

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.228 of 2014

The Project Director,
Tamil Nadu Road Sector Project,
TNMB Building I Floor,
171, South Kesavaperumal Puram,
Off Greenways Road,
R.A.Puram, Chennai-600 028.

.. Petitioner

Vs.

1.M/s.JSR Constructions Pvt. Ltd., Bangalore,
represented by Power of Attorney Holder,
Thiru R.Panneerselvam,
114-G1, Green House Apartments,
Mc Donald's Road,
Cantonment,
Trichy-620 001.

2.Mr.P.Sridharan,
Presiding Arbitrator,
Chief Engineer (H) Retd.,
Plot No.50, Door No.10, U.R. Nagar Extension,
Anna Nagar West Extension,
Chennai-600 101.

3.Mr.K.G.Sukumaran,
Arbitrator,
Chief Engineer (H) (Retd.),
Flat D-2, Jains Eiffel Garden,
Arcot Road,
Vadapalani, Chennai-600 026.

4.Mr.S.Arunachalam,
Arbitrator, Chief Engineer (H) (Retd),
Plot No.59, 3rd Street, Soumya Nagar,
Medavakkam, Chennai-600 100.

.. Respondents

This Arbitration original petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the arbitration award dated 23.11.2013 in respect of claims 1, 2, 3, 4, 5(i) and interest passed by the Arbitration Tribunal and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.M.Sricharan Rangarajan,
Spl.G.P.(C.S.)

For Respondents : Mr.D.Balaraman for R-1

ORDER

Instant 'Original Petition' ('O.P' in singular and 'O.Ps' in plural for brevity) has been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) assailing an 'Arbitral Award dated 23.11.2013' (hereinafter 'impugned award' for brevity) made by a three member 'Arbitral Tribunal' ('AT' for brevity) constituted by three technocrats.

2 Instant O.P has been filed under section 34 of 'A and C Act'. 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' (underlining made by this Court to supply emphasis and highlight). 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 As mentioned supra, it is a three member AT. The impugned award dated 23.11.2013 has been made by a 2 : 1 majority. While the Presiding Arbitrator and one Arbitrator wrote the majority award, one member wrote the dissenting award. It is made clear that this Court exercising powers under section 34 of A and C Act will not be going into the question of which of the views is acceptable. In other words, it is made clear that there is an award, i.e., impugned award before this court. That impugned award is not a unanimous award, but it is a 2 : 1 majority award and whether impugned award is liable to be set aside within the contours of section 34 of A and C Act will be the limited scope of the instant O.P.

4 The entire lis pertains to a contract dated 23.06.2008 between the 'Tamil Nadu Road Sector Project', petitioner in the instant O.P, which shall hereinafter be referred to as 'RSP' and first respondent 'J.S.R. Constructions Pvt. Ltd.', which shall be referred to as 'contractor' for brevity. The agreement dated 23.6.2008 between RSP and contractor is for 'Construction of Ramanathapuram Bypass Contract No:TNRSP 05'. This being the fulcrum of the lis, the same shall be referred to as 'said contract'.

5 Prior to said contract, a tender was floated by RSP, contractor submitted a bid on 6.3.2008, the same was accepted by RSP on 8.5.2008 and said contract came to be executed on 23.6.2008. There is no dispute or disagreement that work under said contract (which shall hereinafter be referred to as 'said work' for convenience and clarity) had to be completed by 22.12.2009, but it was ultimately completed on 31.10.2010 and 31.01.2011. To be noted, there are two dates of completion as there are two sections of work. While one section of work was completed on 31.10.2010, the other section was completed on 31.01.2011. RSP had also issued completion certificate regarding the two sections and the completion certificates are dated 25.2.2011 and 28.02.2011.

6 Thereafter, it is the case of RSP that cracks were noticed with regard to work done and RSP requested contractor to do the needful. Correspondence was exchanged between RSP and contractor in this regard. State counsel, adverting to correspondence in this regard between RSP and contractor, submitted that till 27.02.2012, the contractor was singing a tune to the effect that defect will be set right and made good, whereas suddenly, contractor started saying that work has been completed in accordance with contract.

7 RSP sought to invoke bank guarantee given by the contractor on 30.03.2012 and this is the genesis of the arbitral dispute out of which instant O.P arises. Contractor sent a communication dated 11.04.2012 invoking arbitration clause and prior to that, on 09.04.2012, in O.A.No.277 of 2012 under section 9 of A and C Act, this court had granted an order of

interim injunction restraining RSP from invoking bank guarantee with a condition that contractor should keep the same alive. Ultimately, the three member AT was constituted and first hearing was on 30.05.2012.

8 Before AT, contractor was the sole claimant and RSP was the lone respondent. Contractor made claims / disputes under five heads and the same as can be culled out from the impugned award reads as follows :

“(a)Withheld payment legitimately due ignoring the fact that the distress in the retaining wall of road over bridge is due to the inadequacy in the design approved by the Respondent;

(b)Extension of defect liability period and invoking clause 36.1 of GCC on non existing liability ignoring the embankment protection was omitted by the Respondent in spite of early warning by the Claimant and the Engineer;

(c)Rejecting the claim for payment of revised rates for concrete for box culvert issued under a variation order instead of minor bridge in the original BOQ ignoring the compensation event clause of GCC;

(d)Levy of interest on mobilization advance on the alleged ground of belated repayment in disregard of the provisions of contract that the mobilization advance is interest free and

(e)Claiming damages for loss of over heads and profit and turn over that arose out of prolongation of contract due to the breaches committed by the Respondent.”

9 Aforesaid five heads of claims were disputed by RSP.

10 Before AT, documents were marked both on behalf of contractor and RSP. As already mentioned supra, after oral hearings and after full contest, AT made the impugned award by 2 : 1 majority.

11 From the five claims made by contractor before AT, it will come to light that claim No.5 can be divided into two parts, as one loss is attributable to over head and profit, whereas the other loss is attributable to turnover. In this view of the matter, the quantum of claim made by contractor under different heads and the amount actually awarded vide impugned award have been placed before this court in a tabular form and this court deems it appropriate to usefully extract and reproduce the same which reads as follows :

Claim No.	Dispute / claim	Claimed amount	Amount awarded
1	Withholding payment for IPC 19 & 20	84,55,380/-	84,55,380/-
2	Release of performance security (BG 13B/08-09) and the retention amount (BG 40A/10-11) withheld in the bills	4,62,98,365/-	4,62,98,365/-
3	Revised rate for M-25 concrete for box culvert	10,04,440/-	75,330/-
4	Refund of recovered interest on mobilization advance	5,68,633/-	5,68,633/-
5(i)	Loss due to overhead and profit	4,56,16,350/-	3,90,99,700/-
5(ii)	Loss due to turnover	2,07,49,766/-	Rejected
	Interest	18% interest	8% interest
	Total	Rs.12,26,92,634/- + interest	Rs.9,44,97,108/- + interest

12 Aggrieved by the impugned award, State has filed instant O.P. Contractor has made it clear that no separate O.P has been filed by the contractor though two heads of claim were only partly allowed and one head of claim was rejected.

13 It is not in dispute that value of the contract is Rs.35,29,83,655/- (little over Rs.35.29 Crores). From the tabulation supra, it comes to light that the claim made before AT is Rs.12,26,92,634/- (little over Rs.12.26 Crores) and the amount awarded is Rs.9,44,97,108/- (little over Rs.9.44 Crores) with interest.

14 RSP contending that it is aggrieved by the impugned award, has filed instant O.P. In the instant O.P, contractor has been arrayed as first respondent and three technocrats, who constituted AT have been arrayed as respondents 2 to 4. Considering the nature of the matter and considering the grounds on which instant O.P is predicated, this court is of the opinion that it is wholly unnecessary to array the three members who constituted AT as respondents in instant O.P. However, as the instant O.P is already half a decade old in this court and as instant main O.P itself is now being heard out and disposed of, this court is not embarking upon the exercise of directing respondents 2 to 4 to be deleted as it would cause procedural delay.

15 With the aforesaid prefatory note, this court now moves on to the ground on which impugned award was assailed.

16 Mr.M.Sricharan Rangarajan, learned Special Government Pleader as State counsel was before this Court on behalf of petitioner RSP and Mr.D.Balaraman, learned counsel on record for first respondent (contractor) was before this Court.

17 Primary ground of attack of State counsel qua impugned award was twofold and the same runs as follows :

(a) When loss of profit is claimed during currency of said contract, the entity making such a claim should have been able to show that the resource could have been deployed elsewhere, but in the instant case, contractor failed to do so and therefore, claim of the contractor ought not to have been acceded to. This according to learned State counsel renders impugned award as one that is in conflict with public policy as according to learned State Counsel this is in contravention with the fundamental policy of Indian law.

(b) Even with regard to claims that have been acceded to, AT has adopted a thumb rule approximation approach. According to learned State counsel, this is impermissible in the light of sub-section (2) of section 28 of A and C Act as parties had not expressly authorised the AT to decide *ex aequo et bono* or as *amiable compositeur*. In this regard, it is to be noted that impugned award adopted *Hudson formula*. What is Hudson formula has been explained by Hon'ble Supreme Court in ***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49 and ***McDermott International Inc. Vs. Burn Standard Co. Ltd. and others*** reported in (2006) 11 SCC 181. To be precise, relevant paragraphs in ***Associate Builders*** and ***McDermott*** cases are

paragraphs 48 and 104 respectively. Paragraph 48 of **Associate**

Builders case reads as follows :

“48. The Division Bench while considering Claims 9, 10, 11 and 15 found fault with the application of Hudson's formula which was set out by the learned arbitrator in order to arrive at the claim made under these heads. The Division Bench said that it was not possible for an arbitrator to mechanically apply a certain formula however well understood in the trade. This itself is going outside the jurisdiction to set aside an award under Section 34 inasmuch as in *McDermott case* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181], it was held: (SCC pp. 222-24, paras 104-06)

“104. It is not in dispute that MII had examined one Mr D.J. Parson to prove the said claim. The said witness calculated the increased overheads and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled ‘Change Orders, Overtime, Productivity’ commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overheads and loss of profit. Mr D.J. Parson is said to have brought out the additional project management cost at US \$1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(a) *Hudson Formula*: In *Hudson's Building and Engineering Contracts*, Hudson Formula is stated in the following terms:

'Contract head office x $\frac{\text{Contract sum}}{\text{Contract period}}$ x Period of
overhead and profit delay'
percentage

In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

(b) *Emden Formula*: In *Emden's Building Contracts and Practice*, the Emden Formula is stated in the following terms:

'Head office overhead x Contract sum x Period of
and profit delay'
 $\frac{100}{\text{Contract period}}$

Using the Emden Formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organisation as a whole by the total turnover. This formula has the advantage of using the contractor's actual head office overhead and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases including *Norwest Holst Construction Ltd. v. Coop. Wholesale Society Ltd.* [Decided on 17-2-1998 : 1998 EWHC Technology 339] , *Beechwood Development Co. (Scotland) Ltd. v. Mitchell* [Decided on 21-2-2001 : 2001 CILL 1727 : 2001 SLT 1214 (Scot)] and *Harvey Shopfitters Ltd. v. Adi Ltd.* [(2004) 2 All ER 982 : 2003 EWCA Civ 1757 (CA)]

(c) *Eichleay Formula*: The Eichleay Formula was evolved in America and derives its name from a case heard by the Armed Services Board of Contract Appeals, Eichleay Corporation. It is applied in the following manner:

'Step 1

<u>'Contract billings</u>	x	Total overhead	=	Overhead
Total billings for		for contract		allocable to
contract period		period		the contract

Step 2

<u>Allocable overhead</u>	=	Daily overhead rate
Total days of contract		

Step 3

'Daily contract	x	Number of	=	Amount of
overhead rate		days of delay		unabsorbed
				overhead'

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

105. Before us several American decisions have been referred to by Mr Dipankar Gupta in aid of his submission that the Emden Formula has since been widely accepted by the American courts being *Nicon Inc. v. United States*[331 F 3d 878 (Fed Cir 2003)] , *Gladwynne Construction Co. v. Mayor and City Council of Baltimore* [807 A 2d 1141 : 147 Md App 149 (2002)] and *Charles G. Williams Construction Inc. v. White* [271 F 3d 1055 (Fed Cir 2001)] .

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator."

Relevant portion in paragraph 104 of **McDermott** case reads as follows:

"104. It is not in dispute that MII had examined one Mr D.J. Parson to prove the said claim. The said witness calculated the increased overheads and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled "Change Orders, Overtime, Productivity" commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overheads and loss of profit. Mr D.J. Parson is said to have brought out the additional project management cost at US\$ 1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(a) *Hudson Formula*: In *Hudson's Building and Engineering Contracts*, Hudson Formula is stated in the following terms:

'Contract head office
overhead and profit
percentage x $\frac{\text{Contract sum}}{\text{Contract period}}$ x Period of
delay'

In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor."

18 Learned counsel for contractor took a preliminary objection that none of the grounds which are now being canvassed or in other words, grounds on which O.P is now being predicated have not been articulated in the O.P. Learned counsel for contractor pointed out that even the term 'public policy' has not been mentioned anywhere in the O.P. A perusal of the 6 page O.P reveals that learned counsel for contractor is correct. In this regard, it is made clear that when a challenge to an arbitral award is predicated and canvassed on grounds about which there is no whisper in the O.P, it will certainly take the contesting respondent by surprise. Therefore, it is necessary to mention the grounds in the O.P., so that contesting respondent is not taken by surprise. It may well be unfair to call upon a contesting respondent to meet grounds which were never raised. However, considering the factual matrix of instant case, this Court has made a departure and this court has considered the submissions made on behalf of RSP / petitioner, in the light of the fact that issues or questions of law arise out of undisputed facts. Two more reasons for this Court to hear out the submissions are (i) nature of the matter / peculiar factual matrix and (ii) counsel for contractor was given sufficient time to respond. In this regard, it is deemed appropriate to make it clear that though issues may arise out of undisputed facts, it is desirable to articulate grounds in the O.P for more than one reason. One reason is, contesting respondent should not be taken by surprise and the other reason is, this would effectuate expeditious disposal as points for consideration and the scope can be narrowed down quickly so that it would

be simpler to zero down on the pulse of the problem, i.e., proposition within the contours of section 34 of A and C Act.

19 In this case, as mentioned supra, it is also to be noted that contesting respondent / contractor was given sufficient time to respond. In other words, contesting respondent was not called upon to meet the points advanced in the arguments on the same day, but hearings were adjourned over a period of time, wherein contesting respondent/ contractor was given sufficient time to respond to points raised by State counsel.

20 To be noted, as alluded to supra, the actual construction part of the whole exercise had been entrusted by RSP to contractor, who is first respondent in instant O.P, vide said contract dated 23.6.2008, arbitrable disputes erupted and the same culminated in arbitral award dated 23.11.2013. Thereafter, State, i.e., RSP has carried the matter to this Court by way of instant O.P, being O.P.No.228 of 2014. With regard to this very work, the task / responsibility of design consultancy was given by RSP to another entity vide another contract dated 18.6.2003, arbitrable disputes erupted from the said contract also and the same culminated in an award dated 30.01.2018, which is under challenge before this Court at the instance of the contractor entity (design consultant) therein vide O.P.No.455 of 2018. One more contract dated 02.03.2009 in the nature of supervisory services has been entrusted by RSP to yet another entity (supervisory consultant), arbitrable disputes erupted from the said contract also and the same culminated in an award dated 09.02.2017, which is under challenge before this Court at the instance of the contractor entity (supervisory consultant)

therein vide O.P.No.538 of 2017. It is necessary to mention that these three O.Ps were not tagged together, but were listed on the same days continuously over a period of time and O.Ps were heard out one by one. The reason is, impugned awards have been made by different ATs and arbitrable disputes arose out of different contracts, but the common thread in all these pertains to the same project and RSP is the common entity in all three O.Ps. As it was contended by contractor in each of the O.P that they were not aware of disputes and as to what transpired before AT in other matters, this course was adopted. To be noted, when each of the O.Ps were heard out, counsel in the other O.Ps were present before this Court. Ultimately, each O.P is being decided on its own merits. In this view of the matter, independent orders are being pronounced in the other two O.Ps also. To be noted, though orders in the other two O.Ps are also being pronounced on the same day, they are independent orders which have been made on the basis of the merits of respective O.Ps.

21 It was pointed out that rough and ready approximation is permissible in cases of this nature.

22 With regard to Hudson formula being applied, this being an engineering contract, there are several formule such as Emden formula, Eichleay formula. It is the discretion and prerogative of AT to decide which of the formulae would be appropriate in a given case, that AT chooses to adopt a particular formula cannot be faulted with as long as it is not preposterous. To be noted, in the instant case, AT is constituted by three technocrats.

23 In the instant case, as ground of attack is predicated primarily

on sub-section (2) of section 28, one has to look at two legal expressions, namely, '*ex aequo et bono*' and '*amiable compositeur*'. To be noted, in the instant case, as mentioned supra, it is a three member AT and all three members are technocrats. Be that as it may, according to Black's Law Dictionary, two expressions have been explained as follows :

“ex aequo et bono (eks ee-kwoh et boh-noh). [Latin] According to what is equitable and good. A decision-maker (esp. in international law) who is authorized to decide *ex aequo et bono* is not bound by legal rules and may instead follow equitable principles. For example, article 38(2) of the Statute of the International Court of Justice provides that the Court may “decide a case *ex aequo et bono* if the parties agree thereto.” 37 ILM 999.

“A long-standing debate surrounds whether *amiable composition* amounts to the same thing as decision-making *ex aequo et bono*, according to the 'right and good.' While the two notions are often used interchangeably, they may not be coextensive in all minds. Arbitrators who decide *ex aequo et bono* normally begin and end with a private sense of justice, going directly to a personal view of the right result. With *amiable composition* another option would present itself, directing arbitrators to start at rules of law, but depart only if needed to achieve a just result. The difference is significant, given that there is nothing inherently unjust [a]bout most norms of commercial law.” William W. Park, *Arbitrators and Accuracy*. 1 J. Int'l Disp. Settlement 25, 50-51 (2010).

amiable compositor. (1931) 1. An arbitrator empowered, by agreement of the parties, to settle a dispute on the basis of what is equitable and good (*ex aequo et bono*), subject to procedural fairness and the terms of the arbitration agreement as opposed to the settled substantive rules of a given legal system. See EX AEQUO

ET BONO. **2. Int'l law.** An unbiased third party, often a head of state or high government official, who suggests a solution that disputing countries might accept of their own volition. -- Also termed amiable compositeur (ay-mee-ah-bl? kon-poh-zee-**tuur**). See AMIABLE COMPOSITION.

24 According to P.Ramanatha Aiyar's Advanced Law Lexicon, the two expressions have been explained as follows :

“Ex aequo et bono. (Lat.) According to what is just and good.

Principle of dealing fairly and in good faith.

As a result of fair dealing and good conscience, i.e. on the basis of equity. The phrase refers to the way in which an international tribunal can base its decision not upon conventional law but on what is just and fair to the parties before it. Article 38(2) of the Statute of the International Court of Justice specifically authorizes settlement of disputes based upon *ex aequo et bono* should both parties give their consent, although the Court has not yet given any judgment on this basis. (Oxford Law Dictionary).

Amiable compositeur. A French phrase for an arbitrator who has great freedom in formulating the terms of his award change of paragraph. The concept of *amiable compositeur* is widely used in continental legal systems. It has been variously defined as conciliator, arbitrator *de facto*, or in the most extreme sense, an arbitrator under no obligation to observe the rule of law. An *amiable compositeur* is nevertheless subject to the rules of “natural justice” and must observe the fundamental rules governing judicial procedure and material law. He is distinguished from other arbitrators in that he is permitted to decide *ex aequo et bono*, although the literal meaning of the term, a “friendly” arbitrator, suggests that he is to conciliate both parties rather than secure absolute fairness at the expense of one. In France, Belgium, and Portugal, the parties waive the right of appeal if they authorize the

arbitrator to act as an *amiable compositeur*. The term is not in use in the United States.”

A plain reading of the impugned award reveals that it is neither *ex aequo et bono* nor '*amiable compositeur*', as the findings are based on technical details.

25 In the instant case, as already mentioned, contracts are engineering contracts, to be noted, civil engineering contracts and three member AT was constituted by technocrats. This is therefore a 'Techno Commercial Arbitration' in every sense of the expression.

26 This Court has also reminded itself of *Hodgkinson* principle. *Hodgkinson* principle has been explained by Hon'ble Supreme Court in the oft-quoted and celebrated *Associate Builders* case being ***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49. Hodgkinson principle in simple term means that AT is the best judge of both quality and quantity of evidence before it.

27 Viewing the matter in sum totality of all these principles, considering the nature of said contract and considering the nature of claims, on a careful examination of impugned award, this court finds that there is adequate technical explanation for the quantum arrived at with regard to sums awarded under each head of claim, though this has been described as thumb rule approximation by learned State counsel. Therefore, this court is of the considered view that this cannot be considered as infraction of section

28(2) of A and C Act. To be noted, there is no change in sub-section (2) of section 28 post 23.10.2015. Therefore, **McDermott** case which was rendered on 12.05.2006 can be safely relied on with regard to such approximations and thumb rules being permissible.

28 This takes us to the test as to whether impugned award is in contravention with the fundamental policy of Indian law, inter-alia owing to adoption of what has been described as thumb rule approximation. Various arguments on each of heads of claim were advanced. A careful analysis of these submissions reveals that they are in the nature of grounds that can be canvassed in a regular first appeal under section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). Therefore, this court deems it appropriate to not to burden this judgment with grounds which are generic and which can be canvassed in a regular first appeal under section 96 of CPC.

29 No elucidation or elaboration is required to say that a petition under section 34 of A and C Act is not an appeal. It is not a revision. It is a limited judicial review. This limited judicial review should be within the contours and confines of section 34 of A and C Act and section 34 of A and C Act itself is a very delicate and fine balance between sanctity of finality of arbitral awards and sacrosanct of judicial review.

30 This court has also reminded itself of **Fiza Developers** principle laid down by Hon'ble Supreme Court in **Fiza Developers and Inter-Trade**

Private Limited Vs. AMCI (India) Private Limited reported in (2009) 17 SCC 796. **Fiza Developers** principle is to the effect that section 34 proceedings are one issue summary procedures. This **Fiza Developers** principle was subsequently explained in **Emkay Global Financial Services Ltd. v. Girdhar Sondhi** reported in (2018) 9 SCC 49 and while so explaining, Hon'ble Supreme Court held that **Fiza Developers** principle is a step in the right direction towards expeditious disposal of such legal recourse which are in relation to arbitral proceedings.

31 Owing to these aspects of the matter, this court considers it appropriate to not to burden this judgment with various grounds advanced which are in the nature of generic grounds which can be canvassed only in a regular first appeal under section 96 of CPC.

32 With regard to impugned award, this court does not find anything so preposterous which warrants judicial intervention under section 34 of A and C Act. With regard to pointed submission made by learned State counsel that in cases where loss of profit is claimed during currency of agreement, entity which makes such a claim should demonstrate that resources could have been gainfully deployed elsewhere, learned counsel for respondent Contractor responded by saying that this was not raised as issue before AT and if it had been raised, it would have well been possible for contractor to demonstrate that resources could have been gainfully deployed. To be noted, this is not being canvassed as a factual dispute, but it is being canvassed as determinant / parameter to accede to a claim under the head of loss of profit. Therefore, it cannot be gainsaid that it should have been set up

as a defence before AT. However, in the instant case, a perusal of impugned award reveals that AT has examined these aspects and has come to the conclusion that it is quite possible for the contractor to have made profits from and out of resources which were idling.

33 Learned counsel for contractor submitted that said contract is clearly what is known in industrial parlance as 'BoQ' contract. This court is informed that 'BoQ' stands for 'Bill of Quantities'. Saying so, learned counsel for contractor submitted that clause 11.1 of said contract and (b) therein makes it clear that as far as design is concerned, the risk qua design is responsibility of RSP. Clause 11.1 together with (b) therein reads as follows :

“11. Employer's Risks

11.1 The Employer is responsible for the excepted risks which are (a) in so far as they directly affect the execution of the Works in the Employer's country, the risks of war, hostilities, invasion, act of foreign enemies, act of terrorism, rebellion, revolution, insurrection or military or usurped power, civil war, riot commotion or disorder (unless restricted to the Contractor's employees), and contamination from any nuclear fuel or nuclear waste or radioactive toxic explosive, or (b) a cause due solely to the design of the Works, other than the Contractor's design.”

34 Furthering his submissions in this direction, learned counsel for contractor submitted that the entire matter pertains to two major defects and according to learned counsel for contractor both are attributable to flaws in design. One defect is, distress and the other defect is pertaining to slope protection of road. It was also pointed out that RSP has proceeded against

the design consultant and as alluded to supra, an arbitral award has been passed in the same and the O.P filed by the design consultant against that award is also being heard. Learned counsel for contractor submitted that owing to the very contention of RSP that O.P filed by design consultant should be dismissed and the award in favour of RSP (against design consultant) should be confirmed itself supports his submission that instant O.P filed by RSP deserves to be dismissed.

35 Most importantly, learned counsel for contractor submitted that contractor had pointed out fault in the design at the earliest point of time. In this regard, learned counsel drew the attention of this court to Ex.C1-8 dated 30.05.2009.

36 Be that as it may, as already alluded to supra, a perusal of the impugned award made by a three member AT reveals that it has come to the conclusion that the contractor cannot be blamed. As all these turn on evidence before AT, more particularly evidence which turns on engineering technicalities, reappraisal of such evidence in instant O.P is clearly not warranted. In the considered opinion of this court, no perversity has been brought to the notice of this court in this regard.

37 By way of reply, learned State counsel pressed into service a judgment of learned Single Judge of Delhi High Court in **GTM Builders & Promoters Pvt. Ltd. Vs. Sneh Developers Pvt. Ltd.** reported in **2018 SCC OnLine Del 9653**. Placing reliance on **GTM Builders**, learned counsel submitted that claims of contractor ought not to have been acceded to. In the considered view of this court, **GTM Builders** case does not help RSP in the

instant case, as **GTM Builders** is clearly distinguishable on facts. One distinguishing feature is, **GTM Builders** pertains to validity of termination and another is, that was a case where the court found that loss of profits prayer had been acceded to when there is no evidence at all. In other words, it was a case of validity of termination and as far as loss of profit prayer is concerned, it was a case of no evidence at all. Therefore, **GTM Builders** case being clearly distinguishable on facts does not help RSP in the instant case.

38 As this court does not find anything so preposterous that it warrants judicial intervention under section 34, this court comes to the conclusion that given the factual matrix, dynamics and dimensions of instant matter, it is not a fit case for judicial intervention under section 34 of A and C Act.

39 Owing to all that have been set out supra, instant O.P. fails. O.P.No.228 of 2014 is dismissed. Considering the nature of the matter, parties are left to bear their respective costs.

सत्यमेव जयते

30.04.2019

Speaking order

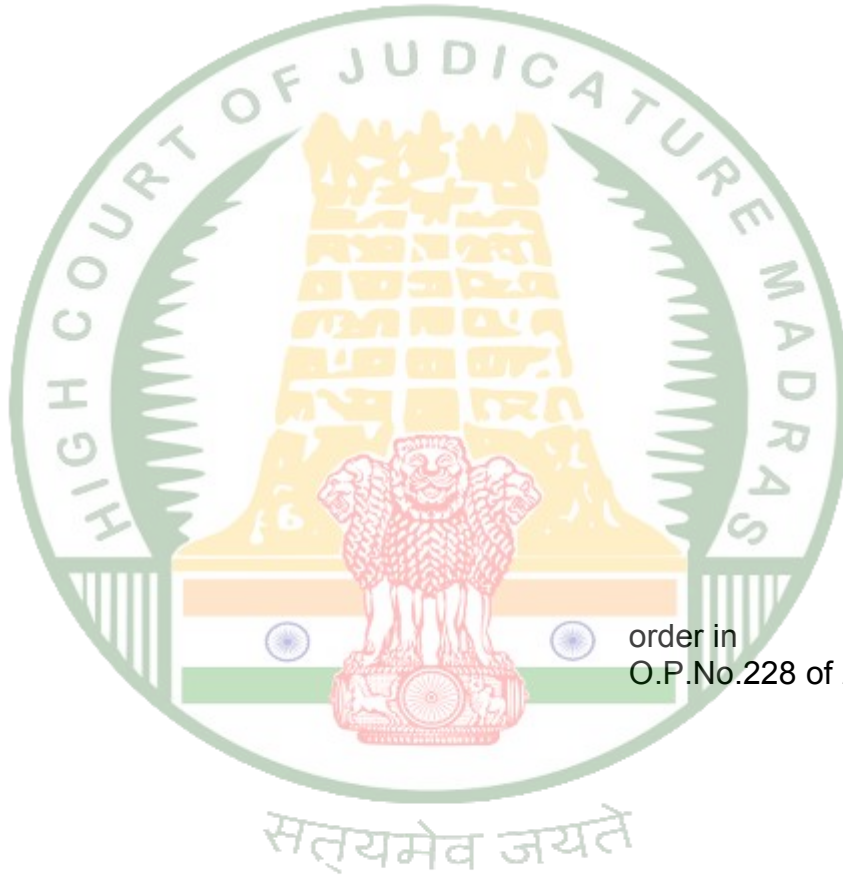
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M.SUNDAR, J.

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order in
O.P.No.228 of 2014

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30.04.2019