

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.538 of 2017

M/s.Sheladia Associates Inc.,
9-1-113 to 118, 2nd Floor, Amsri Shamira
SD Road,
Old Lancer Lanes,
Secunderabad-600 003,
Telangana

.. Petitioner

Vs.

Tamil Nadu Road Sector Project II,
No.171, South Kesavaperumalpuram,
Greenways Road,
R.A.Puram,
Chennai-600 028
represented by its Project Director

.. Respondent

This Arbitration original petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 09.02.2017 passed by learned Arbitrator to the extent aggrieved by the petitioner herein in respect of arbitration proceedings between petitioner and respondent and render justice.

For Petitioner : Mr.S.V.Chowdhry
for Mr.P.J.Sriganesh

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

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 09.02.2017 ('impugned award' for brevity) made by an Arbitral Tribunal ('AT' for brevity) being constituted by a sole arbitrator (a Technocrat), as part of institutional arbitration of 'Indian Council of Arbitration' ('ICA' for brevity) arising out of a contract dated 02.03.2009 captioned 'CONTRACT AGREEMENT FOR SUPERVISION CONSULTANCY SERVICES FOR THE CONTRACT TNRSP 05 CONSTRUCTION OF RAMANATHAPURAM BYPASS' (hereinafter 'said contract' for convenience and clarity).

2 Said contract is between 'Sheladia Associates Inc, Secunderabad', which is the sole respondent before AT and the lone petitioner in instant O.P (hereinafter 'contractor' for brevity, clarity and convenience) and 'Tamil Nadu Road Sector Project-II, Highways Department, Government of Tamil Nadu' (hereinafter 'RSP' for brevity, clarity and convenience). To be noted, the short form / abbreviation 'RSP' stands for 'Road Sector Project'.

3 Said contract between contractor and RSP is for supervision / certain consultancy services which are in the nature of construction supervision services including monitoring the quality of road work, bridge work and approaches of 'Railway Over Bridge' (ROB) and other related works in Ramanadhapuram Bypass. To be noted, description of services which have

to be provided by the contractor under said agreement have been elaborately set out in greater detail in Appendix-A to said contract and considering the nature of the controversy and the scope of instant O.P., it is not necessary to advert to technical specifications and particulars therein in greater detail. In other words, suffice to say that said contract between contractor and RSP is for the purpose of provision of certain construction supervision services by the contractor for the road work, bridge work, approaches of ROB, etc., in Ramanadhapuram bypass.

4 There is no disagreement before this Court that Clause 8 of said contract captioned 'SETTLEMENT OF DISPUTES' provides for resolution of disputes by way of arbitration. It is not necessary to advert to the same as there is no disputation before this court about the constitution of AT or jurisdiction of AT. This is mentioned only for completing narration of facts.

5 From the narration thus far, it will come to light that work which the contractor had an obligation to do under said contract is in the nature of supervision services which has been alluded to supra and for the sake of convenience and clarity, this shall be referred to as 'said services'. Suffice to say that arbitrable dispute arose between contractor and RSP with regard to said services which were to be provided by contractor under said contract resulting in constitution of AT in the aforementioned manner. As already mentioned supra, before AT, RSP was the sole claimant and contractor was the lone respondent.

6 RSP as claimant before AT made claims under three heads and they are as follows :

“1.Claim No.1 – Claim due to Breach of Contract – Rs.8,37,10,916/-.

2.Claim No.2 – Claim due to non usage of road – Rs.14,72,92,500/-

3.Claim No.3 – Payment of interest @ 18% per annum from the date of submission of the claims to the sole arbitrator till the date of actual payment.”

7 With regard to claim No.1 which is a claim of little over Rs.8.37 Crores, the breakup details which can be culled out from the claim statement is as follows :

Breakup details

1	Towards the cost of remedial works for retaining wall in ROB approaches	Rs.7,53,96,206/-
2	Towards the cost of Consultancy Services to IITM and IISc	Rs.28,04,266/-
3	Towards the cost of Tender Advertisement	Rs.4,76,544/-
4	Petty Payments such as work done to prevent the ingress of rain water into the embankment of ROB approaches	Rs.4,40,000/-
5	Towards the cost of Supervision and Establishment	Rs.45,93,900/-
	Total amount in Claim No.1	Rs.8,37,10,916/-

8 Contractor, as sole respondent before AT filed a statement of defence, denying / disputing the aforesaid claims made by RSP. Besides denying / disputing the aforesaid claims made by RSP, contractor claimed a sum of Rs.1,21,46,704/- towards services rendered for RSP, Rs.21,36, 489/- towards remuneration of additional services rendered, Rs.20,00,000/- towards

reimbursement on cost of arbitration and another sum of Rs.3,89,676/- towards other expenses in the nature of remuneration, insurance, travel, etc.,

9 Thereafter, claimant filed a reply before AT. On the basis of aforesaid pleadings, AT framed 12 issues which reads as follows :

“22. On the above pleadings, the following issues were framed by the Tribunal in th 2nd sitting held on 20/02/2016.

- 1) Whether retaining wall design was approved by the Claimant before Respondent took over responsibilities from the Claimant.
- 2) Whether the Respondent was required to review the design and bid documents that were already approved by the Claimant.
- 3) Whether the Detailed Project Report (DPR) was made available to the Respondent by the Claimant?
- 4) Whether the Respondent has committed any breach or violation of its duties and obligations under Supervision Consultancy Contract dated 02/03/2009.
- 5) Whether the Claimant is entitled to an amount of Rs.8,37,10,916/- towards rectification works of retaining wall.
- 6) Whether the Claimant is entitled to an amount of Rs.14,72,92,500/- for non usage of roads for 41 months.
- 7) Whether the Respondent is liable to pay the claimant 50% of total amount of claim no.1 & 2 as claimed in its claim statement.
- 8) Whether the Respondent is entitled for an amount of Rs.1,21,46,704/- towards the services rendered for the Claimant.
- 9) Whether the Respondent is entitled for an amount of Rs.21,36,489/- towards rehabilitation design services.
- 10) Whether the Respondent is entitled for an amount of Rs.3,89,676/- towards other expenses viz. remuneration, insurance, travel etc.
- 11) Whether the parties are entitled to interest and if so, to what rate and for what period?
- 12) To what other reliefs are the parties entitled?”

10 No oral evidence was let in before AT, but as many as 52 documents were marked on the side of RSP as claimant (Exs.C.1 to C.52) and as many as 54 documents were marked on the side of contractor as sole respondent (Exs.R.1 to R.54). Oral hearings were held before AT. After full contest, AT made the impugned award. Impugned award is largely in favour of RSP as it had directed the contractor to pay a sum of Rs.47,07,849/- along with pendent lite interest at the rate of 8% per annum and 12% post award future interest.

11 With regard to claim No.1 of RSP being a claim of little over Rs.8.37 Crores towards breach of said contract, it was partly allowed and Rs.1,41,42,656/- (little over Rs.1.41 Crores) was awarded. With regard to claim No.2 made by RSP being a claim of little over Rs.14.72 Crores towards non usage of road (non usage for 41 months period between January of 2011 and June of 2014), the same was rejected.

12 With regard to interest, as already mentioned supra, AT vide impugned award awarded 8% pendent lite interest and 12% per annum future interest (i.e., interest post award). With regard to contractor's claim of little over Rs.1.21 Crores towards services rendered, AT held that RSP is liable to pay a part of it, namely Rs.75,50,082/-. With regard to contractor's claim of little over Rs.21.36 lakhs towards rehabilitation design services, the same was rejected. With regard to claim of about Rs.3.89 lakhs towards expenses regarding insurance, travel, etc., the same was rejected by AT.

13 As already mentioned supra, net result was that AT awarded a sum of Rs.47,07,489/- in favour of RSP with 8% per annum pendent lite

interest and 12% per annum future interest.

14 Aggrieved, instant O.P has been filed by the contractor assailing the impugned award. State counsel has made it clear on instructions that RSP has not filed any petition under section 34 assailing impugned award. This is recorded.

15 To be noted, as alluded to supra, the nature of work to be done by the contractor in the instant case is in the nature of services and the same is being referred to as 'said services'. To state it with specificity, it is in the nature of supervisory services. With regard to this very work, which is part of a particular project, the task / responsibility of design consultant was given by RSP to another entity vide contract dated 18.6.2003, arbitrable disputes erupted from the said contract also and the same culminated in an arbitral 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. The actual construction part had been entrusted by RSP to another contractor, vide a contract dated 23.6.2008, arbitrable disputes erupted therein also and that the same culminated in an arbitral award dated 23.11.2013. To this, State, i.e., RSP has carried the matter to this Court by way of a petition under section 34 of A and C Act, being O.P.No.228 of 2014. 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 is they pertain 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.Ps 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 three O.Ps were heard out, counsel in the other O.Ps were present before this Court. Ultimately, each of these O.Ps are being decided on their 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.

16 Reverting to the instant O.P, Mr.S.V.S.Chowdhry, learned counsel representing the counsel on record was before this Court on behalf of contractor and Mr.Sricharan Rangarajan, learned Special Government Pleader was before this court on behalf of RSP.

17 Learned counsel for contractor contended that AT has fallen in error in the construction of covenants in said contract, particularly clause 6.2.1 of Appendix A to said contract. Clause 6.2.1 is an adumbration of responsibilities of contractor. To be noted, in the covenant, 'contractor' has been referred to as 'Engineer'. It is the specific and pointed case of contractor that as many as 34 responsibilities have been adumbrated in clause 6.2.1, but this ought to have been read along with clause 11.2 in Appendix A which is captioned 'SCOPE OF WORK FOR MAJOR DESIGNS MODIFIATIONS AND/OR NEW DESIGNS ON CALL BASIS'. Learned counsel submitted that

AT erred in not construing clause 6.2.1 as according to learned counsel clause 6.2.1 ought to have been read along with clause 11.2 and therefore, impugned award is one where decision has not been made in accordance with the terms of the contract. This has resulted in infraction of sub-section (3) of section 28 of A and C Act, is learned counsel's further say.

18 Furthering his submissions on these lines, learned counsel submitted that infraction of section 28(3) of A and C Act is one which clearly leaves impugned award in conflict with public policy and therefore, impugned award is liable to be set aside. In this regard, it is to be noted that the expression 'arbitral tribunal shall decide in accordance with the terms of the contract' in section 28(3) was amended on and with effect from 23.10.2015 and this expression has now been replaced with the expression 'arbitral tribunal shall, in all cases, take into account the terms of the contract' while deciding and making an award.

19 Learned counsel for contractor submitted that commencement of arbitral proceedings is 16.7.2013 as that is the date of show cause notice and AT entered reference on 17.04.2015, both of which are prior to 23.10.2015 and therefore, he is predicated his submission on section 28(3) as it existed prior to 23.10.2015. To be noted, 16.7.2013, for all practical purposes can at best be considered as a notional date of commencement of arbitral proceedings as it is the date of show cause notice and it is not the date of receipt of show cause notice by noticee. The language in which section 21 is couched makes it clear that reckoning date to decide the date of commencement of arbitral proceedings is the date on which notice is received

by the noticee (respondent) and it is not the date of notice itself. As both parties agreed that this show cause notice could not have been received by noticee / addressee prior to 16.7.2013, for the purpose of convenience, it is taken as date of commencement of arbitral proceedings notional though. There is no dispute or disagreement before this Court that 17.04.2015 is the date on which AT entered reference. As both parties agreed that argument of the contractor predicated on section 28(3), as it existed prior to 23.10.2015, can be considered, the question as to whether the provision as it existed prior to 23.10.2015 or post 23.10.2015 will apply to cases of this nature is left open to be decided in a matter where there is serious contest in this regard.

20 Be that as it may, in the light of the specific and pointed submission made by learned counsel for contractor, this court deems it appropriate to extract clauses 6.2.1 and 11.2 in entirety and the same read as follows :

“Clause 6.2.1 :

6.2.1 The principal responsibilities of the Engineer will be, but not limited to, the following:

(a) to carry out generally all the duties of the Engineer as specified in the construction Contractor, within the limitations specified therein.

(b) to carry out design review for pavements & structures all along the project roads, verify the bill of quantities (BoQ) in the bid documents and ensure consistency of design with BoQ based on site requirements;

(c) to approve the Contractor's key superintendent personnel, construction mobilisation programs, land to be

occupied by the Contractor.

(d) Approve the contractor's work program including activity scheduling and resource programming;

(e) To give the order to commence the works:

(f) To prepare in consultation with the Employer, a Construction Supervision Manual outlining routines and procedures to be applied in contract management, construction supervision and administration. The routines and procedures shall be in accordance with the requirements;

(g) To assist/advise the Employer in handing over the sites and in establishing milestones for completion of contracts;

(h) Approve and/or issue working drawings including variations thereof, in this connection, give instructions to the contractor;

(i) To ensure that the construction works are in accordance with the Technical Specifications, Environmental Management Plan and other stipulations of the construction contract documents. The Engineer shall draw the Employer's attention to any instances of non-conformity of the contractor's works with the Technical Specifications, Environmental Management Plan and other stipulations of the construction contract documents;

(j) To ensure a system of quality assurance work; approve materials and their sources, review bituminous mix designs and concrete mix designs proposed by the contractors and approve/suggest modifications to the contractor's proposed mix designs, laying methods, sampling and testing procedures and quality control measures to ensure the required standard and consistency in quality;

(k) To check the laboratory and field tests carried out by the contractors and to develop a mechanism in consultation with the Employer to involve the Team Leader in carrying out independent tests, if necessary, other than the regular testing done;

(l) To order special tests of materials and/or, completed works, and/or order removal and substitution of improper materials and/or works as required;

(m) To monitor quality control and quantity measurements of the works carried out under the contracts, monitor keeping of all measurement records as per the directions of the Employer and issue interim payment certificates when quality of works are satisfactory and quantities are correct;

(n) To assist the Employer in monitoring the progress of the works and in project implementation through computer aided project management techniques and Management Information Systems (MIS);

(o) To direct the contractors to take all necessary steps including those mentioned in the construction contract to protect the environment on and off the site which arise due to construction operations;

(p) To control and appraise the progress of the works, to order suspension of works and to authorize, with the Employer's approval, extensions of the period of completion of works.

(q) To inspect the works, during the construction period and the Defects Liability Period and to issue Defects Liability Certificates after the rectification, by the Contractor, of possible defects;

(r) to advise the Employer on all matters relating to execution of the works, claims from the Contractor and to make recommendations thereon, including the possible recourse to arbitration;

(s) to prepare as necessary detailed recommendations to the Employer for contract variations and addenda to ensure the best possible technical results, achieved with the available funds;

(t) Verify and get corrected the "as-built" drawings supplied by the contractor;

(u) Prepare a maintenance manual outlining the routines to be adopted in each specific reach and for the C.D works and

bridges during the defects liability period and also beyond the defects liability period;

(v) issue monthly progress reports and quarterly progress reports together with detailed quality control test statements in an approved format and to prepare a detailed sectional/ final report for the project;

(w) Issue interim certificates for monthly payments to the contractors, and certify completion of parts of the totality of the works, details of progress. Payments are to be recorded in the measurement book before issue of interim certificate;

(x) To issue variation orders, fix rates for unpriced works, all after obtaining prior approval of the Employer, except in the situations described under para 7, and/or to make recommendations to the employer;

(y) Assist the Employer in providing clarifications/explanations to observations made, from time to time by the Auditor;

(z) To assist the Employer in taking over of completed works from the contractors in particular by preparing list of defects to be corrected by the contractor;

(aa) to write a daily project diary which shall record all events pertaining to the administration of the contract, requests from and orders given to the contractors, and any other information which may at a later date be of assistance in resolving queries which may arise concerning the execution of the works;

(bb) To prepare specific engineering reports when required, which shall include an analysis of the problems encountered and proposed solutions;

(cc) To prepare a training manual outlining the training procedures and to impart on the job training to the HD staff;

(dd) To assist the Employer in co-ordination with other agencies and hold co-ordination meetings to facilitate the proper and timely implementation of the project;

(ee) To prepare revised estimates, etc., if required and accordingly advise the Employer in modifying the cash flow estimate;

(ff) To control and appraise the progress of the works, to order suspension of works and to authorize, with the Employer's approval, extensions of the period of completion of works; and

(gg) To carry out any other duties relevant to the project agrees during the contract negotiations.

(hh) Has to refer to the civil works agreement before taking decision according to the Contract Administration clauses [Variations, EoT, assignment of works changes in legislation, termination etc.]

Clause 11.2 :

11.2 SCOPE OF WORK FOR MAJOR DESIGNS MODIFICATIONS AND/ OR NEW DESIGNS ON CALL BASIS

The scope of work shall cover the following, but not limited to:

(i) additional input of supervision consultant shall be required on structural design revisions conforming to latest IRC specifications;

(ii) design changes suggested to meet the requirements and getting approval of Southern Railway for Road Over Bridges and Public Works Department (PWD) for structures across their regulated river courses besides liaisoning with Southern Railway and PWD;

(iii) major design changes and/or new designs, which may arise due to change in alignment or due to other reasons during implementation in the absence of PCC;

(iv) The consultant shall be responsible for modifications of designs for Geometrics, pavements, culverts, both minor and major bridges, RoBs, etc and preparation of detailed drawings, BoQs and cost estimates for any major changes in designs and/ or new designs conforming to project requirements; and

(v) The Consultant shall be responsible for preparing variation

orders to the design changes and/or new designs.”

21 12 issues which have been framed / formulated by AT have already been extracted and reproduced supra. A careful perusal of the issues will reveal that issue Nos.1, 2 and 4 are pivotal in deciding whether there is infraction of section 28(3) of A and C Act.

22 Elaborating his submission on aforesaid lines, learned counsel for contractor / petitioner submitted that contractor would not have been permitted to make changes in the design and in the 'detailed project report' (DPR) and that would become a breach by itself if contractor had done so. On a careful analysis of evidence before it, AT has come to the conclusion that contractor was required to review the design and bid document that were already approved by the claimant. Relevant portion of the impugned award reads as follows :

“24.....

.... It is clear from the above documentary evidence that the design for one retaining wall alone might have been approved by the Claimant's representative who was acting as SC then and design for remaining three walls were yet to be approved at the time of taking over responsibilities by the Respondent from the Claimant. I have come to the above conclusion because none of the parties pleaded whether the design for all four retaining walls were same or not.

x x x x x x x x

28 Moreover, submission of status of work and quality assessment report as per clause 2.3 and to carry out design review of all structures as per clause 6.2.1 are entirely different and independent obligations which ought to be fulfilled

by the Respondent as per the contract. That is why design review was specified in Appendix A and submission of status report was elaborated in Appendix-B, Reporting Requirements. Therefore, it is evidently clear from the construction of the contract and also from the conduct of parties that the Respondent was required to review the design and bid documents that were already approved by the Claimant.

x x x x x x x x x x

34.....There was no whisper from the Respondent whether it engaged the said Senior Structural Engineer or it got the design review done. It is seen from the payment certificates that the fee for Senior Structural Engineer was received by the Respondent. The Respondent did not plead what it was doing for the first two months from the start of the assignment earmarked for review of design and bid documents. Therefore, the Respondent failed to perform its principal duty of reviewing the design and thereby breached the contract. The issue no.4 is decided in favour of the Claimant and against the Respondent."

23 To buttress the aforesaid submissions, learned counsel for contractor submitted that contract with J.S.R. Constructions Pvt. Ltd. is dated 23.6.2008 but for the period between 23.6.2008 and 2.3.2009, there was no supervision consultant, the Divisional Engineer (Highways) officiated as supervision consultant and the contractor stepped in only with effect from 2.3.2009.

24 The aforesaid argument does not hold water in the light of the finding rendered by AT while dealing with issue No.3. After analysis of documentary evidence before it, AT has returned a finding that the DPR was available with the contractor from the month of July 2009 and it is not from

2.3.2009. Thereafter, AT on a further analysis of documentary evidence, has also returned a finding that design for one retaining wall alone might have been approved by the Superintending Engineer in its capacity as RSP's representative and designs for remaining three walls were yet to be approved at the time of taking over responsibility by the contractor. To be noted, this finding has been returned by AT while dealing with issue No.1 and relevant portion has already been extracted and reproduced supra.

25 AT on a thorough analysis of documentary evidence before it and on the basis of oral hearings, had come to the conclusion that main responsibility of contractor was supervision of construction work to ensure that work is executed as per approved design, desired quality and within the stipulated time, besides bill certification, contract management and reporting. AT has also observed that from the duties and responsibilities assigned to contractor, it comes to light that role of the contractor was more or less same as that of a Project Management Consultant (PMC). Thereafter, AT had returned a finding that RSP had no serious complaint with regard to these duties and complaint of RSP was primarily pivoted on the plank that contractor had not reviewed the design to the entire satisfaction of RSP, i.e., for successful completion of the project.

26 Therefore, the argument pivoted on effective date, i.e., 2.3.2009 does not hold water. Furthermore, narration narrowed down the entire scope of interpretation of responsibility of contractor and as to whether contractor ought to have reviewed the design.

27 As already extracted and reproduced supra, AT while dealing

with issue No.2 had clearly returned a finding based on documentary evidence before it that it was the duty of the contractor to carry out design review of all structures and also give assessment report as per clause 2.3. AT has also held that these obligations are independent obligations cast on contractor and that is the reason why design review has been specified in Appendix A and there is elaboration regarding submission of status report in Appendix-B as part of reporting requirements.

28 In this view of the matter, learned State counsel, i.e., counsel for RSP submitted that the entire lis boils down to issue Nos.1,2 and 4 supra and it stands narrowed down to the scope of interpretation of clauses 2.3, 6.2.1 and 11.2. Furthering his submission in this direction, learned State counsel pressed into service a very recent judgment of Hon'ble Supreme Court in **MMTC Ltd. Vs. Vedanta Ltd.** reported in **(2019) 4 SCC 163** for the proposition that interpretation of the term of contract, conduct of parties and correspondence exchanged are within the Arbitrator's jurisdictional domain. **Vedanta** judgment was pressed into service to emphasis that even with regard to construction of terms of agreement, if the view taken by the AT is a possible view based on reasonable construction of terms of contract, High Courts exercising its power under Sections 34 and 37 of A and C Act will be slow to exercise judicial intervention. Relevant paragraphs are paragraphs 26 and 16 which reads as follows :

“26.Based upon the above discussion, in our opinion, the view taken in the majority award, as confirmed by the High Court in the exercise of its powers under Sections 34 and 37 of the 1996 Act, is a possible view based upon a reasonable construction of

the terms of the agreement dated 14-12-1993 between the appellant and the respondent and consideration of the material on record. We are also of the opinion that the dispute was covered under the agreement between the appellant and the respondent dated 14-12-1993, and as such the dispute is governed by the arbitration clause under the said agreement. Thus, we find no reason to disturb the majority award on the ground that the subject-matter of the dispute was not arbitrable.

16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181]; *Pure Helium India (P) Ltd. v. ONGC* [*Pure Helium India (P) Ltd. v. ONGC*, (2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [*D.D. Sharma v. Union of India*, (2004) 5 SCC 325]. “

29 A careful examination of the impugned order and the manner in which documentary evidence before AT has been appreciated, leaves this Court with the considered opinion that interpretation of clauses 6.2.1 and 2.3 in the Appendix to said contract made by AT is clearly a possible view based on reasonable construction / interpretation and therefore, it is a fit case for this court to refrain from exercising judicial intervention under section 34 of A and C Act.

30 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 with regard to quality and quantity of evidence before it. This coupled with ***Vedanta*** principle if put in the form of a theorem would translate into 'as long as interpretation of covenant in a contract by AT is a possible view and as long as it is based on reasonable construction, the Court will not interfere under section 34'. In this view of the matter, this court is unable to persuade itself to believe that there is infarction of sub section (3) of section 28. To put it differently, this Court is unable to persuade itself to hold that AT has not decided in accordance with the terms of contract. As answer to infarction of section 28(3) is not in the affirmative, it may not be necessary to go into the question as to whether the impugned award is in conflict with public policy of India, as the stated position of contractor and pointed submission of learned counsel for contractor is to the effect that there is infarction of section 28(3) of A and C Act and therefore, that has resulted in impugned award being in conflict with public policy of India. When answer to the infarction of section 28(3) itself is in the negative, it would be otiose and a completely superfluous exercise qua adjudication in instant O.P to examine whether such infarction in the factual backdrop of this case can be elevated to saying that it has resulted in impugned award being in conflict with public policy of India.

31 To be noted, this court has noticed that sheet anchor

submission of learned counsel for petitioner was that contractor cannot review the geo-technical report / design or DPR. To put it in the language of learned counsel for petitioner / contractor Mr.S.V.S.Chowdhry, learned counsel submitted that DPR design and geo technical design are petitioner's bible and any review is forbidden. Therefore, as this court has come to the conclusion which is not in the affirmation qua sheet anchor submission of learned counsel for contractor / petitioner, instant O.P fails. This court has no hesitation in holding that no judicial intervention qua impugned award is warranted in the instant case.

32 Before parting with the case, it is also necessary to make it clear that while testing / examining the impugned award, this court has reminded itself of Fiza Developers principle. Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796 held that proceedings under section 34 are summary procedures. To be noted, ***Fiza Developers*** principle was subsequently explained by Hon'ble Supreme Court 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 qua philosophy underlying section 34 of A and C Act. Be that as it may, suffice to say that examination of impugned award was within the contours and confines of section 34 of A and C Act.

33 In the light of the narrative supra, this court has no hesitation in holding that the instant O.P is liable to be dismissed. Considering the nature of the matter and trajectory of the hearing, this court deems it appropriate to

leave parties to bear their respective costs.

34 Verdict in a nutshell is, O.P.No.538 of 2017 is dismissed. No costs.

30.04.2019

Speaking order

Index : Yes/No

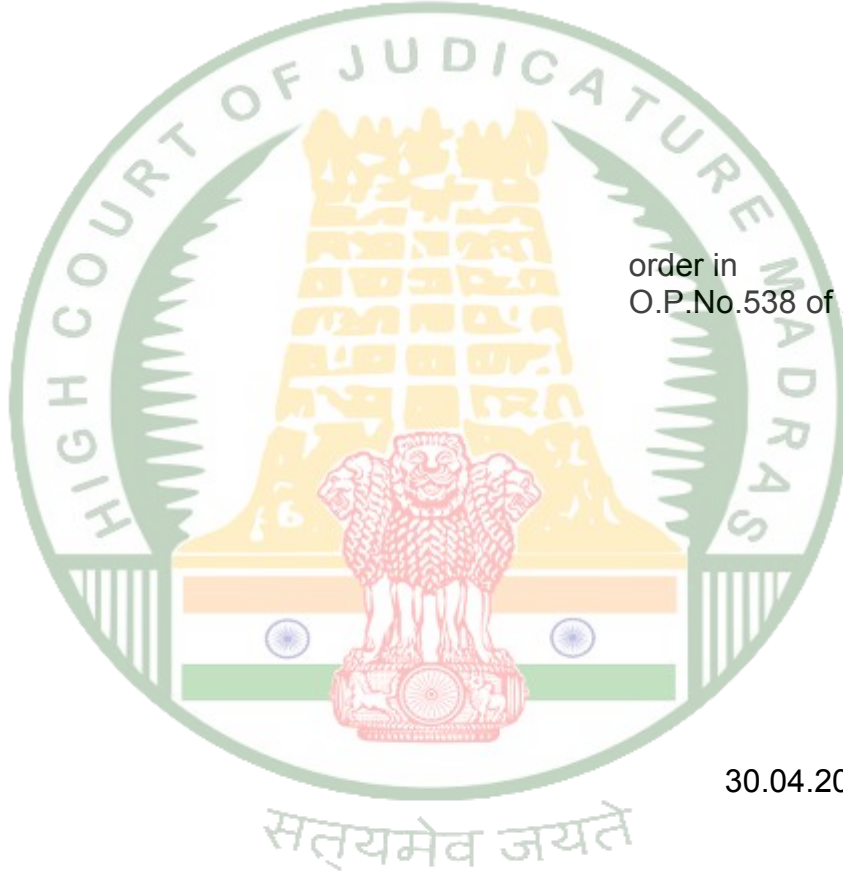
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