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

Reserved on: 19th April, 2018
Pronounced on: 6th August, 2018

+ **FAO(OS) 194/2017 and CM Nos.23594-95/2017**

**M/S NATIONAL HIGHWAYS
AUTHORITY OF INDIA**

....Appellant

Through: Mr.Vikas Goel and
Mr.Kunal Dutta, Advs.

versus

M/S PCL-STICO (JV)

..... Respondent

Through : Dr.Amit George,
Mr.K.Dileep and Mr.Swaroop
George, Advs.

CORAM:-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR JUSTICE C. HARI SHANKAR

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(JUDGMENT)

C. HARI SHANKAR, J.

1. Consequent on the bid, submitted by it, being approved by the appellant-National Highways Authority of India, the work of widening of the 4/6 lane and strengthening of the existing two-lane carriageway of NH-5, from Ganjam to Sunkhala in Odisha was awarded to the respondent, *vide* Agreement dated 20th August, 2001. The time for completion of the work, in the agreement, was stipulated as 32 months.

2. The disputes between the appellant and the respondent, which have led to the present appeal, essentially revolved around filling of two embankments in the carriageway, namely the Kalikhote bypass from km (kilometre) 307 to km 309 and the Balugaon bypass from km 321 to km 339.042.

3. In respect of the Kalikhote bypass, the claim of the respondent was that (i) while the section of the carriageway was to be handed over, to the respondent, for work, in April 2002, it was actually handed over only in April 2004, (ii) the initial plan was that the cuttings available from the Kalikhote bypass area could be initially utilised for embankment filling; however, owing to the delay in handing over of the area till April 2004, only a small quantity of 50,000 m³ was made available in 2002, and the balance could not be made available for want of finalisation of the revised layout and cross sections, which were finalised by the appellant only in January 2004, (iii) resultantly, a huge quantity of excavated material, which was assessed at the time of entering into the tender, as available, was not made available, resulting in upsetting of the entire process of cutting and filling of the embankment, and (iv) the earth for filling the Kalikhote bypass had, therefore, to be borrowed from long distances. The Balugaon bypass area was, in the meanwhile, handed over, by the appellant to the respondent, in July 2003. However, the Full Supply Level ('FSL') of the Balugaon bypass could not be finalised, by the appellant, till January 2005, resulting in drastic changes in the alignment of construction of the proposed bypass. As a consequence of these changes, the quantity of earth work to be used for filling the

embankments had increased from 9,16,953 m³, as envisioned in the Bill of Quantities (BOQ) to 21,89,751 m³, i.e. an increase of 138%. The respondent asserted that this increase, which was attributable to change in design/alignment of the bypasses, was because, before finalising the tender, the entire stretch of the road was not physically surveyed, and design had been prepared by the respondent only on the basis of an aerial survey drawing. No detailed site investigation, for the entire stretch of the bypass, had been undertaken by the respondent, as was apparent from a letter, dated 14th January, 2006, addressed to the Project Director of the respondent. This letter made it clear that the basis of insertion of quantities in the BOQ, at the stage of tender, was purely on assumptions/presumption basis and the employer, i.e. the respondent, was fully aware of the said fact. The relevant portion of the said letter may be reproduced as under:-

“During the preparation of the DPR, the Design Consultants were prevented by the local population to perform detailed site investigation throughout the entire stretch of the bypass because of their strong anti-bypass stance then. We had also sought police intervention with the help of the Employer but the opposition mindset of the local population was so severe that even the police could not convince the people and so the was unable to provide adequate protection for those staff that was involved in the tasks of soil investigations and survey operation to determine the bypass alignment. The Employer had duly been reported with all these adversaries in the design stage.

Consequently the entire stretch could not be physically surveyed and the design had to be prepared with the help of aerial survey drawings only.

The strong and persistent action by the local population continued unabated. Later in the supervision stage, the Government of Orissa had to swing into action in order to convince the local people. Actually, Mr. MS. Padhi, the then Collector and District Magistrate, Khurda on behalf of the State the State Govt. treated the 17 km of the proposed bypass stretch, interacted with the people, took them into confidence by honouring their suggestions regarding the bypass alignment and convinced them finally in favour of the bypass construction. Subsequently, the alignment was demarcated in the field with the consent of the people and the revised land plans, land schedules were prepared by M/s DHV Consultants and submitted to the Employer for initiation of the land acquisition proceedings accordingly. After completion of the LA Process, the bypass land was handed over by the P.D to the Contractor in the early part of the month of the July, 2003 even as the onset of monsoon and already taken place.”

4. In this scenario, as contended by the respondent, it was eligible to be paid, for the additional quantity of earth required to be used by it for filling in the Kalikhote and Balugaon bypass areas, as well as the additional expense incurred in transporting such additional quantity of earth from long distances, on the basis of new rates, the increase in earth work being to the extent of (+) 138%, which could never be treated by as a normal variation in quantity owing to site requirements.

5. Consequently, a notice of dispute, claiming the additional expense stated to have been incurred by it on account of these factors, was issued, by the respondent to the appellant, *vide* letter dated 18th August, 2006, followed by a reminder dated 6th September, 2006. No response being forthcoming to either of these communications, the

respondent addressed third communication, dated 6th October, 2006, to the appellant, requesting that the matter be referred to the Dispute Review Board (DRB) of the appellant.

6. The DRB opined in favour of the appellant. Expressing its disagreement therewith, the respondent, *vide* letter dated 29th December, 2006, invoked the provision for arbitration, contained in the Agreement dated 20th August, 2001, whereupon the dispute was referred to a 3-member Arbitral Tribunal.

7. A preliminary objection, regarding the competence, of the learned Arbitral Tribunal, to adjudicate on the dispute, was raised; however, as the objection was rejected by the learned Arbitral Tribunal, and no challenge, to such rejection, has been made by the appellant, no further reference is required to be made thereto.

8. Relevant clauses of the Agreement:

Before proceeding further, we may reproduce, for ready reference, the relevant clauses, of the Agreement, between the appellant and the respondent, thus:

- (i) Clause 20.4 of the Conditions of Particular Application (COPA), which dealt with the “employers risk”, read thus:

“The Employers risks are

(a) insofar as they directly affect the execution of the Works in the country where the Permanent Works are to be executed:

(i) War and hostilities (whether War be declared or not), invasion, act of foreign enemies;

(ii) rebellion, revolution, insurrection or military or usurp power, or civil war;

(iii) ionizing radiation is, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear components thereof;

(iv) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;

(v) riot, commotion or disorder, unless solely restricted to the employees of the Contractor or office sub-contractors and arising from the conduct of the Works;

(b) loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the contract;

(c) loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor of which the Contractor is responsible; and

(d) any operation of the forces of nature (insofar as it occurs on the Site) which an experienced Contractor

(i) could not have reasonably foreseen, or

(ii) could reasonably have foreseen, but against which he could not reasonably have taken at least one of the following measures:

(A) prevent loss or damage to physical property from occurring by taking appropriate measures, or

(B) insure against such loss or damage.

(ii) Clause 20.3 of the General Conditions of Contract (GCC) dealt with “loss or damage due to employers risk”, and read as under:

“In the event of any such loss or damage happening from any of the risks defined in sub-Clause 20.4, or in combination with other risks, the Contractor shall, if and to the extent required by the Engineer, rectify the loss or damage and the Engineer shall determine an addition to the Contract Price in accordance with Clause 52 and shall notify the Contractor accordingly, with a copy to the Employer. In the case of a combination of risks causing loss or damage any such determination shall take into account the proportional responsibility of the Contractor and the Employer.”

(iii) “Not Foreseeable Physical Obstructions or Conditions” were covered by Clause 12.2 of the GCC, which read thus:

“If, however, during the execution of the Works the Contractor encounters physical obstructions of physical conditions, other than climatic conditions on the Site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have reasonably been foreseen by an experienced contractor, after due consultation with his Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of any costs which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer. Such determination shall take account of any instruction which the Engineer may issue to the Contractor in connection therewith, and any proper and reasonable measures acceptable to the Engineer which the Contractor may take in the absence of specific instructions from the engineer.”

(iv) “Variations” were to be valued in accordance with Clause 52.1 of the GCC, which read as under:

“All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this

Clause referred to as “varied work”), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the contract does not contain any rates or prices applicable to the varied Work, the rates and prices in the Contract shall be used as the basis for evaluation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates of prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates of prices as are in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates prices are agreed fixed, the Engineer shall determine provisional rates of prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.”

- (v) The power of the Engineer to fix rates was governed by Clause 52.2 of the GCC, which read as under:

“Provided that if the nature of amount of any varied work relative to the nature of amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate of price contained in the Contract for any item of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate of price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate of price as is, in his opinion, appropriate and shall notify the

Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates of prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub- Clause 52.1 or under this Sub- Clause unless, within 14 days of the date of such instruction and, other than in the case of committed work, before the commencement of the varied work, notice shall have been given either:

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price,

(b) by the Engineer to the Contractor of his intention to vary rate of price.

(vi) On the issue of the power of the Engineer to fix rates, Clause 52.2 of the COPA further stipulated that “no change in the rate of price for any item contained in the Contractor shall be considered unless such item accounts for an amount more than 5% of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25%.”

(vii) Item 2.02 of the BOQ covered “construction of embankment with approved material with all kinds of leads and lifts complete as per drawings and Technical Specifications”.

The quantity specified, against this item, was 9,16,953 m³.

9. Having thus set out some of the salient features of the Agreement between the appellant and the respondent, we may proceed to the claims of the appellant and respondent, as urged before the learned Arbitral Tribunal, and the findings of the learned Arbitral Tribunal thereon.

10. Re. the Khalikote embankment:

10.1 Insofar as the Kalikhote area of the carriageway was concerned, the respondent submitted, before the learned Arbitral Tribunal, that the changes in design and alignment of the embankment resulted in reduction of the amount of cut quantity of earth available from 12,44,016 m³ to 4,97,830 m³. As such, 7,46,186 m³, which ought to have been available for filling the embankment, was not available. This, as contended by the respondent, was solely owing to failure, on the part of the respondent, in handing over the site in April, 2002 and, as a result, the filling had to be done by bringing earth from borrow areas, which was never contemplated at the time of entering into the agreement. The revised alignment fell in the “reserved forest area” which was not made available till the beginning of January, 2004. The change in quantity was not covered by Clause 51.1 of the GCC, as this clause applied only where “instructed changes”, in quantity, were executed.

10.2 As against this, the respondent contended, in respect of the additional earth that was required to be sourced and used in filling of

the embankment at the Kalikhote area, that, *while the increase in quantity of earth work, as well as revision of design of the alignment, were admitted*, the change in alignment was attributable to local conditions which were not known and could not be anticipated, by the appellant, at the time of inviting tenders. The appellant also sought to contend that the respondent had submitted its no objection, in writing, to the proposed revision of the design of the alignment, *vide* letter dated 31st October, 2001. The design had to be changed owing to site conditions and other considerations.

10.3 The learned Arbitral Tribunal noted, in respect of the Kalikhote area, upon the admission, of the respondent, that the design had been changed and that this had resulted in major differences in the work. The main defence, of the respondent, was that the change in design, and consequently, alignment, was owing to circumstances which could not be foreseen by it. BOQ Item no.2.02, it was noted, included all leads and lifts, but would not apply in the case of the additional quantity of earth required to be excavated for the Kalikhote area, as such requirement of additional quantity was attributable to change in alignment and design, and delay in handing over the site. These changed circumstances, it was observed, had a direct impact on the “lead” factor. As such, the rates stipulated in the contract for the embankment at the Kalikhote area, it was found by the learned Arbitral Tribunal, were inapplicable, and the claim, of the respondent, for a fresh rate, was well-merited.

11. Re. the Balugaon embankment

11.1 Insofar as the Balugaon area was concerned, the respondent contended, before the learned Arbitral Tribunal, that the FSLs were finalized after the stipulated period of completion, resulting in abnormal increase in the quantity of earth work in the bypass. This, it was contended, upset the entire process of cut and fill embankment resulting in the requirement of transportation of huge quantities of earth from long distances, with proportionate increase in the rates of construction of the embankment, with approved filling material, by 66%, thereby upsetting the entire execution of the project, on the basis of which the rates had originally been quoted by it. It was further contended, in this connection, by the respondent, that quantities were inserted, in the BOQ tender documents, on presumption/assumption basis, and the evidence on record demonstrated that, *at that stage, the entire stretch of road was not physically surveyed, and quantities were inserted in the contract, on the basis of aerial survey, without detailed site inspection of the Balugaon bypass.* This, it was submitted by the respondent, warranted fixation of new rates for filling up of the Balugaon embankment.

11.2 As against this, the respondent sought to contend that the increase in quantity of earth for filling the embankment at Balugaon was attributable to inclusion of additional new underpass structures on demand of locals and the soft and expensive nature of the soil encountered in about 50% of the bypass, which necessitated increase in the embankment height. As such, the respondent submitted, no fraud, or deliberate conveying of wrong information to the appellant,

could be attributed to it. The respondent sought to rely on Clause 52.1 of the Agreement, which permitted variations, by the Engineer, of the form, quantity and quality of the work and also sought to draw attention to the fact that, in para 2 of the preamble to the BOQ, as well as in Clause 55.1 thereof, it was stipulated that the quantities mentioned in the BOQ were estimates and provisional in nature, so as to facilitate bidding. It was further sought to be submitted that the claim was barred by Clause 52.2 of the COPA, which permitted fixing of a new rate for any BOQ Item, only where the item accounted for more than 5% of the contract price and the actual quality of work instituted was set out in the BOQ by more than 25%. The respondent sought to point out that the value of BOQ Item 2.02 was less than 5% of the contract price, and that the appellant had not proved the variation to be more than 25%. Further, it was contended that, if the revised rate for BOQ Item 2.02, for additional quantity, was worked out from sub-clause 52.1, it had, in the first instance, to be based on the rate specified in the contract for same or similar items, and that rates for variations could be worked out from market rates, only where no rates for similar items existed in the contract. The claim of the respondent, therefore, as it was sought to be contended, was contrary to Clause 52.7 of the Contract.

11.3 The learned Arbitral Tribunal, held, qua this item, that the change in alignment, which resulted in abnormal increase in the fill quantities at Balugaon was not indicated in the Contract and could not, therefore, be covered by the rates of earth work specified therein, especially, after expiry of the stipulated contract period. Clause 52.2,

which dealt with changes in the rates of existing work, therefore, it was held, would not apply. It had been admitted, by the appellant, that the change in quantities of earthwork were owing to unanticipated change of alignment and existence of soft and expansive soil in about 15% of the Balugaon bypass, which was not envisaged earlier. Inasmuch as the respondent could not have foreseen this condition, the learned Arbitral Tribunal held that the claim of the respondent was justified under Clause 12.2 of the agreement.

12. Impugned judgment of the learned Single Judge

12.1 The learned Single Judge, in the impugned judgment, has found the decision, of the learned Arbitral Tribunal, in respect of both the above items, to be unexceptionable. The impugned judgment notes the fact that there were no written instructions, issued to the respondent, in respect of change in design. The flawed nature of survey, conducted over a crucial part of the stretch of the Balugaon, with respect to which work was to be performed, was also emphasized by the learned Single Judge, referring, for the purpose, on the letter dated 14th January, 2006 *supra*, written by the appellant's Engineer to the appellant, regarding failure to conduct physical survey.

12.2 The learned Single Judge further notes the evidence of the Engineer, to the effect that there was a change in design and alignment and the work, for which, the respondent bid, and rates were quoted against the various items of the BOQ, was different from the work which was actually executed. The learned Single Judge observed that this was a case where, owing to failure, on the part of the appellant, to

carry out a proper survey of the entire stretch of road and the resultant increase in the quantities of earthwork, the very basis of the BOQ was changed. Pains have been taken by the learned Single Judge, to distinguish Clauses 15.1 and 15.2 of the General Clause of Contract (GCC), in the form of the following tabular statement.

“

	52.1 of GCC	52.2 of GCC
1.	<i>A rate is to be fixed for the varied work.</i>	<i>A new rate is to be fixed for the BOQ item if existing rate of items of BOQ become inappropriate or inapplicable due to the effect of variation.</i>
2.	<i>No item of work in the BOQ is considered for rate revision.</i>	<i>Rates of items of Work in the BOQ alone is considered for rate revision.</i>
3.	<i>For valuing the varied work rate of items in the contract is the first consideration.</i>	<i>Existing rate of item cannot be considered at all for fixing the rate as it is only the existing rate that can be revised in this Clause.</i>
4.	<i>In valuation of varied work, the rate of items in the contract alone will be considered as the first method. Quantity of any item contained in the contract or its increase/decrease are not relevant considerations.</i>	<i>The Engineer's power to change the rate of a BOQ item is further subjected to 5% contract value and 255 of BOQ (52.2 COPA)</i>
5.	<i>Fixation of rate for the varied work is</i>	<i>Fixation of new rate or BOQ item depend on</i>

	<i>not dependent on Clause 52.2</i>	<i>Clause 52.1</i>
6.	<i>Applies when the Engineer instructs Varied work under Clauses 51, 12.2 and 20.4.</i>	<i>Applies when the Engineer decided to change the rate of existing BOQ items in the contract due to the effect of variation.</i>

”

12.3 Following on the above discussion, the learned Single Judge has held that Clause 52.1 would apply only where there was an instructed change. Where new rates was required to be fixed, owing to the work being substantially different from that contracted for, the learned Single Judge held, unexceptionably, that Clause 52.2 of the GCC would apply.

12.4 Following on the above discussion, the learned Single Judge held that there was no basis to fault the findings of the learned Arbitral Tribunal.

13 Our findings

13.1 Having perused, in detail, the award of the learned Arbitral Tribunal, and the impugned judgment of the learned Single Judge, we find no reasons to differ with the said judgment. The scope of interference, with arbitral awards, by this court, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) is circumscribed, and the scope of further interference, under Section 37 of the Act, is even more limited. This court had an occasion to comment, thereon, in its judgment in ***Mahanagar***

Telephone Nigam Ltd. vs. Finolex Cables Limited, 2017 SCC Online Del 10497, paras 45 and 46 of which merit reproduction as under:

*“45. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court, which travel from the judgment reported at 1994 Supp (1) SCC 644, **Renusagar Power Co. Ltd. v. General Electric Co. to (2015) 3 SCC 49, Associated Builders v. DDA**. On an analysis of all the said decisions, this court has, in a recent judgment reported at **NHAI v. Hindustan Construction Co. Ltd.**, delineated the following propositions:*

*“36. **Associated Builders v. DDA, (2015) 3 SCC 49**, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in **Shiam Cooperative Group v. Kamal Construction Co. Ltd.**, extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:*

(i) The four reasons motivating the legislation of the Act, in 1996, were

(a) to provide for a fair and efficient arbitral procedure,

(b) to provide for the passing of reasoned awards,

(c) to ensure that the arbitrator does not transgress his jurisdiction, and

(d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

(a) it is contrary to the fundamental policy of Indian law, or

(b) it is contrary to the interests of India,

(c) it is contrary to justice or morality,

(d) it is patently illegal, or

(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a “judicial approach”, i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The “patent illegality” had to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) “Perversity”, as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) *At the same time,*

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as “perverse”,

(b) if the view adopted by the arbitrator is a possible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) “Morality” would imply enforceability, of the agreement, given the prevailing mores of the day. “Immorality”, however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(x) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts.”

46. *It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the Id. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at **MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015)**, the Division Bench of this court has held that “an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34”. Being in the nature of a second appeal, this court would be hesitant to*

interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse. ”

13.2 Mr. Vikas Goel appearing for the appellant, sought to place reliance on the judgment of this Court in ***Chennai-Ennore Port Road Co. Ltd. v. RDS Project Ltd.*** Having examined, minutely, the said judgment, we find that it is clearly distinguishable, *inter alia*, for the reason that the said case did not involve any change in design at all. The learned Single Judge has also distinguished the said decision on the same ground, and we find no reason to differ.

13.3 We are of the opinion that no exception, whatsoever, can be taken, with the decision, of the learned Arbitral Tribunal, to allow the claims of the respondent. The fact that changes in design and alignment of the embankment took place, is not disputed. Neither it is disputed that, owing to the said changes, there was considerable increase in the amount of earth work required to be done by the respondent. The fact that the Kalikhote bypass was made available after the completion date is also admitted. The letter, dated 14th January, 2006, addressed to the Project Director of the respondent, made it clear that the rates stipulated in the BOQ were purely presumptive in nature, fixed without physical survey of the area solely on the basis of aerial survey drawings. We are entirely in agreement with the learned Single Judge that, in such circumstances, a new rate, for the excess work that was as a result of the above factors, required to be done by the respondent, was justified, and that such excess work could not be merely regarded as a “variation”. The learned Arbitral

Tribunal, as well as the learned Single Judge have, in our view, correctly held that the claims of the respondent justified invocation of clause 52.2 of the GCC, rather than clause 52.1 thereof.

14. For all the above reasons, we find that the present appeal is devoid of merit. It is dismissed accordingly, with no order as to costs.

C.HARI SHANKAR, J

ACTING CHIEF JUSTICE

AUGUST 06, 2018
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