

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.12.2020

Coram

**THE HONOURABLE MR. JUSTICE M.SUNDAR**

**O.P.No.746 of 2009**

Chennai Metropolitan Water Supply and Sewage Board  
Chennai – 600 002  
Rep. By its Managing Director ... Applicant

vs.

1. IVRCL Infrastructures & Projects Ltd.,  
M-22/3RT, Vijayanagar Colony  
Hyderabad 500 057 represented by  
D.Venkatasubramaniam  
Senior Deputy General Manager (Projects)  
No.9, Plot No.16, Manchoilai 1 main Road  
Kalaimagal Nagar  
Ekkaduthangal  
Chennai – 600 097

2. Chief Justice V. Ratnam (Retd.),  
(Old No.40), 16, Pelathore  
Mylapore  
Chennai- 600 004

3. Mr. Sutunu Sinha  
Liquidator  
(Appointed vide order dated 26.07.2019  
by NCLT, Hyderabad Bench)  
M/22/3RT, Vijaya Nagar Colony  
Hyderabad – 500 057  
Telangana

... Respondents

(Third respondent impleaded as per order dated 04.08.2020 in Appln.No.8663 of 2019)

Petitioner filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award dated 08.11.2008 passed by the second respondent in favour of the first respondent, to award cost of this petition and to pass such further or other orders as this Hon'ble Court may deem fit and proper.

For Petitioner : Mr.C.Vigneswaran

For Respondents : Ms.Hema Srinivasan for R1

**ORDER**

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity.

2. Captioned OP was presented in this Court in March of 2009 (to be precise on 03.03.2009). Therefore, 3 months from now, captioned OP will complete two years past one decade or in other words, 12 years. This Court reminds itself of the 23.10.2015 amendment to the A and C Act by which sub-section (6) was added to Section 34. This Court is conscious that captioned OP will be governed by pre 23.10.2015 regime

of A and C Act owing to the date of presentation being 03.03.2009. This is by applying ***Ssangyong*** principle or in other words law laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in (2019) 15 SCC 131. Notwithstanding this position, arbitration, is an important 'Alternate Dispute Resolution' mechanism ('ADR' mechanism). Therefore, this Court deems it appropriate to remind itself about sub-section (6) of Section 34 wherein one year timeline has been prescribed for disposal of Section 34 applications. In ***Bhumi Vikas Bank*** case law [***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in (2018) 9 SCC 472] Hon'ble Supreme Court made an observation, which runs as follows:

*'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from*

*the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'*

***(Underlining made by this Court to supply emphasis and highlight, besides ease of reference)***

3. Though ***Bhumi Vikas*** case law is an authority for the broad proposition that sub-section (5) pre-application notice is directory and not mandatory, the aforementioned observation made by Hon'ble Supreme Court is of immense significance, as arbitration even prior to 23.10.2015 regime, is an important ADR mechanism in which the sublime philosophy and salutary principle underlying the A and C Act i.e., timelines and expeditious disposal stand ingrained. Therefore, this Court has no hesitation in describing the captioned OP as a vintage matter nay ancient.

4. This Court having made the aforementioned peripheral observation, now plunges into the core issues. An 'arbitral award dated 08.11.2008' ('impugned award' for the sake of brevity) made by a sole Arbitrator, who constituted the 'Arbitral Tribunal' ('AT' for the sake of brevity) has been called in question in captioned OP.

5. Petitioner in captioned OP i.e., 'Chennai Metropolitan Water Supply and Sewage Board' shall be referred to as 'CMWSSB' and contesting first respondent in captioned OP shall be referred to as 'IVRCL' for the sake of brevity. Before proceeding further, there are two other peripheral issues which require attention. One peripheral issue is with regard to arraying (as second respondent) the sole arbitrator, who constituted the AT and made the impugned award. Sole Arbitrator is a former Hon'ble Judge of this Court and a former Hon'ble Chief Justice of another High Court. Be that as it may, from the submissions made before me, it comes to light that presence of the sole Arbitrator in the array of parties is unnecessary. It is also to be noted that Hon'ble sole arbitrator is now no more. Therefore, following the procedure adopted by Hon'ble Supreme Court in ***Zonal General Manager Ircon International Limited Vs. Vinay Heavy Equipments*** reported in **(2015) 13 SCC 680** (to be noted, deletion procedure is captured in order reported in **2007 SCC OnLine SC 4**), this Court deletes the Hon'ble sole Arbitrator from the array of parties in captioned OP. Therefore, IVRCL now becomes the lone respondent. To be noted, IVRCL has been brought under the

IBC Code, Liquidator was appointed by NCLT, Hyderabad for representing IVRCL and necessary amendments in this regard have been made in the case file. Second peripheral issue is with regard to the nature of disposal of an application under Section 34 of A and C Act. Hon'ble Supreme Court in *Fiza Developers* case [*Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796] has held that legal drill of testing an arbitral award under Section 34 is a summary procedure. It was also held by Hon'ble Supreme Court that it is a one issue summary procedure. Subsequently, in *Emkay Global* case, being *Emkay Global Financial Services Ltd., v. Girdhar Sondhi* reported in (2018) 9 SCC 49, Hon'ble Supreme Court held that *Fiza Developers* principle is a step in the right direction. To be noted, this *Fiza Developers* principle reiterated in *Emkay Gobal* was further reiterated in *Canara Nidhi Limited case* [M/S. *Canara Nidhi Limited vs M. Shashikala* reported in 2019 SCC Online SC 1244]. In this regard, it is made clear that Hon'ble Supreme Court has instructively made it clear that by one issue summary procedure, it does not mean that the lis should turn on one issue. It has been elucidatively explained by Hon'ble Supreme Court that the impugned award being put to challenge

itself is the issue in a Section 34 application and therefore, it is described as a one issue summary procedure. As a sequitur to the second peripheral issue, this Court reminds itself that an application under Section 34 is neither an appeal nor a revision. It is not even a full fledged review. It is an abridged judicial review within the limited legal landscape and short statutory perimeter of Section 34.

6. This Court now proceeds to revert to core issues.

7. CMWSSB, issued an invitation for bids and for work which is described as 'Construction of Water Distribution Station for Choolaimedu Water Supply Zone including underground Tank, Pump House covering Civil, Mechanical, Electrical and Instrumentation Works' (hereinafter 'said work' for the sake of brevity). IVRCL was a bidder and a letter of acceptance / work order dated 27.08.1998 was issued. The work had to be completed within 20 months, but there was an extension. To be noted, the scheduled completion date is 26.09.1999, but at the request of IVRCL, CMWSSB issued an extension letter dated 10.12.1999. Thereafter, there is no dispute or disagreement before this Court that said work was completed within the extended period. Under such circumstances, final bill/s was/were presented on 28.05.2001 (Ex.21 series before AT). Thereafter vide communication dated

29.03.2004 (Ex.C24 before AT), the issue of levy of 'Liquidated Damages' ('LD' for the sake of brevity) was brought up and it was made clear that the matter has to be resolved only by resorting to legal proceedings. LD to the tune of Rs.36 lakhs was levied by CMWSSB. IVRCL on its part made claims under three different heads, namely Office Overheads Calculation claim @3% and off site overheads @7% for the extended period, contractor's profit @ 10%, Establishment cost of skeleton staff retained from 15.01.2000 to 19.02.2001 and interest @12% for preference, proved with lite and 18% till payment. Besides these four heads of claim, IVRCL also sought refund of LD which was levied. This makes it 5 heads of claims in all. There is no dispute that the tender document together with the work order/letter of acceptance constitute the contractual relationship between the parties, the same contains an arbitration clause captioned 'DISPUTES AND ARBITRATION' and this clause is Clause 24. To be noted, this serves as 'arbitration agreement' between the parties within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

8. In the light of arbitration being resorted to, IVRCL filed an application under Section 11 of A and C Act being O.P.No.619 of 2004

and the same came to be disposed of by a Hon'ble single judge of this Court vide order dated 28.03.2005 wherein the aforementioned former Hon'ble Judge of this Court and former Chief Justice of another High Court was appointed as sole Arbitrator to constitute the AT. To be noted, this order dated 28.03.2005 made in O.P.No.619 of 2004 came to be passed after hearing both sides i.e., IVRCL and CMWSSB. It is also to be noted that both parties were represented by respective counsel in O.P.No.619 of 2004.

9. AT entered upon reference and the aforementioned 5 heads of claims were made by IVRCL, which was the claimant before the AT. Obviously, CMWSSB was the lone respondent before the AT. CMWSSB filed a detailed counter statement before the AT. On the basis of rival pleadings, AT framed as many as 15 issues and these 15 issues are captured in Paragraphs 6 of the impugned award reads as follows:

- ' 1. Whether time was of the essence of the contract between the claimant and the respondent?*
- 2. Whether the execution of the work/commissioning of the project was prolonged /delayed owing to unprecedented rain, variation in soil, change in scope of work, variation in work order, delay in obtaining safety certificate and other causes beyond the control of the claimant?*
- 3. Whether the respondent had contributed to any delay in the*

*execution/commissioning of the project by non-performance in time of the obligations under the contract?*

*4. Whether the last schedule of payment made before 15-1-2000 would not establish that the project had been completed and commissioned by the claimant by then?*

*5. Whether the claimant is entitled to recover from the respondent Rs.41.07 lakhs towards office overheads and off site overheads?*

*6. Whether the claimant is entitled to recover from the respondent Rs.41.06 lakhs by way of loss of profits?*

*7. Whether the levy of liquidated damages of Rs.36 lakhs on the claimant by the respondent is justified under the terms of the contract?*

*8. Whether the claimant is entitled to a refund of Rs.36 lakhs withheld by the respondent as and by way of liquidated damages?*

*9. Whether the claim for refund of Rs.36 lakhs is barred by limitation?*

*10. Whether the claimant is entitled to recover from the respondent Rs.4.43 lakhs towards establishment cost of skeleton staff between 15-1-2000 to 19-02-2001?*

*11. Whether the claimant is not entitled to recover from the respondent all or any of the claims, in view of the signing of the final bill on 28-05-2001?*

*12. Whether the Arbitral Tribunal has jurisdiction to entertain the claim?*

*13. Whether the claimant is entitled to interest at 18% from 26-9-1999 till the date of payment on the amounts that may be awarded to it?*

*14. Whether the claimant is entitled to recover cost of the proceedings from the respondent?*

*15.To what relief is the claimant entitled?'*

10. Before the AT, there was documentary evidence. Though there was no oral evidence on both sides, in terms of documentary evidence, IVRCL has also marked as many as 28 exhibits i.e., Exs.C1 to C28 and CMWSSB, as respondent before AT, has marked 13 exhibits, namely Exs. R1 to R13.

11. After hearing both sides, AT made the impugned award and operative portion of the impugned award is paragraph 38, which reads as follows:

*'38. In view of the findings earlier recorded on the points for determination, an award is passed in favour of IVRCL against CMWSSB, for the recovery of the sums of*

*(i) Rs.36,00,000.00 together with interest thereon at 12% per annum from 24.09.2003 till the date of payment and*

*(ii) Rs.75,42,320.00 together with interest thereon at 12% per annum from 21-5-2005 till the date of payment.*

*Having regard to the facts and circumstances of the dispute, each party is directed to bear its cost in these proceedings.*

12. It is submitted that the five heads of claim of IVRCL were acceded to, together with interest at the rate of 12% per annum. With

regard to refund of LD, interest was from the date of levy i.e., 24.09.2003, whereas with regard to the other heads of claim, interest was awarded on and from 21.05.2005.

13. In the above backdrop, today in this web-hearing on a video-conferencing platform, Mr.C.Vigneswaran, on behalf of CMWSSB and Ms.Hema Srinivasan, counsel on record for IVRCL were before me, with the consent of both learned counsel, captioned OP was taken up for final disposal and heard out.

14. Learned Standing Counsel for CMWSSB, notwithstanding the pleadings in the affidavit in the captioned OP submitted that he will make a four pronged attack or in other words he will assail the impugned award on four points, he did so and a summation of his submissions is as follows:

a) Arbitration agreement between the parties is in the form of clause 24 captioned 'DISPUTES AND ARBITRATION' in the bid document that provides for arbitration for only claims under Rs.50,000/- and for claims above Rs.50,000/-, parties will have to seek remedy in Civil Court. Therefore, the AT did not have jurisdiction;

b) The claim of IVRCL is barred by limitation, as it is

beyond three years from the date on which right to apply accrued qua IVRCL.

c) There is enormous delay in making the impugned award by the AT, as the arguments concluded on 26.05.2006, written submission of the claimant (IVRCL) was filed on 30.06.2006, written submissions of the respondent (CMWSSB) was filed on 19.07.2006, but the award came to be made two years later, on 08.11.2008. This, according to learned Standing Counsel, vitiates the impugned award and it is liable to be dislodged by this Court;

d) With regard to the four heads of claim excluding the head of claim regarding refund of LD, there was no documents before AT and therefore, AT has acceded to the prayer of IVRCL with no evidence before it.

15. In response to the above submissions of learned Standing Counsel for CMWSSB, learned counsel for IVRCL made response submissions, summation of which is as follows:

'a) With regard to the claims exceeding Rs.50,000/- point, it was never raised before the AT though CMWSSB

filed a Section 16 application. It was pointed out that this has not been raised even now in the captioned OP;

b) With regard to limitation, it was submitted that final bill is dated 28.05.2001 (Ex.C21) and the levy of LD was only vide Ex.C24 dated 29.03.2004 and therefore, the claim is not barred by limitation;

c) Delay in making the award is a matter which has to be dealt with on a case to case basis and this is a case where neither parties moved the AT;

d) It is incorrect to say that the claims of IVRCL have been acceded to on no evidence or without any documents as Exs.C1 to C28 contained buttressing material and all this has been discussed in the impugned award.'

16. By way of reply, learned Standing Counsel for CMWSSB submitted that plea of jurisdiction of AT can be raised at any point and not necessarily by resorting to Section 16. To be noted, this is ***Lion Engineering*** principle (***M/s.Lion Engineering Consultants Vs. State of M.P & Ors*** reported in ***2018 SCC Online SC 327***). With regard to delay in making the arbitral award, a judgment of a Hon'ble single Judge of Delhi High Court in ***Harji Engg. Works Pvt. Ltd., Vs. Bharat Heavy***

***Electricals Ltd., and Another*** reported in **2009 (107) DRJ 213** and an order of this Court dated 10.09.2019 made in **O.P.No.4 of 2015 [K.Dhanasekar Vs. The Union of India]** were relied on. It was also submitted that cause of arbitration is of relevance and this has been explained in ***Panchu Gopal Bose Vs. Board of Trustees of Port of Calcutta*** reported in **(1993) 4 SCC 338**.

17. This Court now proceeds to consider the rival submissions, discuss the same, give its dispositive reasoning and arrive at a conclusion qua captioned OP.

18. The first point pertains to Rs.50,000/- cap. The arbitration agreement between the parties, which is in the form of a clause in the bid document (Clause 24), captioned 'DISPUTES AND ARBITRATION' reads as follows:

***'24. DISPUTES AND ARBITRATION***

*a) In case any question, difference of dispute shall arise on matters touching the construction of any clause herein contained on the rights, duties and liabilities of the parties hereto or any other way touching or arising out of the presents, the same shall in cases where the total value of claims under the contract is less than and upto Rs.50,000/- be referred to the interpretation, decision and award of a Superintending Engineer of the Chennai Metropolitan Water Supply and Sewerage Board to be nominated*

*by the Managing Director of the Board as the sole arbitrator whose decision shall be final and binding on the parties.*

*b) In case where the value of claims is more than Rs.50,000/- the parties will seek remedy through the competent Civil Court.*

*c) Provided always that the contractor shall not except with the consent in writing of the Engineer, in any way delay carrying out works by reason of any such matter, question or dispute being referred to arbitration, but shall proceed with the work with all due diligence and shall, until the decision of the arbitrator be given abide by the decision of the Engineer and no award of the arbitrator shall relieve the contractor of his obligations to adhere strictly to the instructions of the Engineer with regard to the actual carrying out of the works.*

*d. The liability of the contractor to the Board arising out of then Clause 11-A herein shall not be the subject matter of Arbitration.'*

19. As rightly pointed out by learned counsel for IVRCL, this point was never raised before the AT. More particularly, it has not been raised as a ground even in the captioned OP. In this regard, this Court also notices that before AT, CMWSSB did take recourse to Section 16 and it did file an application under Section 16 raising preliminary objections, vide petition dated 18.07.2005. This application under Section 16 came to be disposed of by AT along with the impugned award on 08.11.2008.

What is of relevance is, a careful perusal of this Section 16 application

made by CMWSSB before AT, which runs to 17 pages and 25 paragraphs, this Rs.50,000/- cap point has not been raised anywhere. As rightly pointed out by learned counsel for IVRCL, a careful perusal of the OP pleadings before this Court also reveals that it has not been raised though it runs to 33 pages and consists of 101 paragraphs. This Court is constrained to observe that it is verbose, but this point has not been raised. This Court is not proceeding on this mere technicality. This Court also considers it appropriate to consider the attendant circumstances. The arbitration trigger notice is Ex.C24 dated 29.03.2004. Thereafter, as already alluded to supra, an application under Section 11 of A and C Act was made by IVRCL being O.P.No.619 of 2004. As already alluded to supra and delineated above, this OP came to be disposed of after hearing both sides. Therefore, CMWSSB has consented to arbitration of the arbitral disputes. This Court is conscious of the language in which sub-section (2) of Section 16 is couched owing to which participation in appointment of Arbitrator or appointment of arbitrator will not preclude a party from raising the issue of jurisdiction, but in this case though Section 16 application was filed raising other aspects of the matter, this point was not raised which clearly means that CMWSSB has derogated this cap. To be noted, this is non-derogable as

AT itself is a creature of contract. In this view of the matter, **Lion Engineering** case also does not come to the aid of CMWSSB. In **Lion Engineering**, party had not chosen to file any Section 16 application. In this regard, Section 4 of A and C Act becomes relevant. Section 4 of A and C Act deals with waiver and the same reads as follows:

*'Section 4 Waiver of right to object. —A party who knows that—  
 (a) any provision of this Part from which the parties may derogate,  
 or  
 (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.'*

20. It is clear as daylight that a party which knows the requirement under the arbitration agreement and yet proceeds with the arbitration without objection, shall be deemed to have waived his right to so object. Section 4 is very clear and in the considered view of this Court, Section 4 nails this issue qua CMWSSB. At the risk of repetition, this Court makes it clear that, it not being raised in Section 11 OP, it not being raised before the AT though a Section 16 application was filed and it not being raised in the captioned OP also nails it, in this view of the matter, Section

4 clearly operates and this Rs.50,000/- cap point does not come to the aid of CMWSSB in its campaign against the impugned award. In other words, this douses the arguments qua Rs.50,000/- cap.

21. This takes us to the next point, namely limitation. Learned counsel for CMWSSB submitted that the Article that is applicable is Article 137 of 'The Limitation Act, 1963' (hereinafter 'Limitation Act' for brevity). It is his specific case that no period of limitation is provided elsewhere in the schedule / chart qua Limitation Act and therefore, the residuary article, namely Article 137 would apply. What is of significance is, with regard to Article 137, limitation starts to run when the right to apply accrues. According to learned counsel for CMWSSB, the right to apply accrued in favour of IVRCL on 10.12.1999 when the extension letter was given by CMWSSB. This 10.12.1999 extension letter has been marked as Ex.20 before the AT. It is the case of counsel for CMWSSB that it was made clear vide this Ex.C20 that the extension upto 15.01.2000 is with LD. It is in this view of the matter, learned counsel submitted that IVRCL knew for sure that LD is going to be levied. The difficulty is, on issue of this Ex.C20 and receipt of the same by IVRCL, it cannot be gainsaid that the right to apply accrues. The right to apply would accrue in favour of IVRCL only when the final bill

was presented on 28.05.2001 (at the highest), but in any event, the levy of LD was only on 29.03.2004. This Court notices that AT has dealt with this aspect of the matter by framing an issue. Issue regarding limitation is Issue No.9. Issue No.9 has been answered by AT in the following manner:

*'21. Point 9:- In regard to the claim of IVRCL for recovery of liquidated damages levied, CMWSSB, in paragraph 51 of its counter had raised a plea of limitation. According to that, liquidated damages had been levied under Running Account Bills 40 to 43 on 2-10-1999, 3-11-1999, 7-12-1999 and 3-12-2000 respectively. It was also stated that IVRCL had signed the final bill on 28-5-2001, but had chosen to invoke the jurisdiction of the High Court only on 5-6-2004, admittedly beyond the period of limitation of three years and therefore the claim of IVRCL, regarding the recovery of liquidated damages levied, is hopelessly barred by limitation. In answer to this, IVRCL in paragraph 26 of its rejoinder had disputed this claim of CMWSSB and stated that the cause of action for arbitral proceedings was subsisting, even as on 24-9-2003 and therefore, the plea of limitation put forward was incorrect and unacceptable.*

*22. Learned counsel for CMWSSB submitted that after the imposition of liquidated damages on 3-12-2000 and signing of the final bill by IVRCL on 28-5-2001, the petition for appointment of Arbitrator was filed on 5-6-2004 and after signing of the last bill, which was the date of commencement of the cause of action, the application filed beyond three years, as per Article 137 of the*

*Limitation Act, was clearly barred. In support of this submission, learned counsel strongly relied on the decisions reported in Kerala State Electricity Board v. T.P.Kunhaliumma (A.I.R. 1977 S.C.282), Inder Singh V.Delhi Development Authority (A.I.R 1988 S.C.1007) and Union of India V. Momin Construction Co. ((1997) 9 S.C.C 97). On the other hand, learned counsel for IVRCL pointed out that after the levy of liquidated damages and also the signing of the final bill, on several occasions, IVRCL had requested for the waiver of the liquidated damages levied and only after the rejection of the same on 24-9-2003, the cause of action enabling IVRCL to claim return of the amounts levied by way of liquidated damages arose and the High Court having been moved within three years from that date, the application was in time and not barred. Referring to Sections 21 to 43 of the Act, learned counsel contended that the commencement of the arbitral proceedings in relation to the dispute regarding the return of the amounts levied as liquidated damages, was the date on which a request to refer the dispute to arbitrator, was received by the opposite party.*

*23. Earlier, it has been pointed out that the levy of liquidated damages as per Clause 45 of the General Conditions of Contract, was not in accordance with that provision. It is seen that even before the signing of the final bill on 28-5-2001, under Ex.C-11 dated 22-1-2001, IVRCL had prayed for the release of Rs.36 lakhs levied as liquidated damages. Again, after the signing of the final bill, under Ex.C-14 dated 19-10-2001, IVRCL had sought refund of the liquidated damages. Under Ex.C-15 dated 13-11-2001, IVRCL had sought the consideration of the waiver of the liquidated damages asked for by it. In another letter Ex.C-17 dated 3-6-2002,*

*IVRCL had reiterated its requests for the release of Rs.36 lakhs levied as liquidated damages. In its letter Ex.C-18 dated 7-9-2002, IVRCL had referred to Exx. C.14, C.15 and C.17 earlier sent by it and repeated its request for the waiver of the liquidated damages and release of Rs.36 lakhs. Again, in Ex.C-19 dated 23-11-2002, IVRCL had catalogued the reasons which were responsible for the delay and prayed for cancellation of levy of liquidated damages. Ex.C-24 dated 29-3-2004 refers to a letter "CMWSSB/CW-II/Spl/2003 dated 24-9-2003" rejecting the request of IVRCL for cancellation of the levy of liquidated damages. It appears from Ex.C-25 dated 17-4-2004 which refers to Ex.C-24 that IVRCL had also repeated the request for refund of liquidated damages before the appellate authority of CMWSSB and that it had been decided that the levy is in order, which was also communicated to IVRCL by the letter "CMWSSB/CW-II/Spl/2003 dated 24-9-2003". From the above referred correspondence it is seen that only on 24-9-2003, IVRCL on the rejection of its claim put forward, acquired for the first time a right of action to recover or a right to require that an arbitration should take place upon that dispute. The letter "CMWSSB/CW-II/Spl/2003 dated 24-9-2003" constituted a clear and unequivocal denial of the right of IVRCL to recover liquidated damages already levied and this gave rise to a cause of action either for arbitration in accordance with Clause 24 of the General Conditions of Contract or to recover otherwise. The application filed by IVRCL on 5-6-2004 was within three years from 24-9-2003 and in time. In addition, as per Section 21 read with Section 43(1) and (2) of the Arbitration and Conciliation Act, 1996, the arbitral proceedings in this case had commenced on 29-3-2004, when*

*under Ex.C-24 CMWSSB had been informed that the remedy through court will be sought. In other words, under Column 3 of Art. 137 of Limitation Act, 1963, the right to apply for arbitration arose on 29-3-2004 and the application having been made on 5-6-2004, within three years after accrual of the right to apply, is in time. That Article 137 of the Limitation Act, 1963, would apply to an application for appointment of arbitrator had been decided in Kerala State Electricity Board v.T.P.Kunhaliumma (A.I.R.1977 S.C.282), Inder Singh v. Delhi Development Authority (A.I.R.1988 S.C.1007) and Union of India V. Monin Construction Co. ((1997) 9 S.C.C 97) relief on by the learned counsel for CMWSSB. However, the question in this case is even if Article 137 of the Limitation Act is applicable, when did the right to apply accrue to IVRCL. That, as discussed earlier, arose either on 24-9-2003 or on 29-3-2004 and the application filed on 5-6-2004, is well within time. The point is found accordingly.*

22. Limitation in most cases is a mixed question of law and facts, AT, on the basis of material available before it has come to the conclusion that the claim of IVRCL is not barred by limitation in the light of Article 137 and in the light of undisputed chronology of dates/events, which have been alluded to supra, this Court is of the considered view that the view taken by the AT is not an implausible view and therefore, it does not call for any judicial intervention. This douses and puts an end to the second argument predicated on limitation.

23. The third argument is with regard to delay in pronouncing the impugned award. As already alluded to supra, there is no dispute or disagreement about the dates i.e., that the claim was filed on 16.05.2005, arguments concluded on 26.05.2006, claimant (IVRCL) filed written submissions on 30.06.2006, respondent (CMWSSB) filed written submissions on 19.07.2006 whereas the impugned award came to be made on 08.11.2008. There are two reasons on the facts and circumstances of this case, owing to which this Court is inclined to hold that though it would have been desirable that impugned award ought to have been made earlier, this delay by itself does not vitiate this impugned award. This is with a caveat that it is in the light of peculiar facts and circumstances of this case, considering the section 11 plea and considering that both parties did not move the AT, the delay in this case does not vitiate the impugned award. Another aspect of the matter is, as already alluded to supra, the captioned OP is governed by pre 23.10.2015 regime. This is by applying ***Ssangyong*** principle i.e., dicta laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131***. Prior to 23.10.2015, there was no Section 29-A in the A and C Act. Absent 29-A, one year time frame for disposal of

arbitral proceedings and disposal within a further period of 6 months (extended mutually), mandate of the AT getting snapped are not available as an argument. Therefore there is statutorily no ground to attack the impugned award on this 29-A, 18 months timeline.

24. With regard to the case laws, ***Harji Engg. Works Pvt. Ltd., Vs. Bharat Heavy Electricals Ltd., & Another*** reported in **2009 (107) DRJ 213** is a judgment rendered by a Hon'ble single Judge of Delhi High Court. Though it is obvious that it has only persuasive value, notwithstanding this position, this Court respectfully looked into ***Harji Engineering*** case law. It is clear from ***Harji Engineering*** case law that, it was a case where Arbitrator proceeded to make the award and pronounce the award even without finally concluding the hearing. This is contained in Paragraph 21 and the relevant portion reads as follows:

*'21. Moreover in the present case learned Arbitrator has proceeded to make and pronounce the award even without finally concluding the hearings.'*

25. Furthermore, ***Harji Engineering*** was a case where the delay was three years, but this Court is not going into numbers. This Court makes it clear that, it was a case where the award was made without even finally concluding hearings and therefore stands distinguished on facts.

**Harji Engineering** was referred to by a Hon'ble brother Judge in **K.Dhanasekar Vs. The Union of India and Ors.**, in an unreported judgment dated 20.08.2019 made in **O.P.No.4 of 2015**. A careful perusal of the order made in O.P.No.4 of 2015 reveals that it was a case where the award was made after three years and 7 months. It is in this context that learned single Judge set aside the counter claim alone and directed the parties to appoint fresh Arbitrators. Therefore, **K.Dhanasekar's** case is clearly distinguishable on facts. Even in **K.Dhanasekar's** case, with regard to delay Hon'ble single Judge has categorically observed in Paragraph 10, that what is reasonable time is flexible and depends upon the facts and circumstances of each case. Relevant portion of Paragraph 10 of K.Dhanasekar judgment reads as follows:

*'10.....The Arbitrators should make and publish the Award within a reasonable time. What is reasonable time is flexible and depends upon the facts and circumstances of each case.....'*

26. On the facts and circumstances of instant case, more particularly as this Court has observed in the prefatory note that captioned OP is not just vintage, but ancient and considering that the tender itself was of the year 1997 and it would be a quarter century old shortly, the trajectory of the matter is also of relevance. Though the

impugned award could have been rendered earlier, on the facts and circumstances of this case, this Court is of the considered view that the award being rendered a little over two years after the filing of the written submissions by CMWSSB (respondent) does not vitiate the impugned award to be dislodged in a Section 34 exercise.

27. This takes us to the last and fourth limb of argument made by learned Standing Counsel for CMWSSB.

28. With regard to four heads of claim, this Court finds that Claim No.1 is Issue No.5 and the same has been dealt with by the AT in the following manner:

*'Point 5 : According to IVRCL, the cost element of overheads and establishment were taken into account to arrive at the project cost at Rs.2250 lakhs and the value of the work was not only varied by more than 1.38 crore, such work required a further period of 111 days for its completion and the prolongation was on account of causes, beyond its control. The expenses on overheads and establishment incurred by IVRCL for the additional period of 111 days was claimed as a loss entitling it to be compensated for the same. Referring to the variation which came to 6.143%, IVRCL further stated that the time needed for the execution of the variation in work will add 1.2 months to the performance period of 20 months. The Government of India, according to IVRCL, had permitted 10% for overheads and on that basis, it had claimed office overheads at 3% and off site overheads at 7% for the*

*extended period amounting to Rs.12.32 lakhs and Rs.28.75 lakhs respectively, totalling to Rs.41.07 lakhs. CMWSSB disputed this claim mainly on the ground that IVRCL had committed the delay in completing the contract and therefore, the claim cannot be put forward. It was also stated that owing to the default committed by IVRCL, no loss can be stated to have been sustained by it and that the question of CMWSSB being to compensate for the loss did not also arise.*

*It has earlier been found under point 2 that the execution of the work and commissioning of the project was prolonged / delayed owing to the delaying factors as put forward by IVRCL and wholly beyond its control. In view of that conclusion, it follows that for the period between 26.09.1999 when the project should have been completed and 15.01.2000 when it was actually completed, IVRCL undoubtedly had been obliged to retain the staff, store and keep materials etc., at the site for a longer period. The delay in the completion of the project was, as found already, on account of totally unexpected situations like variation in soil, change in the scope of work, variation from the work order, sand blow, high water table etc. Though as per Ex.C-6 dated 22.09.1999, 90% of the work had already been completed, the prolongation of the work, for no fault of IVRCL, undoubtedly resulted in the incurring of extra or additional expenditure for the staff etc. In addition, for no fault of IVRCL, the machinery, equipment etc., had also to be necessarily retained and maintained by it at the site for a period longer than what was agreed to earlier. It is also necessary to point out that CMWSSB had enjoyed the benefit of the services rendered by IVRCL upto 15.01.2000 and*

*it cannot disown its liability to compensate IVRCL for the additional expenditure incurred in the retention of the staff, machinery, maintenance at site, supervisory establishment, field office and share of head office charges, travelling expenses, interest, insurance etc during the period of delay. The basis for computing the claim of office overheads and off site overheads at 3% and 7% appears to be Hudson's formula. Even the Government of India, as far back as 1956, had recommended an allowance of 10% on overheads. Though initially reliance was placed on the data in a statement of a Chartered Accountant, the details thereof had not been proved. Necessarily therefore the only basis on which the claim has to be dealt with is the formula referred to earlier. It is not in dispute that, according to this, the office overheads at 3% works out to Rs.12.32 lakhs and the off site overheads at 7% works out to Rs.28.75 lakhs. In all, under the heads of office overheads and off site overheads for the extended period, IVRCL is entitled to recover Rs.41.07 lakhs from CMWSSB. This point is found accordingly.*

29. Claim No.2 is covered by Point 6 and the same has been dealt with in the following manner:

*'Point No.6 According to IVRCL, while pricing the bid, it had taken into account the value of the contract, duration of the contract, profit at 10% and other aspects and that, had the contract been completed as per schedule, it would have invested the amounts in other works thereby earning a profit in such works. It was also the case of IVRCL that owing to the prolongation and increase in work, the profit that would have been earned in 20*

months was earned in 24 months and it was entitled to compensation towards loss of profit at 10% on the contract value as per Hudson's formula. The claim, according to IVRCL, was restricted to 7.5% instead of 10%. CMWSSB in paragraphs 48 and 49 of the counter stated that as IVRCL had delayed the completion of the project, the question of its claiming any profit does not at all arise and therefore no question of compensation would also arise. Disputing the applicability of Hudson's formula, CMWSSB stated that IVRCL is not entitled to any amount much less a sum of Rs.41.06 lakhs claimed. While deciding point No.2 it was found that the prolongation / delay in the execution of the work was on account of factors beyond the control of IVRCL. Even according to CMWSSB, the work was completed on 15.01.2000 as seen from Ex.C-9 dated 09.11.2000. This is also supported by Ex.C-23 wherein the date of completion has been given as 15.01.2000. When the work which in the normal course could have been completed on 26.09.1999, but was completed after a delay of 111 days on 15.01.2000 for no fault of IVRCL, it follows that owing to prolongation and delay, IVRCL had undoubtedly sustained loss of profit, as the profit which it would have earned in 20 months was put off or postponed by 111 days. IVRCL also mobilised and invested for completing the work in 20 months in the hope of realising profits within that time, but owing to the increase in the value of work and other factors over which IVRCL did not have any control, the work was prolonged by 111 days and that did not yield return in the shape of profit on the mobilisation and the efforts put in. It is also necessary to bear in mind that IVRCL lost the profit earning capacity owing to its longer retention in the

work undertaken without any relatable increase in monetary benefit earned and lost the freedom to move elsewhere till June 2003, to earn the profit which it might have otherwise done. The measure of profit would depend upon the facts and circumstances of each case. Implicit in the works contracts is the reasonable expectation of profit and its loss has to be compensated. Under these circumstances, IVRCL would undoubtedly be entitled to get compensation towards loss of profit. However, regarding the quantum of loss of profit, the Government of India, Ministry of Irrigation and Power (Central Water and Power Commission), after a survey of major projects in the country, had stated in its report that in normal circumstances, an allowance of 10% of the prime cost as contractor's profit is reasonable. This was as far back as 1956 and in the present day it could be more; but 10% could be adopted as the minimum. What is claimed by IVRCL is only 7.5% and the loss of profit at 7.5% can be ascertained on the basis of Hudson's formula. In the instant case, the value of the contract was 2250 lakhs and applying Hudson's formula to arrive at the loss of contractor's profit at 7.5% as claimed, the profit lost by IVRCL can be computed as under :

$$\frac{7.5}{100} \times \frac{2250}{20} \times 3.7 = 31.22 \text{ lakhs}$$

Though learned counsel for CMWSSB relied on the decision in All India Radio vs. Unibros and another (2002 (3) RAJ 636 (Del)) to contend that Hudson's formula could not be applied, when there is no material to show that IVRCL was capable of earning elsewhere or that another contract was available, but IVRCL could not take it

*up owing to the prolongation of work, it is seen on the facts that at least till about January 2001, IVRCL had to remain at the work site, though the project was taken over in June 2003. During this period, it had lost the profit earning capacity without any monetary benefit and unable to move out to do other work it might have got. IVRCL would therefore be entitled to recover this amount of Rs.31.22 lakhs towards loss of profit.*

30. Claim No.3 pertains to LD, which is covered by points 7, 8 and 9, which have been dealt with by AT in the following manner:

*'Points 7 and 8 : Referring to Clause 45 of the Contract and Section 74 of the Indian Contract Act and relying upon the decisions of the Supreme Court in Fateh Chand v. Balkishnan Dass (A.I.R. 1963 S.C. 1405), Maula Bux v. Union of India (A.I.R. 1970 S.C. 1955) and Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. ((2003) 5 S.C.C. 705), learned counsel for IVRCL contended that though there was some delay owing to circumstances beyond its control, it had not resulted in any legal injury to CMWSSB and there was therefore no justification at all for the levy of liquidated damages by CMWSSB and its refusal to refund the amount to IVRCL. However, learned counsel for CMWSSB maintained that the levy of liquidated damages was in accordance with the provisions of the contract owing to the delay on account of non-maintenance of the progress of work by IVRCL and therefore CMWSSB was in order in declining to cancel the levy and refund the amount to IVRCL.*

*To ascertain whether the levy of what is termed as liquidated damages of Rs.36 lakhs by CMWSSB on IVRCL is justified, it would be necessary to refer to the relevant provision in the contract, which runs as follows:*

*"45.1 If the contractor fails to maintain the rate of progress of works as stipulated in this clause, the Engineer shall have the power to impose as liquidated damages of such amount as he may deem fit for every week that the work remains uncommenced or unfinished after the proper dates, provided however the total amount of liquidated damages imposed during the stipulated period of completion of the work shall not exceed 5% of the contract value."*

*Before the power to levy liquidated damages under the aforesaid provision is exercised, it would be necessary for the Engineer to be satisfied about the fulfilment of the conditions under which such a levy can be made. First and foremost, there must be a failure by the contractor to maintain the rate of progress as stipulated in the provision referred to earlier. The failure to maintain the rate of progress of work should be referable to an act or omission on the part of the contractor which had retarded the progress of work. It is significant that Clause 45 referred to above does not by itself stipulate the rate of progress of work. The power to levy or impose liquidated damages and the quantum thereof is not absolute. It would depend upon the number of weeks the work had either remained uncommenced or unfinished after the proper dates. In this case, the work was commenced on 27.01.1998, as could be seen from Ex.C-28 dated 22.05.2001 and Ex.C-2 dated 25.07.2002. Exs.C-2 and C-28 would also show that the work was completed on 08.12.1999. Ex.R-11 also proceeds on the basis of the completion of*

*the work on 08.12.1999. While dealing with point 2, on a consideration of the documentary evidence put in by both sides, it had been found that unprecedented rain, variance in soil, variation in the scope of work, variation in work order and other factors had caused delay. If IVRCL, by any act or omission on its part, was not responsible for the delay, which had occurred owing to causes beyond its control, it will be difficult to attribute to the contractor a failure to maintain the rate of progress of work. Further, the imposition of liquidated damages should be on a weekly basis for every week the work had remained unfinished. There is no material to show either the number of weeks during which the work had remained unfinished or even the unfinished state of work during those weeks. Even under Ex.C-6 dated 22.09.1999, CMWSSB had been informed of the problems affecting the progress of work not attributable to IVRCL and that even so, it had completed 90% of the work. Likewise, under Ex.C-7 also, difficulties experienced by IVRCL have been pointed out on account of the arising of situations for which it was not responsible and which had hampered the progress of work. The other correspondence that was exchanged and discussed while determining point No.2 would show that the delay had not occurred on account of any act or omission on the part of IVRCL in the course of the execution of the work. That correspondence would also establish that there was delay in commissioning for want of water etc., for which again IVRCL cannot be held responsible. However, under Ex.C-20 dated 10.12.1999, CMWSSB while extending the period upto 15.01.2000, levied liquidated damages without considering the need to fulfil the requirements of clause 45. Indeed, the evidence on behalf of*

*CMWSSB does not disclose that there was strict adherence to and fulfilment of the requirements of Clause 45 prior to the levy of liquidated damages. From Ex.R.11, it is seen that the total deviation of the work above the contract value was 6.3369% and even on the footing that about 6% of the original completion period i.e. 20 months is included for the variation, that may add about 36 days to the performance period, so that, the so-called delay would stand reduced. It is significant that though according to IVRCL, it had completed the work on 15-1-2000, no water was made available in time by CMWSSB, which had also caused considerable delay. IN several of its letters like Ex.C-14 dated 19.10.2001, Ex.C-15 dated 13.11.2001, Ex.C-17 dated 3.5.2002 and Ex.C18 dated 7-9-2002 etc., IVRCL had brought to the notice of CMWSSB about the non-availability of water and the consequential delay. This was also accepted by CMWSSB about the non-availability of water and the consequential delay. This was also accepted by CMWSSB in Ex.R-11 stating that for want of water, the pumping station was commissioned only on 22-1-2001. It is, therefore, obvious that even if the project had been completed by 20 months from 27-1-1998, CMWSSB could not have put it to any use, for which IVRCL cannot be held responsible.*

*18. Even in the letters Ex.C-11 dated 22-1-2000, Ex-14 dated 19.10.2001 and Ex.C-18 dated 7-9-2002, IVRCL had pointed out that no loss or damage had been sustained by CMWSSB, for resorting to the levy of liquidated damages. The levy of liquidated damages, even considered as some sort of compensation to CMWSSB, cannot be sustained, as in this case, no legal injury to CMWSSB had been established to have resulted.*

19. In Fateh Chand V. Balkishan Dass (AIR 1963 S.C.1405), the Supreme Court dealt with the scope and ambit of Section 74 of the Indian Contract Act. It was held that the elaborate refinements under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty, had been eliminated under Section 74 of the Contract Act, which enacted a uniform principle applicable to all stipulations naming amounts to be paid in case of breach and stipulations by way of penalty. Dealing with the measure of damages in the two classes of cases under Section 74 of the Indian Contract Act, the Court ruled that the measure of damages in the case of breach of a stipulation is reasonable compensation not exceeding the amount stipulated and that the Court can award such compensation as it deems reasonable, having regard to the circumstances of the case. Despite the words “whether or not actual damages or loss is proved to have been caused” in Section 74 of the Indian Contract Act, the Court laid down that the proof of actual loss or damage is merely dispensed with, but that does not justify the award of compensation, when in consequence of the breach no legal injury at all has resulted, as compensation is awarded to make good the loss or damage, which naturally arose in the usual course of things or which the parties knew when they made the contract to be likely to result from the breach. Maula Bux Vs. Union of India (A.I.R 1970 S.C.1955) the Supreme Court again considered the scope of Section 74 of the Indian Contract Act and stated that the expression “whether or not actual damage or loss is proved to have been caused thereby” is intended to cover different classes of contracts and that where a loss in terms of money can be

determined, the party claiming compensation must prove the loss suffered by him. In *Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* ((2003) 5 SCC 705) the Supreme Court referred to the decision in *Fateh Chand's case* and proceeded to deal with Sections 73 and 74 of the Indian Contract Act and stated that in Section 74 the emphasis is 'on reasonable compensation' and if the compensation named in the contract is by way of penalty, the consideration would be different and the party is only entitled to reasonable compensation for the loss suffered and that if the compensation named in the contract for breach is a genuine pre-estimate which the parties knew when they made the contract to the likely to result from the breach of it, there is no question of proving such loss of such party is not required to lead evidence to prove actual loss suffered by him. It was also stated that the burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. It will be useful to refer also to *State of Kerala V. M/s. United Shippers and Dredgers Ltd.*, (A.I.R 1982 Kerala 181) where the Court pointed out that Section 74 of the Indian Contract Act does not dispense with the basic condition of the breach resulting in loss or damage, which can be called legal injury and that the party complaining of breach and claiming compensation is entitled to succeed only on proof of legal injury having been suffered by him in the sense of some loss or damage having been sustained on account of such breach. It was further held that in a case where the party complaining of breach of the contract has not suffered any legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends and therefore he will not be

*entitled to compensation. Thus, on a consideration of Clause 45 in the contract and the principles laid down in the decisions referred to earlier, it is seen that the levy of liquidated damages is not just and in conformity with the provisions of the contract and cannot also be regarded as some kind of compensation due to sustaining of any damage or legal injury by CMWSSB. Point 7 is found accordingly.*

*20. In paragraph 12 of the counter filed by CMWSSB, it had put forward the plea that IVRCL is not entitled to put forward any claim, as a settlement had been arrived at between the parties pursuant to the letters Exx.C-6 dated 22-9-1999 and C-7 dated 12-10-1999. Referring to the claim for recovery of liquidated damages, in paragraph 51 of the counter, CMWSSB referred to the signing of the final bill and receipt of the amount by cheque, as per final bill, by IVRCL and stated that as there was no protest, IVRCL is estopped from putting forward any claim for recovery of the amount levied as liquidated damages. In its reply, IVRCL had refuted this and stated that by its letters Ex.C-19 dated 23-11-2002 and Ex.C-24 dated 29-3-2004, it had challenged the levy of liquidated damages, in addition to making other claims. CMWSSB rejected the claim so made by its letter dated 24-9-2003. From the records, it is seen that the liquidated damages had been levied under four running account bills. This had also been reflected in the final bill Ex.C-1 dated 28-5-2001 (same as Ex.C21). In keeping with the practice of issuing running account bills periodically, amounts have been levied as liquidated damages and in the final bill, whatever had been recovered under the running account bills, had been consolidated and shown as reduction in respect of the amount payable to IVRCL. The issue of the final bill under Ex.C-1 has to be regarded as an indication that*

there will be no more running account bills as before and nothing beyond that. What is significant is that IVRCL had not made any endorsement on the final bill or given anything in writing to the effect that the bill is correct in every detail mentioned therein or that it had given up its right to challenge the levy of liquidated damages and recover the same. Reliance placed by CMWSSB on the letters Ex.C-6 dated 22-9-1999 and Ex.C-7 dated 12-10-1999 to put forward a settlement cannot be accepted. Ex.C-6 dated 22-9-1999 reports the completion of 90% of the work even on that date and that efforts were being taken to keep up the schedule to run the pump and motor by 26-9-1999. Referring to the soil condition, unprecedented rains and increase of ground water level and continuous earth caving, IVRCL had promised to complete the entire balance work. The other letter Ex.C-7 dated 12-10-1999 sent by IVRCL to CMWSSB again refers to the soil conditions which were encountered and that they had overcome the problems forced by nature also and had completed the civil works etc. It was also suggested that the non-critical items of work would be completed after monsoon. IN response to these letters Exs.C-6 and C-7, after the expiry of nearly two months, CMWSSB had extended the time levying liquidated damages. From the letters relied on by CMWSSB, it is not possible to accept the case of settlement put forward by CMWSSB. It is also significant that in Ex.C-11 dated 22-1-2001, Ex.C-15 dated 13-11-2001, Ex.C-17 dated 3-6-2002, Ex.C-18 dated 7-9-2002, Ex.C-19 dated 23.11.2002 and Ex.C-24 dated 29-3-2004, IVRCL had disputed the levy of liquidated damages under Ex.C-20 dated 10-12-1999 and had also repeatedly requested waiver of the penalty imposed. It is thus clearly established by the evidence on record

*referred to earlier that IVRCL and not in any manner accepted the levy of liquidated damages as correct or that it would give up under a settlement, if it had rights to recover the amount. Consequently, IVRCL is entitled to recover from CMWSSB the amount of Rs.36 lakhs levied as liquidated damages and point 8 is found accordingly.*

*21. Point 9:- In regard to the claim of IVRCL for recovery of liquidated damages levied, CMWSSB, in paragraph 51 of its counter had raised a plea of limitation. According to that, liquidated damages had been levied under Running Account Bills 40 to 43 on 2-10-1999, 3-11-1999, 7-12-1999 and 3-12-2000 respectively. It was also stated that IVRCL had signed the final bill on 28-5-2001, but had chosen to invoke the jurisdiction of the High Court only on 5-6-2004, admittedly beyond the period of limitation of three years and therefore the claim of IVRCL, regarding the recovery of liquidated damages levied, is hopelessly barred by limitation. In answer to this, IVRCL in paragraph 26 of its rejoinder had disputed this claim of CMWSSB and stated that the cause of action for arbitral proceedings was subsisting, even as on 24-9-2003 and therefore, the plea of limitation put forward was incorrect and unacceptable.*

*22. Learned counsel for CMWSSB submitted that after the imposition of liquidated damages on 3-12-2000 and signing of the final bill by IVRCL on 28-5-2001, the petition for appointment of Arbitrator was filed on 5-6-2004 and after signing of the last bill, which was the date of commencement of the cause of action, the application filed beyond three years, as per Article 137 of the Limitation Act, was clearly barred. In support of this submission, learned counsel strongly relied on the decisions reported in Kerala*

*State Electricity Board v. T.P.Kunhaliumma (A.I.R. 1977 S.C.282), Inder Singh V.Delhi Development Authority (A.I.R 1988 S.C.1007) and Union of India V. Momin Construction Co. ((1997) 9 S.C.C 97). On the other hand, learned counsel for IVRCL pointed out that after the levy of liquidated damages and also the signing of the final bill, on several occasions, IVRCL had requested for the waiver of the liquidated damages levied and only after the rejection of the same on 24-9-2003, the cause of action enabling IVRCL to claim return of the amounts levied by way of liquidated damages arose and the High Court having been moved within three years from that date, the application was in time and not barred. Referring to Sections 21 to 43 of the Act, learned counsel contended that the commencement of the arbitral proceedings in relation to the dispute regarding the return of the amounts levied as liquidated damages, was the date on which a request to refer the dispute to arbitrator, was received by the opposite party.*

*23. Earlier, it has been pointed out that the levy of liquidated damages as per Clause 45 of the General Conditions of Contract, was not in accordance with that provision. It is seen that even before the signing of the final bill on 28-5-2001, under Ex.C-11 dated 22-1-2001, IVRCL had prayed for the release of Rs.36 lakhs levied as liquidated damages. Again, after the signing of the final bill, under Ex.C-14 dated 19-10-2001, IVRCL had sought refund of the liquidated damages. Under Ex.C-15 dated 13-11-2001, IVRCL had sought the consideration of the waiver of the liquidated damages asked for by it. In another letter Ex.C-17 dated 3-6-2002, IVRCL had reiterated its requests for the release of Rs.36 lakhs levied as liquidated damages. In its letter Ex.C-18 dated 7-9-2002, IVRCL*

had referred to Exx. C.14, C.15 and C.17 earlier sent by it and repeated its request for the waiver of the liquidated damages and release of Rs.36 lakhs. Again, in Ex.C-19 dated 23-11-2002, IVRCL had catalogued the reasons which were responsible for the delay and prayed for cancellation of levy of liquidated damages. Ex.C-24 dated 29-3-2004 refers to a letter "CMWSSB/CW-II/Spl/2003 dated 24-9-2003" rejecting the request of IVRCL for cancellation of the levy of liquidated damages. It appears from Ex.C-25 dated 17-4-2004 which refers to Ex.C-24 that IVRCL had also repeated the request for refund of liquidated damages before the appellate authority of CMWSSB and that it had been decided that the levy is in order, which was also communicated to IVRCL by the letter "CMWSSB/CW-II/Spl/2003 dated 24-9-2003". From the above referred correspondence it is seen that only on 24-9-2003, IVRCL on the rejection of its claim put forward, acquired for the first time a right of action to recover or a right to require that an arbitration should take place upon that dispute. The letter "CMWSSB/CW-II/Spl/2003 dated 24-9-2003" constituted a clear and unequivocal denial of the right of IVRCL to recover liquidated damages already levied and this gave rise to a cause of action either for arbitration in accordance with Clause 24 of the General Conditions of Contract or to recover otherwise. The application filed by IVRCL on 5-6-2004 was within three years from 24-9-2003 and in time. In addition, as per Section 21 read with Section 43(1) and (2) of the Arbitration and Conciliation Act, 1996, the arbitral proceedings in this case had commenced on 29-3-2004, when under Ex.C-24 CMWSSB had been informed that the remedy through court will be sought. In other words, under Column 3 of Art. 137 of Limitation Act, 1963, the right

*to apply for arbitration arose on 29-3-2004 and the application having been made on 5-6-2004, within three years after accrual of the right to apply, is in time. That Article 137 of the Limitation Act, 1963, would apply to an application for appointment of arbitrator had been decided in Kerala State Electricity Board v.T.P.Kunhaliumma (A.I.R.1977 S.C.282), Inder Singh v. Delhi Development Authority (A.I.R.1988 S.C.1007) and Union of India V. Monin Construction Co. ((1997) 9 S.C.C 97) relief on by the learned counsel for CMWSSB. However, the question in this case is even if Article 137 of the Limitation Act is applicable, when did the right to apply accrue to IVRCL. That, as discussed earlier, arose either on 24-9-2003 or on 29-3-2004 and the application filed on 5-6-2004, is well within time. The point is found accordingly.*

31.Claim Nos. 4 and 5 are covered by Point No.13 and the same have been dealt with in the following manner:

*'Point 13: IVRCL has claimed that on the amounts that may be found payable to it by CMWSSB, interest should also be awarded at 18% from 26-9-1999, being the date which, according to it, the cause of action arose. CMWSSB reiterated that amounts had been paid to IVRCL as per final bill, which had been received by it without demur or protest and therefore the claim for interest, not having been made earlier, should not be entertained. It was also stated that of at all, interest can be awarded only from the date of the claim statement and not earlier.*

*37. In this case, the transaction relating to the project can be regarded as one for commercial purposes and the rate of interest awardable can also be considered with reference to the monies lent*

*or advanced by Banks in relation to commercial transactions. In view of this as well as other circumstances, it will be just, fair and equitable to award interest at the rate of 12%. In so far as the claim of IVRCL for recovery of Rs.36,00,000.00, levied and collected by CMWSSB by way of liquidated damages is concerned, it will be fair and just to allow interest thereon at 12% per annum from the date of arising of the cause of action for its recovery i.e. 24-9-2003, till the date of payment, as the amount had already been quantified and there was a rejection of the request of IVRCL for waiver and refund. Regarding the other items of claim made by IVRCL, only in the course of the present proceedings, the amounts have been determined after contest and it would meet the ends of justice, if the interest at 12% per annum on those amounts is allowed from 21-5-2005, the date of the claim petition, till the date of payment.*

*36. Under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, while the award is for the payment of money, the Arbitral Tribunal could include interest on the amounts payable under the award at such rate, as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date in which the award is made. Section 31(7)(b) provides that interest at the rate of 18% per annum may be awarded from the date of the award to the date of payment.*

32. A careful perusal of the impugned award and manner in which the AT has dealt with the five heads of claim, makes it clear that documentary evidence before the AT has been analyzed. For instance,

with regard to one of the heads of claim, *Hudson* formula has been applied and comes into play. The copious reference to in the discussion leaves this Court with the considered opinion that the view taken by AT is not an implausible view. In this regard, this Court reminds itself that a Section 34 OP is not an appeal. As this is not an appeal, this Court will not judicially intervene qua an impugned award unless it finds the view to be an implausible view or AT has taken a view which no reasonable person would have taken on the basis of material before it. With regard to material before the AT, the case on hand, on facts and circumstances, this is a classic case where **Hodgkinson** principle comes into play. **Hodgkinson** principle was laid down by an English Court way back in 1857. Though **Hodgkinson** principle was laid down by a English Court, the same was recognized by Indian Courts i.e, Hon'ble Supreme Court in the oft-quoted **Associate Builders** case [**Associate Builders Vs. Delhi Development Authority** reported in (2015) 3 SCC 49]. Relevant paragraph is 41 and the same reads as follows:

*'41. This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid*

down: (IA pp. 330-32)

*“The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]*

*‘The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.’*

*Now the regret expressed by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then*

*say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."*

*This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.'*

33. If one is to take a reductionist approach and give a simplistic description of what **Hodgkinson** principle is, it can be safely said that **Hodgkinson** principle is to the effect that AT is the best judge of the

quantity and quality of evidence before it. This is a case where both parties did not choose to let in oral evidence. Both parties have only marked documents and documentary evidence has been alluded to and appreciated by AT as would be evident from the extract and reproduction of copious portions of impugned award supra. Exs.C1 to C28 have been marked on the side of IVRCL as claimant before AT and Exs.R1 to R13 have been marked on the side of CMWSSB as respondent before AT. As both parties have not chosen to let in oral evidence, as the documents were made available before AT to sift through the same, analyse and give its dispositive reasoning and from the copious extract and reproduction of relevant portions of impugned award supra, this Court is left with the considered view that it is certainly not an implausible view. Be that as it may, for the sake of capturing what unfurled in the hearing as comprehensively as possible, this Court deems it appropriate to set out that learned counsel for CMWSSB, as protagonist of captioned OP, also referred to settlement aspect though not read to me, but placed as part of compilation of case laws, *Cauvery Coffee Traders* case law [*Cauvery Coffee Traders, Mangalore Vs. Hornor Resources* reported in (2011) 10 SCC 420] and *P.K.Ramiah and Co.* case law [*P.K.Ramiah & Co. Vs. NTPC* reported in (1994) Sup (3) 126] were placed me. All this is

answered in the impugned award vide Paragraph 34. Relevant portion of paragraph 34 reads as follows:

*'34..... No evidence has been let in by CMWSSB regarding the alleged settlement. When the alleged settlement took place and what were the terms of the settlement, have not been made available. The alleged acceptance of the payment without demur by IVRCL has also not been made out by CMWSSB by any evidence. The plea so raised may at best be one of estoppel and not of jurisdiction. Under these circumstances, the objection raised by CMWSSB that the Arbitral Tribunal has no jurisdiction to resolve the dispute cannot be accepted and is rejected.'*

34. Therefore, those case laws are not of any avail to CMWSSB. ***Punchu Gopal Bose Vs. Board of Trustees of port of Calcutta*** reported in ***(1991) 4 SCC 338*** does not aid CMWSSB as this is not a case of issue turning on cause of action and cause of arbitration which was explained by me in ***Ion Exchange India Ltd. Vs. Angeripalayam Common Effluent Treatment Plant Ltd.*** reported in ***2020 (2) CTC 816***. With regard to no evidence, ***Kamal Construction, Mumbai Vs. Union of India and another*** reported in ***2016 (5) Mh.L.J 162*** case does not come to the aid of the CMWSSB in the light of the discussion supra. In any event, that is a judgment of Bombay High Court, which in terms of law

of precedents at best has only persuasive value. With regard to Rs.50,000/- cap, **Obula Reddy** cases [*State of A.P Vs. Obula Reddy* reported in (1999) 9 SCC 568] and [*State of A.P Vs. Obula Reddy* reported in (FB) (2001) 10 SCC 30] and **Rajam Engineering** case [*Rajam Engineering Contractors, rep. by its one of the partner Vs. The State of Tamil Nadu* reported in 2006(1) CTC 769] were placed in compilation. In **Obula Reddy's** case, learned Sub-ordinate Judge appointed an arbitrator in spite of objection and in spite of Rs.50,000/- cap being pointed out. That is not the case here. Again, **Rajam Engineering** case was one where this cap aspect was put in issue and in a Section 11 proceedings on the teeth of this, the court rendered the finding. In this case, there is nothing before me to show that there was any contest on this in Section 11 and subsequently it was raised neither before AT nor before this Court and Section 4 of A and C Act comes into play as delineated supra elsewhere in this order. Learned counsel for IVRCL pressed into service **Quippo Construction Equipment Limited Vs. Janardan Nirman Pvt. Limited** case law reported in 2020 SCC Online Sc 419 and drew my attention to Paragraph 23 to say that a party which has not raised the issue of jurisdiction should be deemed to have

waived such objection. There is no difficulty in holding that this ***Quippo Construction Equipment*** case comes to the aid of IVRCL owing to dispositive reasoning articulated supra. ***Quippo Construction Equipment*** case has been followed by a Hon'ble single Judge in ***Salar Jung Museum and Ors. Vs. Design Team Consultants Pvt. Ltd.***, reported in ***MANU/DE/1073/2020*** and it may not be necessary to advert to the same as this Court has observed that ***Quippo Construction Equipment*** rendered by Hon'ble Supreme Court comes to the aid of IVRCL on the facts and circumstances of this case. Owing to discussion and dispositive reasoning set out supra, this Court is left with the considered view that there is no ground for judicial intervention qua impugned award under Section 34 of A and C act.

In the result, captioned OP is dismissed. There shall be no order as to costs.

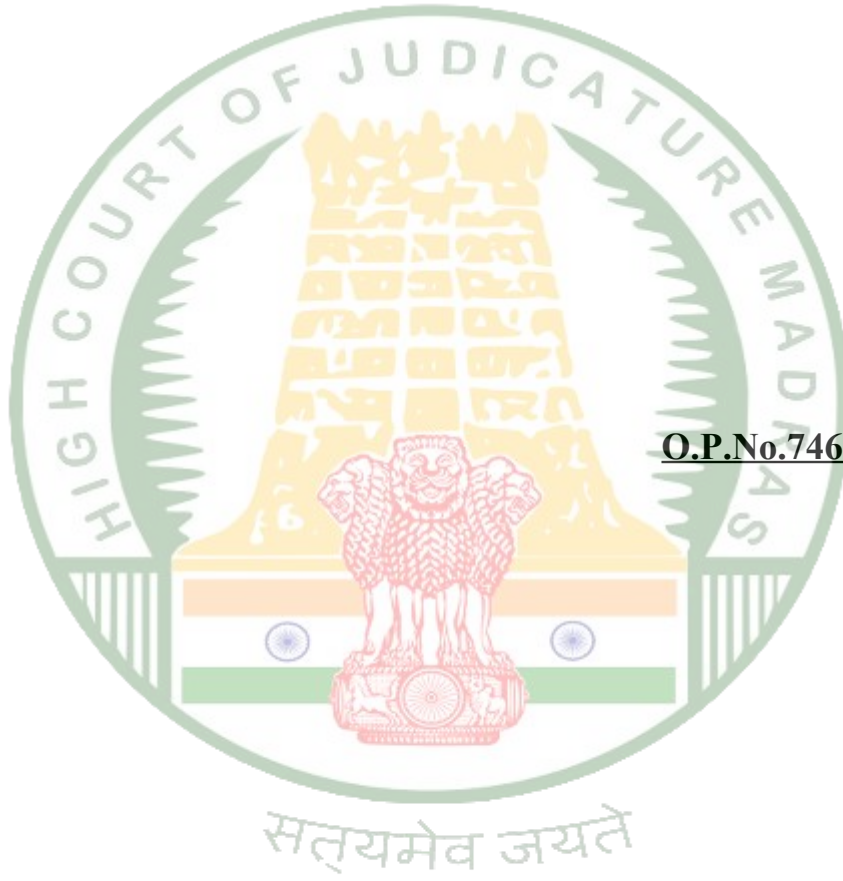
16.12.2020

Speaking order: Yes/No  
Index: Yes/No  
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**M.SUNDAR.J.,**

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**O.P.No.746 of 2009**

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**16.12.2020**