

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 18.03.2019

Judgment Delivered on : 09.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

O.S.A.No.221 of 2012
and
M.P.Nos.1 and 2 of 2012

The Government of Tamil Nadu,
Rep. by the Project Director,
Tamil Nadu Road Sector Project,
T.N.H.B. Complex, Second Floor,
48, Dr.Muthulakshmi Salai,
Adyar, Chennai-600 020. .. Appellant /Petitioner.

Vs.

1. M/s.Amar Constructions Company,
Engineers & Contractors,
14, Atulpark Society,
Karelibaug,
Vadodhara-390 018.
2. Mr.K.Arunachalam,
Presiding Arbitrator for contract MC4,
S.I. Gopal Villa, G-6 (Old No.46), 9th Street,
Anna Nagar East,
Chennai-600 102.
3. Mr.A.Sampathkumar,
Chief Engineer (H) (Retd.),
New No.2, Old No.519,
Second West Street, West Avenue,
Thiruvanniyur, Chennai-600 041.
4. Mr.T.Subramanian,
Chief Engineer, PWD, (Retd.),
2/198, Agaram Main Road,
Selaiyur, Chennai. .. Respondents /Respondents

Original Side Appeal filed under Order 36 Rule 1 of the
O.S.Rules, 1994, read with Clause 15 of the Letters Patent,

against the order dated 09.04.2011 passed by the learned Single Judge in O.P.No.766 of 2008 on the file of this Court.

And Original Petition praying that this Honourable Court be pleased to set aside the award passed by the Arbitration Tribunal dated 20/02/2008 and subsequent modified Arbitration award dated 18/04/2008.

For appellant : Mr.S.R.Rajagopal, Addl. Advocate General
assisted by Mr.M.Sricharan Rangarajan, Addl.G.P

For respondents : Mr.Krishna Ravindran for R-1

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal (O.S.A) has been filed as against the order dated 09.04.2011 passed by the learned Single Judge in O.P.No.766 of 2008, dismissing the said O.P. filed by the appellant herein under Section 34 of the Arbitration and Conciliation Act, which was filed to set aside the award passed by the Arbitral Tribunal, dated 20.02.2008 and subsequent modified arbitration award, dated 18.04.2008.

2. Brief facts which are necessary to decide the issue in this appeal, are as follows:

(a) The Government of Tamil Nadu contemplated upgradation of roads to higher standards to improve quality and serviceability. Based on the request made by the Government, the World Bank had agreed to fund the Tamil Nadu Road Sector Project at a cost of Rs.2,160 Crores, and under this major component, a sub-component of enhanced periodical maintenance of Government roads in various Districts of the State had also been taken up for implementation. Under this sub-component, the tender for enhanced periodical maintenance of Government roads in Nagapattinam and Tiruvarur Districts: Tharangambady-Myladuthurai Km 11/2-29/6, Thanjavur-Mannargudi-Thiruthuraipoondi-Vedaranyam-Kodiyakkarai Road Km 15/7 - 30/3 and Nagore-Vettar Road Km 15/0-23/0 (Contract MC 4) covering 41.00 Km, was invited, fixing the date of receipt of tender as 09.02.2004. The tender of the first respondent-Company, namely, M/s.Amar Construction Company, was found to be responsive and therefore, the tender amounting to Rs.17,32,80,247/- was accepted and communicated on 30.07.2004. An agreement (Agreement No.13/2004-05) setting out the terms and conditions, was concluded on 01.09.2004.

(b) As per the terms of contract, the contract period is 12 months from the date of handing over of the site. The site was handed over on 07.09.2004. The first respondent ought to have completed the work on 06.09.2005. However, the first respondent

completed the work only on 13.04.2006 with a delay of six months.

(c) During the performance of the contract, disputes arose between the parties and at the request of the first respondent, the disputes were referred to arbitration to the Arbitral Tribunal consisting of respondents 2 to 4. Before the Arbitral Tribunal, the first respondent-claimant made various claims and the Arbitral Tribunal had passed an award. After the award was passed, the appellant sought for certain clarification and on that basis, modified award was passed as follows:

Claim No.	Claim	Claim Amount in Rs.	Arbitration Award in Rs.	Modified Arbitration Award in Rs.
1	Claim towards increase in bid price as per clause 15.3 of instruction to bidders	21,02,671/-	19,46,436/-	19,46,436/-
2	Claim towards loss of profit and idling charges due to over stay in the project site	2,23,12,798 /-	22,31,280/-	20,79,363/-
3	Claim towards price escalation	62,15,780/-	62,15,780/-	62,15,780/-
4	Interest on amount withheld beyond intended completion date and upto actual completion date	7,87,396/-	4,37,442/-	4,37,442/-
5	Interest on the amount deposited for bank guarantee and bank commission	41,630/-	23,116/-	23,116/-
6	Refund of recovery made for additional items	6,28,679/-	6,28,679/-	6,28,679/-

Claim No.	Claim	Claim Amount in Rs.	Arbitration Award in Rs.	Modified Arbitration Award in Rs.
7	Claim towards interest for the delay in making payment for the final bill	2,38,341/-	1,63,470/-	1,44,752/-
8	Interest on pending claims from the cause of action to date of payment			
a	Pre reference period	49,17,149/-	10,47,411/-	8,40,726/-
b	Interest for pendent lite	to be quantified	9,04,202/-	8,77,325/-
9	Cost of arbitration	to be quantified	2,94,500/-	2,94,500/-
	Total		1,38,92,316 /-	1,34,88,119 /-
	Interest for the post award period	to be quantified	@ 10% per annum	@ 10% per annum

(d) Aggrieved by the award, dated 20.02.2008 and the subsequent modified award, dated 18.04.2008, the appellant has filed O.P.No.766 of 2008 before the learned Single Judge under Section 34 of the Arbitration and Conciliation Act, for setting aside the award. The learned Single Judge upheld the award passed by the Arbitral Tribunal and made no changes to the compensation given under the award. Against the said order of the learned Single Judge, the present O.S.A. has been filed by the appellant under Section 37 of the Arbitration and Conciliation Act.

3. The learned Additional Advocate General, assisted by the learned Additional Government Pleader, appearing for the appellant submitted that originally, when disputes arose between the parties, the parties approached the adjudicator and the adjudicator allowed a few claims while dismissing the others. Aggrieved by the recommendations of the adjudicator, the first respondent invoked the arbitration clause in the agreement. The Arbitral Tribunal allowed the claim of the first respondent and

awarded compensation to the tune of Rs.1,38,92,316/-, vide award dated 20.02.2008 and the said award was subsequently modified to Rs.1,34,88,119/-, vide award dated 18.04.2008. It is further submitted that the first respondent submitted the bid on 09.02.2004. The initial date of expiry of bid was 08.05.2004. But the letter of acceptance of the bid was on 30.07.2004. Before the adjudicator, the first respondent made a claim for increase in contract price as per Clause 15.3 of Section 1 of the Instructions to bidders. For example, in respect of the said claim being Claim No.1, the adjudicator awarded a sum of Rs.19,46,436/-. Likewise, the adjudicator awarded various claims under various heads. Not being satisfied with the order passed by the adjudicator, the first respondent made various claims before the Arbitral Tribunal. The Arbitral Tribunal awarded various amounts under the claims made by the first respondent, as tabulated above. It is further contended by the learned Additional Advocate General that when the first respondent cannot substantiate the claim before the adjudicator, they cannot substantiate the claim for higher sum before the Arbitral Tribunal also. Therefore, it shows that in respect of the same cause of action, the first respondent made one claim before the adjudicator and another before the Arbitral Tribunal, and hence, there is inconsistency in making the claim, which is opposed to public policy. Therefore, learned Additional Advocate General submitted that the Court can make interference in the claim made by the first respondent.

4. The learned Additional Advocate General invited the attention of this Court to Clause 13.4 of the Instructions to Bidders, which reads as follows:

"13.4. The rates and prices quoted by the bidders shall be fixed for the duration of the Contract and shall not be subject to adjustment on any account."

Relying on the said Clause 13.4, learned Additional Advocate General submitted that when once price is quoted by the bidder at the time of submission of bid, it shall remain fixed for the duration of the contract, if and when the same is accepted by the employer. Clause 13.4 has been inserted in order to prohibit prospective bidders from changing the rates and prices quoted by them in their bid after obtaining its approval from the employer. In this regard, learned Additional Advocate General also invited the attention of this Court to Clause 15.3 of the Instructions to Bidders, which reads as follows:

"15.3. In the case of contracts in which the Contract Price is fixed (not subject to price adjustment), in the event that the purchaser requests and the Bidder agrees to an extension of the validity period, the contract price, if the bidder is selected for

award shall be the bid price corrected as follows:

The price shall be increased by the factor 5% per annum proportionately for each week or part of a week that has elapsed from the expiration of the initial bid validity to the date of issue of letter of acceptance to the successful Bidder."

Relying upon the said Clause 15.3, learned Additional Advocate General submitted that the first respondent's claim under Clause 15.3 is not sustainable, since it states that in the case of contracts in which the Contract Price is fixed and is not subject to price adjustment, the Contract Price shall be increased by the factor 5% per annum proportionately each week or part of a week that had elapsed from the expiration of the initial bid validity to the date of issue of letter of acceptance to the successful bidder, in the event the purchaser requests and the bidder agrees to an extension of the validity period. The learned Additional Advocate General further submitted that Clause 15.4 of the Instructions to Bidders relating to evaluation of the bid on the bid prices, does not apply to the first respondent, as the parties had not fixed the contract price as mentioned in the Clause.

5. The learned Additional Advocate General further submitted that the first respondent did not make any claim for increase in contract price neither at the time of extending the bid validity, nor at the time of receiving / after receiving the letter of acceptance. In this regard, the learned Additional Advocate General brought to the attention of this Court to the letter dated 30.07.2004 addressed by the Project Director of the Tamil Nadu Road Sector Project, Highways Department, Chennai to the first respondent, which clearly shows that the letter of acceptance was awarded for a sum of Rs.17.32 crores (approximately) as modified in accordance with the provisions of the Instructions to Bidders and the same was accepted by the first respondent. Therefore, the contract price fixed is final and is not subject to re-consideration at the whims and fancies of the first respondent. In this regard, the learned Additional Advocate General relied on Clause 2.3 of the Conditions of Contract, which reads as follows:

"2.3: The documents forming the Contract shall be interpreted in the following order of priority:

- (1) Agreement
- (2) Letter of Acceptance, notice to proceed with the works
- (3) Contractor's Bid
- (4) Contract Data

- (5) Conditions of Contract including Special Conditions of Contract
- (6) Specifications
- (7) Drawings
- (8) Bill of Quantities and
- (9) any other document listed in the Contract Data as forming part of the Contract."

Based on the above extracted Clause 2.3, the learned Additional Advocate General submitted that Clause 2.3 lists the documents that form the contract and the order in which they shall be prioritised. Thus, it is clear that the Instructions to Bidders are neither mentioned under Clause 2.3, nor under the Contract Data and the same does not form part of the contract, and hence, it cannot be deemed that the contract price was fixed at the time when the Instructions to Bidders were issued to the potential bidders by the employer. Therefore, the claim No.1, i.e. claim towards increase in contract price, is outside the scope of the arbitration and the same ought to have been rejected by the Arbitral Tribunal as well as by the learned Single Judge.

6. The learned Additional Advocate General also contended that it is the case of the first respondent that the appellant failed to give possession of the land as per Clause 21 of the Conditions of Contract, the employer shall give possession of all parts of the site to the contractor and if possession of a part is not given by the date stated in the Contract Data, the employer is deemed to have delayed the start of the relevant activities and this will be compensation event. Hence, it is the contention of the first respondent that as per Clause 21, since the appellant failed to give possession of the land, the first respondent is entitled to compensation as per Clause 44.2 of the Conditions of Contract. Thus, the first respondent claimed Rs.1,11,56,399/- towards loss of profit and Rs.2,23,12,798/- towards idling charges. The Arbitral Tribunal awarded a sum of Rs.20,79,363/- towards idling charges and rejected the claim towards loss of profit. In this regard, learned Additional Advocate General appearing for the appellant submitted that absolutely, there is no evidence produced by the first respondent to substantiate their claim for loss of profit or idling charges, and unless there is sufficient proof, the Arbitral Tribunal ought not to have awarded the amount under the said head. In support of this contention, the learned Additional Advocate General relied on the decisions of the Supreme Court reported in 2004 (5) SCC 109 (Bharat Coking Coal Vs. L.K.Ahuja), AIR 1963 SC 1405 (Fateh Chand Vs. Balkishan Dass) and 2006 (11) SCC 181 (McDermott International Inc. Vs. Burn Standard Co. Ltd), wherein the Supreme Court held that when the contractor had accepted the extension of time granted on specific condition

that no claim in respect of compensation arising out of extension granted shall be made out, then the contractor will not be entitled to compensation.

7. In the above context, the learned Additional Advocate General submitted that the contractor has merely stated that the machineries and the labour had to be stalled until the site was completely handed over to them. Absolutely, there is no documentary evidence to prove that the machineries so established were idle until the site was handed over in its entirety to the contractor. The reason for delay is attributable to the first respondent. Regardless of the handing over of the site in a piece-meal manner, it was still plausible for the contractor to have completed the remaining portion of the project before the due date. But the Arbitral Tribunal as well as the learned Single Judge had not considered the contribution of the contractor or towards the delay in completion of the project before the Intended Completion Date. In this regard, the learned Additional Advocate General invited the attention of this Court to Clauses 28 and 32 of the Conditions of Contract, which reads as follows:

"28. Extension of the Intended Completion Date:

28.1. The Engineer shall extend the Intended Completion Date if a Compensation Event occurs or a Variation is issued which makes it impossible for completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work and which would cause the Contractor to incur additional cost.

28.2. The Engineer shall decide whether and by how much to extend the Intended Completion Date within 21 days of the Contractor asking the Engineer for a decision upon the effect of a Compensation Event or Variation and submitting full supporting information. If the Contractor has failed to give early warning of a delay or has failed to cooperate in dealing with a delay, the delay by this failure shall not be considered in assessing the new Intended Completion Date."

32. Early Warning:

32.1. The Contractor is to warn the Engineer at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the Contract

Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonably possible.

32.2. The Contractor shall cooperate with the Engineer in making and considering proposals for how the effect of such an event or circumstance can be avoided or reduced by anyone involved in the work and in carrying out any resulting instruction of the Engineer."

Relying on the abovesaid Clauses, the learned Additional Advocate General submitted that upon the request made by the contractor, the employer is empowered by the provisions of the contract to extend the Intended Date of Completion of the project without any price adjustment to the contract price. The contractor should duly inform the employer of any foreseeable delay that would likely result in an increase of the contract price or delay the execution of works beforehand. The contractor in this case did not comply with any of the above terms of the contract and therefore, their claim is untenable. Moreover, the first respondent had requested for extension of time on 06.09.2005, 30.09.2005 and 03.10.2005 with an assurance not to claim any extra price due to the extension of time. The appellant had granted the extension of time as requested by the first respondent based on the condition that the first respondent shall not make extra claims on arbitration grounds due to the extension of time. In reply to the above, the first respondent stated that the letter dated 30.09.2005 would mean no additional claim other than the one in the agreement. But contrarily, the first respondent had claimed for loss of profit and idling charges, which is beyond the scope of agreement and the Arbitral Tribunal had awarded the same, which is not sustainable.

8. With regard to the claim regarding price escalation, the learned Additional Advocate General appearing for the appellant submitted that the first respondent had claimed a sum of Rs.62,15,780/- towards price escalation and the Arbitral Tribunal awarded the said amount under the said head, which was confirmed by the learned Single Judge stating that the findings of the Tribunal are based on evidence and are reasonable. In this regard, the learned Additional Advocate General relied on Clause 47.2 of the Conditions of Contract, which reads as follows:

"47. Price Adjustment:
47.1 Deleted

47.2 To the extent that full compensation for any rise or fall in costs to the contractor is not covered by the provisions of this or other clauses in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such either rise or fall in costs."

Based upon the abovesaid Clause 47.2, the learned Additional Advocate General submitted that the contract does not provide for price adjustment and the price fixed shall be deemed to cover all contingencies with respect to rise or fall in costs. When the first respondent requested for extension of time on 06.09.2005, 30.09.2005 and 03.10.2005, with an assurance not to claim any extra price due to the extension of time, contrarily, the first respondent had claimed for price escalation which is beyond the scope of agreement and the Arbitral Tribunal has awarded the same. Further, the Arbitral Tribunal had fixed the escalation cost at 10% to the value of work, which is not supported by sufficient evidence or reasoning, but the same was upheld by the learned Single Judge under Section 34 proceedings under the Arbitration and Conciliation Act, stating that the price escalation which was awarded by the Arbitral Tribunal, was based on evidence. This is in complete contradiction to the Arbitral Tribunal's finding and thereby proving the fact that the order passed by the learned Single Judge is nothing but a mere extraction of the award and without analysing the illegalities in the award as per the grounds of challenge under Section 34 of the Arbitration and Conciliation Act.

9. With regard to the claim relating to interest on the amount with-held beyond the Intended Completion Date and for interest on the amount deposited for Bank Guarantee and Bank Commission, it is submitted by the learned Additional Advocate General that the first respondent had claimed a sum of Rs.7,87,396/- under Claim No.4 (interest on with-held amount) and Rs.41,630/- under Claim No.5 (interest on the amount deposited for Bank Guarantee and Commission), and the Arbitral Tribunal has awarded a sum of Rs.4,37,442 under Claim No.4 and a sum of Rs.23,116/- under Claim No.5, and the same are upheld by the learned Single Judge. The learned Additional Advocate General submitted that the reason for delay is entirely attributable to the first respondent, but according to the first respondent, since the work was delayed, the contractor has to keep the money beyond the contract period, and therefore, the first respondent is entitled for the interest on the amount beyond the completion date. The first respondent is restrained from raising such claims, which are incidental costs due to the extension of time, since the letters dated 06.09.2005, 30.09.2005 and 03.10.2005 of the first respondent clearly prove

that the extension of time was granted by the appellant with an assurance that the first respondent shall not make extra claims on arbitration grounds due to the extension of time. The first respondent further stated that the letter dated 30.09.2005 would mean no additional claim other than the one in the agreement, thereby the claim towards interest on the amount with-held beyond the Intended Completion Date and interest on the amount deposited for Bank Guarantee, are liable to be rejected.

10. So far as the claim for refund for recovery made for additional items is concerned, the learned Additional Advocate General submitted that the first respondent had sought for refund of recovery of discount made for extra items for a sum of Rs.6,28,679/-, which was granted in their favour and the same was upheld by the learned Single Judge. Further, payment for variation of items is covered under Clause 40 of the Conditions of Contract, as per which the contractor shall provide the Engineer the break-up and it is subject to approval of the Engineer. In this regard, it is useful to extract Clause 40.3 of the Conditions of Contract as follows:

"40.3. If the Contractor's quotation is unreasonable, (or if the contractor fails to provide the Engineer with a quotation within a reasonable time specified by the Engineer in accordance with clause 40.1) the Engineer may order the variation and make a change to the Contract Price which shall be based on Engineer's own forecast of the effects of the Variation on the Contractor's costs."

According to the learned Additional Advocate General, in this case, the Engineer, based on his assessment, came to the conclusion that the rate quoted by the first respondent for additional items, was unreasonable and exercising the power provided under Clause 40.3, the Engineer has adopted a discount of 9% on the rates quoted, based on the previously agreed discount rate of 9% between the parties on the total bid, and therefore, this is in complete compliance with the provisions of the contract and hence, no refund is required to be made by the appellant.

11. With regard to the interest for the delay in making payment for the final bill, it is submitted by the learned Additional Advocate General appearing for the appellant that the first respondent had claimed interest at 18% p.a. for the delayed payment and the Arbitral Tribunal had awarded interest at 10% p.a., amounting to a sum of Rs.1,44,752/-, and the same was upheld by the learned Single Judge. It is his further contention that the work was completed on 13.04.2006 and the completion certificate and the certificate of payment were issued on 18.04.2006. The final bill made to the contractor was

on 13.07.2006. The contractor ought to have submitted a detailed account of the total amount that the contractor considers payable under the contract before the end of the defects liability period under Clause 57 of the Conditions of Contract, which reads as follows:

57. Final Account:

57.1. The Contractor shall supply to the Engineer a detailed account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liability Period. The Engineer shall issue a Defect Liability Certificate and certify any final payment that is due to the Contractor within 56 days of receiving the Contractor's account if it is correct and complete. If it is not, the Engineer shall issue within 56 days a schedule that states the scope of the corrections or additions that are necessary. If the Final Account is still unsatisfactory after it has been resubmitted, the Engineer shall decide on the amount payable to the Contractor and issue a payment certificate, within 56 days of receiving the Contractor's revised account."

Based upon the abovesaid Clause 57, it is submitted by the learned Additional Advocate General appearing for the appellant that the contractor failed to submit a detailed account, yet, he has made claims for interest on payment for the delayed period of 57 days after the completion of final payment, and hence, the first respondent is not entitled to the claimed amount in that regard.

12. With regard to the claim for interest pending claims from cause of action till the date of payment and cost of arbitration, it is submitted by the learned Additional Advocate General appearing for the appellant that as the delay is attributable to the first respondent, the said claim is liable to be rejected.

13. Thus, the learned Additional Advocate General appearing for the appellant submitted that the claims raised by the first respondent are directly hit by the provisions of the Arbitration and Conciliation Act and are in violation of public policy. The learned Single Judge ought to have interfered with the award of the Arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, and hence, the award of the Arbitral Tribunal as well as the order passed by the learned Single Judge, are liable to be set aside. In support of his submissions, the learned Additional Advocate General appearing for the appellant relied on the following decisions:

(i) 2003 (5) SCC 705 (ONGC Ltd. Vs. Saw Pipes Ltd) and

(ii) 2015 (3) SCC 49 (Associate Builders Vs. DDA).

14. Countering the above submissions, the learned counsel appearing for the first respondent submitted that the contract between the parties is an item-rate contract and the contract provides for Bill of Quantities and rates per unit. As per Clause 37.2 of the Conditions of Contract, the Bill of Quantities is used to calculate the contract price and the contractor is paid for the quantity of work done at the rate in the Bill of Quantities for each item. In this regard, the learned counsel appearing for the first respondent invited the attention of this Court to Clause 42.4 of the Conditions of Contract, as per which, the value of work executed shall comprise the value of the quantities of the items in the Bill of Quantities completed. Further, the bill amount will be arrived at based on the actual quantities executed at the rate stipulated in the Bill of Quantities of the contract, and hence, the contention of the appellant that the contract is fixed price, is not maintainable, since the payment is actually based on the actual quantities executed. Further, Clause 44.2 of the Conditions of Contract provides for additional cost if compensation event occurs. In this case, the delay in handing over of work front, is the compensation event as per Clause 21.1 of the Conditions of Contract and hence, the contract provides for compensation in case of compensation event. In this case, Clause 15.3 of the Instructions to Bidders (i.e. extracted earlier in this judgment), applies to item rate contract and the contract does not provide for price adjustment, since Clause 47.1 of the Conditions of Contract stood deleted. The intention of the said Clause 15.3 is to cover the initial escalation of the prices for the delay beyond the bid validity period of 90 days as per Clause 15.1 of the Instructions to Bidders, until the date of acceptance. This Clause is in-built in the contract and there was no time limit fixed for making the claim before issuance of letter of acceptance and signing of the contract.

15. The learned counsel appearing for the first respondent further contended that as per Clause 13.4 of the Instructions to Bidders, the rates and prices will be applicable as in the contract only during the contractual period as per the contract. This Clause shall not act as a prohibition to make claims beyond the contract period due to failure on the part of the appellant. Further, Clause 44 of the Conditions of Contract provides for compensation. The prices in the contract are applicable only during the intended completion period in the contract and not during the extended period for no fault of the first respondent and for reasons attributable to the employer (appellant).

16. With regard to the submission made by the learned Additional Advocate General appearing for the appellant that there is inconsistency in making one claim before the adjudicator and another claim before the Arbitral Tribunal, it

is submitted by the learned counsel for the first respondent that the Arbitral Tribunal is not an appellate authority over the adjudication process and it is an independent dispute resolution authority and the contractor can crystallise the claims before the arbitration and the argument that the claims were higher than the claim made before the adjudicator, was not pleaded before the Tribunal or before the learned Single Judge and it is immaterial. The appellant is arguing beyond the pleadings and law and the same is impermissible.

17. With regard to Claim No.1 relating to the claim towards increase in bid price as per Clause 15.3 of the Instructions to Bidder, it is submitted by the learned counsel appearing for the first respondent that since there was a delay of 82 days from the expiration of initial bid validity to the issue of letter of acceptance, the claim was made as per the said Clause 15.3. The increase in bid price is to cover the initial price raise from the expiry of bid validity period to the letter of acceptance. This Clause is inbuilt in the contract and there was no time limit fixed for making the claim before issuance of letter of acceptance and signing of contract. In this regard, the learned counsel appearing for the first respondent also invited the attention of this Court to Clause 57.1 of the Conditions of Contract and submitted that the contractor can make claims before the expiry of defect liability period, and hence, there is no necessity to raise the claims earlier and as it is not a fixed price contract, the contractor is entitled for the increase in price as per Clause 15.3 of the Instructions to Bidders. The Arbitral Tribunal has correctly appreciated the evidence and granted the relief for the value of work done beyond the contractual completion date only and not for the entire value.

18. So far as the claim towards loss of profit and idling charges due to over stay in the project site, is concerned, the learned counsel appearing for the first respondent submitted that the amount of claim is Rs.2,23,12,798/- and the Arbitral Tribunal rejected the claim towards loss of profit. As per Clause 21.1 of the Conditions of Contract, the employer shall give possession of all parts of the site to the contractor and if possession of a part is not given by the date stated in the Contract Data, the employer is deemed to have delayed the start of the relevant activities and this will be compensation event. Further, as per Clause 44.2 of the Conditions of Contract, if a compensation event would cause additional cost or would prevent the work being completed before the Intended Completion Date, the contract price shall be increased and/or the Intended Completion Date is extended and the Engineer shall decide as to whether and by how much the contract price shall be increased and whether and by how much the Intended Completion Date shall be extended. In the instant case, the appellant failed to give the possession of land as per Clause 21.1 of the Conditions of

Contract, which is a compensation event. The said Clause 44.2 provides for compensation in case of such events. The Arbitral Tribunal considered the clauses of the Conditions of Contract in Clauses 21.1 and 44.2 and granted the relief. In fact, the contractor has given early warnings, vide letter dated 26.12.2005 Ex.C-24, 31.01.2005 Ex.C-26, 02.03.2006 Ex.C-27 and 17.03.2006 and even requested to delete the work from their scope. The Arbitral Tribunal rejected the portion claimed for the loss of profit, since the rates in the Bill of Quantities include profit components and allowed only Rs.22,31,280/- towards idling charges. The Tribunal awarded compensation for 219 days of extended period only. The claim is also admitted only at 2% as against 10% claimed. The total amount claimed under the said claim was Rs.2,23,12,798/-, whereas the Tribunal comprising of technical experts, assessed the damages by their wisdom and granted only Rs.20,79,363/-. The Arbitral Tribunal has to independently analyse the claims and need not look into the decision of the adjudicator.

19. Similarly, learned counsel appearing for the first respondent submitted that insofar as the claim towards price escalation is concerned, the Tribunal analysed the evidence and the delay aspect and rightly concluded that the delay is attributable only to the appellant. Further, in respect of the claim towards interest on the with-held amount and Bank Guarantee, it is submitted by the learned counsel appearing for the first respondent that the appellant has to retain the same as per contract and since the work was delayed, the contractor has to keep the money beyond the contractual completion period. The other reliefs granted were only to compensate the escalation of price and prolongation and relief for retaining the amount was not included. Similarly, in respect of the claim towards refund of recovery made for additional items, learned counsel appearing for the first respondent submitted that the contractor, during the course of execution of works, carried out additional works, for which rates were fixed by the Department itself and not by the contractor. The contention of the appellant that the rates are unreasonable, is not correct. The discount offered by the contractor is only for the items at the time of bid and not for any additional items for which the rates were arrived arbitrarily by the Department itself. Hence, further deduction of discount which was made at the time of bid for the rates for the items in the Bill of Quantities of the contract, is erroneous and lacks fairness and logic. Further, the Arbitral Tribunal has got power as per Section 31(7)(a) of the Arbitration and Conciliation Act to award interest and the same has been done in the most reasonable rate, though the first respondent sought for more interest.

20. With regard to the submission made by the learned Additional Advocate General appearing for the appellant that extension of time was granted on an assurance by the first

respondent-Company that they will not make any extra claim, it is replied by the learned counsel appearing for the first respondent that by letter dated 30.09.2005 (Ex.C-19) sent by them, it is clearly mentioned by the first respondent-Company that they will undertake the responsibility to complete the entire work within the extended period with no additional claim and in this case, the first respondent has not made any claim beyond the scope of contract and this aspect was correctly dealt with by the Arbitral Tribunal as well as by the learned Single Judge.

21. Thus, the learned counsel for the first respondent submitted that the appellant is now trying to mis-interpret the award and make this Court to go into the evidence and facts of the case; on the contrary, this Court has to only see as to whether the award is so dubious that it shocks the conscience of the Court. In fact, the appellant, after receiving the award, had even sought for a clarification in the award and the Arbitral Tribunal considered the same and passed a modification to the award. The award has been rendered by the Arbitral Tribunal consisting of three eminent technical arbitrators, who are well versed with such contracts and the industry practice and taking into account the difficulties of both the employer and the contractor in mind, they have rendered a balanced and fair award. The learned Single Judge has correctly come to the conclusion that there is no scope for interference in the award and accordingly dismissed the O.P. In support of his submissions, the learned counsel for the first respondent relied on the following decisions:

- (i) AIR 1989 SC 1034 (P.M.Paul Vs. Union of India);
- (ii) AIR 1991 Karnataka 96 (State of Karnataka Vs. R.N.Shetty and Co.);
- (iii) AIR 1992 Calcutta 242 (Union of India Vs. Abhoy Shankar);
- (iv) 2004 (2) SCC 663 (Chairman and M.D., NTPC Ltd. Vs. Reshmi Constructions, Builders and Contractors);
- (v) 2011 (2) SCC 400 (R.L.Kalathia and Company Vs. State of Gujarat);
- (vi) AIR 2018 Madras 119 = 2018 (3) LW 695 = 2018 (3) MLJ 1 (Judgment in O.S.A.No.231 of 2015, dated 01.03.2018 - Chettinad International Coal Terminal Pvt. Ltd. Vs. Kamarajar Port Limited (Madras High Court);
- (vii) 2018 (1) SCC 718 (Sutlej Construction Ltd. Vs. Union Territory of Chandigarh) and
- (viii) 2019 SCC Online SC 220 (MMTC Ltd. Vs. Vedanta Ltd).

22. Keeping in mind the above submissions made by the learned counsel appearing for the parties, we have considered

the same and perused the materials available on record.

23. Though very many contentions have been raised by the learned Additional Advocate General appearing for the appellant, it is his foremost contention that there is difference in claim made before the adjudicator and the Arbitral Tribunal, which shows that there is inconsistency in making the claim. He further contended that when the first respondent-Company cannot substantiate the claim before the adjudicator, they cannot substantiate the claim for higher sum before the Arbitral Tribunal. But this Court is of the view that on that score, the Court cannot make interference in the award of the Arbitral Tribunal. The Arbitral Tribunal cannot sit over the adjudication process and the Arbitral Tribunal is an independent dispute resolution authority and the contractor(s) can make their claim before the arbitration process and it is not against any public policy and this aspect of the matter was not either raised before the Arbitral Tribunal or before the learned Single Judge.

24. The next ground of attack made by the learned Additional Advocate General appearing for the appellant is that the extension of time for completion of the contract was granted to the first respondent, by three letters, dated 06.09.2005, 30.09.2005 and 03.10.2005, but there was a delay of six months and the first respondent requested for extension of time with an assurance not to claim any extra price due to the extension of time. Only on the said assurance, time was extended as requested by the first respondent on condition that they shall not make any extra claim and on the contrary, now the contractor, contrary to the assurance given by them, has made extra claim. It is the reply by the learned counsel appearing for the first respondent that in the letter dated 03.10.2005, the claimant-Company had stated that they would not make any additional claim other than the one in the agreement. The relevant portion of the said letter dated 03.10.2005 addressed to the Superintending Engineer of the appellant's office, reads as follows:

"Further we would like to intimate you that we would not be raising any further claims other than the charges in the Agreement, for the works executed by us on the extended time limit."

Accordingly, as per the said letter, the first respondent-claimant-Company has not made any claim other than the one mentioned in the agreement and no extra claim on arbitration grounds, was made. This aspect was correctly dealt with by the Arbitral Tribunal as well as by the learned Single Judge. In this regard, learned counsel appearing for the first respondent has invited the attention of this Court to the relevant portion of the award passed by the Arbitral Tribunal, which reads as follows:

"8. . . .

8.2. e) & f) (i): The letter dated 30.09.2005 of the claimant means no additional claims other than in the agreement. This has been again reiterated in clear terms in letter dated 03.10.2005. The claims are only as per agreement.

(ii) The Claimant's Letter No.ACC/010185/X1/2005, dated 30.09.2005 (Exhibit DR2) has not been mentioned in the Extension of time sanctioned (Exhibit C19 of DC2). The Respondent has stated that no extra claims on arbitration grounds should be made. The Claimant in letter dated 03.10.2005 has conveyed that claims as per clauses of agreement will be made. Hence, the Claimant submitted that their letter dated 30.09.2005 and 3.10.2005 does not prohibit the Claimant from raising claims within the contract provisions. The counsel for the Claimant has stated that the Claimant is not claiming any extra claims other than the contract provisions."

25. To the above submission, it is replied by the learned Additional Advocate General appearing for the appellant that the first respondent has cited Tsunami and rainfall as reasons for delay, whereas paragraph 9 of the Contract Data clearly states that the Intended Completion Date for the whole of the works is one year including monsoon from the date of hand over of the site. Therefore, the first respondent is not eligible to take protection citing the climatic conditions as a reason. Further, only a meagre portion of 2.2 Km of the site out of 41 Km of the total length, was handed over subsequently due to the underground drainage work and the contention of the first respondent that there was delay in handing over the site, cannot be accepted. As on the Intended Completion Date, the first respondent has completed only 71% of the work, which shows that there is slackness on the part of the first respondent. Without considering these aspects, the award was passed by the Arbitral Tribunal and the same was confirmed by the learned Single Judge.

26. The entire issue revolves on the extension of time for completing the contract. According to the learned counsel appearing for the first respondent, the first respondent assured in his various letters stated supra that they will not claim any additional amount due to extension of time, whereas, the first respondent has also stated that they have not made any additional claim, and therefore, the Arbitral Tribunal, by appreciating the evidence and taking into consideration the above said letters, has awarded the amount only within the scope

of the contract. In this regard, we shall state that the Court cannot sit as an appellate authority to decide the matter by appreciating the evidence let in by both sides. On this aspect, it is appropriate to cite the decisions relied on by the learned counsel appearing for the first respondent-Company, which deals with the circumstances under which the award can be interfered with :

(a) AIR 1989 SC 1034 (P.M.Paul Vs. Union of India):

"11. It is well-settled that an award can only be set aside under S.30 of the Act, which enjoins that an award of an arbitrator/umpire can be set aside, inter alia,, if he has misconducted himself or the proceeding. Adjudicating upon a matter which is not the subject-matter of adjudication, is a legal misconduct for the arbitrator. The dispute that was referred to the arbitrator was, as to who is responsible for the delay, what are the repercussions of the delay in completion of the building and now to apportion the consequences of the responsibility. In the objections filed on behalf of the respondent, it has been stated that if the work was not completed within the stipulated time the party has got a right for extension of time. On failure to grant extension of time, it has been asserted, contractor can claim difference in prices.

12. In the instant case, it is asserted that the extension of time was granted and the arbitrator has granted 20% of the escalation cost. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. The arbitrator has noted that claim related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9-5-1980 for the work under phase I and from 9-11-89 for the work under phase II. The total amount shown was Rs.5,47,618.50. After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he has accordingly allowed the same. This was a

matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done.

13. It was submitted that if the contract work was not completed within the stipulated time which it appears, was not done then the contractor has got a right to ask for extension of time, and he could claim difference in price. This is precisely what he has done and has obtained a portion of the claim in the award. It was submitted on behalf of the Union of India that failure to complete the contract was not the case. Hence, there was no substance in the objections raised. Furthermore, in the objections raised, it must be within the time provided for the application under S.30 i.e., 30 days during which the objection was not specifically taken, we are of the opinion that there is no substance in this objection sought to be raised in opposition to the award. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and has awarded as he did."

(b) AIR 1992 Calcutta 242 (Union of India Vs. Abhoy Sarkar) :

"11. On considering the submissions made by both the parties, I am of the view that it was for the Arbitrator to interpret the provisions of the contract including Clause 17(3). There is no doubt that before the Arbitrator the present petitioner referred to several clauses of the contract including Clause 17(3) but the Arbitrator had the jurisdiction to interpret Clause 17(3) and if on such interpretation he awarded the compensation towards the escalation cost and the extra expenses which the respondent No.1 had to incur because of the delay of the railway in giving possession of the site and also for giving the possession of the site

piecemeal then I am unable to hold that he committed any misconduct. It was a matter of interpretation as to whether Clause 17(3) totally prohibited the grant of escalation costs and extra expenses incurred by the Respondent No.1 and it was possible for the Arbitrator to take the view that even though the compensation could not be awarded under Clause 17(3) against the railway but extra expenses incurred due to the fault of the railways in giving possession of the site and also in giving possession of the site piecemeal could be awarded in the light of the Supreme Courts several decisions beginning from Tarapore Company's case (AIR 1984 SC 1072). "

"12. In Sudarsan Trading Co. Vs. Govt. of Kerala, AIR 1989 SC 890 the Supreme Court has held that interpretation of contract is a matter for the arbitrator and when the amounts have been awarded by the arbitrator by taking a particular view of the contract, Court cannot interfere with it and substitute its own decision. In view of the above I am unable to accept the contention of Mr. Banerjee that in awarding the escalation cost for the delay committed by the Railway in handing over the site as also handing over the site piecemeal, the learned Arbitrator committed legal misconduct."

27. A reading of the above judgments would show that an arbitrator, by taking into consideration the aspect of delay, would award compensation for expenses incurred due to the delay caused in completion of the contract. In the instant case, it is the submission of the learned Additional Advocate General appearing for the appellant that the extension of time was granted to the first respondent as requested by letters dated 06.09.2005, 30.09.2005 and 03.10.2005 with an assurance not to claim any extra price due to the extension of time and hence, the appellant has granted extension of time based on the condition that the first respondent shall not make extra claim on arbitration grounds due to the extension of time. But it is the reply of the first respondent that the letter dated 30.09.2005 would mean no additional claim other than the one in the agreement. Therefore, the Arbitral Tribunal, by considering the letter dated 30.09.2005, has come to the conclusion that the first respondent has made claim only as per the clauses in the agreement and they have not made any extra claim other than the

one in the contractual provisions. Therefore, when such view is possible based on the said letters, this Court cannot substitute that view by appreciating its evidence as an appellate authority.

28. Further, learned counsel for the first respondent also relied on the following judgments to show under what circumstances the Court can make interference in the award of the arbitrator:

(a) 2018 (1) SCC 718 (Sutlej Constructions Limited Vs. Union Territory of Chandigarh):

"7. In the opinion of the arbitrator the performance of the contractual obligations by the appellant were dependent on reciprocal performances by the respondent. On appreciation of evidence on record it was concluded that the respondent had failed to comply with its obligations and, thus, held the contract to be illegally terminated. Thereafter the arbitrator, once again, on appreciation of evidence decided to award the amounts as specified aforesaid."

"11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice." (Associate Builders Vs. Delhi Development Authority, (2015 (3) SCC 49 = 2015 (2) SCC (Civ) 204)."

12. The approach adopted by the learned Additional District judge, Chandigarh was, thus, correct in not getting into the act of re-appreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. Vs. State of Kerala (1989 (2) SCC 38 = 1989 (1) SCR 665), Harish Chandra & Co. Vs. State of U.P. (2016 (9) SCC 478 = 2016 (4) SCC (Civ) 526 = AIR 2016 SC 4257) and Swan Gold Mining Ltd. Vs. Hindustan Copper Limited (2015 (5) SCC 739 = 2015 (3) SCC (Civ) 27 = 2014 (4) Arb.LR 1)."

(b) AIR 2018 Madras 119 = 2018 (3) LW 695 = 2018 (3) MLJ 1

(Judgment in O.S.A.No.231 of 2015, dated 01.03.2018 - Chettinad International Coal Terminal Pvt. Ltd. Vs. Kamarajar Port Limited (Madras High Court):

Per M.Sundar,J:

"3. A perusal of the memorandum of grounds of Original Side Appeal in the instant intra-court appeal before us reveals that this appeal has been filed under Order XXXVI Rule 9 of the Original Side Rules of this Court read with Clause 15 of the Letters Patent. It is clearly impermissible, in the light of section 37 of the A and C Act and in the light of the elucidation on this aspect of the matter by the Hon'ble Supreme Court of India in Fuerst Day Lawson Limited Vs. Jindal Exports Limited [2011 (8) SCC 333]. Therefore, without standing on technicalities, as stated supra, we treat this as an appeal under Section 37 of the A and C Act."

"7(j) We are of the view that there cannot be much dispute about the legal position that the petition under Section 34 of A and C Act is neither an appeal nor revision. We are of the view that this legal position is indisputable. We go a step further and hold that a petition under Section 34 of A and C Act is a mere 'challenge to an Award' within the four corners of the grounds adumbrated therein. We are also aware of the scope of intra-court appeal under Section 37 of A and C Act. With this in mind, we examined the controversy before us. For examining the controversy before us, we set out the case laws that were pressed into service by both sides."

"7(n) As stated supra in the earlier part of this judgment, it is not in dispute before us (as between the Appellant and the 1st Respondent) that the entire controversy pertains to only one point and that one point is interpretation of clauses 14 and 15.1.4 of the said agreement by the Arbitral Tribunal. In our view, the entire appeal turns on a very narrow compass and it may not be necessary to go into each and every case law that was cited at the bar in the hearing. However, we have extracted all the judgments cited at the bar (though it is not imperative to do so) for the limited purpose of making

this judgment complete in terms of indicating the trajectory of the hearing before us."

"7(o) Turning to the interpretation returned by the Arbitral Tribunal, it is the specific case of the appellant that clause 15.1.4 has not been applied at all and clause 14 alone has been applied. This according to the appellant is patent illegality.

7(p). Considering that this is an appeal under Section 37 of A and C Act, we do not delve further into this interpretation aspect of the matter. As held by the Supreme Court of India in Swan Gold Mining Limited's case supra (Swan Gold Mining Limited Vs. Hindustan Copper Limited (2015 (5) SCC 739) (incidentally, it has been pressed into service by CICTPL also), wherein the Supreme Court postulates that interference in a petition under Sections 34 and 37 of A and C Act would arise only when parties have arrived at a concluded contract and acted on the basis of terms and conditions therein and thereafter new terms are substituted by the Arbitral Tribunal or the court. Nothing of that kind has happened in the instant case."

"7(r) On an extreme demurer, even if there is another plausible interpretation to the covenant, that cannot become a ground for interference either under Section 34 or under Section 37 of the A and C Act. As set out supra, only when what has not been agreed upon by the parties or when the new covenant or new principle which was not the intention of the parties is read into a contract, can thereby any scope for interference under Section 34 or section 37 of the A and C Act. As we find no such aspects in this appeal, we find no ground to interfere with the order of the learned Single Judge."

"7(s) Referring to paragraph 49 of the judgment of the learned Single Judge, the appellant CICTPL contended that the learned Single Judge has been overwhelmed by the eminence of the members of the Arbitral Tribunal. Otherwise with regard to section 34 of A and C Act, there is nothing to show that there is any illegality much less illegality warranting interference with the order of the learned Single Judge. In our opinion, learned Single Judge has applied Section 34 of A and

C Act in its right perspective. With regard to paragraph 49 of the order of the learned Single Judge, a detailed and close reading of the judgment which has been called in question before us demonstrates that the conclusions that have been arrived at by the learned Single Judge have not in any manner been impacted by the eminence of the Arbitral Tribunal as perceived by the learned single Judge. To be noted, paragraph 49 is the penultimate paragraph of the judgment called in question before us and paragraph 49 begins with 'Before parting with this case,'. Therefore, paragraph 49 is merely in the nature of a postscript after a detailed analysis and correct application of Section 34 of A and C Act."

Per Indra Banerjee, Chief Justice:

"6. It is the appellant company's own case that the grounds for challenge do not concern disputed questions of fact, but an interpretation of Clause 15.1.4, which, according to the appellant company, is patently erroneous. However, as observed by the Supreme Court in P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H.Securities (P) Ltd., reported in 2012 (1) SCC 594, the Court does not sit in appeal over the award of an Arbitral Tribunal."

"9. It is nobody's case that any of the provisions of sub-section 2(a) of Section 34 of the 1996 Act were attracted in this case. An award may also be set aside on grounds specified in sub-section 2(b) of Section 34 of the 1996 Act, that is when the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or on the ground that the arbitral award is in conflict with the public policy of India. It was also nobody's case that the subject matter of the dispute was not capable of settlement by arbitration under the law for the time being in force."

"10. The question is whether the arbitral award can be said to have been in conflict with the public policy of India. The answer to the aforesaid question necessarily has to be in the negative. This is evident

from Explanations (1) and (2) appended to Section 34(2)(b) of the 1996 Act. Explanation (1) clarifies, for the avoidance of any doubt, that an award would be in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or was in contravention with the fundamental policy of Indian law; or was in conflict with the most basic notions of morality or justice. Explanation (2) makes it clear, for avoidance of any doubt, that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on merits of the dispute."

"13. It is well settled that when a case involves interpretation of a clause or some clauses of an agreement and the Arbitral Tribunal gives an interpretation which is plausible, the Court would not substitute that interpretation for its own interpretation only because the Court takes a different view or feels that the other interpretation is a better interpretation. This view is fortified by the decisions of the Supreme Court in *State of Rajasthan Vs. Nav Bharat Construction Co.*, reported in 2010 (2) SCC 182 and *P.R.Shah, supra* (*P.R.Shah, Shares & Stock Brokers (P) Ltd. Vs. B.H.H. Securities (P) Ltd.*, reported in 2012 (1) SCC 594.

"14. There can be no question of interference with an interpretation of the agreement made by an Arbitral Tribunal, unless the interpretation is so perverse, unreasonable and fanciful that no body of persons instructed in law and acting reasonably could have interpreted the contractual provision in the manner that has been done. The award rejecting the claim in relation to exemption of augmentation charges is based on a reasonable interpretation of the provisions of the contract. On a careful reading of the application under Section 34 of the 1996 Act with the memorandum of appeal, it is patently clear that it is the appellant company's own case that the Arbitral Tribunal has given a possible interpretation of the language of the

statutory provisions without going into the intent and object of the provision. A literal interpretation of words and expressions as used cannot possibly be a perverse interpretation."

"16. As held in Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., 2011 (8) SCC 333, cited by M.Sundar, J. all proceedings relating to arbitration are governed by the 1996 Act, including an appeal which is governed by Section 37 of the 1996 Act, and in deciding an appeal, the Division Bench is only to see if the judgment under appeal is patently erroneous. The Division Bench cannot substitute its view for the view taken by the Single Bench only because it prefers another view and it hardly needs mention that the scope of interference with an impugned award by the Appellate Court is restricted to the same grounds on which an impugned award can be interfered with in proceedings under Section 34 of the 1996 Act."

(c) 2019 SCC Online SC 220 (MMTC Ltd. Vs. Vedanta Ltd):

"10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award."

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34 (2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act

in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

"12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2) (b) (ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders Vs. DDA, 2015 (3) 3 SCC 49). Also see ONGC Ltd. Vs. Saw Pipes Ltd., 2003 (5) SCC 705; Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, 2006 (4) SCC 445; and McDermott International Vs. Burn Standard Co. Ltd., 2006 (11) SCC 181)."

"13. It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, subsection (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public

policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

"15. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the Courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of re-assessment of the material on record, but only in terms of the principles governing interference with an award as discussed above."

"16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. (See McDermott International Inc. Vs. Burn Standard Co. Ltd. (supra); Pure Helium India (P) Ltd. Vs. ONGC, 2003 (8) SCC 593, D.D.Sharma Vs. Union of India, 2004 (5) SCC

325)."

"17. We have gone through the material on record as well as the Majority Award, and the decisions of the learned Single Judge and the Division Bench. The majority of the arbitral tribunal as well as the Courts found upon a consideration of the material on record, including the agreement dated 14.12.1993, the correspondence between the parties and the oral evidence adduced, that the agreement does not make any distinction within the type of customers, and furthermore that the supplies to HTPL were not made in furtherance of any independent understanding between the Appellant and the Respondent which was not governed by the agreement dated 14.12.1993."

"26. Based upon the above discussion, in our opinion, the view taken in the Majority Award, as confirmed by the High Court in the exercise of its powers under Sections 34 and 37 of the 1996 Act, is a possible view based upon a reasonable construction of the terms of the agreement dated 14.12.1993 between the Appellant and the Respondent and consideration of the material on record. We are also of the opinion that the dispute was covered under the agreement between the Appellant and the Respondent dated 14.12.1993, and as such the dispute is governed by the arbitration clause under the said agreement. Thus, we find no reason to disturb the Majority Award on the ground that the subject matter of the dispute was not arbitrable."

29. With regard to the intervention of the award if it is against public policy, it is worthwhile to note the following judgment of the Supreme Court reported in 2003 (5) SCC 705 (Oil and Natural Gas Corporation Ltd. Vs. Shah Pipes Ltd), in which, the Apex Court also held that it is settled law that the intention of the parties is to be gathered from the words used in the agreement and further, the essence of the judgment is to the effect that an award contrary to the substantive provisions of law or the provisions of the Arbitration and Conciliation Act or against the terms of the contract, would be patently illegal:

"16. The next clause which requires interpretation is clause (ii) of sub-section (2) (b) of Section 34 which inter alia

provides that the court may set aside the arbitral award if it is in conflict with the "public policy of India". The phrase "public policy of India" is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression "public policy" does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept "public policy" is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions."

30. In the abovesaid decision, the Supreme Court has quoted the view expressed by an eminent Jurist that, "Courts of law may intervene to permit challenge to an arbitral award which is based on irregularity of a kind which has caused substantial injustice".

31. In the decision reported in AIR 1967 SC 249 (U.P. Co-op. Federation Ltd. Vs. Sunder Bros., Delhi), the Supreme Court, with regard to the discretion vested in the Court under Section 34 of the Indian Arbitration Act to interfere in the award passed, held as follows:

"8. It is well settled that where the discretion vested in the Court under S.34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contract conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it

is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. ..."

32. Further, in the decision reported in AIR 1971 SC 1646 (The President, Union of India Vs. Kalinga Construction Co. (P) Ltd), it has been held by the Apex Court as follows, regarding the Court sitting in appeal over the conclusion of the arbitrator:

"9. A bare perusal of the judgment of Misra, J., would show that he decided the matter as if he was entertaining an appeal against the award itself. He re-examined and re-appraised the evidence which had been considered by the arbitrator and held that the arbitrator was wrong in coming to the conclusion that the work contemplated by the contract to be done by manual labour alone... The arbitrator had believed the statement of the Chief Engineer that Ext.P-6 had neither been issued under his authority nor with his approval. Once this part of his statement was believed by the arbitrator it was not open to Misra, J., to sit in appeal over the conclusion of the arbitrator in proceedings for setting aside the award."

33. This Court, while dealing with the scope and discretionary power vested in the Court under Section 34 of the Arbitration and Conciliation Act, held as follows in AIR 1985 Madras 272 (Yeswant Hiralal Veecumsee Vs. Usha Kumar Betala and others), observed as follows:

"Unless the discretionary power vested in the trial Court under Section 34 is found to be used arbitrarily or perversely, the appellate authority will not interfere with such a discretionary order passed by the trial Court. Where the trial Court both on the conduct and also on the delay committed by the defendant in coming forward with such applications for stay under S.34 of the

Arbitration Act, had refused to use his discretion, there was no arbitrariness or perverseness in the order."

34. Moreover, with regard to the interference in the reasoned award passed by the arbitrator, the Apex Court, in the decision reported in 2007 (9) SCC 503 (BOC India Ltd. Vs. Bhagwati Oxygen Ltd.), held as follows:

"24. In the case of Trustees of the Port of Madras Vs. Engineering Construction Corporation Ltd. (AIR 1995 SC 2423), while this Court dealing with a situation when an award can be set aside under Section 30 of the Arbitration Act held as under:

"The above decisions make it clear that the error apparent on the face of the award contemplated by Section 16 (I) (c) as well as Section 30(c) of the Arbitration Act is an error of law apparent on the face of the award and not an error of fact. It is equally clear that an error of law on the face of the award means an error of law which can be discovered from the award itself or from a document actually incorporated therein. A note of clarification may be appended viz., where the parties choose to refer a question of law as a separate and distinct matter, then the Court cannot interfere with the award even if the award lays down a wrong proposition of law or decides the question of law referred to it in an erroneous fashion. Otherwise, the well settled position is that an arbitrator "cannot ignore the law or mis-apply it in order to do what he thinks is just and reasonable. (See Thawardas Perumal Vs. Union of India, (1955)'-) SCR 48 : (AIR 1955 SC 468)."

"25. In para 20 of the said decision this Court also, held that the proposition that emerges is that in the case of a reasoned award, the court can interfere if the award is based upon a proposition of law which is unsound in law and that the erroneous proposition of law must be established to have vitiated the decision. It has also been held in that decision that the

error of law must appear from the award itself or from any document or note incorporated in it or appended to it. This Court also held that it was not permissible to travel and consider materials not incorporated or appended to the award. So far as the facts of the present case are concerned, we do not think that the award of the arbitrator can at all be interfered with as the award was not based upon either a proposition of law which is unsound or an erroneous proposition of law was established to have vitiated the decision. As noted herein earlier, the arbitrator had considered all aspects of the matter including the terms of the contract and all the materials on record and the statement of claim and has come to a conclusion of fact. Such being the position, we cannot but hold that the award was not based upon a proposition of law which is unsound or an error of law must have appeared from the award itself or from any document or note incorporated in the award or appended to it."

35. The Supreme Court, in the case of Union of India Vs. Rallta Ram, reported in AIR 1963 SC 1685, has clearly pointed out that, "it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate. If in law there is no valid arbitration agreement the proceedings of the Arbitrator would be unauthorised."

36. In the decision reported in 2006 (11) SCC 181 (Mcdermott International Inc. Vs. Burn Standard Co. Ltd and another), the Apex Court held that interference on ground of 'patent illegality' is permissible only if the same goes to the root of the matter and a public policy violation should be so unfair and unreasonable as to shock the conscience of the Court. What would constitute "public policy" is a matter dependent upon the nature of the transaction and the statute. The relevance of pleadings and particulars on record in this regard, are explained therein.

37. In Civil Appeal No.419 of 2018, arising out of Petition for Special Leave to Appeal (C).No.31532 of 2010 (K.Sugumar and another Vs. Hindustan Petroleum Corporation Ltd. and another), by judgment dated 16.01.2018, while dealing with Section 34 of the Arbitration and Conciliation Act, the Supreme Court observed as follows:

"3. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act

indicates the highly constricted power of the Civil Court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the Court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.

4. In the present case, we have considered the award of the arbitrator and the order of the learned trial court refusing to set aside the same in exercise of jurisdiction under Section 34 of the Act.

5. The jurisdiction of the High Court in appeal under Section 37 of the Act would naturally be limited to what has been conferred under Section 34 of the Act insofar as an appeal against an order setting aside or refusing to set aside the award is concerned.

6. A reading of the materials placed on record, including the award and the order passed under Section 34 of the Act, would disclose that the view taken by the arbitrator is on a consideration of the evidence and materials placed before him and the conclusion that the respondents are liable to compensate the appellants is a possible and reasonable conclusion. This is precisely what has been held by the Court while exercising jurisdiction under Section 34 of the Act. If that is so, we do not see how in an appeal under Section 37 of the Act, the High Court could have reappreciated the evidence to come to a contrary finding. The High Court was not sitting in appeal over the award of the arbitrator but it is the order passed under Section 34 of the Act, which was the subject matter of challenge before the High Court. The High Court seems to have missed the subtle difference between the two jurisdictions and thereby committed an error which would

require to be corrected in this appeal.

7. We, accordingly, set aside the order of the High Court and affirm the award and the order passed by the learned trial court under Section 34 of the Act. The appeal, consequently, is allowed."

38. From a reading of the judgments relied on by the learned counsel appearing for both parties, and also the said decisions cited by us, and on a reading of the materials placed on record, we are of the opinion that the Arbitral Tribunal has considered the evidence and the materials placed before them in arriving at a just conclusion and the first respondent is liable to be compensated by the appellant, which is a plausible and reasonable conclusion. This is precisely what has been held by the learned Single Judge while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, and therefore, we cannot re-appreciate the evidence to give contrary findings and this Court is not sitting as an appellate authority over the award of the Arbitral Tribunal and the order passed under Section 34 of the said Act is the subject matter of challenge before us. Absolutely, the appellant has not made out any case for interference with the order passed by the learned Single Judge. We do not find any scope or ground to interfere in the award passed by the Arbitral Tribunal as well as the order passed by the learned Single Judge. If an award is in conflict with the public policy, and only if it is in contravention with the fundamental policy of Indian law and if it is in conflict with the most basic notions of morality or justice and only if the award shocks the conscience of the Court, the award can be interfered with by this Court. We do not find any such situation in this case.

39. Accordingly, the O.S.A. is dismissed. No costs. Consequently, the miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To

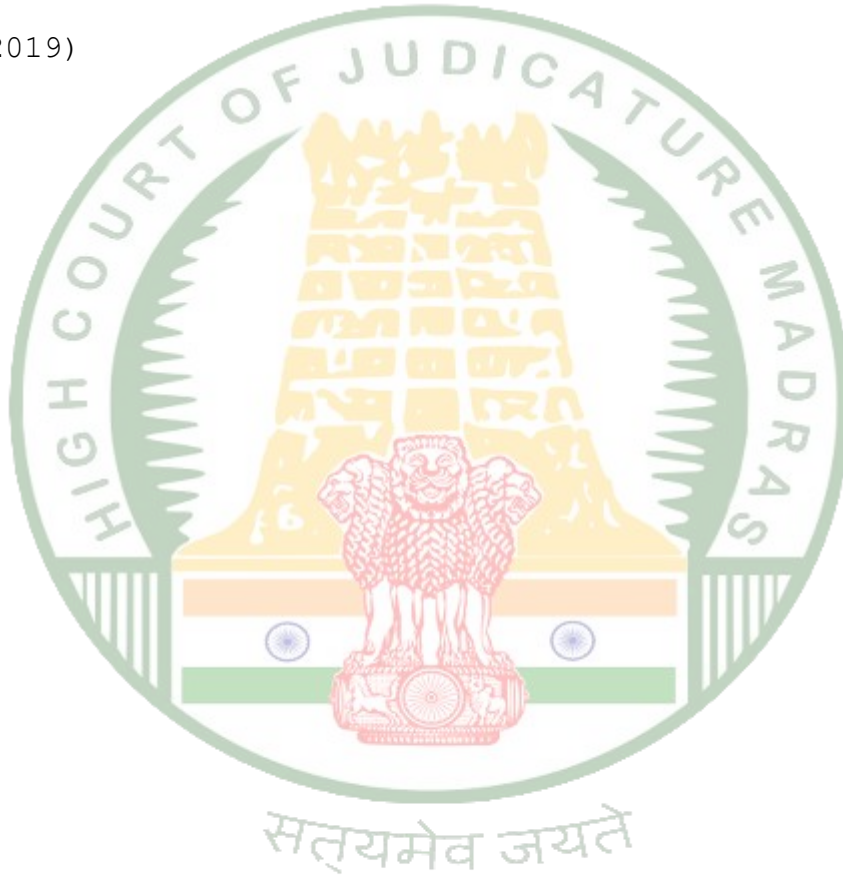
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+1cc to Mr.Krishna Ravindran, Advocate, sr.34870(01/07/2019)

O.S.A.No.221 of 2012

NRJK (CO)
GN(14/06/2019)



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