

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.03.2019

DATE OF DECISION : 02.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.Nos.456 and 457 of 2018
and
A.Nos.4317 and 4318 of 2018

The Superintending Engineer,
National Highways,
Salem Circle,
Omalur Main Road,
Narosithipatty,
Salem-636 004.

.. Petitioner in
both Original Petitions

Vs.

M/s.Gowpatt Associates,
represented by its Proprietor
Mr.P.Arun Kumar,
5/F1, 1st Street,
Gopalapuram,
Chennai-600 086.

.. Respondent in
both Original Petitions

O.P.No.456 of 2018 is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the arbitration award dated 27.10.2017 arising out of agreement No.2/2010-11 dated 04.05.2010 made in Arbitration Case No.11 of 2015 by the learned Arbitrator, allowing various claims to the tune of Rs.35,30,44,558/- with interest at 12% on the said sum payable from the due date till 26.06.2014 and 18% from 27.06.2014 till the date of realisation and pass such further or other order as this Hon'ble Court may deem fit and proper in the circumstances of the case.

O.P.No.457 of 2018 is filed under Section 34 of the Arbitration and

Conciliation Act, 1996 seeking to set aside the arbitration award dated 27.10.2017 arising out of agreement No.26/2010-11 dated 23.09.2010 made in Arbitration Case No.12 of 2015 by the learned Arbitrator, allowing various claims to the tune of Rs.16,76,74,513/- with interest at 12% on the said sum payable from the due date till 26.06.2014 and 18% from 27.06.2014 till the date of realisation and pass such further or other order as this Hon'ble Court may deem fit and proper in the circumstances of the case.

For Petitioner : Mr.G.Rajagopalan,
Assistant Solicitor General
assisted by Mr.Su.Srinivasan

For Respondent : Mr.Sharath Chandran
for Mr.V.Raghavachari

COMMON ORDER

This common order will govern both the aforesaid 'Original Petitions' ('O.Ps' for brevity) which have been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) assailing two arbitral awards, both dated 27.10.2017 (hereinafter 'impugned awards' for brevity). To be noted, 'O.Ps' and 'impugned awards' are references in plural and therefore, wherever it become necessary to these terms in singular, the same shall be referred to as 'O.P' and 'impugned award' respectively.

2 O.P.No.456 of 2018 is directed against impugned award dated 27.10.2017 arising out of contract agreement No.2/2010-11 dated 04.05.2010 for the work of widening and strengthening Km 340/0 – Km 345/2 and Km 345/8 to 360 of NH 67 (Extn). This Court is informed that this stretch

is in Coimbatore – Mettupalayam Highway. O.P.No.457 of 2018 is directed against impugned award dated 27.10.2017 arising out of contract agreement No.26/2010-11 dated 23.09.2010 for the work of widening and strengthening (with paved shoulders) of the road connecting Salem-Cochin at KM 105/0 of Nagapattinam-Gudalur-Mysore Road, Km 289/6 via Nallur and Peruntholuvu Km 0/0-10/4.

3 For the purpose of clarity, based on the sequential numbers assigned, 'O.P.No.456 of 2018' shall be referred to as 'senior O.P' and 'O.P.No.457 of 2018' shall be referred to as 'junior O.P' and the impugned award in senior O.P shall be referred to as 'impugned award-I' and the impugned award in junior O.P shall be referred to as 'impugned award-II'. 'Impugned awards I and II' shall collectively be referred to as 'impugned awards' as mentioned supra. Impugned awards have been made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole arbitrator.

4 Before this Court proceeds further, it is deemed pertinent to make it clear that Section 34 of A and C Act 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 recourses 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.

5 Superintending Engineer, National Highways, Salem Circle, who was the sole respondent before AT is the petitioner in both senior and junior O.Ps before this Court. This Court is informed that one P.Arun Kumar is carrying on business as sole proprietor in the name and style 'Gowpatt Associates', i.e., claimant before AT and sole respondent in both senior and junior O.Ps before this Court. 'Petitioner before this Court' in both O.Ps (sole respondent before AT in impugned awards) shall be referred to as 'NHAI' and 'respondent before this Court' in both O.Ps (claimant before AT in both impugned awards) shall be referred to as 'contractor' for the sake of convenience and clarity.

6 In the hearing, learned Additional Solicitor General Mr.G.Rajagopalan on behalf of Mr.Su.Srinivasan, counsel on record for NHAI and Mr.Sharath Chandran, representing the counsel on record for Caveator (Contractor had lodged caveat for both O.Ps) were before this Court. It was submitted by learned Solicitor that issues before AT with regard to both impugned awards are the same. It was, therefore, submitted that senior O.P will be argued and arguments therein shall be treated as arguments in junior O.P also. Learned counsel for Caveator agreed to such a course being adopted. Therefore, facts as in senior O.P shall be set out on the agreed premise that arguments / issues that arise for consideration are common. However, reference to facts in junior O.P has also been made wherever it is considered imperative for understanding and appreciating this order.

7 Short facts (sans unnecessary details and particulars) which are imperative for appreciating this common order shall be set out infra under the

caption 'Factual Matrix in a Nutshell'.

8 Factual Matrix in a Nutshell :

(a) To be noted, as mentioned supra, facts mentioned here are facts which pertain to senior O.P.

(b) NHAI floated tenders for road work, such as widening and strengthening of specified stretches, bid was held on 25.3.2010, contractor was declared as successful bidder and Letter of Acceptance was issued to the contractor on 20.04.2010. The terms of the contract were reduced to writing on 4.5.2010 (hereinafter 'said contract' for clarity) and the value of the contract was estimated at Rs.33,29,67,770/-. In other words, the value of the contract (obviously in senior O.P) was estimated at Rs.33.29 crores. The work had to be executed within 12 months from the date of commencement of the work as per the 'Conditions of Contract' (hereinafter 'GCC' for brevity). This Court is being informed that this Conditions of Contract is generally referred to as 'General Conditions of Contract' and therefore, the abbreviation 'GCC'. It is also not in dispute that GCC stipulates 365 days from the date of completion of work as defect liability period. It is also not in dispute that the contractor furnished security as performance guarantee as required under the said contract, which was to be refunded after expiry of defect liability period.

(c) It is also not in dispute that the work was not completed within 12 months as stipulated in the said contract. It is also not in dispute that many extensions were given and the work was ultimately completed after eight extensions as far as senior O.P is concerned.

(d) Contractor complained of deliberate inaction on the part of the

NHAI in removing obstructions and not taking steps to ensure that arterial water lines and RCC pipelines were not shifted. It is the case of the contractor that the site or in other words the stretch of road in which work had to be done was ultimately made available to them only in June of 2012. NHAI while refuting that delay was owing to lethargy on its part inter-alia in removing obstructions and handing over the site in a condition which is ready for commencement of work blames the Contractor for the delay. It is also NHAI's case that it is the Contractor's responsibility to visit and examine the work site and contractor should have obtained all information that may be necessary for preparation of bid and for entering into said contract. In other words, it is the contention of NHAI that the Contractor cannot be heard to say that there was delay in handing over the site and the delay was owing to lethargy on the part of NHAI as site ought to have been visited / examined at the time of bid / said contract. Work was ultimately completed on 28.11.2012 against the original date of 03.05.2011, is NHAI's stand.

(e) In the aforesaid backdrop, contractor invoked the arbitration clause, AT was constituted (by sole arbitrator, as mentioned supra) and AT entered reference. Before AT, contractor made claims under 19 heads and those 19 heads as can be culled out from impugned Award-I are as follows:

“42.The Claimant prays for an award of a sum of Rs.112,06,45,105/- only. The details are as follows:

<i>Sl.No.</i>	<i>Abstract of claims</i>	<i>Amount (Rs.)</i>
1.	Refund of fine/liquidated damage levied	37,40,000
2.	Refund of labour welfare fund	10,27,487.00

<i>Sl.No.</i>	<i>Abstract of claims</i>	<i>Amount (Rs.)</i>
3.	Amount receivable towards water sprinkling on roads	29,89,200.00
4.	Balance amount due for dismantling Cement concrete pavement	13,81,120.00
5.	Amount receivable on account of steel rod fixation	71,831.00
6.	Balance amount for PC with seal coat in Diversion roads	3,49,749.00
7.	Payment towards dry lean concrete in lieu GSB/WMM	12,45,077.00
8.	Amount receivable on account of restoration Works for UGD	1,50,00,000.00
9.	Loss due to over head and profit	12,01,59,402.00
10.	Uprooting and filling the portions in the tree Cut portions.	70,30,411.00
11.	Cost of diversion road formation & maintenance	2,81,857.00
12.	Rework done at km 352/4 LHS	3,78,679.00
13.	Variation in bitumen quantity as per job mix	66,40,277.00
14.	Earth filling in approaches of bridges and culverts	23,88,836.00
15.	Loss of Turnover	4,79,15,934.00
16.	Payment receivable on account of Patch work attended	9,00,477.00
17.	Increase in Contract price due to compensation event	33,63,14,534.00
18.	Receivables from price adjustment of all bills	3,25,96,218.00
19.	Interest on all the above amounts at the rate 21% per annum	53,92,79,282.00
	Total	112,06,45,105.00

(f) The claims made by the Contractor as can be culled out from impugned Award-II under 9 heads are as follows:

ABSTRACT OF CLAIMS		
S.No.	Details of claim	Amount claimed Rs.
1.	Refund of fine / liquidated damages levied	38,10,000.00
2.	Tack coat over BM for laying SDBC	51,80,633.00
3.	Balance amount – Variation of bitumen quantity	37,56,524.00
4.	Filling the rock pit portion, causeway & open well	8,54,555.00
5.	Loss due to overhead and profit	7,70,15,368.00
6.	Loss of Turnover	4,79,15,934.00
7.	Increase in contract price due to compensation event:	13,99,40,444.00
8.	Price Variation	2,15,85,516.00
9.	Interest on all the above amounts at the rate of 21% per annum from the due date	20,29,78,258.00
	Total claim amount	50,30,37,235.00

(g) NHAI resisted the claims by saying, that the Contractor is not entitled to aforesaid claims, that as many as eight extensions became necessary owing to lethargy on the part of the contractor and that the contractor is not entitled to price variation or the aforesaid claims owing to various covenants in the said contract and GCC.

(h) On such rival pleadings, 13 issues were framed by AT in impugned award-I and the same are as follows :

“75. In the light of the above pleadings and counter pleadings of the parties, the tribunal framed the following issues for consideration:

1. Whether the Respondent has breached the terms of clause 21.1 of the GCC requiring the Engineer to hand over possession of all parts of the site to the Contractor?

2. In view of the letter of the Divisional Engineer, National Highways, dated 16-12-2011, sent to the Ministry of Road Transport and Highways, whether the Respondent is stopped from frivolously contending that the Claimant had delayed the execution of the Contract?

3. In view of the letter dated 16-12-11 of the Divisional Engineer, National Highways sent to the Ministry of Road Transport and Highways, whether the Respondent is liable for breach of the terms of the GCC dated 04-05-2010?

4. Whether the Claimant is entitled to compensation under clause 44 of the GCC?

5. Whether the Claimant is entitled to loss of overheads profits computed as per the Hudson formula?

6. Whether the levy of liquidated damages by the Respondent is illegal and contrary to the terms of the Contract?

7. Whether the Claimant is entitled to all the claims set out in paragraph 38 of the claim petition in view of the breach committed by the Respondent?

8. Whether the Claimant is entitled to exemplary costs in view of the delaying tactics adopted by the Respondent in the conduct of the arbitral proceedings?

9. Whether the claims claimed by the Claimant are barred by limitation?

10. Whether the Claimant by his acknowledgment dated 08-01-2013 by signing the final bill "without prejudice to any claims" has discharged the Respondent from invoking the arbitration clause?

11. Whether the Claimant has furnished the final bill including the disputed claims as required under the terms of the Contract?

12. Whether the Claimant is entitled to claim for the execution of extra/varied items carried out without approval?

13. To what other relief is the Claimant entitled?"

(i) Issues framed by AT in impugned award-II are as follows :

“1. Whether the Respondent has breached the terms of clause 21.1 of the GCC requiring the Engineer to hand over possession of all parts of the site to the Contractor?

2. Whether the Respondent has breached its obligations under the contract in handing over the possession of the contract site, free of all hindrance, to the Contractor as required under the GCC, thereby committing a fundamental breach of its obligations under the contract dated 23.09.2010?

3. Whether the Claimant is entitled to compensation under Clause 44 of the GCC on account of the default of the Respondent?

4. Whether the Claimant is entitled to loss of overhead profits computed as per the Hudson formula?

5. Whether the levy of liquidated damages by the Respondent is illegal and contrary to the terms of the contract entitling refund with interest?

6. Whether the Claimant is entitled to all claims set out in paragraph 33 of the claim petition in view of the breach committed by the Respondent?

7. Whether the Claimant is entitled to exemplary costs in view of the delaying tactics adopted by the Respondent in the conduct of arbitral proceedings?

8. Whether the claims claimed by the Claimant are barred by limitation?

9. Whether the Claimant by his acknowledgement dated 08.01.2013 by signing the final bill “Without Prejudice to any claims”, has discharged the Respondent from invoking the arbitration clauses?

10. Whether the Claimant has furnished the final bill including the disputed claims as required under the terms of contract?

11. Whether the Claimant is entitled to claim for the execution of extra/varied items carried out without approval?

12.To what other relief the Claimant is entitled?"

(j) After framing of issues, it is not in dispute that there were oral hearings and there was trial before AT. Contractor who was claimant before AT let in oral evidence. P.Arunkumar, sole proprietor carrying on business in the name and style Gowpatt Associates examined himself as C.W.1, i.e., by filing proof affidavit and as many as 161 documents were marked as Exs.C.1 to C.161 in impugned award-I. It comes out clearly from the impugned award-I that C.W.1, i.e., Mr.P.Arunkumar (carrying on business in the name and style 'Gowpatt Associates' as sole proprietor) offered himself for cross examination, but NHAI chose not to cross examine him. Besides choosing not to cross examine C.W.1, NHAI did not let in oral evidence. In other words, nobody was examined on behalf of NHAI. Though no oral evidence was let in by NHAI, 38 documents were filed and the same were marked as Exs.R.1 to R.38.

(k) After detailed appreciation of oral and documentary evidence in the arguments, AT returned a finding in impugned award-I wherein the verdict qua the 19 heads of claim made by the contractor are as follows :

“161.In the result, this tribunal awards the following sums of money for the Claims raised in this dispute:

<i>Sl.No.</i>	<i>Details of claim</i>	<i>Amount in Rupees</i>
1.	Refund of fine / Liquidated damages	37,40,000
2.	Refund of Labour Welfare Fund	10,27,467
3.	Amount receivable towards water Sprinkling rates	29,89,200

4.	Balance due for dismantling	11,41,421
5.	Amount receivable on account of Fixation of steel rods	54,417
6.	Balance amount for PC for Seal Coat in Diversion Roads	Rejected
7.	Payment towards dry lean concrete in lieu of GSB/WMM	6,55,700
8.	Amount receivable on account of Restoration works for UGD	1,50,00,000
9.	Loss due to overheads and profits	9,45,81,091
10.	Uprooting & filling the portion in the tree cut portions	54,44,096
11.	Cost of diversion road formation And maintenance	2,32,940
12.	Rework done on KM 352/4 LHS	Rejected
13.	Variation in Bitumen quantity as Per job mix	45,39,927
14.	Earth filling in approaches on bridges And culverts	16,28,751
15.	Loss of Turn over	Rejected
16.	Payments receivable on account of Work attended	Rejected
17.	Increase in Contract price due to Compensation event and receivables From price adjustment of all Bills.	22,20,09,548
	Total amount awarded	35,30,44,558

(I) To be noted, claims under heads 17 and 18 made by the contractor have been rolled into one and shown as serial No.17 by AT. The claim under head No.19 is interest that was claimed by the contractor at the rate of 21% p.a. and this has been dealt with in a separate paragraph. Therefore, while there are 19 heads of claim made by contractor, the verdict as can be culled out from the impugned award-I shows 17 serial numbers. However, fact of the matter is, all 19 heads of claim have been examined and

a verdict has been returned one way or the other on all 19 heads of claim. With regard to interest, suffice to say that while the claim of the contractor was 21% interest, AT awarded interest at the rate of 12% p.a. from the date on which the amount became due, i.e., when the work was executed upto 26.6.2014 being the date of appointment of Predecessor sole arbitrator. Thereafter, from 27.6.2014, AT has awarded interest at the rate of 18% p.a. from the said date, i.e., 27.6.2014 to the date of realization.

(m) With regard to impugned award-II, relevant portion regarding answers to heads of claims reads as follows :

“64.In the result, this Tribunal awards the following sums of money for the Claimant:

i)	Refund of fine / Liquidated Damages levied by the Respondent	Rs.38,10,000
ii)	Tack coat over Bitumen for laying SDBC	Rs.46,17,642
iii)	Balance amount – variation in bitumen quality	Rs.37,56,524
iv)	Filling the rockpit portion, causeway & open well	Rs.7,06,243
v)	Loss due to over head and profit	Rs.6,38,83,716
vi)	Loss of turn over	Rs.NIL
Vii)	Increase in Contract price due to compensation event	Rs.9,09,00,388
	Total amount awarded	Rs.16,76,74,513

(n) Aggrieved, impugned awards have been assailed by NHA and

instant senior and junior O.Ps have been filed. Specific grounds on which impugned awards were assailed and discussion on the same are set out infra under the caption 'Discussion and Dispositive Reasoning'.

9 DISCUSSION AND DISPOSITIVE REASONING :

(a) Captions to senior and junior O.Ps say that the respective O.Ps have been filed under Section 34 of A and C Act. Adverting to this, learned Solicitor submitted that grounds on which instant O.Ps are predicated fall under Section 34(2)(a)(iv) and Section 34(2)(b)(ii) read with clauses (ii) and (iii) of Explanation-1 thereto. However, in the course of arguments, as submissions touched upon patent illegality also, this court made it clear that impugned awards will be tested under section 34(2-A) also. If these provisions of law are translated as grounds on which instant O.Ps are predicated, they would read as follows :

(i) Impugned awards contain decisions on matters beyond the scope of submission to arbitration by dealing with disputes which do not fall within the terms of 'submission to arbitration'.

(ii) Impugned awards are in conflict with public policy as they are in contravention with the fundamental policy of Indian law;

(iii) Impugned awards are in conflict with public policy of India as they are in conflict with the most basic notions of morality or justice;

(iv) Impugned awards are vitiated by patent illegality

appearing on the face of the award.

(b) With regard to aforementioned four grounds on which instant O.Ps are predicated, while the first ground, i.e., ground (i) should be tested within the contours of section 34 of A and C Act, second and third grounds, i.e., grounds (ii) and (iii) are circumscribed further by Explanation 2 to section 34(2)(b)(ii), which makes it clear that while so testing, it shall not entail a review on the merits of the dispute. Likewise, 4th ground, i.e., ground (iv) regarding patent illegality will be circumscribed by proviso therein, wherein and whereby a mere erroneous application of law cannot lead to patent illegality appearing on the face of the award and there shall be no reappraisal of evidence.

(c) Contours and principles which abridge the test qua three of the four grounds have been set out. With this in mind, this Court now proceeds to examine the submissions made and grounds on which impugned awards were assailed.

(d) The grounds of attack projected by learned Solicitor can be summarized as follows :

(i) Impugned awards have bypassed clauses 24 and 25 of GCC and therefore, impugned awards travel into forbidden areas resulting in decisions on matters beyond the scope of submission;

(ii) Having sought eight extensions, there is a clear estoppel against contractor from making various claims

which the AT has examined and this is clearly in contravention of fundamental policy of the Indian law;

(iii) Impugned awards are in excess of the original contract value and therefore, they are in conflict with most basic notions of morality or justice and consequently are in conflict with public policy of India;

(iv) Adverting to Ex.C.158 on which claimant placed reliance, which is a letter from the Superintending Engineer of NHAI, Salem, on a demurrer, even if the contractor is so entitled, it is only Rs.3,25,96,218.68 (in other words, little over Rs.3.25 Crores), whereas impugned arbitral award-I has awarded sums of money in excess of the total value of the contract and it is therefore in conflict with most basic notions of morality and justice and consequently, it is in conflict with public policy of India. Price fixed is only when the work is completed within 12 months and it will not apply once there is extension beyond 12 months period, this aspect has been misread in the impugned awards resulting in patent illegality appearing on the face of impugned awards.

(e) Mr.Sharath Chandran, learned counsel representing learned counsel for Caveator submitted that the question regarding the contractor not being entitled to price variation once there is extension of time period has

been repeatedly raised by NHAI in similar contracts and it has been negated by Hon'ble Courts. Extending his argument, learned counsel submitted, that this issue was raised in similar disputes by the NHAI in similar contracts culminating in arbitral awards which were carried to Delhi High Court by way of applications under Section 34 of A and C Act, that Delhi High Court (Hon'ble Single Judges) negated this, that this plea was confirmed by Division Benches of Delhi High Court in intra-court appeals under section 37 of A and C Act and Hon'ble Supreme Court refused to interfere in Special Leave Petitions when the matter was carried to Supreme Court.

(f) In one such case, after this entire trajectory of Single Judge, Division Bench, refusal to interfere by Hon'ble Supreme Court, there was also full satisfaction of execution petition by making payment to Contractor. In support of this submission, learned counsel referred to a judgment of Delhi High Court in **National Highways Authority of India Vs. Progressive Construction Ltd.** made in O.M.P.No.735 of 2012 dated 19.05.2014 (hereinafter 'Progressive Construction case' for clarity).

(g) In Progressive Construction Case, according to learned counsel for Caveator, in a similar contract with similar covenants and clauses, same issue of whether the contractor is entitled to price variation after extension of time originally contemplated when the contract was given came up at the instance of NHAI, there was an award in favour of the contractor, award being dated 21.3.2012. This award was assailed by NHAI in the Delhi High Court vide OMP No.735 of 2012 and this OMP No.735 of 2012 under Section 34 of A and C Act was dismissed by a detailed order dated 19.05.2014 by Delhi

High Court. According to learned counsel for Caveator, this was carried in appeal by way of intra-court appeal vide FAO (OS) No.401 of 2014. The same came to be dismissed on 8.9.2014. NHAI carried it to Hon'ble Supreme Court by way of Special Leave to Appeal (C) No.51 of 2015 and that came to be dismissed on 16.01.2015. Thereafter, proceedings in the execution court shows that an execution petition has been disposed of as satisfied vide proceedings dated 07.07.2015.

(h) Learned counsel submitted that this is not the only case where NHAI's such plea has been negated. Learned counsel referred to another judgment of the same Progressive Constructions case and therefore, this shall be referred to as 'Progressive Construction-II'. This case is reported in **2015 SCC OnLine Del 7887** being **National Highways Authority of India Vs. Progressive Constructions Ltd.** This was carried in appeal by way of intra-court appeal vide FAO (OS) No.242 of 2015, which was dismissed. Some other judgments including one judgment of a Division Bench of our High Court were referred to. Those are as follows :

(i) **Vidhyadhar Vs. Manikrao and another** [(1999) 3 SCC 573];

(ii) **Muddasani Venkata Narsaiah Vs. Muddasani Sarojana** [(2016) 12 SCC 288];

(iii) **General Manager, Northern Railway Vs. Sarvesh Chopra** [(2002) 4 SCC 45];

(iv) **K.N.Sathyapalan Vs. State of Kerala** [(2007) 13 SCC 43];

(v) **Assam State Electricity Board Vs. Buildworth Private Limited** [(2017) 8 SCC 146];

(vi) **National Highways Authority of India Vs. R.N.Shetty & Company [(2015) 220 DLT (CN) 19];**

(vii) **The Commissioner, Transport Vs. BSC-C & C JV [O.M.P.(Comm) No.567 of 2016, dated 16.12.2016];**

(viii) **Commissioner, Transport Vs. BSC-C&C JV [FAO (OS)(Comm) No.63 of 2017, dated 12.05.2017];**

(ix) **Commissioner, Transport Department Vs. BSC-C & C JV [SLP (Civil) Diary No.21477 of 2018, dated 13.7.2018];**

(x) **National Highways Authority of India Vs. Hindusan Construction Co. Ltd. [OMP No.260 of 2015][2017 SCC OnLine Del 6631];**

(xi) **NHAI Vs. Hindustan Construction Co. Ltd. [FAO (OS) No.116 of 2017] [2017 SCC OnLine Del 10273];**

(xii) **National Highways Authority of India Vs. Afcons-Apil Joint Venture [OMP (Comm)No.10 of 2018] [2018 SCC OnLine Del 7194];**

(xiii) **National Highways Authority of India Vs. AFCONS APIL(JV) [FAO (OS) (Comm) No.110 of 2018, dated 18.05.2018];**

(xiv) **Superintending Engineer Vs. K.A.Thomas [C.M.A.(MD)No.1285 of 2014] [2016 SCC OnLine Mad 9582];**

(xv) **Mumbai Metropolitan Region Development Authority Vs. Unity Infraproject Ltd. [2008 SCC OnLine Bom 190].**

- (i) Learned Solicitor pressed into service Lion Engineering case

being ***Lion Engineering Consultants Vs. State of Madhya Pradesh*** reported in **(2018) 16 SCC 758**. Learned Solicitor pressed into service this ***Lion Engineering case*** to say that AT has travelled beyond the scope of submission to arbitration and impugned awards contained decisions on matters beyond the scope of submission and this has been held to be a good ground to set aside an arbitral award under section 34 of A and C Act.

(j) Learned Solicitor also pressed into service ***Madhya Pradesh Power Generation Company Limited Vs. ANSALDO Energia Spa*** reported in **(2018) 16 SCC 661**. Adverting to paragraphs 22 to 24, learned Solicitor submitted that public policy has been elucidated by Hon'ble Supreme Court and if the principles elucidated therein are applied to the instant case, NHAI is entitled to have impugned awards set aside.

(k) It would be appropriate to advert to the case laws that were pressed into service by both sides.

(l) With regard to case laws pressed into service by learned counsel for Caveator, a perusal of Progressive Constructions case reveals that facts are similar, clauses and covenants are similar and issues were also similar. To be noted, Progressive Constructions case was carried to Supreme Court, Supreme Court refused to interfere and subsequently, there has also been full satisfaction of the award in execution court by paying out the contractor. Perusal of case laws brings to light that issues are clearly similar and comparable. Learned Solicitor attempted to make a distinction by saying that value of the contract is different and therefore, Progressive Constructions case cannot be applied to instant case, but was unable to point out material

before this court to carve out such a distinction. Therefore, I am inclined to proceed on the premise that Progressive Constructions case is similar to the case on hand.

(m) Be that as it may, with regard to case laws cited by learned Solicitor, as far as Lion Engineering case is concerned, in the considered view of this court, Lion Engineering case is an authority for the proposition that if a party to proceedings before AT has not raised an issue regarding arbitrability or jurisdiction under Section 16 of A and C Act, it can still raise such an issue for the first time under Section 34 of A and C Act.

(n) Earlier, Hon'ble Supreme Court vide **MSP Infrastructure Ltd. Vs. M.P. Road Development Corpn. Ltd.** reported in (2015) 13 SCC 713 held that a party who has not raised objections available to a party under section 16 of A and C Act cannot subsequently raise for the first time in Section 34 proceedings of A and C Act. This aspect of **MSP Infrastructure Ltd.** was set aside by a Larger Bench of Hon'ble Supreme Court in **Lion Engineering case**. To be noted, **MSP Infrastructure Ltd.** was rendered by Hon'ble Supreme Court vide a judgment made by a Bench where the bench strength is Two. In **Lion Engineering case**, the bench strength was Three and in **Lion Engineering case**, the aforesaid principle laid down in **MSP Infrastructure Ltd.** was set aside. Therefore, as mentioned supra, in the considered view / opinion of this Court, **Lion Engineering case** is an authority for the proposition that a party which has not raised preliminary objection available to it under section 16 of A and C Act, can raise it for the first time subsequently in proceedings under Section 34 of A and C Act. Be

that as it may, the question regarding whether impugned awards of AT contained decisions on matter beyond the scope of submission is to be examined.

(o) Having said this, with regard to second case law pressed into service by learned Solicitor being **ANSALDO Energia Spa** case, a perusal of paragraphs to which attention of this Court was drawn, namely paragraphs 22 to 24 reveals that Hon'ble Supreme Court has gone into the principle governing what is public policy by placing reliance on **Renusagar Power Co. Ltd. Vs. General Electric Co.**, reported in **1994 Supp (1) SCC 644** and **ONGC Ltd. Vs. Saw Pipes Ltd.**, reported in **(2003) 5 SCC 705** and more importantly, **ONGC Ltd. Vs. Western Geco International Ltd.**, reported in **(2014) 9 SCC 263**. To be noted, the celebrated **Western Geco International Ltd.**, was subsequently reiterated by Hon'ble Supreme Court in the oft quoted judgment in **Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**.

(p) Learned counsel for Caveator advertng to an addenda to 246th Law Commission Report which is also in the form of a communication sent under cover of a letter dated 06.02.2015 from the Law Commission, bearing reference D.O.No. 6(3)/238/2014-LC(LS), submitted that this is downloaded from the official website of Government of India and it is effectively a supplementary to the 246th Report of the Law Commission. Advertng further to this, learned counsel submitted that expansive and wide interpretation given to 'public policy' inter-alia in **Western Geco International Ltd.**, and

earlier in **Saw Pipes Ltd.**, necessitated the inclusion of Explanation 2 to section 34(2)(b)(ii) and proviso to section 34(2-A) of A and C Act. Stating so, learned counsel submitted that therefore, **Western Geco International Ltd.**, which has been reiterated in **Associate Builders** cannot be pressed into service by learned Solicitor.

(q) Having carefully considered these submissions, this Court is of the considered view that a perusal of the language in which section 34(2)(b)(ii) and sub-clause (ii) of Explanation 1 thereto is couched reveals that an arbitral award being in contravention with the fundamental policy of Indian law still forms part of the expression 'conflict with the public policy of India', occurring in section 34(2)(b)(ii) of A and C Act. Therefore, the elucidation of Hon'ble Supreme Court with regard to what is 'fundamental policy of Indian law' can certainly be pressed into service, but when it is applied in the post 23.10.2015 scenario, application of these principles by this Court while testing impugned awards will be clearly controlled and restricted by Explanation 2 which clearly says that such test shall not entail a review of impugned awards on the merits of the dispute. To be noted, this has already been alluded to by this Court supra.

(r) It was submitted by learned counsel for Caveator that **ANSALDO Energia Spa** case rendered on 16.04.2018 has not considered the **GAIL (India) Limited** case being **HRD Corporation (Marcus Oil and Chemical Division) Vs. GAIL (India) Limited** rendered earlier on 31.08.2017 and reported in **(2018) 12 SCC 471**. Referring to **GAIL (India) Limited** case, learned counsel drew my attention to paragraph 18 of the said

judgment, which reads as follows :

“18. Shri Divan is right in drawing our attention to the fact that the 246th Law Commission Report brought in amendments to the Act narrowing the grounds of challenge coterminous with seeing that independent, impartial and neutral arbitrators are appointed and that, therefore, we must be careful in preserving such independence, impartiality and neutrality of arbitrators. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC Ltd. v. Saw Pipes Ltd.* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] has been expressly done away with. So has the judgment in *ONGC Ltd. v. Western Geco International Ltd.* [*ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Co. Ltd. v. General Electric Co.* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] . “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders v. DDA* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 :

(2015) 2 SCC (Civ) 204], making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one. “

(s) As this Court is only applying principles as elucidated, but within restrictions brought in post 23.10.2015 (to be noted, instant O.Ps were argued based on Section 34 of A and C Act as it exists post 23.10.2015), further discussion in this regard and delving more into this aspect of the matter may not be necessary.

(t) Learned counsel Mr.Sharath Chandran, submitted that amendments to A and C Act which were brought in with effect from 23.10.2015 flow from Report No.246 of the Law Commission of India which was submitted to the Government on 05.08.2014. It was the pointed submission of learned counsel that post submission of Report No.246 on 05.08.2014, Law Commission of India submitted a supplementary to Report No.246 in February, 2015. Adverting to this supplementary to Report No.246 which was placed before this Court, it was submitted that Explanation 2 to section 34(2)(b)(ii) and proviso to section 34(2-A) were incorporated only to ensure that the expression 'fundamental policy of Indian law' is narrowly construed.

(u) From the discussion and narrative thus far, it emerges clearly that section 34(2)(b)(ii) and section 34(2-A) as originally recommended in Report No.246 in August of 2014 read as follows :

“Section 34(2)(b)(ii) :

S.34(2)(b)(ii) the arbitral award is in conflict with the public policy of India.

Explanation.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if:

(a)the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81;

(b)it is in contravention with the fundamental policy of Indian law; or

(c)it is in conflict with the most basic notions of morality of justice.

Section 34(2-A) :

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.”

- (v) A perusal of aforesaid supplementary to Report No.246 of Law Commission of India reveals that section 34(2)(b)(ii) and section 34(2-A) as recommended in February 2015 are as follows :

“Section 34(2)(b)(ii) :

S.34(2)(b)(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1 – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if :

(a)the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81;

(b)it is in contravention with the fundamental policy of India

law; or

(c) it is in conflict with the most basic notions of morality or justice.

Explanation 2 – For the avoidance of doubt the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Section 34(2-A) :

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or re-appreciation of evidence.”

(w) On the aforesaid basis, it was contended that learned Solicitor cannot rely on case laws and judgments rendered prior to 23.10.2015. In other words, adverting to supplementary to Report No.246, it was submitted that crucial expressions, such as 'public policy', 'fundamental policy of Indian law' and 'most basic notions of morality or justice' were given wide / expansive meaning by judgments rendered prior to 23.10.2015. Explanation 2 to section 34(2)(b)(ii) and proviso to section 34(2-A) were introduced only to ensure that these expressions are construed narrowly is learned counsel's say. On this basis, it was contended that judgments rendered prior to 23.10.2015 cannot be pressed into service by learned Solicitor.

(x) This Court has very carefully and closely examined this argument. In the considered view of this Court, learned counsel for Caveator / respondent is correct in arguing that Explanation 2 to section 34(2)(b)(ii) and

proviso to section 34(2-A) were brought in to ensure that aforementioned crucial expressions, i.e., 'public policy', 'fundamental policy of Indian law' and 'most basic notions of morality or justice' are narrowly construed. However, this court in its considered view is unable to persuade itself to believe that judgments rendered on section 34 of A and C Act prior to 23.10.2015 with regard to aforesaid expressions cannot be relied on. Reason is, a very careful examination of Explanation 2 to section 34(2)(b)(ii) and proviso to section 34(2-A) reveals that they have neither narrowed down the explanation of 'public policy' nor taken away 'patent illegality' as a ground available for assailing arbitral awards under section 34. On the contrary, without narrowing down the explanation of expressions 'public policy' as contained in Explanation 1 and without taking away patent illegality as a ground available for assailing an arbitral award as contained in section 34(2-A), these provisions have narrowed down the scope and nature of tests which a Court exercising powers under section 34 should apply for examining whether an arbitral award is hit by the vice being in conflict with public policy / contravention with the fundamental policy of Indian law and as to whether it is vitiated by patent illegality on the face of the award. While applying the tests with regard to conflict with public policy / contravention with fundamental policy of Indian law, the Court cannot embark upon review on the merits of the dispute. In other words, while testing whether an arbitral award is in conflict with public policy / contravention with the fundamental policy of Indian law, Court should do so without embarking upon the exercise of a review on the merits of the dispute.

(y) As far as patent illegality is concerned, while patent illegality appearing on the face of the award is still available as a ground to set aside an arbitral award, owing to the proviso, i.e., proviso to section 34(2-A) while testing arbitral award in search of an answer to whether it is vitiated by patent illegality appearing on the face of the award, Court should refrain from answering this question in the affirmative if it is a mere erroneous application of law. The other limiting factor while testing an arbitral award qua patent illegality appearing on the face of the award is, the Court cannot embark upon an exercise of reappreciation of evidence.

(z) To put it differently, aforesaid Explanation 2 to section 34(2)(b)(ii) and proviso to section 34(2-A) restrict the manner in which litmus tests are to be applied. Therefore, it cannot be gainsaid that case laws explaining these expressions which were rendered prior to 23.10.2015 cannot be looked into at all. Be that as it may, one more aspect that has to be borne in mind while applying these case laws rendered prior to 23.10.2015 is to ensure that it is within the contours and confines of Explanation of public policy as contained in Explanation 1. As Explanation 1 still contains contravention with fundamental policy of Indian law as one of the facets of being in conflict with public policy of India, judgments rendered prior to 23.10.2015 which are elucidations of the expression 'fundamental policy of Indian law' can also be looked into, but the application of the same should be within the confines of Explanation 1 and the test should perambulate within the contours of Explanation 2. Likewise, patent illegality is still available, i.e., post 23.10.2015 also as a ground to assail an arbitral award as mentioned

supra, but while applying the test, the test should be applied by adhering to the two restrictions adumbrated in the proviso, i.e., proviso to section 34(2-A). As mentioned supra, one restriction is, mere erroneous application of law has to be eschewed and the other restriction is, there cannot be reappraisal of evidence.

(aa) This discussion on elucidation of aforesaid crucial expressions and case laws on the same rendered prior to 23.10.2015 have become necessary owing to pointed submissions made by learned counsel for Caveator / respondent by relying on supplementary to Report No.246 of Law Commission of India.

(ab) Be that as it may, in the instant case, impugned awards have been made post 23.10.2015 and obviously, instant O.Ps have been filed post 23.10.2015. Impugned awards are dated 27.10.2017 and instant O.Ps have been presented in this Court on 24.01.2018. However, the date of commencement of arbitral proceedings is somewhere in 2014, i.e., prior to 23.10.2015. As impugned awards have been tested on the basis of submissions made by learned Solicitor, the question as to whether section 34 of A and C Act as it existed prior to 23.10.2015 should be applied or whether section 34 as it exists in the statute book post 23.10.2015 will operate is left open for being decided in an appropriate case, where there is serious contest in this regard. In the instant case, the contest was only with regard to Explanation 2 to section 34(2)(b)(ii) and proviso to section 34(2-A) and therefore, the same have been dealt with leaving the aforesaid question open.

(ac) A careful analysis of submissions made before this Court, as captured thus far in the narrative supra, will reveal that most relevant clauses are clause 13 in Preparation of Bids and Clauses 24 and 25 and Clauses 21 and 28 of GCC which read as follows :

“Clause 13 in preparation of bids :

“13.Bid Prices

13.1.The contract shall be for the whole works as described in Sub-Clause 1.1, based on the priced Bill of Quantities submitted by the Bidder.

13.2.The bidder shall fill in rates and prices and line item total (both in figures and words) for all items of the Works described in the Bill of Quantities alongwith total bid price (both in figures and words). Items for which no rate or price is entered by the bidder will not be paid for by the Employer when executed and shall be deemed covered by the other rates and prices in the Bill of Quantities. Corrections, if any, shall be made by crossing out, initiating, dating and rewriting.

13.3.All duties, taxes, and other levies payable by the contractor under the contract, or for any other cause shall be included in the rates, prices and total Bid Price submitted by the Bidder.

13.4.The rates and prices quoted by the bidder shall be fixed for the duration of the Contract and shall not be subject to adjustment on any account (For contracts upto 12 months period).

OR

13.4.The rates and prices quoted by the bidder are subject to adjustment during the performance of the Contract in accordance with the provisions of Clause 47 of the Conditions of Contract (For contracts more than 12 months period).”

Clauses 24 and 25 and Clauses 21 and 28 of GCC :

24.Disputes

24.1. If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Dispute Review Expert within 14 days of the notification of the Engineer's decision.

25.Procedure for Disputes

25.1. The Dispute Review Expert (Board) shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2. The Dispute Review Expert (Board) shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Dispute Review Expert. Either party may give notice to the other to refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of the Dispute Review Expert's written decision. If neither party refers the dispute to arbitration within the next 28 days, the Dispute Review Expert's decision will be final and binding.

25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

21.Possession of the Site

21.1. The Employer shall give possession of all parts of the Site to the Contractor. 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.

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 35 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.

28.3. The Engineer shall within 14 days of receiving full justification from the contractor for extension of Intended Completion Date refer to the Employer his decision. The Employer shall in not more than 21 days communicate to the Engineer the acceptance or otherwise of the Engineer's decision. If the Employer fails to give his acceptance, the Engineer shall not grant the extension and the contractor may refer the matter to the Dispute Review Expert under Clause 24.1."

(ad) A careful analysis of aforesaid covenants finds this Court being unable to persuade itself that impugned awards contained decisions on matters beyond the scope of submission to arbitration.

(ae) With regard to challenge on the ground that impugned awards being in conflict with public policy of India owing to being in contravention with the fundamental policy of the Indian law, a careful analysis of the elucidation of fundamental policy of the Indian law reveals that three juristic doctrines have been set out by Hon'ble Supreme Court, albeit with a caveat that these three juristic principles are not exhaustive. Three juristic principles / doctrines

carved out by Hon'ble Supreme Court with regard to the fundamental policy of the Indian law are (a) judicial approach, (b) principles of natural justice and (c) irrationality / perversity.

(af) With regard to judicial approach, an arbitral award to pass the muster of section 34 should show fidelity of judicial approach. A detailed perusal of instant impugned awards reveal that it cannot be gainsaid that there is no fidelity of judicial approach, more so as each one of the issues have been exhaustively and elaborately dealt with in the light of the evidence before AT. In this regard, this court cannot lose site of the fact that the contractor, i.e., proprietor examined himself as C.W.1 and offered himself for cross examination, but NHAI chose not to cross examine C.W.1. This is articulated in paragraph 76 of impugned award-I and the same reads as follows :

“76....Though CW1 offered himself for cross-examination, the Respondent did not choose to cross-examine him at all.....”

(ag) This position before AT (to be precise, this trajectory before AT) is not in dispute before this Court. NHAI having chosen not to cross examine C.W.1 and having allowed as many as 161 documents to be marked through C.W.1 by consent, cannot now be heard to contend that impugned awards lack fidelity of judicial approach.

(ah) Second principle being tested turns on *audi alteram partem* and

reasons being given in an award. In the light of grounds of challenge, this is not of any significance in the instant case.

(ai) Third juristic principle is irrationality / perversity and it has been held by Hon'ble Supreme Court that irrationality / perversity should be tested on the time honoured Wednesbury principle of reasonableness. NHAI have not even cross examined C.W.1 and having allowed more than 150 documents (to be precise, 161 documents) to be marked by consent by the contractor cannot now be heard to contend that impugned awards did not pass the muster of Wednesbury test of reasonableness. Be that as it may, without resting on this aspect of the matter, this Court also examined the impugned awards carefully. A careful examination and analysis of impugned awards reveals that conclusions which impugned awards arrived at definitely do not fall in the category as those which no reasonable person will arrive at on the basis of materials which were before AT. Therefore, impugned awards are certainly not in contravention of the fundamental policy of the Indian law.

(aj) This takes this Court to the next question as to whether impugned awards are in conflict with the most basic notions of morality or justice. The point that was urged in this regard is that impugned awards have acceded to the claims which are far in excess of the value of the contract itself. Merely because, award quantum is more than the value of the contract, it cannot lead to a conclusion that it is in conflict with most basic notions of morality or justice. To be noted, as already mentioned more than once supra and these principles have been tested keeping in mind explanation-2 that

such test shall not entail a review on the merits of the dispute.

(ak) This takes us to the question as to whether there is any patent illegality on the face of the award. Before this court proceeds further, it is to be made clear that in the considered view of this Court, the expression 'patent illegality appearing on the face of the award' , occurring in section 34(2-A) of A and C Act necessarily means a illegality which is so obvious that no inferential process need to be applied for detecting the same. In other words, an illegality which is so patent and obvious which does not require any inferential process to be applied to arrive at a conclusion that it is illegal, will fall in the category of patent illegality appearing on the face of the award. A careful reading of impugned awards leads this court to a conclusion that this court is unable to find any such patent illegality on the face of the award. To be noted, this test of patent illegality has also been applied keeping in mind the proviso that a mere erroneous application of law cannot be the basis for setting aside an award on the ground of patent illegality. The other restriction that reappraisal of evidence is impermissible in testing the patent illegality plea. When patent illegality plea is applied keeping in view these two restrictions and also the manner in which this court understands the expression 'patent illegality appearing on the face of the award, which has been alluded to supra, this Court is unable to persuade itself to believe that impugned awards are vitiated by patent illegality appearing on the face of the award and are therefore liable to be set aside under section 34(2-A) of A and C Act.

(al) This takes us to the last limb of discussion. This Court reminded

itself that Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796 has held Section 34 is a summary procedure. This ***Fiza Developers*** principle has been reiterated by Hon'ble Supreme Court in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in (2018) 9 SCC 49 and it has been held that ***Fiza Developers*** principle is a step in the right direction towards expeditious disposal of proceedings under section 34 of A and C Act.

(am) On a close and careful examination of the trajectory of the march of law with regard to A and C Act, all of which have been alluded to supra (including the supplementary to 246th Law Commission Report dealing with Development post-Report No.246), this Court is of the considered view that section 34 by itself is a very delicate and fine balance between sanctity of finality of arbitral awards and sacrosanctity of judicial review. To put it differently, it is fine and delicate balance between the need to give finality to arbitral awards, 'Alternate Disputes Resolution Mechanism' ('ADR Mechanism' for brevity) and one of the most sacrosanct functions of Courts, namely judicial review. This fine balance in section 34 rests on a sublime judicial philosophy and that philosophy is 'minimum judicial intervention in ADR Mechanism'.

(an) This Court has applied section 34 of A and C Act and perambulated within the contours and confines of the same keeping in mind the ***Fiza Developers*** principle and aforementioned view of delicate balance between finality or arbitral awards and judicial review. To put it differently, it is

a nuanced balance of legal tussle between finality and fallibility of arbitral awards.

10 **CONCLUSION :**

The above discussion and dispositive reasoning leads this Court to the conclusion that no grounds have been made out for interference with the impugned awards.

11 **DECISION :**

Both O.Ps., namely O.P.Nos.456 and 457 of 2018 are dismissed. Considering the nature of the matter and the trajectory of the hearing, parties are left to bear their respective costs. Consequently, connected applications are closed.

02.04.2019

Speaking order

Index : Yes

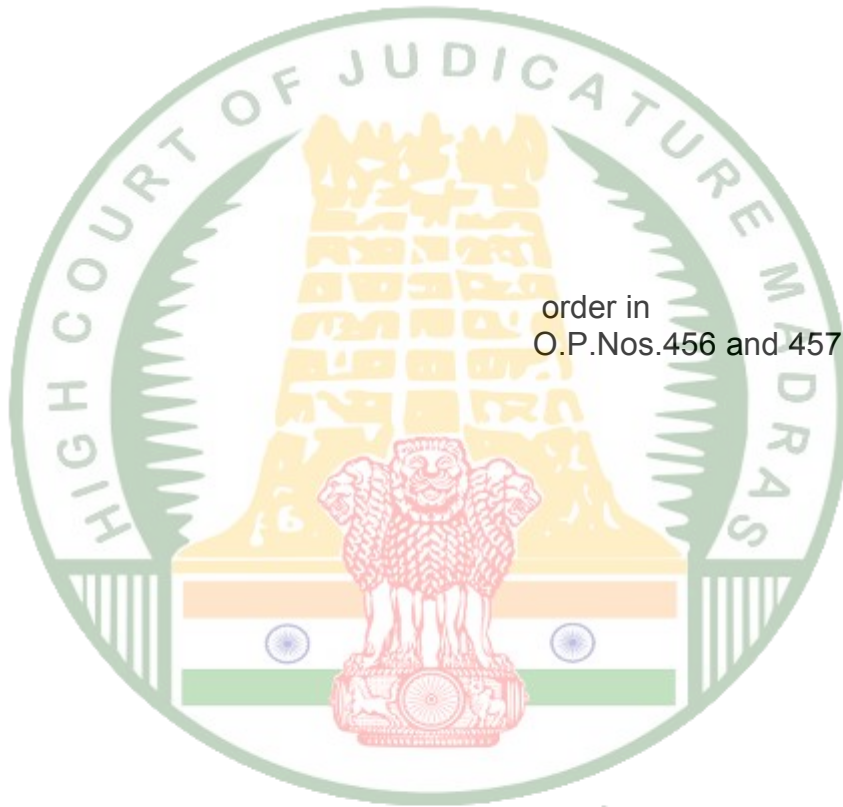
vvk

सत्यमेव जयते

WEB COPY

M.SUNDAR, J.

vvk



order in
O.P.Nos.456 and 457 of 2018

सत्यमेव जयते

02.04.2019

WEB COPY