

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.415 of 2018

Chennai Bunkering Terminal Private Limited,
'Neeladri', No.9, Cenotaph Road,
Alwarpet,
Chennai-600 018.

.. Petitioner

Vs.

Board of Trustees,
Chennai Port Trust,
No.1, Rajaji Salai,
Chennai-600 018.

.. Respondent

This original petition is preferred under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the impugned award of the learned Arbitrator dated 30.03.2018 insofar as it rejects the prayer A of the petitioner made in the arbitration proceedings and pass such further or other orders as may be deemed necessary in the interest of justice.

For Petitioner

: Mr.P.S.Raman, Senior counsel
for Mr.V.P.Raman,
Mr.M.S.Seshadri

For Respondent

: Mr.P.Saravanan

ORDER

Instant 'Original Petition' ('O.P' for brevity) has been filed assailing an Arbitral Award dated 30.03.2018 (hereinafter 'impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a Sole Arbitrator.

2 Instant O.P has been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' (hereinafter 'A and C Act' for brevity). In the scheme of A and C Act, Section 34 is slotted under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A perusal of Section 34 also reveals that recourse to a Court against an arbitral award under section 34 of A and C Act may be made by an 'application'. Also to be noted, caption to section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, a legal proceeding which is in the nature of recourse against an arbitral award, is being assigned the nomenclature 'Original Petition' in the Registry of this Court and therefore, instant proceedings are being referred to as 'O.P', for the sake of convenience and clarity.

3 Sole Petitioner before this Court in instant O.P is a juristic person, i.e., a private limited company, which goes by the name 'Chennai Bunkering Terminal Private Limited' and the same shall hereinafter be referred to as 'Contractor' for the sake of clarity and convenience. Lone Respondent before this Court is the 'Board of Trustees, Chennai Port Trust' and respondent shall hereinafter be referred to as 'Port Trust' for the sake of convenience and clarity.

4 It is necessary to set out short facts for appreciating this order and the same is done under the caption 'Factual Matrix' infra.

5 **FACTUAL MATRIX :**

(a) Port Trust with a view to develop Barge handling facility at Chennai Port through private sector participation issued a tender in January 2012, inviting applications seeking Request for Qualification (RFQ) from interested parties. This tender was to put up Barge handling facility with a project capacity of 1.35 Million MT at the Chennai port with capability to accommodate vessel / barge capacity of 4000 MT Dead Weight Tonnage (DWT) with a jetty of size which shall be not less than 150 meters in terms of length and 15 meters in terms of width. In response to this tender floated by Port Trust, Contractor submitted an application dated 20.03.2012. After evaluation, Contractor was found to satisfy pre-qualification requirements.

(b) This Court is informed that this construction is on what is known as PPP Module and is on BOT basis. Elaborating on this, this Court was informed that 'PPP' stands for 'Public Private Partnership' and 'BOT' stands for 'Build Operate Transfer'. This court was informed that PPP Module on BOT basis means that the contractor who builds the concerned project would operate the same for 30 years in partnership with the Port Trust with a revenue share module and at the end of 30 years, the built structure will be transferred by the contractor to the Port Trust. It was submitted that this is to encourage private partnership and also to ensure that development in port trust takes place by involving expert private contractors / entrepreneurs.

(c) Thereafter, Contractor and other bidders who were found to be qualified, were furnished with a detailed project report, which inter-alia contains details of volume of business that may be attracted on successful implementation of the project. This shall hereinafter be referred to as 'said project'.

(d) It can be culled out from the case file placed before this Court that there are several technical details with regard to said project. After several rounds of discussion, Contractor and Port Trust entered into an agreement dated 30.03.2013. This agreement is captioned 'Concession Agreement for Development of Barge Handling Facility at Chennai Port under PPP Mode with Chennai Bunkering Terminal Pvt. Ltd.' and this agreement has been marked as Ex.C.4 before AT. As already mentioned supra, this court is informed that 'PPP' is an abbreviation and it stands for 'Public Private partnership'. This Ex.C.4 is the nucleus of this lis and the same shall, therefore, be referred to as 'said contract' for the sake of convenience and clarity. As mentioned supra, this Court is informed that said contract is on BOT basis, 'BOT' again is an abbreviation and it stands for 'Build Operate Transfer'. Contractor expressed certain concerns and an Expert committee was appointed to go into such concerns.

(e) It is also not in dispute, as mentioned supra, that the Contractor was given a 'Detailed Project Report' ('DPR' for brevity). Post said contract, claimant realised that the volume of business at Port Trust does not match the projections in the DPR. This led to the contractor submitting a revised layout dated 08.12.2014 which was marked as Ex.C.7 before AT. This revised

layout which shall hereinafter be referred to as 'modified plan' for the sake of convenience and clarity became the trigger for this lis as the Port Trust expressed apprehension about the modified plan.

(f) Thereafter, both parties, namely Contractor and Port Trust agreed to appoint an Expert in accordance with Clause 19.2 of said contract and the Expert gave a report dated 24.6.2015 which is Ex.C.10 before AT. While Port Trust raised several objections for the modified plan, Contractor contended that Ex.C.10 report of the Expert accepts the Contractor's concerns with regard to carrying out the said project without resorting to 'modified plan'.

(g) Ultimately, Port Trust terminated said contract vide a termination letter dated 31.10.2015 bearing reference No.MP3/27/2012/E (hereinafter 'termination notice' for brevity).

(h) Considering the narrow scope on which this O.P turns, suffice to say that this led to invocation of arbitration clause which is clause 19 in said contract. While Clause 19 deals with dispute resolution, Clause 19.3 specifically deals with arbitration. As there is no disagreement between parties about all these aspects of the matter, it is not necessary to delve into these facets of this case any further.

(i) There were some pre arbitration legal proceedings between Contractor and Port Trust, but considering the narrow scope of this O.P., it may not be necessary to advert to all these in great detail. Suffice to say that the AT constituted by the sole arbitrator, entered upon reference, arbitration

was conducted and ultimately the impugned award was passed / made by AT.

(j) In the interregnum, there was change of sole arbitrator, but it may not be necessary to go into those details owing to same being in the realm of undisputed factual details and owing to the scope of the instant O.P.

(k) With regard to pleadings before AT, Contractor filed a claim statement dated 03.11.2016 with a prayer to declare the termination notice (to be noted, termination notice is Ex.C.13 before AT) as wrongful and to direct the Port Trust to accept the modified plan for execution of said project vide said contract. This prayer with regard to the termination notice and acceptance of modification is the first limb of prayer in the claim statement of contractor before AT. The second limb of prayer of contractor before AT is for permanent injunction restraining the port trust from invoking performance bank guarantee of Rs.1.36 Crores. Port Trust filed a counter statement dated 06.01.2017 denying the averments and allegations made in the claim statement. More importantly, Port Trust in the counter statement which is styled 'Statement of Defence' made a counter claim. The crux of the counter claim is a sum of Rs.1,15,55,548/- with interest towards what according to Port Trust is loss of revenue. This claim was made by Port Trust stating that if the Contractor had commenced construction activities from the date of environment clearance, said project would have been completed and operations could have been commenced from September, 2015. According to

Post Trust, from September 2015, it would have started earning land lease charges and revenue share from said project. This did not happen and this is the basis for counter claim.

(l) As counter claim had been made by the Port Trust, the Contractor filed a rejoinder dated 24.1.2017 and a separate reply also dated 24.1.2017 being reply to the counter claim. This completed the pleadings before AT. 18 issues framed by predecessor sole arbitrator, who then constituted the AT, were recast and 7 issues were framed on 02.01.2018. Those 7 issues read as follows :

“(1)Whether the claimant/respondent violated any terms of concession agreement dated 30.03.2013 entered into between the parties and if so, what are the violations?

(2)Whether the termination of contract made by the respondent is valid?

(3)Whether the claimant is entitled to all or any of the claims made by it in its claim statement?

(4)Whether the respondent is entitled to all or any of the counter-claim made by it in its defence statement?

(5)Whether the claimant/respondent is entitled to claim interest on the amount claimed by it and if so, what is the rate of interest and for what period?

(6)Whether the claimant/respondent is entitled to any cost and if so, what is the cost?

(7)To what other relief the parties are entitled to?”

(m) A perusal of the impugned award reveals that as many as 27 exhibits, namely Exs.C.1 to C.27 were marked on the side of Contractor

(claimant before AT) and as many as 25 exhibits, namely Exs.R.1 to R.25 were marked on behalf of Port Trust, which was the sole respondent before AT.

(n) Ultimately, AT made the impugned award vide which contractor's claim for declaration that termination notice is wrongful and direction to accept the modified plan was negatived, but second limb of prayer seeking injunction restraining Port Trust from invoking performance bank guarantee amounting to Rs.1.36 Crores was acceded to, Port Trust's counter claim was negatived, parties were left to bear their respective costs and AT also mentions that parties are not entitled to interest, but it appears that given the nature of the impugned award, the question of interest may not arise.

(o) Aggrieved by first limb of its claim being negatived, Contractor is before this Court as petitioner in instant O.P. Mr.P.Saravanan, learned standing counsel for port trust submitted on instructions that port trust has not filed any independent O.P assailing the impugned award, though the second limb of contractor's prayer has been acceded to and though the entire counter claim made by port trust has been negatived vide impugned award. This is recorded.

(p) The grounds on which impugned award was assailed and discussions on the same are set out infra under the caption 'Discussion and Dispositive Reasoning'.

6 Discussion and Dispositive Reasoning :

(a) As mentioned supra, the instant O.P has been filed under Section 34 of A and C Act. The caption to instant O.P reads as follows :

'PETITION UNDER SEC.34 OF THE ARBITRATION
AND CONCILIATION ACT, 1996'

(b) Mr.P.S.Raman, learned senior counsel appearing on behalf of counsel on record for petitioner Contractor submitted that the ground on which the impugned award is assailed in the instant O.P fits into section 34(2)(b)(ii) read with clause (ii) of Explanation 1 and Section 34(2-A) of A and C Act. If this is translated into grounds on which instant O.P is predicated, they are (a) that the impugned award is in conflict with public policy of India as it is in contravention with fundamental policy of Indian law and (b) that the impugned award is vitiated by patent illegality appearing on the face of the award.

(c) In this regard, it is to be noted that both sides had no disagreement that the date of commencement of arbitral proceedings is one of the dates between 29.9.2016 and 03.10.2016. 29.09.2016 (Ex.C.22 before AT) is the letter by which port trust nominated an arbitrator and sought the consent of contractor. In other words, in this notice dated 29.9.2016 (Ex.C.22), port trust made a request for arbitral dispute to be referred to arbitration. To this, contractor sent a reply dated 03.10.2016 (Ex.C.23 before AT), wherein and whereby contractor consented for the sole arbitrator nominated / suggested by port trust. A perusal of the language in which section 21 of A and C Act is couched makes it clear that in the instant case,

the date of receipt of Ex.C.22 notice by the contractor is the date on which arbitral proceedings commenced. To be noted, both parties agreed that they had not agreed for any other mode of commencement of arbitral proceedings. However, both parties before this Court, i.e., contractor and port trust are unable to give the date of receipt of Ex.C.22 by the contractor. In other words, neither is Port Trust able to produce the acknowledgement nor is the contractor is able to give the exact date of receipt. However, it has to be one of the five days, i.e., one of the days from 29.9.2016 to 03.10.2016 (both days inclusive). As contractor submitted that they obviously could not have received Ex.C.22 notice from port trust prior to 29.9.2016, it was agreed that 29.9.2016 can be construed as date of commencement of arbitral proceedings (notional date though). Therefore, arbitral proceedings commenced post 23.10.2015 when large scale amendments were brought in to A and C Act originally by way of an Ordinance and subsequently by way of an Amending Act, being Act 3 of 2016. Thereafter, vide an order dated 30.11.2017 made in C.M.A. No.2851 of 2017 by this Court, there was a change of sole arbitrator and ultimately, the impugned award came to be made on 30.03.2018. In other words, this is a case where everything from the commencement of arbitral proceedings to making of the impugned award are post 23.10.2015, i.e., under A and C Act as amended on and with effect from 23.10.2015. On this basis, both sides agreed that section 34 as it exists in the statute books post amendment on 23.10.2015 will be the basis for the instant O.P and arguments are predicated on this basis.

(d) Learned senior counsel for petitioner submitted that the said contract is clearly a techno commercial contract. Learned senior counsel submitted that there are several technical details and the modified plan had to be submitted only owing to viability issues. It was submitted that owing to the nature of the dispute, an Expert being Mr. Joseph Mathew was examined and his proof affidavit was filed. It was pointed out that the Port trust chose not to cross examine the Expert, i.e., C.W.1.

(e) A perusal of the impugned award, particularly, paragraph 1 articulates this and relevant portion reads as follows :

“.....In the first sitting held on 13.12.2017 at 1.00 PM in Madras High Court Arbitration Centre, since the parties have already filed their pleadings, documents and also the proof affidavit of CW1, it was decided to list the matter on 20.12.2017 for cross-examination of CW1. In the second sitting held on 20.12.2017, the documents filed by both sides were marked. The learned counsel appearing for the respondent submitted that there is no cross-examination of CW1 and there is also no oral evidence on behalf of the respondent. Hence, the matter was listed on 02.01.2018 to putforth arguments by he learned counsel for claimant and on 08.01.2018 for the arguments of the learned counsel for respondent.....”

(f) It was submitted on behalf of the Contractor / petitioner that though an Expert was examined as C.W.1 by the Contractor in its capacity as claimant before AT and though a detailed proof affidavit was filed, Port Trust did not even choose to cross examine the Expert. More importantly, notwithstanding this position besides aforesaid reference to C.W.1 and his

deposition vide proof affidavit, there is no reference to C.W.1 or to Expert evidence anywhere in the impugned award, is learned senior counsel's say. In other words, it is the submission of learned senior counsel that the evidence of Expert that too uncontroverted evidence of C.W.1 has not been considered at all.

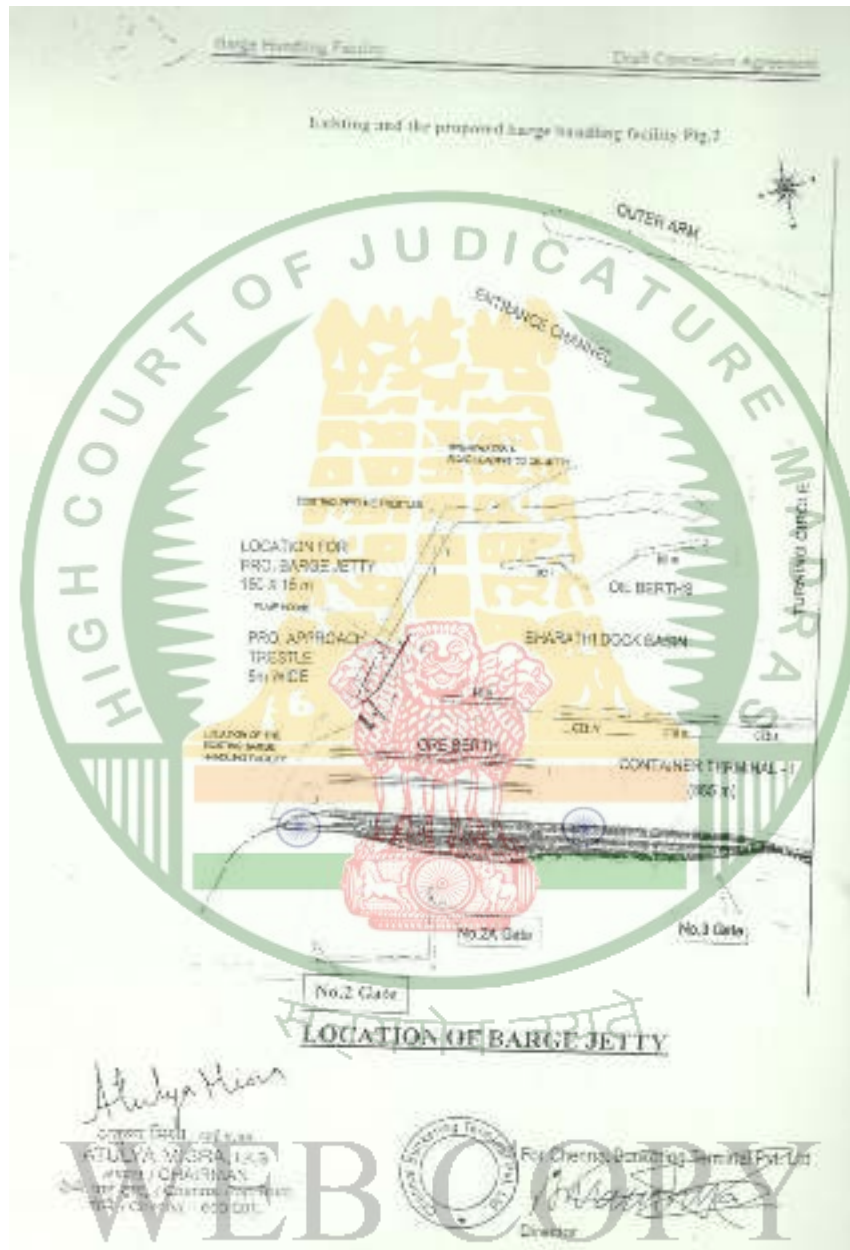
(g) It was submitted on behalf of contractor / petitioner that if there had even been a passing reference to the deposition of C.W.1 and if the AT had held that his evidence is unacceptable or that it does not help the contractor, the position, i.e., dynamics and dimensions of instant O.P may have been very different. According to learned senior counsel for Contractor / petitioner, the fact that the impugned award does not make any reference to the evidence of C.W.1 though the impugned award itself clearly mentions that C.W.1 was in fact examined in chief and his evidence in chief was available before AT and that Port Trust chose not to cross examine C.W.1 is clearly irrationality / perversity which is one of the facets of contravention of fundamental policy of Indian law, besides being patently illegal.

(h) To be noted, one Mr. Joseph Mathew has deposed as C.W.1 vide proof affidavit dated 24.05.2017 and he has averred that he has been a Consulting Engineer for Port and Harbour works for more than 40 years. It is also not in dispute that with regard to original plan, while port trust wanted the structure to be one concrete slab, this court is informed that the contractor vide modified plan suggested what is known as 'mooring Dolphins'. However,

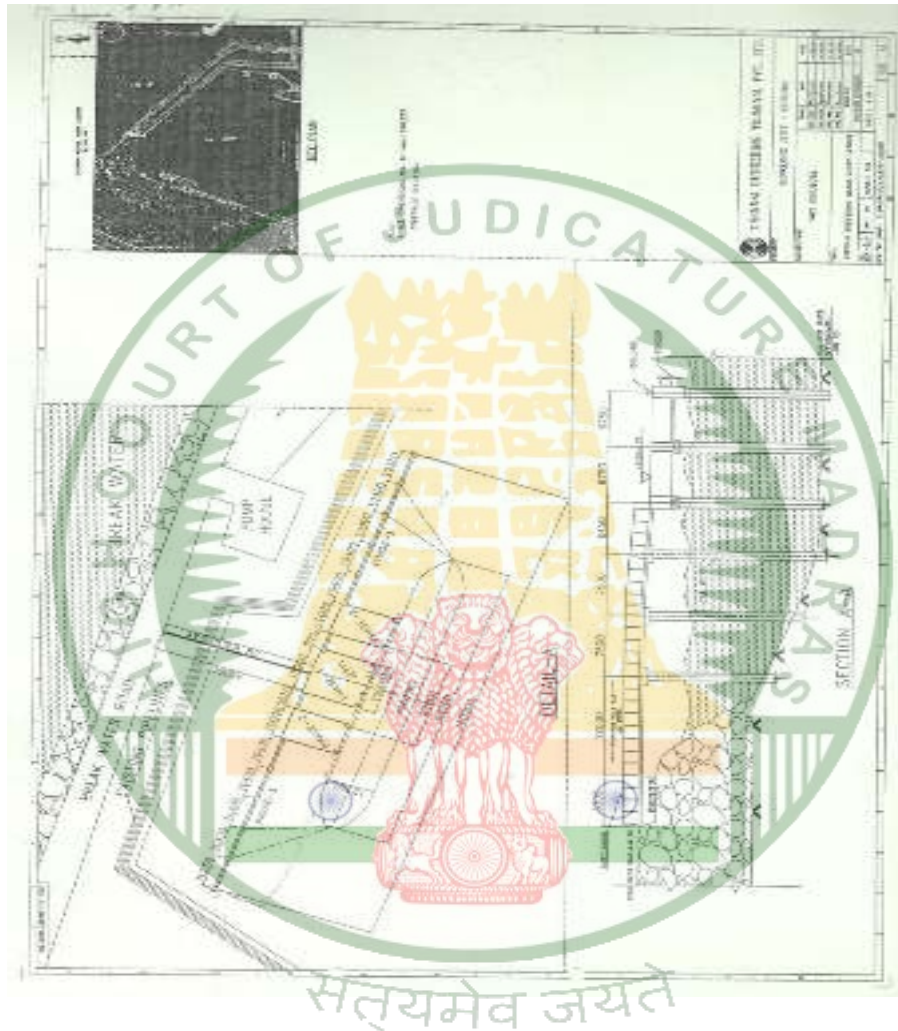
considering the scope of a petition under section 34, more so scope of instant O.P, it may not be necessary to delve into those aspects of the matter. For the purpose of completing facts narrative, suffice to say that the original plan and modified plan are as follows :

Original plan :





Modified plan :



(i) It was argued that the fundamental policy of Indian law has been elucidatively explained by Hon'ble Supreme Court in **ONGC Ltd. v. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263** and three distinct juristic principles were laid down for testing whether an award is in contravention of fundamental policy of Indian law. The three distinct

principles are, judicial approach, principles of natural justice and irrationality / perversity. It was submitted that the ground of attack in instant O.P is predicated on irrationality / perversity. Referring to **Western Geco International Ltd.** case, it was submitted that irrationality / perversity should be tested on the time honoured Wednesbury principle of reasonableness. A mere perusal of the impugned award reveals clearly that it does not pass the muster of Wednesbury principle of reasonableness as the impugned award has been passed without any reference whatsoever to the evidence of C.W.1, though the entire arbitration is clearly a techno commercial arbitration. It was reiterated and emphasised that this is not a case of no evidence. It was submitted that it was not a case of wrong appreciation of evidence either. It was submitted that in a techno commercial arbitration when an Expert was examined and when it is clearly noticed, more so when evidence is uncontroverted (Port Trust chose not to cross examine C.W.1), it is a clear case of irrationality / perversity to pass an award without making any reference whatsoever to the evidence of C.W.1.

(j) Besides this, it was pointed out by learned senior counsel for petitioner that in answering issue No.1, which pertains to whether contractor or Port Trust violated the terms of said contract, AT has returned a finding vide impugned award that both parties have not violated conditions of said agreement. This is articulated in paragraph 25 of the impugned award and the relevant portion reads as follows :

“25.Now in the background of the discussions and finding rendered above, the issues framed by this Tribunal needs

to be answered.

(a) ISSUE NO.1:

“Whether the Claimant/Respondent violated any terms of Concessional Agreement dated 30.03.2013 entered into between the parties and if so what are the violations?”

As discussed earlier none of the parties violated any terms and conditions of the Contract. The only problem between the parties was pertaining to the design submitted by the Claimant. The other matters, as discussed earlier are consequent to the rejection of the design submitted by the Respondent. Therefore, this Tribunal finds that none of the parties violated the terms and conditions of the Concession Agreement dated 30.3.2013.”

(k) According to learned senior counsel, when the AT returned a finding that both parties have not violated the terms of said agreement, it should follow as a natural sequitur that termination notice is bad. It is learned senior counsel's say that negating the claim of contractor that termination notice is bad after returning a finding that both parties to the lis have not violated terms of said contract is a patent illegality on the face of the award.

(l) Reverting to the first ground of attack regarding not considering the evidence of C.W.1 completely, it was also pointed out that the impugned award in internal page 36 while giving the list of witnesses, exhibits / documents, says that evidence on the side of claimant is Nil. Relevant portion reads as follows :

“Evidence on the side of the claimant:

NIL”

(m) For the purpose of contradistinction, it is to be seen in the light of the relevant portion of paragraph 1 of impugned award which has already been extracted supra, wherein AT has clearly noticed that proof affidavit of C.W.1 is before it and that Port Trust chose not to cross examine C.W.1

(n) Contending that completely ignoring C.W.1's evidence and not discussing C.W.1's evidence at all and ultimately, holding that there is no evidence on the side of contractor / claimant is perversity / irrationality, learned senior counsel pressed into service following judgments :

- (i) Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Corporation Limited [(2010) 11 SCC 296]; and
- (ii) S.R.Tewari Vs. Union of India [(2013) 6 SCC 602].

(o) With regard to Sumitomo and S.R.Tewari cases, in the considered opinion of this Court, what can be culled out from Sumitomo and S.R.Tewari is that Hon'ble Supreme Court has held that a finding can be held to be perverse under six different situations and those six situations, in the considered opinion of this court, if an adumbration of the same is to be made, the same will read as follows :

(i) Findings have been arrived at by ignoring or excluding relevant materials;

(ii) Findings have been arrived at by taking into

consideration irrelevant / inadmissible materials;

(iii) When the finding is against the weight of evidence;

(iv) When the finding so outrageously defying the logic as to suffer from the vice of irrationality;

(v) When a finding is rendered on the basis of no evidence; and

(vi) When a thoroughly unreliable evidence, which no reasonable person would act upon, is the basis for the findings.

(p) This Court has also noticed that S.R.Tewari case arises under Service law. Therefore, this Court is aware that while drawing inspiration from the instructive elucidation of Hon'ble Supreme Court in Sumitomo and S.R.Tewari cases, this Court has to bear in mind that instant O.P is under section 34 of A and C Act.

(q) Therefore, this court reminded itself that perversity / irrationality has been held to be one of the three juristic doctrines while testing whether an arbitral award is in contravention of the fundamental policy of India law. This was in **ONGC Ltd. v. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263** and this was reiterated by Hon'ble Supreme Court in the celebrated **Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** . This Court has also noticed that both *Western Geco International Ltd.* and *Associate Builders* cases were rendered prior to

23.10.2015, but conflict with public policy owing to being in contravention with the fundamental policy of Indian law is still available as a ground post 23.10.2015. The difference is, public policy has now been statutorily explained and while testing an arbitral award, the test has been limited / circumscribed. It has been made clear that while testing an arbitral award for contravention with the fundamental policy of Indian law, it cannot be done by way of review on the merits of the dispute. In other words, such test will not entail a review on the merits of dispute. More over, this court has also noticed that with regard to irrationality / perversity, the litmus test that has been laid down by Hon'ble Supreme Court in *Associate Builders* case is the time honoured Wednesbury principle of reasonableness.

(r) Reverting to six different situations of perversity, as culled out / adumbrated supra, in the instant case, we are only concerned with the first of six situations, namely when a finding has been rendered ignoring / excluding relevant material. For examining this, merits of the dispute and review of the same is not necessary. With regard to other five situations, as they do not arise, in the instant case, this Court leaves those issues open to be decided in a case where it becomes imperative to apply the same. In other words, if an arbitrable dispute is to be tested for perversity / irrationality on the ground that the finding has been arrived at by ignoring or excluding relevant materials, the same is permissible under section 34 as long as the test can be done without resorting to review on the merits of the dispute.

(s) This takes us to the contention raised by Mr.P.Saravanan, learned standing counsel for Port Trust. Learned standing counsel for Port

Trust submitted that the contractor has not mentioned any specific ground/s on which impugned order is being assailed and the O.P merely says that it is under section 34 of A and C Act.

(t) With regard to the scope of section 34, learned standing counsel pressed into service a recent judgment of Hon'ble Supreme Court rendered on 18.02.2019 in **MMTC Ltd. Vs. Vedanta Ltd.** Besides, MMTC Ltd. Vs. Vedanta Ltd., learned standing counsel also pressed into service an earlier judgment of Hon'ble Supreme Court in **P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.**, reported in **(2012) 1 SCC 594 : AIR 2012 SC 1866**. The scope of section 34 as explained by Hon'ble Supreme Court is to the effect that a O.P under section 34 is not an appeal. It has also been clarified that violation of public policy includes violation of fundamental policy of Indian law which in turn would cover compliance with statute and judicial precedents and adoption of judicial approach, compliance with principles of natural justice and Wednesbury principle of reasonableness. Besides this, it has also been held that patent illegality will mean and include contravention of substantial law of India. This Court has respectfully taken into account the instructive elucidation by Hon'ble Supreme Court.

(u) This Court reminds itself that section 34 is not an appeal. In the considered opinion of this court it is not even a revision. It is not even a full-fledged review. It is a very limited review within the contours and confines of section 34.

(v) With regard to specific ground not being mentioned, no elucidation is required to say that as long as a question of law arises on undisputed facts, the same can be gone into in a petition and specific ground not being mentioned may not denude the court of its power as long as this court otherwise has power to examine the award within the contours and confines of section 34.

(w) Besides this, learned standing counsel for Port Trust also relied on section 92 of the Indian Evidence Act, 1872 and submitted that oral evidence cannot be looked into when documentary evidence is available. As alluded to supra, if the AT had referred to deposition of C.W.1 and merely said that the same is not acceptable, dynamics and dimensions of this O.P would have been entirely different, as AT is the best judge of quantity of quality of evidence before it as laid down in *Hodgkinson* principle. In this case, though there is no dispute that expert evidence, i.e., evidence of C.W.1 was let in and though port trust has chosen not to cross examine C.W.1, a finding for negating the first limb of the contractor's prayer has been arrived at by completely ignoring and excluding the evidence of C.W.1. It is the case of the contractor that AT ought to have mentioned whether the evidence of C.W.1 is acceptable or not acceptable. If AT had held that evidence of C.W.1 was acceptable, that would have been the end of the matter as the first limb of the contractor's prayer had to be acceded to. If AT had come to the conclusion that evidence of C.W.1 is not acceptable, re-examination or reappraisal of that evidence in proceedings under section 34 would have become a far cry, perversity being the lone exception. It is the specific and

pointed case of contractor that there is no whisper one way or the other about the evidence of C.W.1. AT has neither said that it is acceptable nor has it said that it is not acceptable. In other words, AT has completely ignored and excluded the evidence and returned a finding, i.e., without a whisper about evidence of C.W.1

(x) It was also argued on behalf of Port trust that novation cannot be thrust on port trust. In the considered opinion of this Court, it is not a case of thrusting novation on port trust. It is the question of examining the most viable option, more so when it is on PPP module and BOT basis. It is a techno commercial arbitration. Nothing prevented Port trust from cross examining C.W.1 and demonstrating that the modified plan is completely unnecessary or unworkable. It is to be noted that port trust had not even objected to C.W.1 being examined, though a point is now being raised for the first time in this regard by pressing into service section 92 of the Evidence Act. In the light of section 19 of A and C Act, the law is well settled that Evidence Act is not applicable to arbitration proceedings. However, principles of evidence / deposition apply and therefore even if AT had held that C.W.1's evidence is being eschewed, it would have become a far cry for the contractor with regard to assailing the impugned award.

(y) Learned standing counsel for Port Trust Mr.Saravanan contended that Explanation 2 is for entire section 34. This court is unable to accept this submission. A plain reading of section 34 would reveal that Explanation 2 is available for section 34(2)(b)(ii) and it is also in the nature of an Explanation which controls Explanation 1.

(z) While testing this submission / first ground of attack, this Court reminded itself about Explanation 2 to Section 34(2)(b)(ii) of A and C Act. Explanation 2 makes it clear that while testing an impugned award as to whether it is in contravention of fundamental policy of Indian law, there shall be no review on the merits of the dispute. It is one of the reasons why even in capturing the factual matrix of the case, this Court has refrained itself from going into facts in great detail. Without embarking upon the exercise of review of the arbitrable dispute on merits, this court is convinced that impugned arbitral award is clearly hit by vice of irrationality / perversity owing to not referring to evidence of C.W.1, particularly when there is no dispute or disagreement before this Court that arbitration itself is a techno commercial arbitration.

(aa) This takes us to second ground of attack, on which instant OP is predicated, i.e., patent illegality on the face of the award. Before examining this ground and before setting out dispositive reasoning of this court, it is made clear that this Court reminded itself that while testing an arbitral award to find out whether it is vitiated by patent illegality on the face of the award, the test cannot result in an arbitral award being set aside if it is merely a case of an erroneous application of law and that the test cannot be applied to an arbitral award by reappreciation of evidence either. It is clearly mandated in proviso to section 34(2-A) of A and C Act. Be that as it may, with regard to the expression 'patent illegality appearing on the face of the award', occurring in

section 34(2-A) of A and C Act, this court is of the considered opinion that this expression would necessarily mean an illegality which is so obvious and so explicit that no inferential process whatsoever is required for detecting the same. To put it differently, it is something which is obvious / conspicuous and not detected by applying an inferential process. In this view of the matter, the submission made on behalf of the Contractor / petitioner that in the impugned award, the AT returning a finding that both parties, i.e., contractor and Port Trust have not violated the terms of the said contract and thereafter, negating contractor's prayer that termination notice is bad comes across as a patent illegality on the face of the award. In other words, when there is a clear and categorical finding, particularly by way of answering issue No.1 that both parties to the lis, namely contractor and Port Trust have not violated the said contract, the termination of the said contract on the alleged ground of breach cannot be sustained. In the considered opinion of this court, no process of inference is required to come to this conclusion. A mere reading of impugned award of AT reveals that termination of a contract on the ground of breach has been sustained after holding that both contracting parties have not violated the terms of contract. It is so patent and so conspicuous that it appears on the face of the award. It is made clear that it is not a case of erroneous application of law. It is a case of conclusion and finding running into each other. In other words, it is a case of finding and conclusion contradicting one another. Appreciation of evidence is forbidden qua test of patent illegality and this Court reminded itself of this obtaining position while testing the impugned award. To put it statutory provision parlance, the proviso

to section 34(2-A) of A and C Act has been applied with utmost rigour in testing the impugned award on this ground.

(ab) After orders were reserved, for the purpose of clarifying the exact present position with regard to first limb of the prayer of the contractor, the matter was listed under the caption 'FOR CLARIFICATION' on 16.04.2019 and 23.04.2019. Obviously, it was so listed on this Court's direction to Registry. Learned standing counsel for Port trust had already mentioned that said project had been taken up by port trust as part of what goes by the name Sagar Mala projects. While it was submitted by learned standing counsel for Port trust that target time for completing the same and making it operational is September / October of this calendar year, counsel for contractor on instructions submitted that only 15% of first stage has been completed. These are all factual issues and it cannot be gone into. However, what was highlighted by learned senior counsel for contractor in the clarification hearing is that an order was passed in a petition seeking interim order. This order is dated 27.04.2018 and the most relevant paragraph is paragraph 6 and the same reads as follows :

“6.Post the original petition on 20.06.2018 for final disposal. In the mean while, the applicant is at liberty to file appropriate application seeking amendment of the prayer sought for as the situation has arisen subsequent to the award passed. It is clarified that the awarding of the tender post award would be subject to the final order to be passed in the main original petition.”

(ac) Adverting to this, learned senior counsel for contractor submitted that amendment if any can be only to claim petition before AT and

amendment to section 34 petition would only mean that if the contractor ultimately succeeds in having the impugned award set aside, the contractor will be entitled to seek and pursue all legal avenues available thereafter. In other words, it was submitted that issues such as damages may flow as a sequittur legal course if the impugned award is set aside. Therefore, in the light of the order dated 27.04.2018 made by this Court, suffice to hold that contractor will be entitled to take recourse to legal remedies and legal avenues that may follow as a sequittur to impugned award being set aside.

(ad) There is one another perspective of the whole matter which was examined by this Court. This court examined whether there is possibility of bringing into play sub-section (4) of section 34 of A and C Act. This would be by way of giving AT an opportunity to resume the arbitral proceedings to examine the evidence of C.W.1 and give its finding, so that it eliminates the perversity / irrationality ground. In the instant case, if such a course is adopted, it can at best eliminate only the perversity / irrationality ground as AT can be given an opportunity to resume arbitral proceedings, return a finding regarding the evidence of C.W.1. With regard to patent illegality appearing on the face of the award ground, the same cannot be eliminated as that would tantamount to embarking upon a review which will do violence to and militate against the legal philosophy (emanating from ADR Mechanism principle) underlying sub-section (4) of section 34. Therefore, even if recourse under Section 34(4) of A and C Act is taken, it can at best eliminate only one of the two grounds of attack qua impugned award. This leads this Court to believe that taking recourse to section 34(4) will not serve any useful purpose. In any

event, having said this, this court makes it clear that the language in which section 34(4) is couched, brings to light that recourse to section 34(4) of A and C Act can be taken only when there is request in this regard by one of the parties. There is no such request in instant case.

7 CONCLUSION :

The above discussion and dispositive reasoning leads this Court to the conclusion that the impugned award made by AT is hit by both grounds of attack, i.e., being in contravention of fundamental policy of Indian Law, therefore being in conflict with public policy of India and (ii) being vitiated by patent illegality appearing on the face of the impugned award and therefore, is liable to be set aside.

8 DECISION :

O.P.No.415 of 2018 is allowed and impugned arbitral award is set aside insofar as it rejects prayer (A) of petitioner herein / claimant before Arbitral Tribunal. Considering the nature of the matter and the trajectory of the hearing, parties are left to bear their respective costs.

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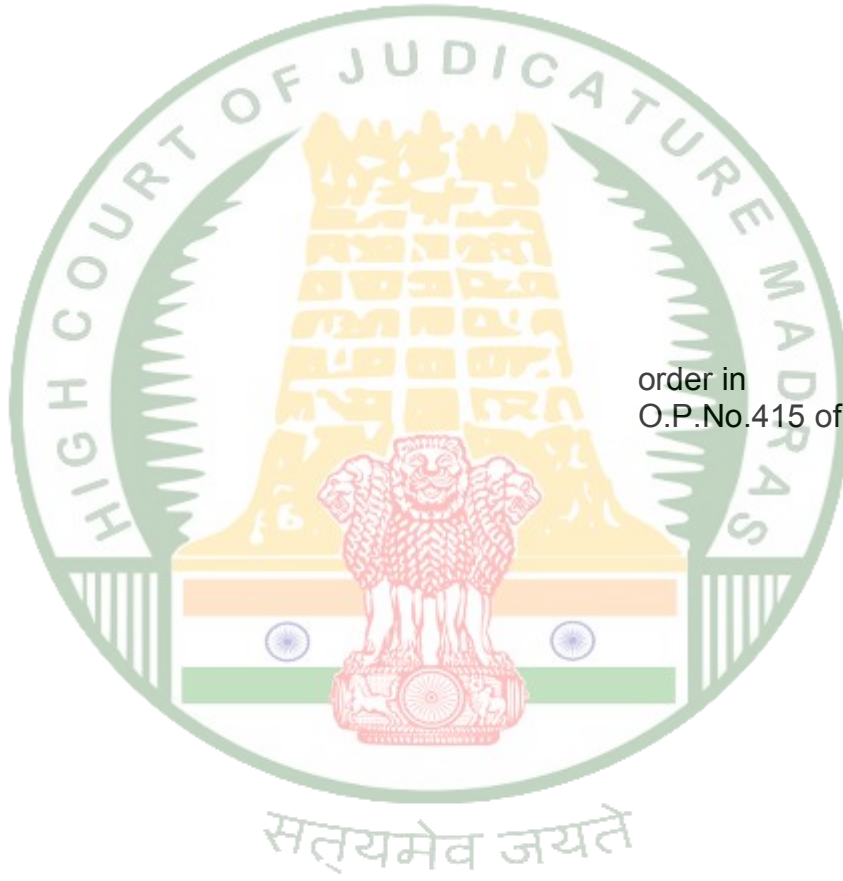
Speaking order

Index : Yes

vvk

M.SUNDAR, J.

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order in
O.P.No.415 of 2018

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