

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	21.10.2019
Judgment pronounced on	07.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.132 of 2010

1.IJM-SCL JV

House No.1-90/A Plot No.20 & 21,
RBI Colony, Madhapur,
Hyderabad – 500 081.

2.IJM Corporation,

House No.1-90/A Plot No.20 & 21,
RBI Colony, Madhapur,
Hyderabad – 500 081.

3.Maytas Infra Limited,

(formerly Satyam Constructions Ltd.),
6-3-1186/5/A, IIIrd Floor,
Amogh Plaza, Begumpet,
Hyderabad – 500 016.

All the Petitioners rep. by
Power of Attorney holder
D.Srinivasa Rao.

... Petitioners

Vs.

1.M/s. National Highway Authority of India,
Plot No.G-5 & 6, Sector – 10,
Dwarka, New Delhi – 110 005 and
its Local Office at 8th Floor SPIC House,
Annex Building, No.88,Anna Salai,

Guindy, Chennai – 600 032.

2.Hon'ble Mr.Justice R.C.Lahoti
Former Chief Justice of India,
B-56, Sector – 14, Noida – 291 301.

3.Hon'ble Mr. Justice Avadha Behari Rohatgi,
Former Judge of High Court of Delhi,
N-217, Greater Kailash -1,
New Delhi – 110 048.

4.Er.Wasim Ur Rehman,
20, Avas Vikas Colony, Pili Khoti,
Civil Lines, P.O.
Moradabad.

... Respondents

Prayer:- Original Petition is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Awards dated 15.11.2009 passed by the Majority Arbitrators.

For Petitioners : Dr.Amit George
Mr.Amol Acharya
Mr.Rishabh Dheer for
Mr.Bijesh Thomas

For Respondents : Mr.Richardson Wilson for
M/s.Wilson Associates for R-1

सत्यमेव जयते

ORDER

The claimants before the Arbitral Tribunal are the Petitioners before this Court. A contract was executed by the Petitioners and the first Respondent on 13.05.1998 (the Contract) for the purpose of construction of the Chennai Bypass Phase – I, spanning a length of about 18.8 kms. The Conditions of Contract for Works of Civil Engineering Construction of

the Federation Internationale Des Ingenieurs-Conseils (FIDIC), 4th Edition, 1987 (the GCC) applied to this Contract, as modified by the Conditions of Particular Application (COPA). This bypass was intended to connect National Highway – 4 (NH-4) with National Highway – 45(NH-45). The stipulated period for completion of works under the Contract was 18 months, with the date of commencement being 12.06.1998 and the stipulated date of completion being 11.12.1999. However, it is the admitted position that there was a delay in completion of work due to multiple reasons and that eventually work was completed on 31.10.2001, according to the Petitioners, and on 30.11.2001, according to the first Respondent. Thus, work was executed over about 40-41 months. As per the Contract, the estimated value of work was Rs.42,45,43,850 but this was subject to variation based on the actual quantity of work, which was to be paid for at Bill of Quantities (BoQ) rates, if applicable. As a matter of fact, about Rs. 57,78,82,594 had been paid up to IPC 37 but there were disputes, inter alia, related to total value of work executed, including non-payment for the period subsequent to IPC 37 and deductions thereto, additional work/variation, including rates for additional work/variation, idling and prolongation cost. The said disputes were referred to arbitration under two references, namely, Reference No.1 and Reference No.2. In Reference No.1 and 2, the Petitioners made about 29 claims(including interest and cost claims) and about 12 claims(including

interest and cost claims), respectively. The first Respondent made 9 counter claims in Reference No.2. An Interim/Draft Award dated 09.07.2009 was pronounced by a majority of two members of the Arbitral Tribunal (the Interim Award) and the Minority Award dated 08.08.2009 (the Minority Award) was pronounced by the third member of the Arbitral Tribunal. Thereafter, the Final Award dated 15.11.2009 was also pronounced by the same majority of two members of the Arbitral Tribunal (the Final Award). By the Interim Award, Claims 3,5, 6,18 and 20 in Reference No.1 were allowed, wholly or partly, by awarding sums of Rs.13,38,480, Rs.13,75,585, Rs.82,17,346, Rs. 4,34,536 and Rs.4,96,400, respectively. As regards Reference No.2, Claim 2 was awarded in a sum of Rs. 46,00,000 and Claim 4 in a sum of Rs.14,89,714. All the other Claims were rejected, except Claim 1 in Reference No.1 and 2, which were not adjudicated upon in the Interim Award but deferred. As regards the Counter Claims, Counter Claim 4 was allowed in a sum of Rs.81,09,248, Counter Claim 5 in a sum of Rs. 59,51,899 and Counter Claim 8 in a sum of Rs.37,10,936. The adjudication of Counter Claim 1, which pertains to recovery of material advance and is connected to Claim 1 in Reference No.1 and 2, was deferred. It is pertinent to mention that the Interim Award was detailed and contained the analyses and conclusions on the all the Claims and Counter Claims except Claim 1, in the two references, and Counter Claim 1, as stated above. By the Final

Award, which was brief and only contained the computation of the net payable under the Award, the Arbitral Tribunal accepted the calculation memo of the first Respondent, albeit with a minor modification so as to reckon the amount awarded to the Petitioners towards Claim 3, and directed the first Respondent to pay a net sum of Rs. 1,98,73,970 to the Petitioners with interest on the sum of Rs.1,21,67,760 (Reference No.1 payable as per the Final Award) at 12% per annum from 17.10.2002 till realization and on Rs. 77,06,210 (Reference No.2 payable as per the Final Award) at 12% per annum from 24.04.2004 till realization. Both the Interim Award and the Final Award are under challenge in this Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) and these awards are collectively referred to as the Award and individually as the Interim Award and Final Award. For the sake of convenience, the two arbitrators who delivered the Interim Award and Final Award are referred to as the Majority Arbitrators and the third arbitrator, who delivered the Minority Award, is referred to as the Minority Arbitrator.

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2. I heard Dr.Amit George, the learned counsel for the Petitioners, and Mr.Richardson Wilson, the learned counsel for the first Respondent.

3. The first issue that was addressed by the learned counsel for the Petitioners relates to the jurisdiction of this Court to consider and dispose of the Petition. The first Respondent contended that a Petition was filed under Section 11 of the Arbitration Act before the Delhi High Court and that, therefore, this Petition is not maintainable before this Court and should have been filed before the appropriate court in Delhi. In response to the said contention, the learned counsel for the Petitioners submitted that the Order in the Section 11 Petition is not passed by a court; instead, it is an order pronounced by the Chief Justice or his designate. Consequently, under Section 42 of the Arbitration Act, it is not necessary that subsequent proceedings should be filed in the same court, where the Section 11 Petition was prosecuted. In this regard, he referred to Section 42 of the Arbitration Act which uses the expression "court". The word "court" is defined in Section 2(e) of the Arbitration Act "as Court means in the case of an arbitration other than an international commercial arbitration, the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of a suit, but does not include a civil court of a grade inferior to such principal civil court, or any court of small causes." He, thereafter, referred to Section 11

wherein the word "Court" was not used until the amendment of 2016, which would not apply to this dispute, and the expression used in the unamended Section 11 was "Chief Justice or his designate". Accordingly, he submitted that this Court is not precluded from exercising jurisdiction on account of Section 42 of the Arbitration Act read with Section 2(e) thereof. In this connection, he referred to the judgment of the Hon'ble Supreme Court in **STATE OF WEST BENGAL AND OTHERS vs. ASSOCIATED CONTRACTORS, (2015) 1 SCC 32**, and, in particular, paragraphs 16,17,22,23 and 25 thereof. He also referred to the judgment of this Court in **JAYAMURUGAN GRANITE EXPORTS vs. SONY GRANITES AND ANOTHER, 2015(6) Arb.LR 450(Madras)** and, in particular, paragraphs 34 to 38 thereof.

4. With regard to jurisdiction, he also referred to Clause 82 of the COPA, which stipulated, in relevant part, that "...no suit or other proceeding relating to the Contract shall be filed or taken by the Contractor in any Court of Law except in the High Court which has jurisdiction over the area in which the Works lie....". In this case, he submitted that the work was admittedly executed within the jurisdiction of this Court and, therefore, this Court is vested with jurisdiction as a result of the said clause. With regard to the submission that Clause 67.3 (v) of the COPA specifies that arbitration proceedings shall be held at New Delhi,

he submitted that New Delhi was not designated as the seat or even venue of arbitration. Even assuming without admitting that New Delhi was designated as the seat of arbitration, he contended that the Hon'ble Supreme Court and the Delhi High Court held in **BALCO LTD vs. KAISER ALUMINIUM TECHNICAL SERVICES INC. (2012) 9 SSC 552 (BALCO)** and **ANTRIX CORPORATION LTD vs. DEVAS MULTIMEDIA PVT. LTD. 2018 SCC Online Del 9338 (ANTRIX)**, respectively, that both the courts, namely, the court within the territorial jurisdiction of which the seat of arbitration is situated and the Court having jurisdiction over the subject matter of the dispute would have jurisdiction. On the above basis, he submitted that the contention that this Court does not have jurisdiction to consider and dispose of the Petition is liable to be rejected.

5. The next submission made by the learned counsel for the Petitioners is an overarching contention, which is relevant in respect of the Award on a global basis. This submission pertains to the procedure adopted by the Arbitral Tribunal while pronouncing the Final Award. In particular, the learned counsel pointed out that the Minority Award was pronounced and circulated on 08.08.2009. After pronouncing the Minority Award, the Minority Arbitrator disassociated himself from the Arbitral proceedings. In this connection, he pointed out that, by Order dated 13.08.2009(at page No.14 of Volume-V), it was stated by the Minority

Arbitrator as follows:

"I disassociate myself from the proceedings being taken under the said majority Award. This may kindly be recorded in today's proceeding so that it may not be said that I in any way agree with the majority Award."

According to the learned counsel for the Petitioners, the publishing of the Interim Award by the Majority Arbitrators on 20.07.2009 and the Minority Award dated 08.08.2009 rendered the Arbitral Tribunal *functus officio*. Consequently, he submitted that all further proceedings were without jurisdiction and void. In support of this proposition, he referred to the judgment of the Hon'ble Karnataka High Court in **RUDRAMANI DEVARU vs. SHRIMAD MAHARAJ NIRANJAN JAGADGURU, AIR 2005 KAR 313 (RUDRAMANI DEVARU)** and, in particular, Paragraph 20 thereof. In the said judgment, the Hon'ble Karnataka High Court had relied on the decision of the Hon'ble Rajasthan High Court, in the case of **FAZE THREE EXPORTS LTD vs. PANKAJ TRADING CO. 2004(2) Raj 573 (FAZE THREE EXPORTS)**, and held that the Arbitral Award was liable to be set aside because two out of the five Arbitrators were not present at the hearings, and that the presence of all members was essential. He also relied upon the judgment of this Court in **KUPPUSWAMI CHETTY vs. ANANTHARAMA IYER, AIR (35) 1948 Madras 40 (KUPPUSWAMI CHETTY)**, wherein a Division Bench of this Court held that it is a well

settled principle that all the Arbitrators should give their united consideration to all the disputes referred to them in arbitration. On the above basis, he submitted that the continuation of proceedings by the Majority Arbitrators after the publication of the Interim Award and the Minority Award, in the absence of the Minority Arbitrator, was illegal and contrary to the fundamental precepts of the Arbitration Act. On this issue, he further submitted that the Arbitral Tribunal had reserved the Award for pronouncement on 29.07.2008 and, thereafter, the Interim Award was pronounced on 9.07.2009 and the Minority Award on 08.08.2009. Subsequent thereto, the Arbitral Tribunal re-opened the proceedings by holding clarificatory hearings on 03.11.2009 and 09.11.2009 (Page Nos.16 to 18 and 19 and 20 of Volume-V). After re-opening the proceedings, he pointed out that the Final Award was pronounced on 15.11.2009.

6. He also pointed out that the Interim Award did not contain findings on many of the issues and that, therefore, it cannot be said that only the process of quantification of amounts to be awarded was kept pending by the Arbitral Tribunal. He further submitted that the Award does not contain cogent or tenable reasons and, therefore, violates the mandate of Section 31 of the Arbitration Act, as interpreted in **SOM DATT BUILDERS vs. STATE OF KERALA, (2009) 10 SCC 259.**

7. The learned counsel for the Petitioners also made a global submission in respect of the Counter Claims. The said submission was that all the Counter Claims were made without following the mandatory pre-arbitration procedure, as prescribed in Clause 67.1 of the GCC (Page 161 of Volume-II), read with Clause 67.3 of the COPA (Page 198 of Volume-II). According to the learned counsel, as per the said Clauses, arbitration may only be commenced in respect of disputes in relation to which, inter alia, the decision of the Engineer appointed under the Contract was requested. In particular, Clause 67.3(a) of the COPA refers to the reference to arbitration of disputes in respect of which the decision of the Engineer did not become final and an amicable settlement could not be reached. By referring to the said clauses, he contended that the said clauses impose a clear condition precedent for the initiation of arbitration under Clause 67.3(i) of the COPA. As regards the claim of the Petitioners, he pointed out that there is an undisputed finding by the Majority Arbitrators to the effect that the Petitioners had complied with the pre-arbitration procedure before invoking arbitration (Page No.84 of Volume-I). On the contrary, he submitted that the first Respondent admittedly did not do so. He further pointed out that the Arbitral Tribunal had specifically framed an issue with regard to the non-fulfillment of the mandatory pre-arbitration procedure. On this issue, he submitted that the Minority

Arbitrator interpreted Clauses 67.1 and 67.3 and unequivocally held that only disputes that were referred to the Engineer may, thereafter, be referred for arbitration because the Arbitral Tribunal is a creation of the contract. By contrast, he submitted that the Majority Arbitrators brushed aside this objection in a completely unreasoned and perfunctory manner in the Majority Award (Page Nos.84 and 85 of Volume-I). In support of this contention, he referred to and relied upon a judgment of the Kerala High Court in **NIRMAN SINDIA vs. INDAL ELECTRONICS LTD, 1999 SCC Online Ker 149 (NIRMAN SINDIA)**, wherein the High Court of Kerala disallowed a request for the appointment of an arbitrator on account of non-compliance with the pre-arbitral procedure obligating the applicant, inter alia, to first refer the disputes to a designated engineer prior to invoking of arbitration. He also relied upon the judgment of the Delhi High Court in **SUSHIL KUMAR BHARDWAJ vs. UNION OF INDIA, judgment dated 17.03.2009** in A.A.389/2006 (**SUSHIL KUMAR BHARADWAJ**), wherein the Delhi High Court held that the pre-arbitral procedure is mandatory and not directory in nature.

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8. In addition, he submitted that Counter Claims 3,4 and 5 were barred by limitation and, thus, should have been rejected on that ground. According to the learned counsel, counter claims were raised for the first time in 2005 as part of Reference No.2, whereas the work was

completed substantially on 31.10.2001. On this aspect, he relied on the judgment in **STATE OF GOA vs. PRAVEEN ENTERPRISES 2011 (3) Arb.LR 209(SC) (STATE OF GOA)** and, in specific, paragraph 32 thereof. He also pointed out that the Minority Arbitrator had concluded that the Counter Claims were barred by limitation. He further pointed out that the Majority Arbitrators failed to render a finding in this regard.

9. The learned counsel for the Petitioners, thereafter, made submissions on the merits of individual claims and counter claims. Although the overarching submissions of the learned counsel for the Petitioners covered all the Claims and/or Counter Claims, globally, the focus of his submissions on individual claims was limited to Claims 1,4,6,8,9,15 and 16 in Reference No.1 and Claims 1,5,6 and 7 in Reference No.2 and Counter Claims 4,5 and 8. He first made submissions in respect of Claim 1 in Reference No.1 and Reference No.2. The said Claim 1 relates, in effect, to unpaid bills, including price adjustment, for work done. With regard to the said claims, he pointed out that the findings of the Majority Arbitrators are at Page No.92 of Volume-I and that of the Minority Arbitrator are at Paragraphs 58 to 60 at Page Nos.18 and 19 of Volume-I. According to the learned counsel, the Final Award with regard to Claim 1, in both references, is totally unreasoned and represents a blanket acceptance of the submissions of the first

Respondent without application of mind. In this regard, he pointed out that the Majority Arbitrators noted that the dispute between the parties related to the quantum of work executed and the value thereof. As per the Petitioners, the value of executed work was Rs.64,26,11,861/-, whereas it was Rs.61,20,82,206/- as per the first Respondent. After noting the significant variation between these figures, he pointed out that the Majority Arbitrators had deferred the decision on this issue until the Final Award. However, in the Final Award, the Majority Arbitrators, without basis, and unreasonably adopted the figure of Rs.61,61,40,787/-, which was submitted by the first Respondent by relying on the calculation memo of the first Respondent. In effect, he contended that the Majority Arbitrators rubber stamped the figure provided by the first Respondent at the stage of the Final Award.

10. With regard to the conclusions on the above claim, he submitted that the Majority Arbitrators did not make a reference to the relevant contractual clauses or material documents, including admissions in the pleadings of the parties. Therefore, he submitted that this is a case wherein the relevant clauses of the contract and material documents were disregarded. Thus, he concluded his submissions by stating that the Award in respect of this claim cannot be sustained.

11. His next submission related to Claim 4 in Reference No.1, which relates to the rate for variation order No.12. The learned counsel pointed out that the findings on this claim are at pages 95 and 96 of Volume – I of the Interim Award and at Paragraphs 84 and 91 at Page Nos.26, 27 and 28 of Volume – I of the Minority Award. This claim pertains to the rates for undertaking additional work in terms of variation order 12. With respect to this claim, he submitted that the Interim Award adopted the rate of Rs.150/m³ as per the internal High Level Committee (HLC) of the first Respondent without undertaking an independent adjudication of the dispute. He further submitted that the rate of Rs.214/m³ was arrived at by the Engineer in consultation with the parties and that this was a final rate and not a provisional rate. According to the learned counsel, the fact that it is a final rate was unequivocally recorded in the minutes of meeting dated 04.05.2001 and 11.05.2001 at page Nos.26 and 27 of Volume – IV. On the contrary, the first Respondent paid at the rate of Rs.150/ m³. In this connection, he also referred to and relied upon the findings in the Minority Award (at Page No.26 of Volume – I), wherein it was held that the lead chart specifying the lead distance was signed and prepared by the consultant of the first Respondent, the Engineer and the Petitioners and that this document was not controverted by the first Respondent. Moreover, he pointed out that the rate of

Rs.214/ m³ was based on the Ministry of Service Transport (MOST) Data Book. As regards the reliance in the Interim Award on the report of the HLC, he pointed out that the HLC was not recognized or even mentioned in the Contract between the parties. Further, he submitted that the HLC was not an expert appointed by the Arbitral Tribunal under Section 26 of the Arbitration Act. On the contrary, the rate of Rs.150/ m³ was fixed by the HLC and the Petitioners approached the Arbitral Tribunal because they were aggrieved by the said rate fixation. In these circumstances, he pointed out that the mechanical reliance by the Arbitral Tribunal on the report of the HLC was arbitrary and amounted to an abdication of responsibility by the Arbitral Tribunal to discharge the obligation of independently deciding the case. In support of this submission, the learned counsel relied upon the judgment of this Court in **ENNORE PORT LTD vs. HINDUSTAN CONSTRUCTION COMPANY, 2016 SCC Online Mad 19320 (ENNORE PORT)**, wherein, at Paragraph 11, it was held that "even where a contract provides in certain circumstances for the finality of certain recommendations of an adjudicatory forum that is constituted prior to reference of disputes to an Arbitral Tribunal, it is still not permissible for the Arbitral Tribunal to merely rubber stamp the findings of the said forum without independent application of mind." In this case, he submitted that the HLC Report was not binding on the Petitioners but the Majority Arbitrators rubber stamped the said findings. Accordingly, he

submitted that the Interim Award on Claim 4 is liable to be set aside.

12. He, thereafter, dealt with Claim 6 in Reference No.1, which deals with the execution of structural work beyond the scope of the contract. He pointed out that the findings in the Interim Award of the Majority Arbitrators are at Page No.98 of Volume No.I and that of the Minority Arbitrator are at Paragraph Nos.102 to 105 at Pages 30 to 32 of Volume-I. With regard to this claim, he pointed out that the Interim Award incorrectly records that the dispute only pertains to rates and that the quantity was not disputed. Once again, he submitted that the Majority Arbitrators mechanically relied upon the report of the HLC without undertaking an independent adjudication of the dispute. He also pointed out that the reasoning of the Majority Arbitrators is contrary to the record because the Petitioners had disputed the quantities. He also pointed out that the Minority Arbitrator recorded that the quantities were disputed. In this connection, he submitted that originally the Contract was for a 2-lane carriageway with a width of 12 metres, whereas the Petitioners were instructed to increase the width up to three times as also to build underpasses etc. and such increase of width resulted in a material change, including changes in the specifications. He also pointed out that the findings of the Arbitral Tribunal that the increase in width did not result in a change in specifications of the altered structures is in clear violation of Clause 52.2 of the contract, whereby the work has to be

valued irrespective of change in specifications. With regard to this claim, he submitted that the Majority Arbitrators did not refer to the relevant contractual clause and material documents. Consequently, he submitted that the Interim Award of the Majority Arbitrators on Claim 6 is liable to be set aside.

13. The next claim that was dealt with by the learned counsel for the Petitioners was Claim 7 in Reference No.1, which pertains to payment due on account of pavement works at NH-4 and NH-45 junctions and at under pass locations. On this claim, he pointed out that the findings in the Interim Award are at Page No.98 of Volume – I and that of the Minority Arbitrator at Paragraph Nos.106 to 112 at Page Nos.32 to 33 of Volume – I. With regard to this claim, he submitted that the Majority Arbitrators concluded that the admitted increase in width of the structures that were executed did not result in a change in specifications. This conclusion was in violation of Clause 52 of the contract, whereby varied work is to be valued irrespective of change in specifications. On this claim also, he relied upon the Minority Award at Paragraph Nos.107 and 109 at page 32 of Volume – I, wherein it was held that the junction work would be understood as new work for the reason that after the change the concrete pavement was converted into a bituminous pavement. He also pointed out that the conclusion of the Majority Arbitrators that the rates

already provided in the BOQ are applicable to a flexible bituminous pavement is invalid and untenable especially when seen in the light of the findings of the Minority Arbitrator. Therefore, he concluded his submission on this claim by pointing out that the Arbitral Award is liable to be set aside.

14. Claim 8 in Reference No.1 was dealt with next and this Claim pertains to amounts claimed for cutting trees beyond 600 mm girth. On this claim, he pointed out that the relevant findings in the Interim Award are at page No.99 of Volume – I and that of the Minority Arbitrator at paragraph Nos.115 to 117 at Page Nos.33 and 34. He submitted that the findings of the Majority Arbitrators that the provisional sums, as specified in Bill No.10.01, are not a part of the Contract are perverse and untenable and totally contrary to Clause No.31.2 of the Invitation to Bidders (at Page No.109 of Volume – II) and Clauses 58 and 52 of the GCC at Pages 153 and 149, respectively, in Volume - II. With regard to this claim also, the learned counsel relied upon the findings in the Minority Award at page No.34 of Volume – I, and, in particular, paragraph 116 thereof, wherein the Minority Arbitrator held that "Clause 31.2 of the invitation to bidder, which is forming part of the contract, clearly stipulates that for evaluating the bid price, the provisional sum included in the BOQ will not be taken into account. Otherwise for all other purposes this item

of work is part of contract i.e. item 10.01 in the Bill of quantities.” He also submitted that the Petitioners claimed additional rates, proportionately, in accordance with Clause 52.1 of the GCC, which provided that the rates and prices in the Contract shall be used as the basis for valuation as far as may be reasonable. Therefore, he contended that the Petitioners worked out the rates on a proportional basis from the rate mentioned in Bill No.10.01 for cutting trees of differing girths in a reasonable manner. He also pointed out that the findings of the Majority Arbitrators that the Petitioners failed to place the materials before the Engineer as per Clause 58.3 of the GCC is palpably erroneous because Clause 58.3 of the GCC applies only when the work was not valued in accordance with the rate or prices set out in the tender. He submitted that the findings of the Majority Arbitrators that the Engineer fixed the rate of Rs.65/- per tree and that the Petitioners agreed to the same is contrary to the evidence on record (Page No.95 of Volume – III). Therefore, he concluded his submissions, on this claim, by submitting that the Award in respect of this claim is also liable to be set aside.

15. The learned counsel, thereafter, dealt with Claim 9 in Reference No.1 and Claims 5,6 and 7 in Reference No.2. He pointed out that all these claims are in respect of prolongation costs. In specific, he pointed out that Claim 9 in Reference No.1 is for payment due on account

of additional expenditure incurred towards transportation of material by circuitous routes due to the delay in handing over the site at K.M. 4.5 to 5.2. Claim 5 in Reference 2 is for losses sustained due to idling of resources. Claim 6 in Reference 2 is for losses sustained due to locking of securities. Claim 7 in Reference No.2 is for infructuous overhead expenses suffered on account of prolongation of the contract period. He pointed out that the findings of the Majority Arbitrators, on the aforesaid claims, are at page No.113 of Volume - I of the paper book (Claim 5), page No.114 of Volume - I of the paper book (Claim 6), page No.114 of Volume - I of the paper book(Claim 7), paragraph Nos.120 and 121 at Page No.35 of Volume - I of the paper book(Claim 9). He also pointed out that the findings of the Minority Arbitrator on the above claims are at paragraph Nos.202 and 203 at page No.55 of Volume - I of the paper book (Claim 5), Paragraph Nos.208 and 232 at Page Nos.56 to 61 of Volume - I of the paper book (Claim 6 and 7), Paragraph Nos.120 and 121 at Page No.35 of Volume - I of the paper book(Claim 9).

16. He submitted that these claims arise out of the delay in completion of work due to delay in handing over the site by the first Respondent and that the factum of delay was unequivocally admitted by the first Respondent and noted by the Majority Arbitrators at Page No.100 Volume - I of the paper book. He pointed out that these claims were

disallowed mainly on the basis that notice was not issued as per Clause 12.2 and that these amounts were not reflected in the Petitioner's monthly statements under Clause 60.1 of the GCC for issuance of the monthly interim payment certificate. In this regard, he submitted that Clause 12.2 does not envisage the requirement of issuance of a notice by the Petitioners to the first Respondent or the Engineer as a pre-requisite for making these claims. He relied upon the judgment of the Delhi High Court in **BHAGHEERATHA ENGINEERING LTD vs. NATIONAL HIGHWAYS AUTHORITY OF INDIA, 2019 SCC Online Del 7885** and, in particular, paragraph No.18 thereof, to substantiate the submission that there is no need for a specific notification when the relevant facts are fully within the knowledge of the employer.

17. With regard to the finding that this additional cost was not specified in the Petitioner's application for issuance of the monthly IPCs, he submitted that a bare perusal of the text of Clause 60.1 of the GCC would reveal that it is not necessary for the Petitioners to specify the amount incurred each month as additional cost on account of the breach of the promise to hand over the site in terms of Clause 42.1 by the first Respondent. He further submitted that Clause 60.1 of the GCC does not stipulate that if a claim was not included in the said monthly statement, it cannot be raised later and would be barred forever. He also pointed out

that Clause 60.11 and 60.14 of the COPA at pages 195 and 196 of Volume – II of the paper book further stipulate that claims are not barred from being raised by the Petitioners till the time of submission of the final statement by the Petitioners after issuance of the requisite defect-liability certificate by the first Respondent. In this case, he pointed out that these claims were raised by the Petitioners even before the submission of the final statement and were specifically incorporated and made a part of the final statement, which was submitted for certification to the Engineer under Clause 60.11 of the COPA. He referred to and relied upon the judgments in **NATIONAL HIGHWAYS AUTHORITY OF INDIA vs. PROGRESSIVE CONSTRUCTIONS LTD, 2014 SCC Online Del 3104, NARAINDAS R.ISRANI vs. UNION OF INDIA, AIR 1993 DELHI 78** and **McDERMOTT INTERNATIONAL INC. vs. BURN STANDARD CO. LTD AND ORS. (2006) 11 SCC 181 (McDERMOTT INTERNATIONAL)**, in support of the proposition that the right to make the claims survives till the stage of the final bill and that a claim for damages arising out of a breach of contract need not be separately invoiced.

18. With regard to the specific findings of the Majority Arbitrators that no evidence was produced by the Petitioners in support of Claim 5 in Reference No.2, he submitted that this finding is fallacious for the reason that evidence in the form of the monthly progress report was

available on record to substantiate the stand of the Petitioner as to the mobilization of machinery and manpower at site, and that this evidence was not even adverted to by the Majority Arbitrators. In this connection, he referred to and relied upon the judgment in **NATIONAL HIGHWAYS AUTHORITY OF INDIA vs. ORIENTAL STRUCTURAL ENGINEERS PVT. LTD. AND GAMMON INDIA LTD, 2013(2) ARB. LR 264**, wherein it was held by the Hon'ble Delhi High Court that monthly progress reports represent cogent and reliable evidence as to the extent of mobilization of machinery at the site.

19. In respect of the specific findings of the Majority Arbitrators in relation to Claim 6 in Reference No.2, he submitted that the Majority Arbitrators erred in failing to take note of the fact that the Petitioners incurred additional cost in order to keep the bank guarantee alive in the prolonged period and the said prolongation was on account of the delay in handing over the site. With respect to the specific findings of the Majority Arbitrators in relation to Claim 7 in Reference No.2, he submitted that the Arbitral Tribunal failed to appreciate that the agreed BOQ rates were for executing the works within the originally stipulated time frame and that when the stay was extended on account of the admitted breaches by the first Respondent, the excess overheads through the prolonged period should be compensated by the first Respondent. For

this purpose, he relied upon the Minority Arbitrator's finding at paragraph 230 and 232 at page 60 of the Volume – I of the paper book and also on the finding of the Hon'ble Supreme Court in **McDERMOTT INTERNATIONAL.**

20. In respect of the specific findings of the Majority Arbitrators in relation to Claim 9 in Reference No.1, he submitted that the Petitioners' claim was not for extra cost incurred for working at night but for cost incurred in transporting the construction material by taking a circuitous route as opposed to the route originally envisaged because possession of certain stretches of the site could not be provided by the first Respondent. He also submitted that the dispute between the first Respondent and third parties cannot be used as an excuse to avoid the contractual liability for payment of additional cost to the contractor on account of unavailability of the requisite land. For this purpose, he referred to and relied upon the judgment of the Delhi High Court in **NATIONAL HIGHWAYS AUTHORITY OF INDIA vs. SUNWAY CONSTRUCTION SDN BHD, 2019 SCC Online Del 8273**, and that of the Patna High Court in **SATAV INFRASTRUCTURE PVT. LTD vs. UNION OF INDIA & ORS, 2008 SCC Online Pat 48.**

21. The next claim that was dealt with is Claim 15 in

Reference No.1, which relates to traffic management and diversions. As regards this claim, he submitted that the findings of the Majority Arbitrators that the work of traffic management is incidental to the work to be done under the Contract and not eligible for extra payment is diametrically opposed to a plain reading of Clause 112.6 of the Technical Specifications. He further submitted that the work that was carried out by the Petitioner was the temporary diversion of the road and that this work was required to be paid for by the first Respondent and that it is incorrect to state that the Engineer was unaware of the execution of the work as could be evidenced from Ex.C-101 to C-105 at page Nos.186 to 191 of Volume – IV of the paper book and Exhibits C-113 to C-116 at Page Nos.197 to 200 of Volume – IV of the paper book.

22. With regard to the Counter Claim 4 for recovery of excess payments, he submitted that the findings in the Interim Award are at page No.93 of Volume – I of the paper book and that of the Minority Arbitrator at paragraph Nos.71 to 74 at Page Nos.22 and 23 of Volume – I of the paper book. He further submitted that the reasoning and findings of the Majority Arbitrators that the rate of Rs.150/m³ should be rejected is patently erroneous. In this regard, he pointed out that Item No.10.02 of the BOQ at Page No.46 of Volume – II of the paper book provides for the rate of Rs. 150/m³. He further submitted that Clause 52.2 of the

COPA at page 189 of Volume- II of the paper book unequivocally provides that the rate or price for an item contained in the contract would remain unchanged unless: i) the item accounts for more than 5% of the Contract Price; and (ii) the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the BOQ by more than 25%. Therefore, he submitted that the rate of Rs.150/m³ was not liable to be changed unless the aforesaid benchmarks were met. Consequently, he submitted that the aforesaid finding is totally contrary to the contract.

23. He next dealt with Counter Claim 5 which deals with the recovery of excess rate paid for pond filling. In this regard, he pointed out that the finding in the Interim Award is at page No.94 of Volume I of the paper book. The said finding is patently fallacious, as per the learned counsel for the Petitioners, because the rate of Rs.360/m³ was agreed to by both the parties at the relevant time and payment was made on that basis to the Petitioners. He further submitted that the first Respondent did not dispute the variation order or challenge the certification made by the Engineer under Clause 2.6 of the GCC. Consequently, he submits that this counter claim is an after thought and that the Majority Arbitrators erred patently in allowing it.

24. The last counter claim that was dealt with by the learned

counsel for the Petitioners is Counter Claim 8 for recovery on account of hard rock. As regards this counter claim, he submitted that the findings in the Interim Award of the Majority Arbitrators are at page Nos.118 and 119 of Volume – I of the paper book. He pointed out that this claim was allowed on the specious ground that no explanation was offered by the Petitioners with regard to the fate of the excavated rock generated during execution of the work. In this connection, he pointed out that the Petitioners had produced photographs of the excavated rock lying at both sides of the road which is available at page Nos.357 to 364 of Volume – IV of the paper book. He further submitted that the Forest Department did not allow the Petitioners to take away the excavated rock and, instead, it utilized most of the rock for filling the excavated quarries in the forest land. In this regard, he relied upon the letter dated 02.08.2001 at page 365 of Volume – IV of the paper book. He further submitted that there is no provision in the contract that enables the first Respondent to claim payment for the excavated rock and therefore this counter claim should not have been allowed.

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25. By making the aforesaid submissions, the learned counsel for the Petitioners concluded his submissions by referring to and relying upon the judgment of the Hon'ble Supreme Court in **SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD. vs. NATIONAL**

HIGHWAYS AUTHORITY OF INDIA, 2019 SCC Online SC 677 (SSYANGYONG), wherein the Hon'ble Supreme Court set aside the majority award and adopted the minority award so as to avoid further delay in dispute resolution. On that basis, the learned counsel for the Petitioners submitted that the Minority Award should be upheld and that the Majority Award should be set aside.

26. In response and to the contrary, the learned counsel appearing for the first Respondent opened his submissions by contending that the Section 34 Petition can only be filed where the seat/venue of the arbitration is located. For this purpose, he relied upon the judgments of the Hon'ble Supreme Court in **INDUS MOBILE DISTRIBUTION PRIVATE LIMITED vs. DATAWIND INNOVATIONS PRIVATE LIMITED AND OTHERS, (2017) 7 SCC 678 (INDUS MOBILE)** and **UNION OF INDIA vs. HARDY EXPLORATION AND PRODUCTION (INDIA) INC 2018 SCC Online 1640 (HARDY)**. He also relied upon the judgment of the Hon'ble Supreme Court in **BRAHMANI RIVER PELLETS LIMITED vs. KAMATCHI INDUSTRIES LIMITED, 2019 SCC Online SC 929 (BRAHMANI)**, and, in particular, paragraph 18 thereof, to contend that the Section 34 Petition should only be filed before the appropriate court either at the seat or venue of arbitration. By relying upon the said judgments, he pointed out that the admitted position in this

case is that the Arbitration Proceedings took place at Delhi. As regards clause 82 of the GCC, he submitted that it would apply to the filing of suits and not to the filing of a Section 34 Petition. For this purpose, he submitted that clause 82 should be read with clause 67.3. Consequently, he submitted that this Petition is liable to be rejected on the ground of lack of jurisdiction.

27. His next submission was with regard to the procedure adopted by the Arbitral Tribunal. In this connection, he referred to the record of proceedings held on 16.11.2007, whereby the parties were informed that the Award will be pronounced in due course of time. He also referred to the record of proceedings held on 03.11.2009, which reflect that the first Respondent forwarded a calculation sheet, as requested by the Arbitral Tribunal, and pointed out the circumstances in which the calculation of the first Respondent was accepted. In particular, he pointed out that the Petitioners refused to submit a calculation sheet or to respond to the calculation sheet that was submitted by the first Respondent and that, therefore, the Arbitral Tribunal did not have any other option except to accept the calculation of the first Respondent. He next referred to the Final Award, which was communicated on 20.07.2009, and pointed out that the only aspect that was not covered by the Interim Award was the calculation. Therefore, he submitted that the

procedure that was adopted by the Arbitral Tribunal cannot be faulted and that this does not constitute a valid reason to interfere with the Arbitral Award.

28. After dealing with the aforesaid preliminary objections of the learned counsel for the Petitioners, the learned counsel for the first Respondent proceeded to deal with the Award in respect of individual claims. He first dealt with the Award on Claim 1, in both references, and counter claim 1. With regard to the above claims, he referred to the findings in the Interim Award of the Majority Arbitrators at page 92 of Volume I, wherein it is stated that, as per the Petitioners, they executed work for a total value of Rs. 64,26,11,861/-, whereas it is Rs.61,20,82,206/- according to the first Respondent. On that basis, the Arbitral Tribunal concluded that the difference is a sum of Rs.3,05,29,655/-. He also referred to the fact that the Arbitral Tribunal had recorded that the last payment was in respect of IPC 37 and that an aggregate sum of Rs.57,78,82,594/- was paid up to IPC 37 and that the issue to be decided is: what is the balance amount due for the entire work done by the Petitioners? According to the learned counsel, this determination was done in the Final Award based on the calculation memo that was submitted by the first Respondent, in the factual context of the failure/refusal of the Petitioners to submit a calculation memo or to respond to the calculation memo that was submitted by the first

Respondent.

29. The next claim that was dealt with by the learned counsel for the first Respondent is Claim 4 in Reference No.1. As regards this claim, he pointed out that the Petitioners made a claim for this variation item at the rate of Rs.214/m³ whereas the first Respondent had contended that the applicable rate is Rs.95/m³. After considering the evidence on record, he pointed out that the Arbitral Tribunal fixed the rate at Rs.150/m³. In this connection, he pointed out that the Arbitral Tribunal referred to the proceedings of the HLC, which was constituted by the first Respondent to review the provisional rate of Rs.214/m³ that was fixed by the Engineer. After examining the proceedings of the HLC, he contended that the Arbitral Tribunal accepted the findings of the HLC. He pointed out that the Arbitral Tribunal recorded the finding that the report of the HLC is detailed and well reasoned and that the Tribunal had no reason to take a different view from that of the HLC consisting of experts when none of the parties had questioned the competence, independence and credibility of the members of the HLC. On that basis, the learned counsel pointed out that the Arbitral Award is in conformity with and, in fact, advances public policy and, therefore, should not be interfered with. While dealing with this claim, he adverted to the minutes of the HLC at pages 140 and 141 of Volume VI and concluded that there is no perversity in relying on the minutes of the HLC. The learned counsel for the first Respondent,

thereafter, made submissions on Claim 7, which is in respect of pavement work. With regard to this claim, he pointed out that there was no change either in the technical specifications or in the quantity of work and that, therefore, the Arbitral Tribunal held that BOQ rates are applicable. The said finding is not vitiated by perversity and, therefore, should not be interfered with.

30. Claim 8 in Reference No.1 was dealt with next. This claim relates to the cutting of trees with girth greater than 600 mm. As regards this claim, he pointed out that the Arbitral Tribunal concluded that neither the provisional sum nor the rate quoted by the Engineer and approved by the employer can be taken as binding for the purpose of payment to the contractor. On the basis of the said reasoning, he pointed out that the rate of Rs.65/-, which was adopted by the Engineer and accepted by the contractor, became the BOQ rate and that the said rate is liable to be used as the benchmark for increase based on the girth. He, thereafter, dealt with Claim 9, which relates to additional expenses by transportation through a circuitous route. In this connection, he referred to Clause 45.1 which stipulates that no work should be carried out at night. He also referred to the sketches at Pages 82 to 84 of Volume 4 so as to point out that the route was not circuitous and that the findings of the Arbitral Tribunal are not liable to be interfered with.

31. With regard to Claim 5 in Reference No.2, which deals with idling of resources, he referred to the findings of the Arbitral Tribunal at pages 113 and 114 of the Interim Award. By referring to the said portion of the Interim Award, he pointed out that the claims were rejected on the basis that these claims were not indicated in the monthly progress report and that there was no indication therein that the machinery or plant was idle. He also pointed out that the Arbitral Tribunal recorded that no log books had been produced and that there is no documentary evidence with regard to purchase, hire or deployment of machinery. In addition, the Arbitral Tribunal recorded that no notice was given as required by Clause 53.1 of the Contract that there was any plant or machinery lying idle and that the contractor was intending to make a claim in that regard. The learned counsel pointed out that there is a categorical finding that this claim was made for the first time in the Arbitral Proceeding and that Clause 53.2 requires a contemporary record of documents supporting the claim and that in the absence of such documents, the claim is an after thought and is liable to be rejected.

32. As regards Claim 6 in Reference No.2, which relates to the alleged losses sustained due to locking of securities, the learned

counsel referred to page No.114 of Volume I and pointed out that Clauses 10.1, 10.2 and 10.3 of the COPA stipulate that the cost of complying with the requirement in relation to securities shall be borne by the contractor. Similarly, the contractor's all risk insurance policy is also a mandatory requirement of the contract to be kept available throughout the subsistence of the contract. On that basis, he pointed out that the claims were rejected and that these conclusions are entirely based on the relevant contractual provisions and no interference is warranted. As regards Claim 7 in Reference No.2, which relates to infructuous overhead expenses, he pointed out that the Arbitral Tribunal concluded that the overhead expenses are included in the tender rates of the contract and that even if the scope of work increases, the overhead costs are included in the BOQ rates. Therefore, he submitted that Claim 7 was correctly rejected by the Arbitral Tribunal. As regards Claim 15 in Reference No.1, which deals with the payment of traffic management, he pointed out that the Arbitral Tribunal referred to the relevant clauses of the contract such as 112.1, 112.2, 112.3 and 112.6 and concluded that traffic management is incidental to the work and the contractor's responsibility. Once again, he submitted that this conclusion is based on a fair and reasonable interpretation of the contract and no interference is warranted.

33. With regard to the contention of the learned counsel for

the Petitioners that the pre-arbitral mechanism was not followed in respect of counter claims, he submitted that the said pre-arbitral mechanism was not followed by the Petitioners also. In this regard, he also referred to Section 4 of the Arbitration Act which provides for waiver. He also referred to the judgment in **RAVINDRA KUMAR VERMA vs. M/S.BPTP LTD AND ANOTHER, 2014 SCC Online Del 6602 (RAVINDRA KUMAR VERMA)**, wherein, at paragraph 5, it was held that the pre-arbitral procedure is directory and not mandatory. He also referred to the judgment in the case of **UNION OF INDIA AND ANOTHER vs. CIPLA LIMITED AND ANOTHER, (2017) 5 SCC 262**, to substantiate his submission that the pre-arbitral procedures are not mandatory. Consequently, he submitted that the counter claims were maintainable as correctly concluded by the Arbitral Tribunal. In this regard, he relied upon the judgments reported in **M.K.SHAH ENGINEERS & CONTRACTORS vs. STATE OF M.P. (1999) 2 SCC 594(M.K. SHAH)** and **VISA INTERNATIONAL LIMITED vs. CONTINENTAL RESOURCES (USA) LIMITED, (2009) 2 SCC 55(VISA INTERNATIONAL)**.

34. By way of rejoinder submissions, the learned counsel for the Petitioners contended that, in **BALCO**, it was held that a Section 34 Petition can be filed either where the seat of Arbitration is situated or in

the Court having exclusive jurisdiction. He also relied upon the judgment in **ANTRIX** (cited supra). With regard to the pre-arbitration procedure, he submitted that the Arbitral Tribunal recognized and acknowledged the fact that the Petitioners fulfilled the pre-arbitration procedure at Page 84 of Volume – I. He reiterated that the procedure adopted in the Final Award by mechanically adopting the calculation of the first Respondent is illegal inasmuch as the Arbitral Tribunal blindly accepted the calculation sheet of one contesting party without independently applying its mind. In this connection, he referred to the Interim Award, wherein it was recorded that there is a difference of Rs.3.05 crores as between the total value of work as per the Petitioners and the total value of work as per the first Respondent, and submitted that the Arbitral Tribunal should have decided this dispute in the Final Award. Instead, he submitted that the Arbitral Tribunal merely adopted the calculation memo of the first Respondent without applying its mind. Similarly, as regards Claims.4 and 6 in Reference No.1, he submitted that the Arbitral Tribunal adopted the report of the HLC without independently applying its mind. In this connection, he submitted that the HLC does not have contractual basis. Moreover, the HLC's report was impugned by the Petitioners and, therefore, these claims should have been independently decided by the Arbitral Tribunal. Thirdly, he submitted that the HLC is not an expert body appointed under Section 26 of the Arbitration Act, and that, therefore, the report of the HLC cannot

be relied upon by the Arbitral Tribunal, when such report is impugned by the Petitioners. In fact, he pointed out that the Arbitral Tribunal had faulted the first Respondent for blindly following the HLC's report at page No.11 of Volume I. With regard to claim 6, he pointed out that there was a 45% increase in earth work over BOQ quantities and, that, therefore, the application of BOQ rates by the Arbitral Tribunal is patently erroneous. As regards claim 8, he submitted that it is false to state that the contractor accepted the rate of Rs.95/-. As regards claims 5, 6 and 7 in Reference No. 2, all of which relate to prolongation cost, he submitted that the prolongation occurred due to delay in handing over the work site and that was certainly an obligation of the employer. In this connection, he referred to and relied upon Clause 42.1 at Page 144 of Volume – II and on the judgment of the Patna High Court, which is reported in 2008 SCC Online Pat 48. He further submitted that the monthly progress report contained particulars of men and material, who/which were deployed at site. He also pointed out that the BOQ rates do not include the additional overheads that were incurred during the extended/prolonged period and that, therefore, the Petitioners are entitled to such additional overheads as per paragraph 98 of the judgment of the Hon'ble Supreme Court in **McDERMOTT INTERNATIONAL**. He finally concluded his submissions by pointing out that the Majority Award is liable to be set aside and that the Minority Award may be adopted and upheld by following the judgment

of the Hon'ble Supreme Court in **SSYANGYONG**.

35.The records were examined and the oral and written submissions of both sides were carefully considered. Before dealing with the merits of the Award, it is necessary to consider the preliminary objections of the learned counsel. The first preliminary objection is with regard to the jurisdiction of this Court to deal with the Section 34 Petition. The submission of the learned counsel for the first Respondent is that the seat of Arbitration is in Delhi and, therefore, this Court does not have jurisdiction. In this connection, as correctly contended by the learned counsel for the Petitioners, Clause 82 confers exclusive jurisdiction on the High Court within whose jurisdiction the works were executed. It is admitted that the works were executed within the jurisdiction of this Court. Therefore, Clause 82 applies and the contention that clause 82 should be confined to suits is untenable because Clause 82 uses the expression "suit or other proceeding". Once clause 82 applies, the principle that both the Court with subject matter or exclusive jurisdiction and the Court where the seat of Arbitration is situated would have jurisdiction, as laid down in **BALCO**, would apply to this case. In this regard, the judgment in **INDUS MOBILE**, as is evident from paragraph 19 thereof, turned on the fact that the seat of arbitration was designated as Mumbai and jurisdiction was also vested in courts in Mumbai. **HARDY** is an authority for the proposition that courts at the seat or venue of

arbitration have jurisdiction and in **BRAHMANI**, the contract did not vest jurisdiction in courts in any other place, whereas, in this case, this Court is vested with jurisdiction by Clause 82 of COPA. In effect, this Court has jurisdiction to consider and decide this Petition and the jurisdictional objection is overruled.

36. A preliminary objection was raised by the learned counsel for the Petitioners that the procedure adopted by the Majority Arbitrators in first pronouncing an Interim Award and, thereafter, a Final Award, much after the Minority Award, is improper. In this connection, the learned counsel pointed out that even before the Final Award of the Majority Arbitrators, the Minority Arbitrator had pronounced an Award and also recused from participating in subsequent proceedings. On that basis, the learned counsel contended that the Arbitral Tribunal had been rendered *functus officio*. While it is true that the procedure adopted in this case - whereby the Arbitral Tribunal delivered a detailed Interim Award and, thereafter, a brief Final Award - is unusual, it cannot be said that the said procedure *per se* vitiates the Award or that the Arbitral Tribunal was rendered *functus officio* for that reason. In specific, in this case, the Minority Arbitrator pronounced a separate dissenting Award and, thereafter, refused to participate in the Arbitral Proceedings. Therefore, it cannot be said that the Minority Arbitrator was not called upon to

participate in the deliberations and conclusions of the Arbitral Tribunal. On the other hand, as stated above, he differed with the Majority Arbitrators, delivered a dissenting Award prior to the Final Award of the Arbitral Tribunal and refused to participate in subsequent proceedings. Unlike the fact situation in **RUDRAMANI DEVARU, FAZE THREE EXPORTS** and **KUPPUSWAMI CHETTY**, in the facts and circumstances of this case, it cannot be said that the Award is liable to be set aside or that the Majority Arbitrators were rendered *functus officio*. Therefore, this preliminary objection is rejected.

37. The last preliminary objection is with regard to the non fulfillment of the pre-arbitration procedure in respect of the counter claims of the first Respondent. The basis of this preliminary objection is that the pre-arbitration procedure is mandatory. In order to establish that such procedures are mandatory, the learned counsel for the Petitioners relied upon the relevant clauses of the GCC and COPA and also on the Award of the Minority Arbitrator. In substance, the submission is that the claims should have been first made before the Engineer before being raised before the Arbitral Tribunal. In support of this contention, the learned counsel for the Petitioners relied on the judgment of the Kerala High Court in **Nirman Sindia** and that of the Delhi High Court in **Sushil Kumar Bharadwaj**. In both those cases, it was held that the pre-arbitral

procedure is mandatory and that a party is not entitled to maintain a Section 11 petition for the appointment of an arbitrator without complying with the contractual procedure unless such procedure was waived or the counter party had prevented the party applying from complying with such procedure. On the contrary, the learned counsel for the first Respondent relied on **RAVINDRA KUMAR VERMA, M.K. SHAH** and **VISA INTERNATIONAL**. In order to decide this preliminary objection, the relevant Sub-Clauses should be examined closely. Clause 67.1 of the GCC specifies that a party, which is dissatisfied with the decision of the Engineer, should give notice to the counter party and that, "subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given". It further stipulates that if no notice of the intention to commence arbitration is given within the stipulated time "... the said decision shall become final and binding upon the Employer and the Contractor." Sub-Clause 67.4 applies to a situation wherein a decision of the Engineer is not adhered to although not challenged in arbitration and enables the aggrieved party to initiate arbitration in respect of the non-compliance with the Engineer's decision. Sub-Clause 67.3 of the COPA also is unambiguous that a dispute in respect of which the decision of the Engineer has not become final and is not amicably settled may be referred to arbitration. Thus, from the above clauses, it is clear that all disputes are required to be referred to the Engineer for decision and the

parties are not given an option in this regard. Moreover, if the decision of the Engineer is not challenged by initiating arbitration, finality is attached to the decision. The Arbitral Tribunal, in the Interim Award, did not take note of the above stipulations, including the consequences of not complying with the requirements of Clause 67.1 and, therefore, recorded the patently erroneous finding that neither party is bound by the Engineer's decision, whereas Sub-Clause 67.1 expressly states that the decision would be final and binding unless challenged, by way of arbitration, as per the prescribed procedure. In this case, it cannot be said that the parties waived these procedures and, on the contrary, there is an express finding that the Petitioners complied with these requirements in respect of the claims. In this regard, it may be noted that there was a categorical finding of waiver in paragraph 18 of **M.K. SHAH**. Similarly, in paragraph 38 of **VISA INTERNATIONAL**, there is a factual finding that amicable settlement was not possible and the decision turned on it. In the context of a contractual machinery for the settlement of disputes, Chadwich L.J. held in **INFINITELAND LTD. Vs. ARTISAN CONTRACTING LTD [2006] 1 B.C.L.C. 632** as under:

" I can see no reason, in principle, why a party, say 'A', who chooses not to allow the contractual machinery to operate should be able to ask the court, nevertheless, to enforce the contract against

the other party, say 'B'. It is no answer, in such a case, to say that the machinery is non-essential. It is the machinery that the parties agreed upon when they made the bargain....”

As stated above, in this case, we are primarily concerned with a pre-arbitral requirement of referring disputes to an Engineer and the relevant clauses provide that the Engineer's decision would be final and binding unless challenged and also that only the decisions that have not attained finality may be referred to arbitration if not amicably settled. Keeping in mind this contractual and factual context, in my view, these procedures are mandatory and the first Respondent is not entitled to raise the counter claims before the Arbitral Tribunal without complying with these procedures. While the right of the first Respondent to raise these claims is not extinguished, the remedy is in accordance with the contractual machinery and scheme. Therefore, as correctly contended by the learned counsel for the Petitioners, the pre-arbitral procedure is mandatory for purposes of initiating arbitration and the Award, as regards the counter claims, is liable to be set aside on this basis. With regard to the counter claims, I also find that the Arbitral Tribunal framed a question as to whether the Counter Claims are barred by limitation, in the Interim Award, at page 120 of Volume I but did not determine the said question. Therefore, the objection of the learned counsel for the Petitioners on the

basis of paragraph 32 of **STATE OF GOA** is also tenable.

38.After dealing with the preliminary objections, it is necessary to deal with the merits of the claim. As regards Claim 1 in both references, it is evident from the Interim Award that the bone of contention is whether the total value of work done is Rs.64,26,11,861/-, as contended by the Petitioners, or Rs.61,20,82,206/- as contended by the first Respondent. This issue is critical and should have been independently adjudicated by the Arbitral Tribunal. Instead, it is clear and, indeed, self-evident from page 129 of Volume I, i.e. the Final Award of the Arbitral Tribunal, that the calculation submitted by the first Respondent specified the total value of work done as Rs.61,20,82,206 and this value was mechanically adopted in the Final Award as the basis for deciding the overall net payable, albeit by making a minor modification and including the Claim 3 payable of Rs.13,38,480. Indeed, the computation of the net amount payable to the Petitioners, which is at the heart of the Final Award, is riddled and replete with patent errors. Although Counter Claims 4,5 and 8 were allowed in the Interim Award, the calculation does not take into account the amounts awarded towards Counter Claims 4 and 8. Moreover, Counter Claim 7 for a sum of Rs. 77,06,210 was rejected in the Interim Award, as would be evident on perusal of internal pages 37 and 38 of the Interim Award at pages 117-

118 of Volume-I, but is taken into consideration at Serial No. C of the calculation table in the Final Award, although the relevant internal pages of the Interim Award are cited in the calculation table. Thus, apart from the award on Claim 1 in Reference No.1 and 2, the Final Award, as regards the computation of net payable by the first Respondent to the Petitioners, cannot be sustained for reasons set out above.

39. With regard to Claim 4 and Claim 6 of Reference No.1, the Arbitral Tribunal decided these claims by fully relying upon the report of the HLC, which was constituted by the first Respondent. As correctly contended by the learned counsel for the Petitioners, the report of the HLC does not have any contractual sanctity. In addition, the said HLC is not an expert committee appointed by the Arbitral Tribunal under Section 26 of the Arbitration Act. It is also the admitted position that the Petitioners challenged the report of the HLC by making the claim before the Arbitral Tribunal. In these facts and circumstances, the Award on this issue is vitiated by an error apparent on the face of the Award inasmuch as the Arbitral Tribunal has adopted the report of the HLC merely because there is no direct challenge to the independence of the said HLC by the Petitioners, and the principle laid down in **ENNORE PORT** would apply in this regard.

40. The Award in respect of Claim 7 in Reference No.1, which relates to the payment for pavement works, turns on a determination by the Majority Arbitrators that it is an item of work for which BoQ rates should be applied. Claim 8 in Reference No.1, which relates to the cutting of trees, was decided by proceeding on the basis of the generic conclusions that neither the provisional sums in the tender nor rates approved by the Engineer without the approval of the employer are binding. Claim 9 in Reference No.1, which relates to transportation, was rejected on the basis that notice under Clause 12.2 was not provided and that this claim was not included in the monthly statements as required under Clause 60.1 of the GCC. Claim 15 in Reference No.1, which relates to traffic management, was rejected on the basis that traffic management is incidental to the execution of work by referring to the relevant technical specifications and, in particular, TS 112.6. All these findings are based on appraisal of evidence and/or construction of the relevant contract clauses and I do not find any perversity in the said conclusions. Therefore, the challenge in respect of the said claims are rejected.

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41. As regards the alleged prolongation claims in Reference No.2, the contention of the learned counsel for the Petitioners is that all the relevant details are contained in the monthly progress reports. The Arbitral Tribunal rejected the idling claim, Claim 5, on the basis that there

is no indication in the monthly progress reports that machinery was idle; no log books were produced; no documentary evidence was adduced to prove that machinery was purchased, hired or deployed at site; and that notice under Clause 53.1 was not given. This claim is actually a disruption claim and not a prolongation claim. Therefore, the Petitioners should have notified the fact that there was idling during a particular period for reasons attributable to the first Respondent and produced evidence of idling of machinery/equipment and manpower during such period, including evidence of costs incurred on such machinery and manpower during such period. Instead, it is clear from the statement of claim read with Annexure CA-5/1 thereto, at page 42 of Volume VI, that this claim is made for the extended period of 23 months. The only documentary evidence that was produced was by way of monthly progress reports for July and August 2001 (page 197 of Volume III). Besides, such a claim would also be subject to the obligation to mitigate under Section 73 of the Contract Act, 1872 and there is no evidence of mitigation. Thus, this claim is fundamentally flawed and was correctly rejected. The rejection of Claim 6, in Reference No.2, is based on a plausible construction of Clauses 10.2 and 10.3 of the COPA read with Clause 60.5 and 60.6 thereof and, therefore, no interference is warranted. Similarly, in respect of the claim for overheads, Claim 7, the Petitioners should have adduced evidence as to the actual expenditure incurred towards site office overheads and

project-specific off-site overheads during the extended period, whereas the claim was made by deriving the monthly overheads on a theoretical basis as Rs.23,63,547 and multiplying the same by the extended period of 23 months. While formulae such as Hudson's, Emden's and Eichleay's can be used to calculate head office overheads because they are apportioned across all the projects of the contractor in question, site office overheads can be and are, consequently, required to be proved through hard evidence. Thus, the rejection of this claim also does not warrant interference.

42. The contention of the learned counsel for the Petitioners that the Minority Award should be made enforceable after setting aside the Majority Award by following the judgment in **Ssyangyong** cannot be countenanced because the Supreme Court resorted to Article 142 of the Constitution so as to adopt this course of action and such recourse is not available to this Court. The Full Bench of the Bombay High Court in **R.S. JIWANI v. IRCON INTERNATIONAL LTD. 2010 (112) Bom LR 491 (FB)** held that the Arbitral Award may be severed, if possible, so as to uphold the award in part and set aside the award in part. Especially in view of the already protracted dispute resolution process and the fact that the challenge was focused on the Award in respect of specific claims, I am of the view that this is the proper course of action with regard to the Award under challenge. Accordingly, the Award in respect of Claim 1 in

both the references is set aside. Likewise, the Award in respect of Claim 4 and Claim 6 in Reference No.1 is set aside. The computation of the net payable under the Final Award is completely flawed and is set aside. The Award in respect of Counter Claims 4,5 and 8 is set aside by accepting the preliminary objection that the mandatory pre-arbitral procedure was not complied with. On all these aspects, the Award violates both public policy and is patently illegal as per the law laid down in **ASSOCIATE BUILDERS vs. DELHI DEVELOPMENT AUTHORITY(2015) 3 SCC 49** and, in particular, paragraphs 29 and 31 thereof and paragraph 42 of **SSYANGYONG**. The Award in respect of all other claims are based on an appraisal of evidence or a plausible construction of contractual clauses and, therefore, no interference is warranted.

43. In the result, the Award is partly set aside in the manner and to the extent set out above. Consequently, the Petitioners are granted leave to initiate de novo arbitration proceedings in respect of Claims 1,4 and 6 in Reference No.1 and Claim 1 in Reference No.2 and also for interest thereon. If such proceedings are initiated, the Petitioners shall be entitled to the benefit of Section 14 of the Limitation Act,1963 in respect of time taken both in the Arbitral Proceedings and in proceedings before this Court.

07.01.2020

Speaking order

Index: Yes

Internet: Yes

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SENTHILKUMAR RAMAMOORTHY, J.

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