

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.Nos.545 of 2013 and 764 of 2014
and
A.Nos.7274 and 7275 of 2018

M/s.National Highways Authority of India,
New Delhi,
through its Project Director,
National Highways Authority of India, PIU,
Door No.212-3/D3-1,
Sri Nagar Colony,
Narsothipatti,
Salem-636 004.

.. Petitioner in
both original petitions

Vs.

1.M/s.JSR Constructions Pvt. Ltd.
3415, 2nd Cross, 2nd Stage,
Indira Nagar, Bangalore-560 038.

2.Lt. Gen. Y.P.Khurana, PVSM (Retd.),
Presiding Arbitrator.

3.Mr.H.P.Jamdar,
Co-Arbitrator

4.Mr.N.K.Bahri,
Co-Arbitrator.

.. Respondents in
both original petitions

O.P.No.545 of 2013 is filed under Section 34(2) read with Section 13(5) of the Arbitration and Conciliation Act, 1996 seeking to call for the records leading to the Award dated 03.10.2012 and corrected Award dated 04.01.2013 respectively passed by Arbitral Tribunal on Claim Nos.1, 2A, 2B

and 3 and majority award on claim No.4 and to set aside the same and allow the present petition and set aside the arbitral award on claim Nos.1, 2A, 2B and 3 and the majority award on claim No.4 dated 03.10.2012 and 04.01.2013 respectively, costs of this petition and to pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

O.P.No.764 of 2014 is filed under Section 34(2) read with Section 13(5) of the Arbitration and Conciliation Act, 1996 seeking to call for the records leading to the award dated 08.05.2014 passed by the Arbitral Tribunal on claim Nos.8.1, 8.2, 8.3, 8.4, 9 and 10 including the interest part thereof and the dissent note passed by the Third Arbitrator on claim No.9 and to set aside the same and allow the present petition and to set aside the Arbitral Award on Claim Nos.8.1, 8.2, 8.3, 8.4, 9 and 10 including the interest part thereof and the dissent note passed by the Third arbitrator on claim No.9, costs of this petition and to pass such further or other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

For Petitioner : Mr.P.Wilson, Senior counsel
for Mr.R.T.Arivu Kumar
of M/s.P.Wilson Associates
in both petitions

For Respondents : Ms.K.Aparnadevi
for Mr.P.Subba Reddy for R-1

COMMON ORDER

This common order will dispose of both these 'original petitions' ('O.Ps' in plural and 'O.P' in singular for brevity). O.P.No.545 of 2013 shall be referred to as 'senior O.P' and O.P.No.764 of 2014 shall be referred to as 'junior O.P' for the sake of convenience and clarity.

2 The array of parties is same in senior and junior O.Ps. 'National Highways Authority of India' ('NHAI' for brevity) is the petitioner in both O.Ps and a company which goes by the name 'JSR Constructions Pvt. Ltd.' (hereinafter 'contractor' for convenience and clarity) is the contesting first respondent in both O.Ps. Respondents 2 to 4 in both O.Ps are three individuals who constituted a Three member Arbitral Tribunal ('AT' for brevity) which passed arbitral awards which have been called in question in instant O.Ps. Considering the nature of the matter and the grounds on which instant O.Ps are predicated, in the considered opinion of this Court, it was not necessary to array the three individuals who constituted the AT as respondents in both O.Ps. However, O.Ps are already more than half a decade old in this court and as main O.Ps are now being heard out and disposed of, this Court refrains itself from embarking upon the exercise of deleting the arbitrators who have been arrayed as respondents 2 to 4 in the instant two O.Ps, as that will cause procedural delay.

3 Before this Court proceeds further, it is deemed pertinent to make it clear that Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) is slotted under Chapter VII of A and C Act, which is captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A reading of section 34 of A and C Act reveals that recourse to a Court against an arbitral award shall be made by an 'application'. To be noted, caption to Section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. However, with regard to recourse to this Court against an arbitral award, the nomenclature 'Original Petition' is being assigned to such

applications and therefore, senior and junior O.Ps are being referred to as 'O.Ps' in plural and 'O.P' in singular for the sake of convenience and clarity as mentioned to supra.

4 Both O.Ps arise out of one contract being a Contract dated 28.04.2005 between NHAI and contractor. This contract goes by the caption / nomenclature 'Contract Agreement for North – South Corridor Project Thoppurghat to Thumpipadi section of NH-7, Contract Package NS-25 (TN) Four Laning of Km. 163.4 to Km. 180 of Thoppurghat to Thumpipadi Section of NH-7 in the State of Tamil Nadu'. This court is informed that this stretch is 16.6 Kms long. This contract is in three parts. Part I consists of 'Letter of Acceptance' ('LOA' for brevity), Conditions of Contract, etc., including an Addendum / Corrigendum. Part II contains technical specifications and Part III is drawings. This contract styled as agreement dated 28.04.2005 between NHAI and contractor which is the nucleus of instant O.Ps shall be referred to as 'said contract' for the sake of brevity, clarity and convenience.

5 The work that needs to be done under the said contract for the 16.6 kms stretch in National Highways-7 shall be referred to as 'said work' for the sake of convenience and clarity. This court is informed that the value of said contract is Rs.49,70,17,005/- or in other words, it is little over Rs.49.70 Crores. Said work under the said contract, as per agreed terms ought to have been completed within a time frame of 30 months which elapsed on 26.11.2007. It is not in dispute that said work was not completed by 26.11.2007 and it is also not in dispute that it was ultimately completed on

31.12.2009 after extensions. To be noted, there is no disagreement before this court that said work under said contract commenced on 27.05.2005.

6 Several issues such as who was responsible for the delay, additional work done, interpretation of certain clauses of contract and quantum of payment arrived at on the basis of same, etc., erupted. This in short constitutes the crux and gravamen of arbitral disputes between NHAI and contractor. There is also no disagreement that arbitration agreement between parties i.e., NHAI and contractor is in the form of a covenant / clause in the said contract and the same is clause 67 captioned 'Settlement of Disputes' which reads as follows :

“Settlement of Disputes

Engineer's Decision 67.1

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every

such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the Eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

Amicable settlement 67.2 Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

Arbitration 67.3 Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,

shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

Failure to Comply with Engineer's Decision 67.4

Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clauses 67.1 and 67.2 shall not apply to any such reference.”

7 A perusal of the arbitration agreement between parties reveals that the arbitration is a tiered mechanism. It is a tiered mechanism. This Court is also informed that disputes are first referred to a 'Disputes Review Board' ('DRB' for brevity). DRB examines disputes and makes its recommendations and it is thereafter that if dissatisfaction with the recommendations persists, the resolution exercise is triggered.

8 As many as 10 claims raised by the contractor were referred to DRB and DRB made its recommendations one after the other. Post recommendations by DRB, arbitration clause was invoked. Claims 1 to 5 were dealt with in one set of arbitration proceedings by AT and an award dated 03.10.2012 came to be passed. A correction of this award dated 03.10.2012 was sought. Ultimately, an interpretation was given on 04.01.2013 and therefore, the 04.01.2013 addendum to the award can be referred to as an interpretation / correction award, both of which are encompassed in Section 33 of A & C Act. This award dated 03.10.2012 together with correction / interpretation award dated 04.01.2013 has been assailed by NHAI under section 34 of A and C Act vide senior O.P. This award and correction award dated 03.10.2012 and 04.01.2013 respectively shall collectively be referred to as 'impugned award-I'. To be noted, though there were five claims before AT, claim No.5 was given up (contractor was claimant before AT) and the AT has decided and returned findings on four claims.

9 Be that as it may, with regard to remaining five claims, namely claim Nos.6 to 10, the same were dealt with by the same AT in another arbitral proceedings, which culminated in an arbitral award dated

08.05.2014 which shall hereinafter be referred to as 'impugned award-II'. In this proceedings pertaining to claim Nos.6 to 10 also, contractor was the sole claimant and NHAI was the lone respondent before AT. NHAI has also filed junior O.P obviously under section 34 of A and C Act assailing impugned award-II.

10 As impugned awards I and II arise out of same contract, i.e., said contract between same parties, more so as they pertain to same work, i.e., said work, senior and junior O.Ps have been tagged together by consent of parties and were heard out together by consent, by this Court. As already mentioned, with regard to impugned award-I, though originally there were five claims, claim No.5 was given up and claim Nos.1 to 4 form subject matter of impugned award-I. To be noted, with regard to claim No.2, impugned award-I has bifurcated the same into two heads, namely claim Nos.2A and 2B. While claim No.2B pertains to 'Bill of Quantities' ('BOQ' for brevity) claim No.2A deals with Non-BOQs. Details of claims and findings returned by AT in terms of quantum as can be culled out from impugned award-I in a tabular form reads as follows :

	Details of claims	Findings
Claim No.1	Amount claimed Rs.8,76,592/-. Measurement of BOQ item no.2.05 (b) Construction of embankment with fly ash conforming to Table 1 of IRC:SP:58-2001	AT awards Rs.8,76,592/-.
Claim No.2	Amount claimed Rs.48,87,843/-. Method adopted for fixing of rates of BOQ and Non BOQ varied quantities.	Claim 2A : AT awards Rs.33,13,621/- with interest. Claim 2B : AT awards Rs.10,03,743/- with interest.
Claim No.3	Amount claimed Rs.10,52,013/-. Application of a wrongful method used	AT holds that there has been an excess recovery of

	by the Respondent to recover the Mobilisation Advance.	Rs.2,50,568 as interest. This amount is to be refunded to claimant by respondent with interest.
Claim No.4	Amount claimed Rs.3,82,90,850/-. The method of calculation of x, y, z percentages for Price Adjustment and tempering with the definition of R value.	AT awards Rs.51,05,439/- and interest Rs.15,06,105/-

11 Likewise, in impugned award-II, claim No.6 was given up and impugned award-II deals with four claims, namely claim Nos.7 to 10. Those details as can be culled out from impugned award-II put in a tabular form reads as follows :

	Details of claims	Findings
Claim No.7	Payment of additional cost incurred due to change in scope of work for Minor Bridge No.33.	AT rejected this claim.
Claim No.8	Wrongful fixation of rates for variations by the Engineer	AT awarded Rs.16,63,506 for construction of embankment from borrow areas. AT awarded Rs.1,92,987/- for RCC M35 grade piling concrete. AT awarded Rs.1,37,700 for perforated PVC pipes
Claim No.9	Payment of compensation of loss of profit, infructuous overheads for head office and site office and ownership charges of machinery during prolonged period of construction.	9C - AT awarded Rs.28,72,344/- for Loss of business and profit 9D - AT awarded Rs.3,14,77,737/- for overhead costs - prime costs 9A - AT awarded Rs.2,66,60,890/- for plant and machinery deployed for 30 months had to remain at site for 55 months (Idling cost in the form of ownership

		charges)
Claim No.10	Rate adjustment for bitumen and CRMB variation.	Claim amount of Rs.6,29,082 is justified.

12 A perusal of senior O.P reveals that it runs to 110 pages and it is more in the nature of memorandum of grounds in a regular first appeal under section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). Junior O.P which runs to 72 pages is not vastly different in this regard.

13 Mr.P.Wilson, learned senior counsel assisted and instructed by Mr.R.T.Arivu Kumar of M/s.P.Wilson Associates (Law Firm) on behalf of NHAI and Ms.K.Aparna Devi, counsel on record for contesting respondent, were before this Court.

14 Learned senior counsel for NHAI, advertng to senior and junior O.Ps (which in the opinion of this Court are verbose and as mentioned supra, more in the nature of regular first appeal under section 96 of CPC), submitted that in the light of contours and confines of section 34 of A and C Act, a challenge to an arbitral award under section 34 of A and C Act not being an appeal and being merely a limited review strictly within the contours and confines of section 34, he will abridge the OPs and confine his submissions to two main grounds of attack i.e., lack of judicial approach and patent illegality. It was submitted on behalf of NHAI that the expression 'public policy' occurring in section 34 of A and C Act was elucidatively explained by Hon'ble Supreme Court in **ONGC Ltd. v. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263. Western Geco International Ltd.** case, in

turn, was reiterated by Hon'ble Supreme court in the celebrated and oft-quoted **Associate Builders** case, being **Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**. Three distinct juristic principles / doctrines were culled out and held to be forming part of public policy in **Western Geco International Ltd.**. These three juristic principles / doctrines are (a) judicial approach, (b) non adherence to principles of natural justice and (c) irrationality / perversity. To be noted, tests were also laid by Hon'ble Supreme Court and tests for the three juristic doctrines for testing an arbitral award under section 34 of A and C Act are (a) fidelity of judicial approach, (b) audi alteram partem, reasons being given for findings rendered and (c) Wednesbury principle of reasonableness.

15 In the instant case, learned senior counsel for NHAI submitted that lack of judicial approach (besides patent illegality) would be a ground on which submissions qua challenge to impugned award-I and impugned award-II will be predicated. Therefore, the test will be whether there is fidelity of judicial approach.

16 No elucidation is required to say that patent illegality was available as one of the grounds of challenge owing to the same being added to the grounds by Hon'ble Supreme Court in the oft-quoted **ONGC Ltd. Vs. Saw Pipes Ltd.**, reported in **(2003) 5 SCC 705** and **ONGC Ltd. Vs. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263**.

17 Ms.Aparna Devi, learned counsel for Contractor defended impugned awards I and II and submitted that they do not lack fidelity of judicial approach and there is no patent illegality.

18 Before this Court embarks upon the exercise of examining the grounds canvassed, discussion of the same and dispositive reasoning qua the same, it is to be noted that impugned awards I and II have been made by ATs which were constituted by Three members. Of the three members AT, impugned awards I and II are by 2 : 1 majority. In this regard, while making submissions, learned senior counsel for NHAI referred to certain portions of findings rendered by one member of AT, who penned the lone dissenting and minority award / view. While it may well be open to learned senior counsel for NHAI to draw inspiration from the dissenting views expressed by one of the three learned arbitrators for advancing his arguments, it is made clear that this Court exercising powers under section 34 of A and C Act will not be delving into the aspect of which of the views is correct. In other words, it is made clear that impugned awards I and II are awards made by 2 : 1 majority in contradistinction to unanimous awards. Therefore, awards as a whole, i.e., 2 : 1 (majority) awards and which are under challenge and correctness of the same will be tested within the contours and confines of section 34 of A and C Act. This position is made clear as some of the arguments advanced by learned senior counsel for NHAI were made by relying on the dissenting view taken by one learned Arbitrator.

Discussion and Dispositive Reasoning :

19 Claim No.1 which forms part of impugned award-I pertains to measurement qua Bill of Quantities (BOQ) pertaining to construction of embankment with fly ash. To put it in very simple terms, the

question was whether it should be fly ash per se or whether the earth layer and several other components which go into the same should also be factored into fly ash for arriving at the value of the same. Learned counsel for NHAI, advertng to clause 2.05(b), which deals with embankment with fly ash, clause 2.03 which deals with construction of embankment with approved materials, clauses 2.1, 2.2.7 and clause 305 which deals with embankment construction and a table which deals with deposit of embankment, besides clause 305.2.2.2 which deals with borrow materials, it was submitted that earth layer or other components ought not to have been factored into fly ash when it comes to volume of work done and BOQ. In response, it was pointed out by learned counsel for respondent that AT after referring to at least two judgments of Delhi High Court, one being NHAI Vs. Hindustan Construction Company Limited being a decision dated 30.11.2011 made in O.M.P.No.456 of 2010 and another being NHAI Vs. Sunway Construction made in O.M.P.No.786 of 2011 dated 23.5.2012 had come to the conclusion that soil cover and intermediate soil layers provided in the fly ash embankment constituted an integral part of the embankment with fly ash and its components could not be segregated for payment purpose. There is nothing before this court to show that the facts in the instant case are any different from the facts in the aforesaid two orders / judgments of Delhi High Court in Hindustan Construction Company Ltd. and Sunway construction cases. Besides this, advertng to impugned award-I, learned counsel for respondent submitted that AT has interpreted clause 2.05(b) of said contract and has returned a finding (relying on Delhi High Court judgments in Hindustan

Construction Company Ltd. and Sunway Construction) that splitting the volume of work under BOQ into fly ash and earth layer for payment purposes is in violation of provisions of the contract. It was also pointed out that though this finding is clearly unimpeachable and correct, as an extreme demurrer, AT has also made a short reference to 'contra proferentem' principle and said that if there is any ambiguity or ambivalence with regard to interpretation of covenants of said contract, that interpretation which prefers the contractor / claimant would be preferred as NHAI is the drafter of documents. In this view of the matter, this Court is unable to persuade itself to believe that there is lack of fidelity of judicial approach or patent illegality on this aspect of the matter.

20 Claim No.2 under the impugned award –I pertains to the method adopted for fixing rate of BOQ and non BOQ with regard to varied quantities. As already alluded to supra, this claim has been bifurcated into two by AT, namely 2A and 2B. 2A deals with non BOQ and 2B deals with BOQ. Under BOQ, while claim is Rs.15,74,222/-, AT has awarded Rs.10,03,743/-. Adverting to clause 70.2 of said contract, which deals with costs and legislation, it was submitted on behalf of NHAI that there is an error in the interpretation and the award of AT. This is with regard to both 2A and 2B. To be noted, with regard to 2A which deals with non BOQ, claim is Rs.33,13,621/- and it has been acceded to in its entirety. With regard to claim No.2 as a whole, the M 20 grade concrete used in foundation for bridges and culverts and M35 grade concrete used in foundation of Railway Over Bridge (ROB) are the main contentious issues. In this regard, paragraph 3.9 and sub

paragraphs therein of impugned award-I are of relevance and the same read as follows :

“2A.3.9.It is evident from the record that :

(a)The Respondent/Engineer failed to prove that the BOQ item 5.08(a)(iii) rate when compared with the rate of the period of execution of the varied item was unbalanced.

(b)The Respondent stated that deriving of rates based on BOQ item 5.08(a)(iii) was inappropriate and inapplicable on comparison with Schedule of Rates of NH circle Selam for the year 2003-2004 pertaining to bridges and culverts vis-a-vis the rate quoted by the Claimant at the bidding stage.

(c)In view of (a) and (b) above and as provided in clause 52.1 GCC it would be in order to derive the rate of the varied item from BOQ item 5.08(a)(iii) being similar in nature.

(d)The Engineer's action to fix the rate which in his opinion is most appropriate, ignoring the first obligation of deriving the rate from the existing BOQ item, is contrary to the Contract provision.

(e)The Claimant during arguments brought out that the Engineer had relied upon the same BOQ rate of M-30 concrete for fixing the rate of M-35 concrete for pile cap. New rate for T-girder concrete was also fixed after deriving from the existing BOQ rate by the Engineer. AT's interrogations brought out that the above statements of the Claimant were correct and the same were admitted by the Respondent.

(f)Clause 30.4 of “Instructions to Bidders”, on page 39 of the Contract says:

“If the Bid of the successful Bidder is seriously unbalanced in relation to the Employer's estimate of the cost of the items of the Works to be performed under the Contract, the Employer may require the bidder to produce detailed price analysis for any or all items of the Bill of Quantities to demonstrate the internal consistency of those prices... ..”

.....”

In this case Engineer / Respondent have not put on record any evidence showing that the Contractor was asked to produce detailed price analysis of any item at the bidding stage. This proves that they were satisfied that the rates of this Contractor were balanced in relation to the Employer's own estimate of the cost of the items of the works to be performed under the Contract.

g)AT noted BOQ Bill No.5, covers all activities pertaining to construction of culverts and bridges. The rates quoted make no distinction between culvert and bridge. The bifurcation of the rate by the Engineer into culvert and bridge does not stand to reason and is also contrary to the Contract provision.

h)The Engineer / Employer at no time during execution except at the time of fixing the rate have intimated the Claimant that his rate was higher and not workable.”

21 With regard to 2B, a perusal of paragraph 4.1 of impugned award-I which consists of 9 sub paragraphs reveals that NHAI has not cogently explained as to how Rs.2954/- per cum was fixed. This court refrains itself from burdening this order by extracting and reproducing entire paragraph 4.1 to avoid prolixity. Suffice to say that a bare perusal of this finding with regard to 2A and 2B leaves this Court with the considered view that it cannot be gainsaid that there is no fidelity of judicial approach or there is any patent illegality.

22 With regard to claim No.3, the same is based on the compliant that a wrongful method has been used by NHAI to recover mobilization advance. Referring to clause 60.6 of the said contract, it was

submitted that interest portion should have been first knocked off and thereafter, the principal whereas AT fell in error in this regard by not doing this. It was submitted that a judgment of Hon'ble Supreme Court reported in AIR 1999 SC 1036 : (1999) 3 SCC 80 [**Industrial Credit & Development Syndicate v. Smithaben H. Patel**] which reversed AIR 1997 Karnataka 188 has been wrongly applied. It was submitted that it was a case where the claim had culminated into a decree, whereas there is no decree in the instant case.

23 A careful perusal of impugned award-I reveals that discussion in this regard is contained in three sub paragraphs (a) to (c) of paragraph 3.3.2.3 of impugned award-I and the same reads as follows :

“3.3.2.3 Civil Procedure Code:

(a) It provides that general rule of appropriation of payments towards a decretal amount is that such an amount is to be adjusted firstly in payment of Interest and thereafter in payment on the Principal amount.

(b) AT noted that SC in its judgment AIR 1999 SC 1036 (AIR 1997 Karnataka 188, Reversed) observes that if the debtor has indicated the manner in which apportionment is to be made, the creditor has no choice to apply payment in a different manner.

(c) AT observed that the Claimant vide its letter dated 06.10.2007 had intimated the Engineer, that all recoveries made commencing with IPC 13 (July 2006) be considered for adjustment against the Principal amount.”

24 This Court is informed that 'IPC' in the impugned award-I is an abbreviation for 'Interim Payment Certificate'. In the light of the communications / correspondence between contractor and NHAI which bring to light the manner in which said contract had been understood by the

contracting parties particularly with regard to mobilisation advance and recovery of the same, AT has come to the conclusion regarding mobilisation advance. Articulation in this regard in impugned award-I has been extracted and reproduced supra. In the considered view of this Court, such articulation is cogent, this court is unable to convince itself that there is lack of fidelity of judicial approach or there is any patent illegality in this regard. It is not preposterous and it is not such that it shocks the conscience of this Court.

25 This takes us to the last claim qua impugned award-I, i.e., claim No.4, which deals with the method of calculation for price adjustment and tempering the same with the definition of what is known as 'R' Value. To be noted, the calculation is referred to in 'x, y, z' percentage and the entire computation is extremely technical. In this regard, the only argument that was advanced by NHAI was predicated on the dissenting view of one of the three arbitrators in the Three member AT. With regard to the dissenting view, this Court has already made it clear that this Court would not go into the question of which view is correct and the 2:1 award as whole will be tested. Therefore, though obvious, it is made clear that the dissenting view is being examined only for the limited purpose of appreciating the arguments advanced on behalf of NHAI. Before adverting to the dissenting view, it is to be noted that this Court is informed that claim No.4 pertains to price adjustment with regard to three components, namely bitumen, cement and steel. The issue centres around whether only the base price at which materials were purchased by contractor is payable or as to whether subsequent expenses like transportation, storage, overheads, etc., also

should be factored into these three products / components while computing price adjustment.

26 This takes us to dissenting view expressed by one Arbitrator which reads as follows :

“8.0 Finding:

In view of above, the Claim raised by the Claimant with regard to x,y,z components does not stand. It is established that extra payment had been erroneously made in this regard by the Engineer, who later on decided to recover the same once the error came to notice.

9.0 Award:

It is established that an excess amount of Rs.2,11,93,896/- has been paid to the Contractor. It is directed that the same be recovered from him.”

27 As alluded to supra, this Court, exercising powers under section 34 of A and C Act is not examining as to which of the views, i.e., the majority view of the Presiding Arbitrator and one Arbitrator or the dissenting view of the lone arbitrator is correct. There is one impugned award, namely impugned award-I before this Court which has been rendered by a Three member AT by 2 : 1 majority. Therefore, NHAI should be able to independently demonstrate that the view taken by majority of Arbitrators in the AT is vitiated within the contours of Section 34 of A and c Act and is liable to be set aside. This has not been done. Though this has not been done, this court has examined the manner in which the majority view has been

articulated in impugned award-I. This court refrains from extracting and reproducing all relevant paragraphs here to avoid prolixity and to avoid this order becoming verbose. Suffice to say that a perusal of the reasoning of AT in this regard reveals that AT has given cogent interpretation by reading clauses 70.2 and 70.3 harmoniously together and by making it clear that price adjustment formulae qua said contract are intended to cover the specified inputs and any other rise or fall in cost of work executed under the contract is deemed to be covered in the rate quoted. Thereafter, AT has made computation and has awarded only a minuscule part of the claim made by the contractor. To be noted, while contractor has claimed a whopping sum of Rs.3,82,90,850.00 (little over Rs.3.82 crores), AT after computation has awarded only Rs.51,05,439/- which is barely 13.33 % of the claim. NHAI has not been able to demonstrate anything that is lacking in fidelity of judicial approach or patent illegality in this regard also.

28 This takes us to impugned award-II, which deals with claim Nos.7 to 10. As already alluded to supra, claim No.6 which was based on a complaint of refusal of measurement for varied items with regard to bore log work was given up.

29 Claim No.7 pertains to additional cost incurred due to change in scope of work for one of the bridges being Minor Bridge No.33. This claim has been negated by AT vide impugned award-II in its entirety. It is also submitted on instructions that contractor has not filed any independent O.P against impugned award-II. Therefore, this claim No.7 has ended in favour of NHAI and no arguments were advanced with regard to the same.

30 Claim No.8 pertains to wrongful fixation of rate for variation with regard to inputs of Engineer. Claim No.9 pertains to compensation for loss of profits, infrastructure overheads for head office / site office and ownership charges of machinery during prolonged / extended period of construction. With regard to claim Nos.8 and 9, again, as in the case of claim No.4, the lone argument is predicated on dissenting view expressed by one of the Arbitrators in the Three member AT and the dissenting view to which attention of this court was drawn with regard to claim No.8 reads as follows :

“3.0 SUMMING UP:

As detailed in the findings above, the additional payment for Labor, Machinery Charges, Transportation Charges and Royalty claimed by the Claimant is not justified and hence denied. Taking that into account the Rate Analysis prepared by my Leaned Colleges (Annexure-1) would work out to Rs.191/- per Cum, which is the same as what was worked out by the Engineer. As such, I hold that nothing becomes payable to the Claimant towards the Claim for BOQ Item No.2.03.”

31 Dissenting view with regard to claim No.9 reads as follows :

“3.14 What is produced by the Claimant is an overall list of Equipments deployed on the Project. There is nothing to indicate any specific events of delays suffered by specific Equipments for a specific period of time, and the reasons that caused the Idling.

3.15 This overall list of Equipment too was submitted by the Claimant only after completion of the Project.

3.16 CONCLUSION :

What has been produced by the Claimant is just a

dossier of various Plants / Equipments deployed by him on the Project. It contains nothing whatsoever to establish any Idling / under utilization and the reasons thereof.

3.17 As such it does not qualify as Contemporary Record on the basis of which a Claim could be established.

3.18 As per Clause 53.4, this AT can consider the claim only on verification of Contemporary Record. In the instant case, no Contemporary Record is produced.

3.19 The claim for the Item in question is therefore rejected.”

32 With regard to claim No.9, it was also argued that the contractor being in the industry should have sound commercial sense and merely because the contractor has brought more machinery than what is required, the contractor would not be entitled to ownership charges for the machinery. It was also argued that the AT has come to the conclusion that NHAI has granted extensions and therefore, it has to these charges also should be borne by NHAI.

33 A further perusal of impugned award-II of AT reveals that it is not so. AT adverting to IRC guidelines has calculated ownership charges by taking trade practice into account. To be noted, this Court is informed that 'IRC' stands for 'Indian Road Congress'. AT has also compared the machinery mobilised by the contractor with the abstract of total hours of machinery required for executing the quantities in the extended period and after going into all technical aspects of this matter, has returned a finding qua claim Nos.8 and 9. A feeble attempt was made to raise several grounds

regarding the mode of computation adopted by AT with regard to claim Nos.8 and 9. These are technical issues and the AT is constituted by technocrats. Suffice to say that nothing in the nature of findings which shock the conscience of this Court have been pointed out and there is nothing to show that there is patent illegality or lack of fidelity of judicial approach. Therefore, this Court is unable to persuade itself to believe that the award is vitiated with regard to claim Nos.8 and 9.

34 This takes us to claim No.10 which deals with adjustment of bitumen and what has been described as CRMB variation. This court is informed that CRMB is an abbreviation which stands for 'Crumb Rubber Modified Bitumen'. It was submitted on behalf of NHAI that the claim is contrary to bid conditions. Specific reference was drawn to Clause 501.3.4.1 which read as follows :

“Clause 501.3.4.1 This Clause shall read as under :

“The surface on which profile corrective course is to be laid shall be thoroughly swept clean of dust and any other extraneous material using mechanical broom and dust collected removed or blown off using compressed air except in places where mechanical means cannot reach.”

“After preparing the granular surface as in Clauses 501.3.1, 501.3.2 and 501.3.3, the profile corrective course with materials as per Clause 501.2.3/501.2.4 shall be laid and compacted to the requirement of particular specification Clause. Where a bituminous profile corrective course is to be laid over primed granular surface, a tack coat conforming to Clause 503 shall be applied prior to laying profile corrective course.””

35 In this regard, learned counsel for respondent / contractor drew attention of this Court to AT's conclusions with regard to claim No.10 articulated in paragraphs 7.4.17 and 7.4.18 which read as follows :

“7.4.17 The Respondent's contention that only base price ex-refinery should be the basis to arrive at the adjustment amount applicable to unit rate of BOQ item nos.4.03, 4.09 and 4.05 is contrary to the Contract Provisions and trade practice.

7.4.18 After considering all the evidences placed before it, the AT holds that the details of costing submitted by the Claimant as exhibit C-10/3 on page 97 of CC-1 are according to the Contract Provisions. The extra rate of BOQ item nos.4.03 and 4.09 works out to Rs.45.08/Cum and as for BOQ item no.4.05(b) it works out to Rs.57.20/Cum. The claimed amount of RS.6,29,082/- is justified.”

36 A careful examination of the same reveals that AT has taken into consideration the evidence placed before it and has come to the conclusion that costing submitted by the contractor is justified. In other words, AT has rejected the contention of NHA that only base price ex-refinery should be the base to arrive at the decision. AT has taken into account the trade practice.

37 In this regard, this court is unable to find fault with AT much less persuade itself to believe that impugned award-II is vitiated and becomes liable to be set aside. As rightly pointed out by learned counsel for respondent / contractor, AT while deciding / making an award shall also decide in accordance with the trade usage applicable to the transaction. It

enshrined in sub-section (3) of section 28 of A and C Act. No elucidation or articulation is required to reiterate that a trade usage applicable to a transaction more so a techno commercial transaction shall certainly be one of the determinants for the AT while making an award.

38 This brings us to the conclusion that this Court is unable to persuade itself to believe that impugned awards I and II are vitiated by lack of fidelity in judicial approach or by patent illegality.

39 With regard to conclusions arrived at by this Court qua impugned awards I and II by applying the tests, certain legal parameters guidelines postulates and principles have been followed. This court deems it appropriate to refer to these aspects of the matter. To be noted, reference to this aspect of the matter infra may not be exhaustive, but is a broad outline of principles and postulates qua the manner in which the tests have been applied.

40 This Court has borne in mind **Hodgkinson** principle. **Hodgkinson** principle is a time honoured principle which is to the effect that AT is the best judge of both quality and quantity of evidence before it. To be noted, this **Hodgkinson** principle has been referred to by Hon'ble Supreme Court in the oft-quoted and celebrated **Associate Builders** case which has been referred to supra.

41 Therefore, wherever AT has weighed the evidence before it and arrived at some conclusions, as long as the conclusion is a possible view, this Court has restrained itself from intervention.

42 The next aspect of the matter is, regarding testing arbitral award under section 34 of A and C Act. As long as AT has arrived at a conclusion which is a possible view, this court will not substitute its views by way of judicial intervention even if this court is of the considered opinion that another view is a more preferred view. In the instant case, the views of AT on the eight claims (four each in impugned awards I and II) are not only possible views, but they also come across as plausible views owing to reasons alluded to supra.

43 This Court has also reminded itself that it is a techno commercial arbitration and AT has been constituted by technocrats. The nature of the claim, adjudication of the same and findings rendered on the same are highly technical and they turn heavily on engineering particulars and details.

44 This court has also borne in mind the Fiza Developers principle. Fiza Developers principle is laid down by Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796. To put it in simple terms, Fiza Developers principle is to the effect that applications under section 34 assailing arbitral awards are summary procedures. It follows as a sequitur and corollary from Fiza Developers principle that proceedings under section 34 are not appeals, they are limited reviews within the contours and confines of section 34 of A and C Act. While expeditious disposal is the salutary principle and sublime philosophy underlying arbitral proceedings and proceedings relating to arbitration, section 34 by itself is a fine and delicate

balance between sanctity of finality of arbitral awards and sacrosanctity of judicial review. In other words, if finality of arbitral awards are sanctus, judicial review is sacrosanct. Section 34 by itself is a fine and delicate balance between this sanctus legal philosophy and sacrosanct judicial principle.

45 Another aspect of the matter this Court has reminded itself is regarding patent illegality. Patent illegality should be on the face of the awards. In other words, in the considered view of this court, patent illegality is one which readily meets the eye. It should be an illegality which is so obvious and conspicuous. It is not something which should be detected much less detected by taking recourse to an inferential process. Reappreciation of evidence (as long as there is no perversity in appreciation of evidence) and review on the merits of the matter (as long as there is no perversity / irrationality) are forbidden, considering the circumference within which a test under section 34 should perambulate. To be noted, with regard to irrationality / perversity, it has been laid down in Associate Builders case, test is time honoured Wednesbury principle of reasonableness which in simple terms means it should be so unreasonable that no reasonable person could have come to such a conclusion on the basis of material before it.

46 Owing to all that have been set out supra, this Court is unable to persuade itself to come to the conclusion that NHAI has made out a case for judicial intervention qua impugned awards I and II much less within the contours and confines of section 34 of A and C Act.

47 Considering the nature of the matter and trajectory of the hearing, this Court considers it appropriate to leave the parties to bear their respective costs.

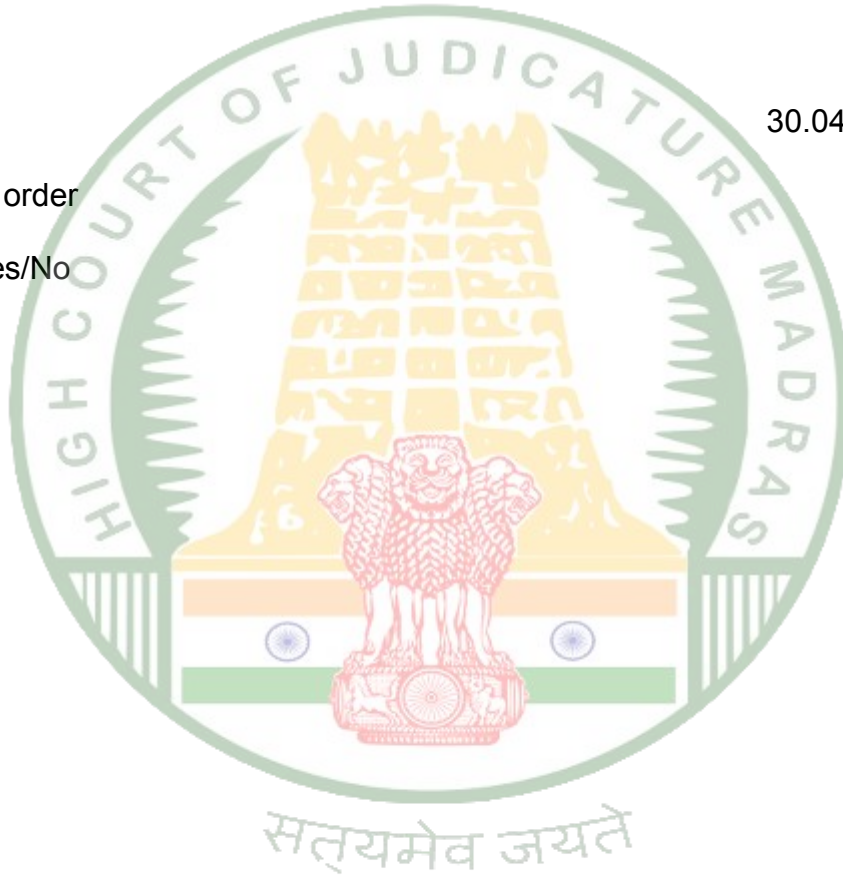
48 Resultantly, both O.Ps are dismissed. No costs. Consequently, connected applications are closed.

30.04.2019

Speaking order

Index : Yes/No

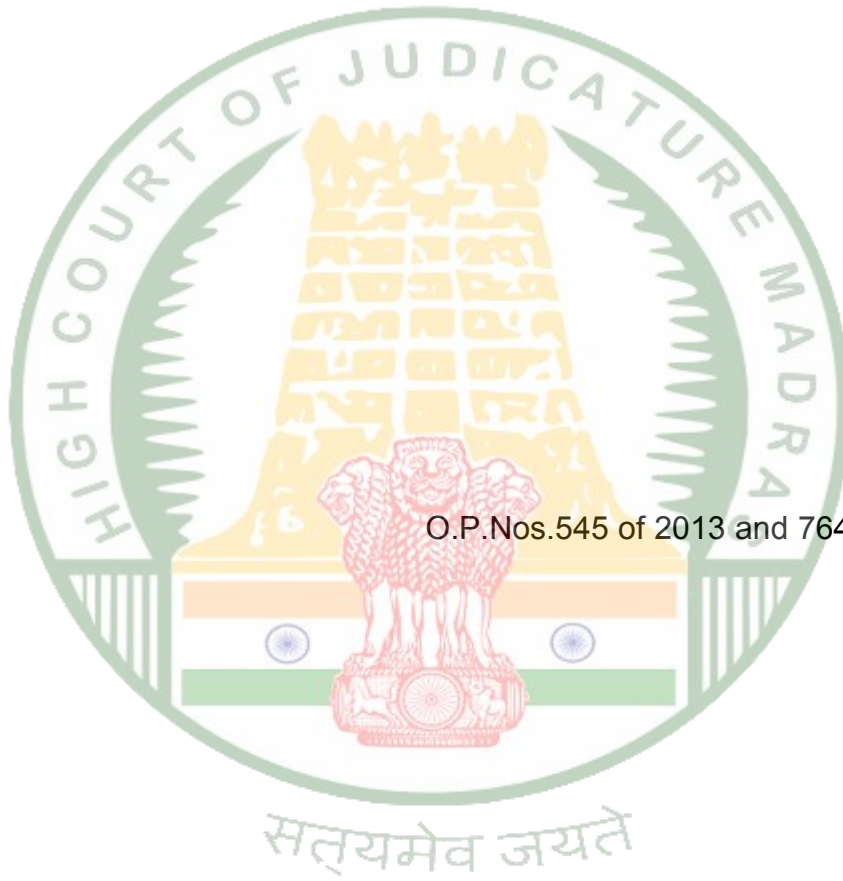
vvk



WEB COPY

M.SUNDAR, J.

vvk



order in
O.P.Nos.545 of 2013 and 764 of 2014

WEB COPY 30.04.2019