judicial Committee in Rangaswami Gounden v. Nachiappa Gounden [(1918) I.L.R. 42 Mad. 523.]. Recently, this Court has also considered the doctrine in Bhau Ram v. Baij Nath Singh and others .

20. On facts, Mr.Krishnan relies on the decision of the Bombay High Court in Prema Amarlal Gera vs. The Memon Co-operative Bank Ltd. and another (2017 (2) Arb. LR 354 (Bombay) to the effect that the conclusion drawn by the learned Arbitrator has to be based on evidence.

21.This case is wholly distinguishable on facts however and does nothing to advance the case of the petitioner.

22.He points out that perversity in adjudication amounts to a jurisdictional error and the errors committed by the learned Arbitrator go to the root of the matter. According to him, such errors vitiate the award and the same is liable to set aside as perverse and bad in law. In this regard, he relies upon the judgment of the Supreme Court in *Sharma and Associates Contractors (P) Ltd. vs. Progressive Constructions Ltd.* 2017 (2) Arb. LR 26 (SC).

23.By way of reply, Mr.R.Subramanian for the respondent argues that the Original Petition is itself not maintainable in so far as the scope of an application under section 34 of the Act is very minimal. He supports the findings and conclusions of the learned Arbitrator who has exhaustively, according to him, dealt with all the issues raised and evidence produced in arriving at his conclusions.

24. As regards the submissions of Mr.Krishnan that the petitioner came to know about the exparte decree passed in C.S.No.623 of 1997 per chance he would state that the same was incorrect and in fact the petitioner had engaged a counsel and also filed a counter in the application seeking ABJ. It is only thereafter that it was set exparte. As far as this submission is concerned, it is one of fact and no contra position has been placed on record by the petitioner.

25. Mr. Subramaniam places considerable reliance upon the decision of the Division Bench on 17.06.2010, to the effect that ENMAS was only a certifying agency and had no privity of contract between itself and the petitioner. Thus the entire work had been entrusted by the petitioner to 1st respondent and as a matter of fact, the entire work had also been carried out by 1st respondent and this position has been settled in fact, finally and indisputedly.

26.As regards the submission that a more scientific method ought to have been adopted by the learned Arbitrator instead of approximating the claims awarded, Mr.Subramaniam would state that there is nothing incorrect in the methodology adopted and that the same was one probable approach to the issue.

27.In fine, he would urge that section 34 was not an appeal provision and the scope of interference has been held to be minimal. In such circumstances, according to him, the original petition has to be dismissed in full.

28.The legal issue that I am called upon to answer is whether the learned Arbitrator has acted beyond the terms of reference by this Court. The canvas drawn for the consideration of objections against an award in arbitration are set out in section 34 of the Act. The provisions of section 34(1)(iv) read thus:

'34.Application for setting aside arbitral award – (1)Recourse to a Court against an arbitral award may be made only by an

application for setting aside such award in accordance with sub-section (2) and sub-section (3).

*(2)An arbitral award may be set aside by the Court only if -
(a)the party making the application furnishes proof that -*

.....

(iv)The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.'

.....

29. As rightly submitted by Mr.Subramanian, the scope of section 34 is indeed limited. The grounds on which the setting aside of the impugned award is sought are, as I see it, three in number:

- (i) Excessive jurisdiction assumed by the learned Arbitrator;
- (ii) Failure to appreciate that 1st respondent was aprobating and reprobating and not taking a consistent stand and
- (iii) Unscientific and adhoc approach to the awarding of the claims sought.

30.Section 34 provides for very limited interference in an award in arbitration and that too in very specific situations. Learned counsel for the petitioner relies on Section 34(ii) and (iv) as the impugned award deals with a dispute not falling within the terms of reference and excess of jurisdiction assumed by the learned Arbitrator.

31. I find however that the learned Arbitrator has looked into the matter in details and has set out reasoned findings in support of his rejection of the same. The relevant findings in the Award are as follows;

'27.The main plank of the Respondents' defence to the dispute is that the main contract was between the Claimant and Enmass and not with the Respondent. The said contention has been raised by the Respondent repeatedly with reference to all issues and is the backbone/crux of the entire defence by the Respondent.

28.It is true that the judgement of the Learned Single Judge in C.S.No.623 of 1997 is to be treated as non operative in view of the terms of the Memo of Compromise filed between the parties agreeing to refer the issue for Arbitration. The issue as to whether Enmass is a necessary party to this dispute and whether there is any privity of contract between the Claimant and the Respondent have to be considered by the Arbitrator. As regards whether Enmass is a necessary party or not, the issue has been concluded subsequently by the Division Bench also in the Appeal filed by the Claimant in O.S.A. No.113 of 2204. Therefore it is not open to the Respondent to harp on that the Claimant could have claimed amounts due to him only from Enmass. Even so, I have considered this issue independently bearing in mind that in that appeal the Respondent was given up as party.

29.It is pertinent to note that it is not the case of the Claimant that there was any contract between the Claimant and Enmass. The work carried out by the Claimant is only on the basis of the contract between the Claimant and the Respondent. Even though at the inception in the year 1992 there has been correspondences and discussion and submission of quotation between the Claimant and Enmass (Ex. C1,C2 and C4), the contract took a firm shape only by virtue of Ex.C3 dated 19.01.1993 which is the order placed by the Respondent in favour of the Claimant. Ex.C3 not only refers to the discussion with the Claimant, but also made clear by the unequivocal expression that they (Respondent) **"are pleased to place the order on you (Claimant) on the following terms and condition"**. Neither in the said letter nor in its Annexure is there any reference to Enmass. Therefore whatever role which Enmass had played in the contract, can have no significance or relevance on the rights and liabilities between the Claimant and the Respondent. In Ex.C5 letter dated 05.07.1993, the Claimant has clearly stated that they were trying to finish the work very quickly on the basis of assurance by the Respondent and that the Respondent shall compensate them suitably. There

is no demur by the Respondent as against the said letter. Even a copy of the said letter has not been marked to Enmass. The fact that Enmass was totally outside the scope of any right or liability under the contract is also evident from the admitted fact that it was the Respondent by their letter dated 30.07.1993 under Ex.C6 had informed the Claimant that in view of their decision to defer the expansion of the project, the Claimant was directed to stop the work carried out by them. Significantly no copy of the same is marked to Enmass. This is followed by a telegram by the Respondent dated 11.11.1993-Ex.C8 expressing that in view of their decision to proceed with the completion of erection work, the Claimant may mobilize their team for the erection and fabrication work. Other Exhibits also show that bills have been raised only to the Respondent.

30. Perusal of all the documents disclose that the involvement of Enmass was no more or less than a certifying agency. Even the subsequent correspondence Ex.C12 letter of the Respondent to the Claimant dated 13.04.1995, shows that the award of the contract for dismantling of the existing boiler and erection and commissioning of the new boiler was given to the Claimant under the direction Enmass. There is not even a tripartite agreement as far as the contract is concerned. The rights and obligations of Enmass with the Respondent if any will be governed only by the contract as between themselves. As far as the impugned contract is concerned it is clear that it is only between the Claimant and the Respondent and hence the liability to pay/ compensate the Claimant is only of the Respondent and not Enmass. Enmass was only a supplier/agent of the Respondent and certifying agency. If the Respondent was of the opinion that Enmass was a necessary and answerable party, the Respondent should have made Enmass also as a party to the MoU and ought not to have executed the MoU without Enmass. Not having done so, the Respondent cannot be heard to contend that there was no privity of contract between the Claimant and the Respondent.

31. I have arrived at the above conclusion independently even apart from the judgment of the Learned Single Judge in C.S. No.623 of 1997 and as confirmed by Division Bench on Appeal holding that Enmass is not a necessary party. For all the aforesaid reasons it would be idle to contend that there was no privity of contract between the Claimant and the Respondent and that the claims if any should have been made only against

Enmass and not against the Respondent. This issue is answered against the Respondent holding that there is privity of contract between the Claimant and the Respondent.

32. For the same reasons as above, preliminary objection Nos. 3, 4 and 5 as summarized below which are in the same context are rejected:

I). There is no privity of contract between Claimant and the Respondent.

II). There is no cause of action against the Respondent.

III). Suit is bad for non joinder of Enmass.

32. The conclusions of the learned Arbitrator as set above are detailed and deal with the specific argument advanced.

33. As far as the merits of the matter are concerned, the learned Arbitrator has adverted to each and every issue raised and evidences filed by 1st respondent. Interestingly while the petitioner would dwell on the allegedly erroneous approach adopted by the learned Arbitrator in appreciation of evidence filed by 1st respondent, not a shred of evidence has been filed by the petitioner, the respondent in arbitration, to support this stand or to disprove the stand of 1st respondent. It is thus that the learned arbitrator has come to a conclusion that the claims are to be allowed in part. The conclusions of the learned Arbitrator are based on facts and evidence and nothing has been brought on record to establish that the same are perverse. In any event, findings of fact only are to be

interfered with exercising great caution and in exceptional cases where they are shown to be wholly erroneous, or perverse.

34. In the present case, except for re-appreciation of the material already placed before the learned Arbitrator, nothing new is produced and I am thus not inclined to interfere with the findings of fact rendered by the learned Arbitrator. The Supreme Court has settled the law in this regard in the following judgements:

(i) Associate Builders vs Delhi Development Authority

2015 (1) CTC 191

'It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.

An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, this Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that 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. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and [D.D. Sharma v. Union of India](#) [(2004) 5 SCC 325]).

113. Once, thus, 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."

(ii) *K.V.Mohammed Zakir vs. Regional Sports Centre in Civil Appeal No.2506 of 2004*

'6.....

We are of the view that the settled position in law is that Court should not substitute its own view for the view taken by the arbitrator while dealing with the proceedings for setting aside an award. 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.

(iii) *U.P. State Electricity Board vs. M/s.Searsole Chemicals Limited in Appeal (Civil) No.10014 of 1995;*

'When the arbitrators have applied their mind to the pleadings, the evidence adduced before them and the terms of contract, we do not think, it is within our scope or re-appraise the matter as if this were an appeal, and it is clear that where two views are possible in this case there is no such scope the view taken by the arbitrators would prevail.'

(iv) *Madhani Construction Corporation Pvt Ltd. Vs. U.O.I.* (2010) 1 SCC 549.

'20.It is well settled that the arbitrator is the master of facts. When the arbitrator on the basis of record and materials which are placed before him by the railways came to such specific findings and which have not been stigmatized as perverse by the High Court, the High Court in reaching its conclusions cannot ignore those findings. But it appears that in the instant case, the High Court has come to the aforesaid finding that the items mentioned above are excepted matters and non-arbitrable by completely ignoring the factual finding by the arbitrator and without holding that those findings are perverse.'

35. I thus agree that the scope of interference in terms of section 34 of the Act is limited and the specific situations envisaged therein do not arise in this particular case.

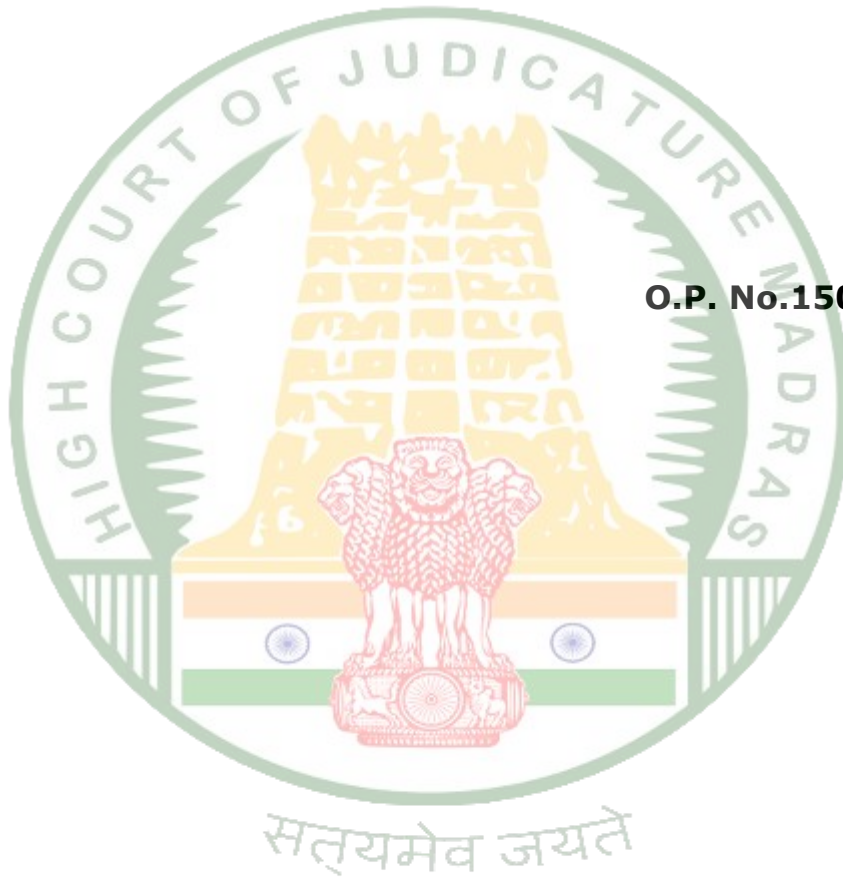
36. In the above view of the matter, this Original Petition is liable to be dismissed and I do so.

18.12.2017

vga/msr/msv

Dr.ANITA SUMANTH,J.

Msr/vga/msv



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