

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	24.09.2019
Judgment pronounced on	04.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.293 of 2011

- 1.The Superintending Engineer (Highways)
Madurai Circle,
Madurai.
 - 2.The Superintending Engineer(National Highways),
Madurai Circle,
Madurai.
 - 3.The Superintending Engineer(National Highways),
Salem Circle,
Salem.
- ... Petitioners

- 1.S.Jayamani
 - 2.Justice K.Sampath Kumaran
Sole Arbitrator,
NCB No.1, PSKR Salai,
Greenways Road,
Chennai -28.
- ... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Preliminary Award dated 03.06.2010 and Final Award dated 08.04.2011 passed by the Sole Arbitrator.

For Petitioners : Mr.M.Sricharan Rangarajan
Spl. Government Pleader(CS)

For Respondents : Mr.K.J.Parthasarathy for R-1

ORDER

The Respondents in the Arbitration Proceedings are the Petitioners before this Court. The First Respondent herein initiated Arbitration Proceedings wherein a sum of Rs.1,65,30,698/- with interest at 18% per annum on Rs.52,76,662/- was claimed. By Preliminary Award dated 03.06.2010, the learned Arbitrator held that the First Respondent herein is entitled to an aggregate sum of Rs.51,90,602/- with interest thereon. By Final Award dated 08.04.2011, the learned Arbitrator directed the Petitioners herein to pay a sum of Rs.1,12,63,051.02 with interest on the principal sum of Rs.51,90,602/- at 18% per annum from 22.11.2010 till the date of payment; Arbitrator's fees; lawyer's fees, expenses etc., as specified in the said Final Award. The said Awards are impugned herein and are referred to as the Award hereafter.

2.I heard the learned counsel for the Petitioners and the learned counsel for the First Respondent.

3.The learned counsel for the Petitioners submitted that the Award is challenged primarily on the ground of limitation and jurisdiction. He subsequently circulated written submissions wherein some contentions were made on the merits also. With regard to limitation, he submitted that the admitted position is that the Arbitration Proceedings commenced on or about 21.04.1999, when the First Respondent herein invoked the arbitration clause. After invoking the arbitration clause on 21.04.1999, he submitted that the Petition under Section 11 of the Arbitration and Conciliation Act, 1996(the Arbitration Act) was filed only on 24.03.2005, whereas, as per Article 137 of the Limitation Act, 1963(the Limitation Act), the limitation period for filing an application under Section 11 of the Arbitration Act is three years from the date when the cause of action accrues. Accordingly, if calculated from the date of final bill, namely, 27.03.1999, the Section 11 Petition should have been filed on or before 27.03.2002 and, if calculated from the date of commencement of Arbitration, namely, 21.04.1999, the Section 11 Petition should have been filed on or before 21.04.2002. Consequently, he submitted that the Section 11 Petition filed on 24.03.2005 is clearly barred by limitation. In support of this submission, he referred to and relied upon the judgments, which are set out below along with context and principle:

(i)**Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, (1988) 2 SCC 338**, wherein, at paragraph 4, the Hon'ble Supreme Court held that the period of limitation for filing an application under Section 20 of the Arbitration Act, 1940 commences from the date when the dispute arises and is a period of three years from the date when the dispute arose.

(ii)**Golden Chariot Recreations Pvt Ltd. Vs. Mukesh Panika & another, (2018) SCC Online Del 10050**, wherein, it was held by the Hon'ble Delhi High Court that a Petition under Section 11 of the Arbitration Act, which was filed more than three years after the notice invoking the Arbitration clause, is barred under Article 137 of the Limitation Act.

(iii)**Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta (1993) 4 SCC 338**, wherein, the Hon'ble Supreme Court held that the cause of arbitration commences when one parties serves notice on the other party requiring the appointment of an arbitrator and that Section 3 of the Limitation Act applied to arbitral proceedings.

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4.He further submitted that this question was not decided in the order passed in the Section 11 Petition, wherein the Court merely recorded that this is a fit case for making a reference under Section 11(5) of the Arbitration Act. Therefore, he submitted that the question of

limitation should have been decided by the Arbitral Tribunal. Instead, he submitted that the Arbitral Tribunal rejected the plea of limitation on the basis that the High Court had considered the contention that the claim is barred by limitation but nevertheless appointed the Arbitrator and thereby impliedly held that the claim is not barred by limitation. According to the learned counsel for the Petitioners, the said conclusion is patently illegal.

5.The 2nd ground of challenge raised by the learned counsel for the Petitioners is discussed herein. According to the learned counsel, the tender conditions incorporated by reference the Preliminary Specifications to Standard Specifications to Roads and Bridges (P.S. to SSRB). In specific, he submitted that Clause 48 of the tender conditions specifies as under:

"The P.S. to SSRB form an inseparable condition of the contract in all agreements entered into by the contractor for execution of works for the Tamil Nadu Highways and Rural Works Department. For items of work in building and structures not covered by these specification relevant items of M.D.S.S. and S.S.R.B. the Ministry of Transport of G.O.I. specification, amended from time to time shall apply."

On the basis of the said clause 48, he contended that the P.S. to SSRB is incorporated by reference in the contract between the Petitioners and the

First Respondent and, consequently, is an integral part of the said contract. He further submitted that the said P.S. to SSRB provides at Clause 111 that claims shall be preferred within one year from the date of final payment and that any claim preferred after this limitation period shall be time barred. The said clause reads as under:

"In case of any dispute or difference between the parties to the contract either during the progress or after the completion of the works after the determination, abandonment, or breach of the contract, as to the interpretation of the contract, or as to any matter arising thereunder except as to the matter left to the sole discretion of the Engineer under Article 106-01, 106-02, 106-04, 106-09, 107-03, 107-05, 107-06, 107-07, 107-15, 107-16, 107-17, 108-16, 110-01 and 110-02 (a) & (b) of the preliminary specification or as to the withholding by the Engineer of payment of any bill to which the Contractor may claim to be entitled, then either party shall forthwith give to the other, notice of such dispute or difference, and such dispute or difference shall be referred to the Arbitrator mentioned in the contract and the award of such Arbitrator shall be final and binding on the parties. The claims shall be preferred within one year from the date of final payment. Any claim preferred after this limitation period shall be time barred."

In this case, he submitted that the claims were evidently not made within one year from the date of final payment and were actually made only on

01.11.2002. In response to a question as to whether PS 111, which is reproduced above, does not violate Section 28 of the Contract Act, 1872(the Contract Act), he submitted that the stipulation that "the claims shall be preferred within one year from the date of final payment" is certainly not in violation of Section 28 of the Contract Act and that this portion of Clause 111 is valid and can be severed from the portion that stipulates that "any claim preferred after the limitation period shall be time barred."

6.The 3rd ground of challenge of the learned counsel for the Petitioners is that G.O.Ms.No.1545 dated 26.07.1990 stipulates that any claim for more than Rs.2,00,000/- should be referred to the civil court and not to an arbitrator. According to the learned counsel for the Petitioners, the said G.O.Ms.No.1545 is incorporated by reference in the contract between the Petitioners and the First Respondent. He contended that such incorporation by reference is on account of Clause 48 of the tender conditions read with clause 108.02 of the PS to SSRB which reads as under:

"108.02 Laws to be observed:-

The Contractor shall at all times observe and comply with all Union and State laws, local laws, ordinances and regulations which in any manner affect the conduct of the works and **all such orders as exist at the present and which may be enacted in the future by legislative bodies or tribunals**

having legal jurisdiction or authority over the work(emphasis added) and no place of misunderstanding or ignorance thereof will be considered. He shall indemnify and save harmless the Government and all its officers, agents, employees and servants against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree whether by himself or by his employees."

7. According to the learned counsel for the Petitioners, the P.S. to SSRB is incorporated by reference by virtue of Clause 48 of the tender conditions and, in turn, G.O.Ms.1545 stands incorporated by reference by virtue of Clause 108.02 of PS to SSRB and is binding on the First Respondent/Contractor. In effect, he submitted that the claims before the Arbitral Tribunal are beyond the jurisdiction of the said Tribunal because they are for amounts greater than the stipulated sum of Rs.2,00,000/-. In this connection, he referred to and relied upon the judgments, which are set out below along with context and principle:

(i)NAPC Limited Vs. The Superintending Engineer, National Highways(the NAPC case), in O.P.Nos.881 and 899 of 2018, wherein, by order dated 10.07.2019, this Court expressly referred to G.O. Ms.No.1545 dated 26.07.1990 and held that the Arbitral Tribunal did not have jurisdiction in respect of any claim for more than Rs.2,00,000/-.

(ii) **Rajam Engineering Contractors Vs. The State of Tamil Nadu, rep. by its Secretary to Government, Highways Department, Fort St. George, Chennai-9 (2006) - 2 - L.W. 639 (the Rajam Engineering Contractors case)**, wherein, this Court, in a Section 11 Petition, held that the words "be referred to the Court" in G.O.Ms.No.1545 dated 26.07.1990 does not mean reference to the Court for the purpose of appointing an Arbitrator. Instead, it means reference to the Court for the purposes of adjudication.

(iii) **Giriraj Garg Vs. Coal India Ltd and others (2019) 4 Scale 406 (the Giriraj Garg case)**, wherein the Hon'ble Supreme Court held that the arbitration clause contained in the 2007 scheme of Coal India Limited was incorporated by reference in the sale order which states that the sale order would be governed by the guidelines, circulars, office orders etc. In effect, in the said judgment, it was held that the 2007 scheme which provides for dispute resolution by arbitration stands incorporated in the sale orders by virtue of Clause 7 thereof read with Section 7(5) of the Arbitration Act.

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8. The learned counsel further submitted that the Petitioners are not estopped from raising the plea of jurisdiction notwithstanding the fact that the said plea was not raised before the Arbitral Tribunal by filing a petition under Section 16 of the Arbitration Act. In this connection, he

relied upon the judgment of the Hon'ble Supreme Court in **Lion Engineering Consultants vs. State of Madhya Pradesh (2018) 16 SCC 758 (the Lion Engineering Consultants case)**. As stated earlier, some contentions were raised in the written submissions to the effect that the learned Arbitrator disregarded/misconstrued the terms of the contract and failed to appreciate the evidence properly. By raising the above contentions and grounds, the learned counsel for the Petitioners concluded his submissions by contending that the Award is liable to be set aside because: (a) the claims are barred under the Limitation Act and under the terms of Clause 111 of the PS to SSRB whereby the claims should have been made within a period of one year from the date of final payment; and (b) the Award is, in any case, beyond the jurisdiction of the Arbitral Tribunal and, therefore, liable to be set aside.

9. In response, the learned counsel for the First Respondent submitted that the Section 11 Petition was filed on 22.03.2002 and not 24.03.2005. In order to establish this submission, he produced a certified copy of O.P.No.672 of 2005 (the Section 11 Petition). He further submitted that the docket of the said petition shows that it was filed on 22.03.2002. He also pointed out that it bears the endorsement that the delay in representation was condoned on 14.02.2005 in Application No.2808 of 2005. Thereafter, he submitted that the O.P. was numbered in the year

2005 after the delay in re-presentation of the petition was condoned. On the above basis, he submitted that the Section 11 petition was filed within three years from the date of payment of the final bill and also within three years from the date of commencement of arbitration.

10. With regard to the contention that the claims should have been referred for arbitration within one year from the date of final payment, he submitted that the final payment was made on 27.03.1999 and the arbitration clause was invoked on 21.04.1999, i.e. within a period of one month from the date of payment of the final bill. Accordingly, he submitted that the claim was made within one year from the date of final payment and, therefore, not barred as per P.S. 111. In this connection, he also referred to the findings in the Award with regard to this issue at pages 65 to 67 of the typed set of papers filed by the First Respondent. On a demurrer, he submitted that a clause curtailing the period of limitation violates Section 28 of the Contract Act and is, consequently, void. For this purpose, he referred to the judgment of the Hon'ble Supreme Court in **National Insurance Company Limited Vs. Sujir Ganesh Nayak & Co and another, (1997) 4 SCC 366** (the National Insurance Case), wherein, at paragraph 16, the Hon'ble Supreme Court held that any agreement that seeks to curtail the period of limitation prescribed under the Limitation Act is void under Section 28 of the

Contract Act. Therefore, he submitted that the stipulation in P.S. 111 that "any claim preferred after the limitation period shall be time barred" is void under Section 28 of the Contract Act.

11. With regard to the contention on the pecuniary limit of Rs.2,00,000/-, he submitted that G.O.Ms.No.1545 is not mentioned or specified in the P.S. to SSRB and, therefore, the said Government Order cannot be said to be incorporated by reference in the contract between the Petitioners and the First Respondent and is, consequently, not binding. He also relied upon the Hon'ble Supreme Court's judgment in **SBP & Co. Vs. Patel Engineering Ltd. and another, (2005) 8 SCC 618**, to contend that if the question of limitation is decided by the High Court in a section 11 petition, the Arbitral Tribunal cannot re-examine the issue. Moreover, he submitted that the plea that the Arbitral Tribunal does not have jurisdiction was not raised either in the Section 11 Petition or in the Arbitral Proceedings and that, therefore, such a plea cannot be raised at this juncture. For all these reasons, he submitted that the Arbitral Award is not liable to be set aside. He also subsequently circulated written submissions.

12. By way of rejoinder, the learned counsel for the Petitioners reiterated that in the **Rajam Engineering Contractors case**, this Court

held that G.O.Ms.No.1545, which stipulates a limit of Rs.2,00,000/-, is binding by following a Full Bench Judgment of the Andhra Pradesh High Court in **Vishakapattinam Urban Development Authority Vs. V.Narayana Raju, (1999) (9) SCC 568**. He also submitted that the delay in re-presentation cannot be for more than the limitation period of three months specified under Section 34(3) of the Arbitration Act. In conclusion, he submitted that the plea of limitation was required to be examined by the Arbitral Tribunal even if it was not raised by the Petitioners on account of Section 3 of the Limitation Act.

13.The records were examined and the oral and written submissions were considered carefully. The Arbitral Award has been assailed primarily on the grounds of both statutory and contractual limitation and on the ground of pecuniary jurisdiction. As regards the contention that the Section 11 petition was filed beyond the limitation period of three years, which is prescribed in Article 137 of the Limitation Act, it is evident from the certified copy of the Section 11 petition that the same was filed on 22.03.2002 and that the delay in re-presentation thereof was condoned on 14.07.2005. Therefore, the contention that the Section 11 Petition was filed beyond the limitation period of three years and that the Arbitration Proceedings are, consequently, barred by limitation is rejected.

14.The next contention to be dealt with relates to the effect of P.S. 111 which specifies that claims shall be preferred within one year from the date of final payment and that claims preferred after the limitation period shall be time barred. In this regard, the admitted position is that final payment was made on 27.03.1999. It is also the admitted position that the arbitration clause was invoked on 21.04.1999. As per Section 21 of the Arbitration Act, the date of receipt of the letter invoking the arbitration clause is the date of commencement of arbitration. In other words, the limitation clock stops on this date. These facts and the relevant documents were duly considered by the Arbitral Tribunal before concluding that the claim was submitted within one year from the date of final payment on 27.03.1999. The said conclusion is a reasonable conclusion based on appraisal of the relevant documents. Therefore, the said conclusion is not liable to be interfered with.

15.In any event, P.S. 111 is clearly void under Section 28 of the Contract Act as regards the stipulation that any claim preferred after the limitation period shall be time barred. As held in the **National Insurance case**, cited supra, such a clause limiting the period of limitation prescribed by the Limitation Act violates Section 28 of the Contract Act and is, therefore, void. The contention of the learned counsel for the Petitioners, in this regard, that the portion of P.S.111 that

stipulates that the claim would be barred by limitation may be severed is untenable because that is the only portion that deals with the consequences of not making the claim within the stipulated time. In specific, Clause 111 does not specify that the claim is waived or relinquished if not made within the specified time.

16.The 3rd contention of the learned counsel for the Petitioners that the Arbitral Tribunal does not have pecuniary jurisdiction hinges on establishing that G.O. Ms. No.1545 is incorporated by reference in the contract between the Petitioners and the First Respondent. It is pertinent to state, in this regard, that this contention was not raised in the Section 11 Petition before this Court or before the Arbitral Tribunal and, more importantly, G.O. Ms. No.1545 was not filed as an exhibit. Before analyzing this issue, it may be noted that the contention of the learned counsel for the Petitioners is that G.O. Ms. No.1545 forms part of the contract between the parties and not that it is binding on account of being statutory. Consequently, the production of G.O. Ms. No.1545 in the Section 34 Petition is tantamount to the introduction of additional evidence, at this stage, which is not permissible. This ground of challenge is liable to be rejected on this basis itself. By contrast in the **Lion Engineering Consultants case**, the jurisdictional challenge was on the basis that a relevant statute impacted the jurisdiction of the arbitral

tribunal and there was no disputed factual basis to the jurisdictional challenge.

17. Nonetheless, elaborate arguments were addressed on whether G.O. Ms.1545 is incorporated by reference and, therefore, this issue is considered. For this purpose, Clause 48 of the tender conditions should first be examined. The said tender conditions are a part of the contract and may be referred to as Document A for the purposes of deciding this issue. On examining Clause 48 of the tender conditions, it is evident that the intention to incorporate the PS to SSRB in Document A is manifest and unambiguous. The said PS to SSRB may be referred to as Document B for the purposes of deciding this issue and it may be concluded that Document B is incorporated by reference in Document A. However, it remains to be seen whether, by virtue of Clause 108.02 of the said P.S. to SSRB, G.O. Ms.No.1545 stands incorporated by reference. The said G.O. Ms. No.1545 may be referred to as Document C for the purposes of deciding this issue. On examining Clause 108.02 closely, it is evident that there is no reference therein to Document C. Instead, it is clear that this is a clause that makes it obligatory on the Petitioner/Contractor to comply with Central and State laws and regulations. With reference to orders, this clause stipulates that the First Respondent/contractor should comply with "all such orders that may be

enacted by legislative bodies or tribunals with jurisdiction over the work". In other words, it is a clause that makes it obligatory on the First Respondent/Contractor to comply with applicable laws. There is no reference therein to executive orders and, undoubtedly, no reference to Document C, namely, G.O. Ms. No.1545. In addition, there is no indication elsewhere in the PS to SSRB or in the tender conditions that the parties intend to incorporate by reference orders such as G.O. Ms. No.1545. Indeed, Clause 108.02 of Document B does not even refer generically to government orders. Instead, it refers generically to laws, regulations and orders.

18. This issue can also be examined from a rational or common sense perspective. When one concludes that a document is incorporated by reference, in effect, the incorporated document is made applicable and binding on parties who/which have not signed or subscribed to such document. In this case, the parties signed a contract, namely, Document A. Document A refers to the PS to SSRB, namely, Document B, expressly and the intention to incorporate the said PS to SSRB is manifest in Document A. The contention of the learned counsel for the Petitioners is that this Document B incorporates by reference G.O. Ms. No.1545, namely, Document C and that, therefore, this Document C is also binding on the signatories to Document A. Needless to say, this does

not stand to reason unless the intention to incorporate Document C in Document A is clear and unambiguous because otherwise a non-signatory is compelled to comply with the terms and conditions of a document, which could be alien to such person. In this case, as stated earlier, Document C, namely, G.O. Ms. No.1545, is not specified in Document B. Moreover, Clause 108.02, which is said to be the incorporating clause in Document B does not even deal with executive orders. Instead, it deals with laws, regulations and legislative orders and imposes obligations on one party, namely, the Respondent/contractor and not on the Petitioners.

19.The law on this subject may be examined against this background. The Hon'ble Supreme Court held in **M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited (2009) 7 SCC 696** that in order to conclude that a document is incorporated by reference, there should be a clear or specific indication of the intention of the parties concerned to incorporate the said document by reference and that mere reference to a document does not lead to the inference that the said document is incorporated by reference. Paragraph 17 of the said judgment reads, inter alia, as under:

“ 17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a

contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract...."

20.The **NAPC case** turned on the finding that clause 4.2 of the general conditions of contract therein made G.O.Ms. No.1545 an inseparable part of the contract. Besides, the principles laid down by the Hon'ble Supreme Court with regard to incorporation by reference were not canvassed before or considered therein. In the **Rajam Engineering Contractors case**, the request for reference of the dispute to arbitration was rejected, at the threshold, on the basis of G.O. Ms. No.1545 and, therefore, it is clearly distinguishable on facts. As regards the **Giriraj Garg case**, only two documents were involved, namely, the sale orders

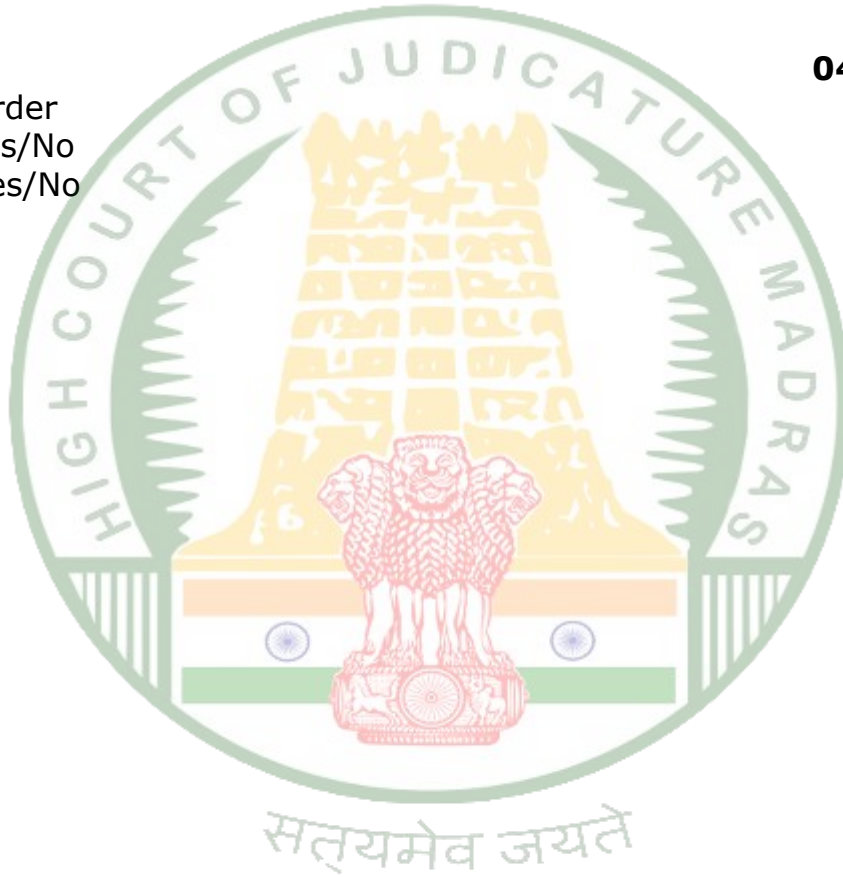
and the 2007 Scheme and by examining the relevant clause in the sale orders in the context of Section 7(5) of the Arbitration Act, the Hon'ble Supreme Court concluded that there is an incorporation by reference of the arbitration clause. Thus, all these judgments are distinguishable and this case should be decided independently by applying settled principles regarding incorporation by reference. Thus, by applying the principles of law, as discussed above, that should be applied to determine as to whether a document is incorporated by reference to the facts of this case, I have no hesitation in concluding that G.O.Ms.No.1545 is not incorporated by reference. In view of the above finding, it is not necessary to deal with and enter definitive findings on the plea that a jurisdictional challenge can be made at the S.34 stage although it was not raised either in the Section 11 Petition or before the Arbitral Tribunal.

21.The challenge to the Award on merits does not pass muster because of the settled legal position that construction of the contract and appraisal of evidence is within the domain of the Arbitral Tribunal and the decision in these respects would not be interfered with except on limited grounds which are clearly absent in this case.

22.In fine, all the objections to the Award are liable to be and are hereby rejected. As a result, the Petition to set aside the Award is dismissed. No costs.

04.10.2019

Speaking order
Index: Yes/No
Internet: Yes/No
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SENTHILKUMAR RAMAMOORTHY, J.
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Pre Delivery order
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