

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 07.12.2020

Delivered on: 23.12.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.153 of 2015

M/s. NCC Ltd.,
Represented by its Senior Manager Mr.P.Narasimhan,
No.190 A, 8th Floor,
Pettukola Towers,
Kilpauk, Chennai – 600 010. ... Petitioner

Vs.

1. M/s. Indian Institute of Technology, Madras,
Represented by its Director,
Chennai - 600 036.
2. Mr.K.V.Rupchand,
Hon'ble Sole Arbitrator,
No. 7 B, 'Govind I'
Kannapa Nagar Extension,
Thiruvanmiyur, Chennai – 41. ... Respondents

(R2 deleted vide order of this Court dated 06.10.2020)

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award dated 09.07.2014 passed by the second respondent.

For Petitioner : Mr.P.J.Sri Ganesh
for Mr.P.J.Rishikesh

For Respondent : Mr.P.Neelakantan

of M/s.Menon Karthik Mukundan
Neelakantan (Law Firm)

ORDER

Captioned 'Original Petition' (hereinafter 'OP' for the sake for 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 the 'A and C Act' for the sake of brevity. Captioned OP has been filed assailing an 'arbitral award dated 09.07.2014' (hereinafter 'impugned award' for the sake of convenience) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole arbitrator.

2. The sole Arbitrator, who constituted the AT, had been arrayed as Respondent No.2 in the captioned OP, but when the captioned OP was taken up for final disposal with the consent of learned counsel on both sides, it was submitted in unison by learned counsel on both sides or in other words it was submitted by learned counsel on both sides without any disputation or disagreement that the sole Arbitrator, who constituted the AT, need not continue to be in the array of parties in the captioned OP owing to the nature of challenge to the impugned award. Therefore, vide proceedings / orders dated 06.10.2020, this Court deleted from the

array of respondents the sole Arbitrator (who constituted the AT) and who had been arrayed as Respondent No.2. Therefore, there is a sole petitioner and a lone respondent in captioned OP now. 'Sole petitioner' and the 'lone respondent' shall hereinafter be referred to as 'contractor' and 'IIT' respectively for the sake of convenience and clarity.

3. There is no dispute or disagreement about the fact that a contract dated 09.07.2009 captioned 'Articles of Agreement' together with 'General Conditions of Contract' ('GCC' for the sake of brevity) and 'Special Conditions of Contract' ('SCC' for the sake of brevity) constitute the codified documents qua contractual relationship between the parties i.e., Contractor and IIT. Therefore, this 'Articles of Agreement dated 09.07.2009, GCC and SCC' shall hereinafter be compendiously and collectively referred to as 'said contract' for the sake of convenience and clarity. There is also no dispute or disagreement that Clause 14.1 of GCC is an arbitration clause and the same serves as an arbitration agreement between the Contractor and IIT being an 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. Captioned OP is a challenge under Section 34 of the A and C Act qua impugned award and therefore, short facts shorn of elaborate

details / particulars or in other words, factual matrix in a nutshell containing essential facts imperative for appreciating instant order will suffice.

4. Factual matrix in a nutshell is that said contract is for construction of 96 staff quarters; that said staff quarters are referred to as C2 type quarters; that the time frame for construction was 6 months which elapsed on 08.01.2010; that thereafter there were multiple time extensions; that last of the time extensions (which was in the region of 10th extension) was upto 31.03.2011; that the work of construction of all 96 staff quarters was completed within this last extended period i.e., by 27.03.2011 to be precise; that the contractor submitted final bill on 22.10.2011; that IIT deducted 'Liquidated Damages' ('LD' for the sake of brevity) in a sum of Rs.52.66 lakhs and paid the balance to the contractor; that the contractor claimed additional amounts by relying on the price variation clause in said contract; that such additional amount was claimed towards material / labour and it is to the tune of 7.80 crores; that the deduction of LD and claim of additional sum of Rs.7.80 crores towards material and labour based on price variation clause in said contract became the bone of contention between contractor and IIT; that Rs.7.80 Crores additional claim is made up of a claim of Rs.3.24 crores

and Rs.4.58 crores towards labour and material; that two pronged bone of contention, i.e., deduction of LD and additional claim of Rs.7.80 crores (posited on price variation clause in said contract) lead to aforementioned arbitration agreement being triggered; that vide letter dated 12.04.2012, IIT appointed a sole Arbitrator; that the sole Arbitrator entered upon reference and after full contest made the impugned award on 09.07.2014; that vide the impugned award, AT scaled down the LD deduction from Rs.52.66 lakhs to Rs.47 lakhs and rejected the Rs.7.80 crores additional claim of the contractor (based on price variation clause in said contract); that IIT accepted the impugned award and paid the differential i.e., scaled down portion of LD to the contractor; that the contractor has chosen to lay challenge to the impugned award vide captioned OP.

5. To be noted, factual matrix in a nutshell set out supra also captures the trajectory of the matter thus far and as to how the captioned OP which has now been taken up for final disposal in a virtual hearing on a video conferencing platform with the consent of learned counsel on both sides reached this virtual Court.

6. In the final disposal /final hearing listings of the captioned OP before this virtual Court i.e., web hearings on a video conferencing platform Mr.P.J.Sri Ganesh, learned counsel representing the counsel on

record for the contractor (sole petitioner) and Mr.P.Neelakantan of M/s.Menon Karthik Mukundan Neelakantan (Law Firm) on behalf of IIT (lone respondent now) are before this virtual Court.

7. This Court now proceeds to capture and set out the rival submissions.

8. Learned counsel for contractor made submissions assailing the impugned award and a summation of the same is as follows:

a) Impugned award contains decisions beyond the scope of submission to arbitration and is therefore, liable to be set aside under Section 34(2)(a)(iv) of A and C Act. This submission is posited on the point that 'Extension of Time' ('EOT' for the sake of brevity) was not the issue submitted for arbitration, but levy of LD was the issue;

b) Impugned award is liable to be set aside as being in conflict with public policy of India as it is perverse. This submission was predicated on the argument that contractor's claim for additional sum of Rs.7.80 Crores based on price variation clause in the said contract has been negatived solely on the ground of delay, whereas EOT or correctness of EOT was never an issue before the AT.

9. A summation of submissions made by learned counsel for IIT is as follows:

a) All EOTs were provisional and while granting each EOT, IIT had preserved its rights to claim LD. This has been made clear in every EOT letter and therefore, it cannot be gainsaid that LD ought not to have been levied;

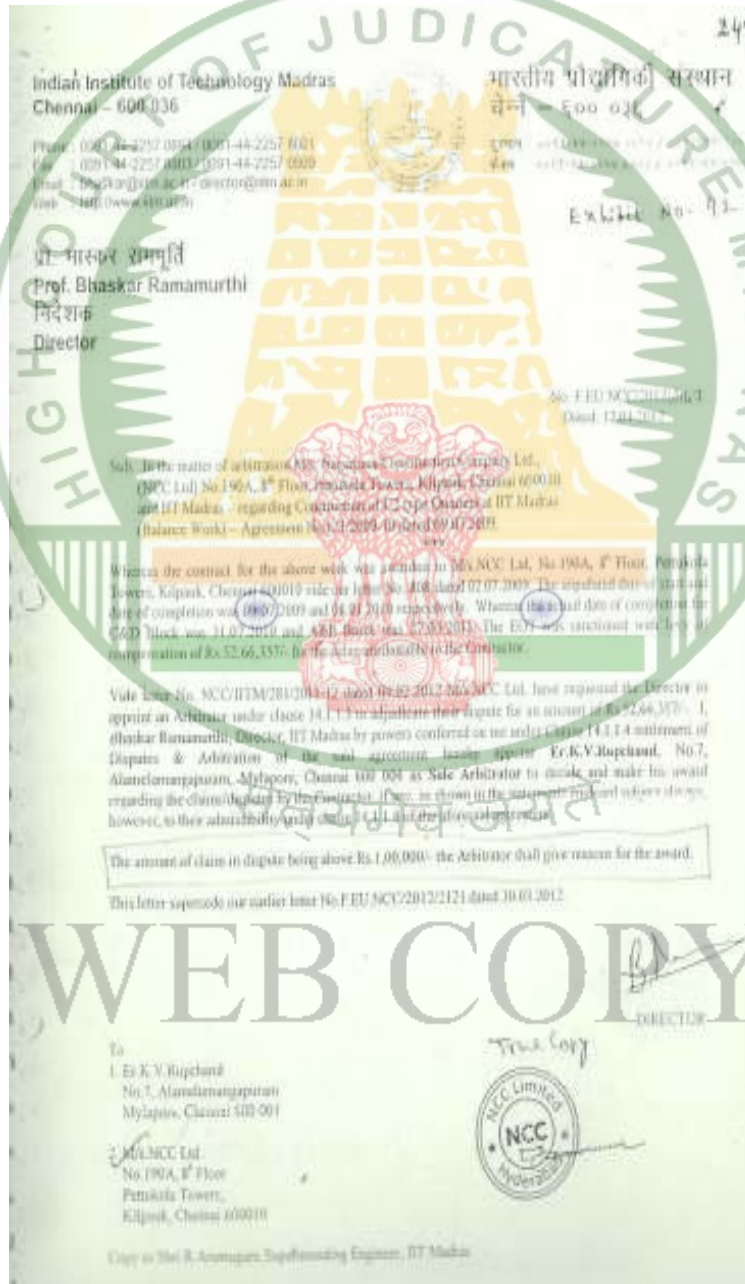
b) It is not tenable to say that the claim of additional sums of money towards material and labour on the basis of price variation clause was negated by AT solely on the ground of delay as AT has looked into other material placed before it in this regard.

10. To be noted, IIT raised the issue of arbitrability qua price variation clause alone, but this was negated by AT, however IIT has accepted this verdict of AT is also learned counsel's say.

11. This Court, having set out the summation of rival submissions, now proceeds to discuss the rival submissions and give its dispositive reasoning for arriving at a conclusion qua the prayer in captioned OP.

12. It would be evident from the summation of rival submissions that the first point that falls for consideration is whether the impugned award contains decisions beyond the scope of submission to arbitration.

In this regard, letter dated 12.04.2012 from IIT *inter alia* to the contractor (Ex.No.42 before AT) is of relevance. Owing to the nature of the argument, this Court deems it appropriate to scan / reproduce the entire letter and the same is as follows:



13. Before discussing the contents of the above letter, it is necessary to have clarity on what the expression 'submission to arbitration' occurring in Section 34(2)(a)(iv) of the A and C Act means. This expression 'submission to arbitration' is made up of three facets i.e., a) dealing with a dispute not contemplated by the terms of submission to arbitration, b) dealing with a dispute not falling within the terms of submission to arbitration and c) containing decision on matters beyond the scope of submission. In the instant case, it was made clear by the learned counsel for petitioner that 34(2)(a)(iv) argument is predicated on the third limb. Hon'ble Supreme Court, in the recently rendered elaborate *Ssangyong* judgment i.e., *Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India* reported in *[(2019) 15 SCC 131]* has explained the expression 'submission to arbitration' by endorsing commentaries in standard text books and English case laws. The most relevant portion of *Ssangyong* case law which is elucidative and instructive in this regard is contained in Paragraph 58 of the SCC Online report and that relevant portion reads as follows:

'The ground of challenge under Section 34(2)(a)(iv)

58. So far as this defence is concerned, standard

textbooks on the subject have held that the expression “submission to arbitration” either refers to the arbitration agreement itself, or to disputes submitted to arbitration, and that so long as disputes raised are within the ken of the arbitration agreement or the disputes submitted to arbitration, they cannot be said to be disputes which are either not contemplated by or which fall outside the arbitration agreement. The expression “submission to arbitration” occurs in various provisions of the 1996 Act. Thus, under Section 28(1)(a), an Arbitral Tribunal “...shall decide the dispute submitted to arbitration....”. Section 43(3) of the 1996 Act refers to “...an arbitration agreement to submit future disputes to arbitration...”. Also, it has been stated that where matters, though not strictly in issue, are connected with matters in issue, they would not readily be held to be matters that could be considered to be outside or beyond the scope of submission to arbitration.’

14. Thereafter, in paragraph 66 (to be noted, paragraph number as in SCC online report) of **Ssangyong** case law after referring to English and Irish case laws as also Mansfield’s commentary on the subject, Hon'ble Supreme Court has made it clear that there is a presumption that the AT has acted within its mandate and the onus of establishing otherwise rests on the party seeking to set aside the award on this ground.

15. This Court, having set out how the expression 'submission to arbitration' is understood and as to the onus qua a plea predicated on the argument of AT having wandered and given a decision on matters beyond the scope of submission, now proceeds to examine whether impugned award in the case on hand is vitiated qua the ground that it contains decisions beyond the scope of submission to arbitration.

16. A perusal of the letter dated 12.04.2012 from IIT (scanned and reproduced supra) makes it clear that submission to arbitration is no doubt on LD and price variation, but the presumption with regard to discussion is that AT embarked upon such discussion for the purpose of deciding the disputes submitted to arbitration. It is for the contractor (protagonist of the captioned OP) to dispel this presumption. In other words, going by **Ssangyong** principle, the onus is on the contractor who is the protagonist of captioned OP to demonstrate that AT has wandered. In this regard, the campaign of the learned counsel for contractor is predicated on the five issues framed by AT, which is contained in Paragraph 3 of the impugned award which reads as follows:

'3. Subsequently, in Meeting No.3 held on 27.08.2012,

Issues were framed with the consent of both the parties as follows, to facilitate the adjudication of the dispute between the parties:

- 1. Extension of Time : Application and Grant*
- 2. Grant of Extension of Time under Clause 5*
- 3. Levy of Compensation*
- 4. Interest on Compensation*
- 5. Claim No.3 – Reworded as 'Arbitrability of Claim No.3' in Meeting No.4.'*

17. Finding returned at paragraphs 7.1(d) and 7.2(d) of the impugned award reads as follows:

7.1(d) Tribunal's ruling

1. Clause 5.2 of the Contract (p.67/T1) lists 8 events which may cause delay in the works. Clause 5.3 of the Contract (p.68/T1) states 'Request for rescheduling of milestones and extension of time, to be eligible for consideration, shall be made by the contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form. The contractor may also, if practicable, indicate in such a request the period for which extension is desired'. There are three requirements for considering EOT, viz. (i) Request for rescheduling of milestones, (ii) request for extension of time and (iii) request shall be made in the prescribed form. Requirement (ii) has to be preceded by requirement (i) according to the sequence of these clause of terms under Clause 5.3. It is found from (c) above that none of these three requirements has been

complied with by Claimant while applying for EOT on all the ten occasions.

2. Clause 5.4 of the Contract (p.68/T 1) states 'In any such case the Engineer in Charge may give a fair and reasonable EOT and reschedule the milestone for completion of work...Non application by the contractor for EOT shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor'. In this contract, no rescheduling of milestone has been done. Claimant has given a suo-moto extension (p. 179/C 1) for the work as a whole, whereas some works had been completed much earlier in August 2010(c. 8 above). This is mentioned as provisional extension. Claimant states that "By their very expression, the term provisional itself means that it was not final. Further Clause 5 also mentions, 'final EOT' thereby implying that there can be provisional EOTs (c. 13 above)". The work 'provisional' connotes something which is in a nascent stage, to be confirmed later and hence, cannot qualify to be used for a shifting date of completion. At best, such provisional extensions but only extensions as per clauses 5.3 & 5.4.

3. Held that Application for EOTs by Claimant and Grant of EOTs by respondent do not conform to the provisions in the contract.

.....

7.2(d) Tribunal's ruling

Grant of EOT under clause 5 does not conform to the provision in the contract.'

18. This takes us to the question as to whether the correctness or otherwise of EOT was submitted to arbitration. Correctness or otherwise of EOT may not have been set out with specificity, but it is certainly not something which falls outside the dynamics and dimensions of LD. It is a certain determinant qua LD/price escalation as it is an inseparable facet of LD / price escalation as it is so intertwined with LD / price escalation that to disentangle the same would tantamount to missing the wood for the trees. The reason is LD was levied owing to delay, price escalated owing to time delay and EOT was subject to LD.

19. To be noted, this is of immense significance (EOT and LD being inextricably dovetailed) as in every single EOT letter given by IIT, IIT has made it clear that it is without prejudice to the rights of IIT to levy LD. A typical EOT reads as follows:

WEB COPY

INDIAN INSTITUTE OF TECHNOLOGY MADRAS
Chennai - 600 075
Telephone : [044] 2257 8151
FAX : [044] 2257 8155

TUV CERT
RWTUV

Dr. R. Arumugam B.E., M.Tech.(III-IV)
Superintending Engineer

No. 64/08-09/1872
April 30, 2010

M/s. Nagaraja Construction Company Ltd.,
No.41, Naganur, Hilla,
Perungudi, Madurai-625 002

FAX No. 043 23380214

Sub: Construction of 96 Nos. C2 type quarters at IIT Madras (Balance work) -
Extension of time - Reg.

Ref: 1. Work Award letter No. 64/08-09 dated 02.09.2009
2. Agreement No. 121/08-10
3. This office order No. 64/08-09/1130 dated 08.01.2010 on 20% (up to 30.04.10)
4. M/s. Nagaraja Construction Company Ltd., letter No. NCC/IT-14/153/2009-10 dated 13.01.2010

Please refer to the office order above in connection with the grant of extension of time for the work of construction of 96 Nos. C2 type quarters at IIT Madras (Balance work) at IIT Madras.

The date of completion of the above mentioned work is 10.11.2010 as stipulated in the above work Agreement.

Extension was granted from 01.01.2010 to 30.06.2010 vide letter No. 64/08-09/1130 dated 08.01.2010.

Extension of time for completion of the above mentioned work is provisionally granted from 01.07.2010 to 30.06.2010 without prejudice to the right of the Institute to recover liquidated damages in accordance with the provisions of clause of the said agreement.

Provided that not withstanding the extension hereby granted (and to read shall) will continue to be the terms of the said agreement.

No compensation will be paid to the contractor on any account under any head during the extended period.

Yours faithfully,
Superintending Engineer

Asst. Registrar (EU)

Copy to
M/s. Nagaraja Construction Company Ltd.
No. 41, Naganur, Hilla, Perungudi, Madurai-625 002
For submission to
The Director
The Chairman (EU)
Executive Engineer (E&E)
Executive Engineer (I/c (proj))

For necessary action

सत्यमेव जयते

20. Therefore, in the light of **Ssangyong** case law where the expression 'submission to arbitration' has been explained, this explanation of Hon'ble Supreme Court is elucidative, instructive and

when this Court respectfully applies the same to the case on hand, the argument of learned counsel for petitioner fails as the petitioner has not been able to dispel the presumption and discharge the onus qua wandering ground. It follows as a sequitur that on the facts and circumstances of instant case, going by the **Ssangyong** principle, it cannot be gainsaid that it is not a matter connected with matters in issue and therefore, it cannot be held to be beyond the scope of submission to arbitration. This answers the first argument/issue regarding impugned award containing decisions beyond the scope of submission to arbitration. In other words, this Court finds for IIT in this regard.

21. There is no dispute regarding LD being a genuine pre-estimate and IIT preserving its rights to levy LD in every single EOT letter is infeasible as it is clear as daylight. However, even on this aspect the impugned award/AT has considered the matter on merits, gone into the technical i.e., engineering aspects of the matter and has reduced the LD of Rs.52.66 lakhs levied by IIT to Rs.47 lakhs and this differential amount of little over Rs.5 lakhs has also been duly paid to the contractor by IIT by accepting the impugned award.

22. This takes this Court to the next aspect of the matter, which is pivoted, posited and predicated on price variation clause in said contract.

It would be evident from paragraphs supra in this order (where rival submissions have been captured by way of summations) that this argument turns on a very acute and narrow curve. That acute and narrow curve is whether AT has decided this issue of additional claim solely on the ground of delay. To put differently, the simple question is whether AT has negated this additional claim of the contractor solely on the ground of delay in execution of said work.

23. A bare perusal and plain reading of the impugned award brings to light that the additional claim of Rs.7.80 crores made by the contractor on the basis of price variation clause has not been negated by AT solely on the ground of delay. This is clear *inter alia* from the following two portions of the award:

'5. Provisions in Clause 10 C are crystal clear. Claimant has failed to comply with the conditions set forth in clause 10 C, viz. giving notice to Engineer-in-Charge, maintain book of Accounts and producing proof of having actually incurred increased expenditure on account of increase in the wages of labour and cost of materials. There is absolutely no scope to arrive at the increase in expenditure made, if any, by any other method, such as the hypothetical calculations resorted to by Claimant. As Claim No.3 is not maintainable, the consequential interest payment does not arise.

(d) Tribunal's Ruling

1.

2. *Statutory Minimum Wages of labour increased from Rs.102 on 07.10.2009 to Rs.203 on 18.12.2009 (7.5.a.4 above). Claimant should have 'woken up' then and there and initiated action to stake his claim due to increased wages as per the terms of the contract. Claimant simply kept quiet till 06.09.2011 i.e., for more than 20 months and made this claim for the first time, that too without following the provisions in the contract. It is unbelievable that Claimant bid time for such a long period to allow the claim to 'brew', to its ultimate quantum of nearly Rs.8 Crores. The elaborate working sheets which Claimant has produced in support of Claim No.3 can, at best, be termed as a good 'theoretical exercise' bringing forth absolutely no benefit to Claimant.*

24. The argument on this price variation clause was predicated on perversity. Perversity, no doubt, is one of the jurisdictional doctrines culled out by Hon'ble Supreme Court in the celebrated *Associate Builders* case [*Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49], which can be applied to the case on hand as it is covered by pre 23.10.2015 regime of the A and C Act. Perversity facet has been articulated in Paragraphs 31 and 32 of *Associate Builders* case law and the said paragraphs are as follows:

'31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have

arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the

conclusions would not be treated as perverse and the findings would not be interfered with.”

25. To be noted, captioned OP was presented in this Court on 15.09.2014. The test for perversity as well as irrationality is Wednesbury principle of reasonableness but it is clear as daylight that the impugned award has not negated contractor's claim for additional sum (predicated on price variation clause in said contract) solely on the basis of delay as AT has considered the evidence before it to come to the conclusion that contractor has not produced adequate material much less adequate material in the form of evidence and in accordance with said contract to be entitled to claim monies under price variation clause. Therefore, it cannot be gainsaid that impugned award does not pass the rigour of Wednesbury test of reasonable. In other words, it passes the rigour of Wednesbury principle of reasonableness. This puts an end to the campaign of the petitioner with regard to price variation clause.

26. This takes us to the submission of learned counsel for contractor that the Arbitral Tribunal has not given reasons for justifying LD and for negating the claim posited on price variation clause. There is no dispute or disagreement that the case on hand does not fall

under either sub-clause (a) or sub-clause (b) of sub-section (3) of Section 31 of the A and C Act. In other words, there is no dispute or disagreement that the case on hand is not one where the parties have agreed that no reasons have to be given and the impugned award is not an award on agreed terms within the meaning of Section 30 of A and C Act. Therefore, it follows as a sequitur that AT has to give reasons, but in the considered view of this Court, AT has given reasons in the impugned award. The relevant portions regarding LD and price variation as contained in the impugned award have been extracted and reproduced elsewhere supra in this order. As already alluded to initially in factual matrix and later delineated in discussion / dispositive reasoning supra, the LD sum of Rs.52.66 lakhs levied by IIT has been reduced to Rs.47 lakhs by the AT after discussion and by giving dispositive reasoning. Likewise, AT has given the reason that material placed before it by the contractor is not good enough to substantiate its claim for additional sums on price variation clause. Relevant paragraphs from the impugned award of AT in this regard have also been extracted and reproduced supra. Therefore, ***Som Datt Builders Limited Vs. State of Kerala*** reported in ***(2009) 10 SCC 259*** pressed into service by learned counsel for contractor with regard to reasons not being given does not come to

the aid of the petitioner as in ***Som Datt Builders*** was a matter where the contractor took the stand that seeking of extension of time qua loss itself was on account of strike by various local unions, bundh and interference by police, other authorities and a delay upto 18 ½ months was held to be attributable to the claimant, but no reasons were given. It is in this context that in ***Som Datt Builders*** case Hon'ble Supreme Court considered it an appropriate case where the High Court could have given opportunity to the AT i.e., an opportunity to resume the arbitral proceedings and eliminate this ground for setting aside by giving reasons. To be noted, even in ***Som Datt Builders***, Hon'ble Supreme Court has held that an AT is not expected to write judgment like a Court and it is not expected to give elaborate and detailed reasons in support of its findings. ***Som Datt Builders*** was a case where the submissions were merely noticed and reference to the documents were made. It was held that noticing submissions and making reference to documents is not a substitute for reasons which the AT is obliged to give. In the case on hand, relevant portions of discussion and reasons, as contained in the impugned award particularly, paragraphs 7.1(d), 7.2(d) have been extracted and reproduced supra, a plain reading of these paragraphs leaves this Court with the view that the reasons do have the trappings of

dispositive reasoning and therefore, this Court is unable to see any infarct of sub-section (3) of Section 31 of A and C Act, much less an infarct which vitiates the impugned award.

27. Reverting to perversity, the celebrated *Western Geco* case [*ONGC v. Western Geco International Ltd.*, reported in (2014) 9 SCC 263] and *Associate Builders* case which reiterates *Western Geco* principle were pressed into service and this perversity aspect and principles laid down by Hon'ble Supreme Court have already been discussed supra. The impugned award passes the rigour of Wednesbury principle of reasonableness test as mentioned supra and therefore, it is not vitiated by perversity. This means that *Western Geco* and *Associate Builders* case laws also do not come to the aid of the contractor in its campaign qua challenge to impugned award.

28. To be noted, from the case file placed before this Court it comes to light that the date of presentation of captioned OP in this Court is 15.09.2014 and therefore, applying the *Ssangyong* principle, captioned OP is governed by pre 23.10.2015 regime or in other words, it is governed by A and C Act as it stood prior to amending Act 3 of 2016 which kicked in with retrospective effect on and from 23.10.2015. In

this regard, in ***Ssangyong*** case law, the impact of 23.10.2015 amendment on perversity as understood in ***Associate Builders*** case law has been set out. In this case, as captioned OP is governed by pre 23.10.2015 regime, perversity as understood and elucidated in paragraphs 31 and 32 of the oft-quoted ***Associate Builders*** case (extracted and reproduced supra) can be safely relied upon.

29. To be noted, even post 23.10.2015, perversity is available in the form of patent illegality, but it is not necessary to dilate much on this aspect of the matter. Applying the principles set out in paragraphs 31 and 32 of oft-quoted ***Associate Builders*** case, this Court is unable to come to the conclusion that the view taken by the AT in the impugned award is implausible and that it is a view which no reasonable person would take on the facts and circumstances of the case. As all EOTs have been given by IIT with a rider that it is without prejudice to the rights of IIT qua LD, this Court is also coming to the conclusion that EOT facet is inseparably intertwined with deduction of LD. Before winding up this matter, for the purpose of capturing what unfurled in the hearing with completeness, this Court deems it appropriate to record that learned counsel for IIT placed before this Court ***Jagan Nath Ashok Kumar*** case

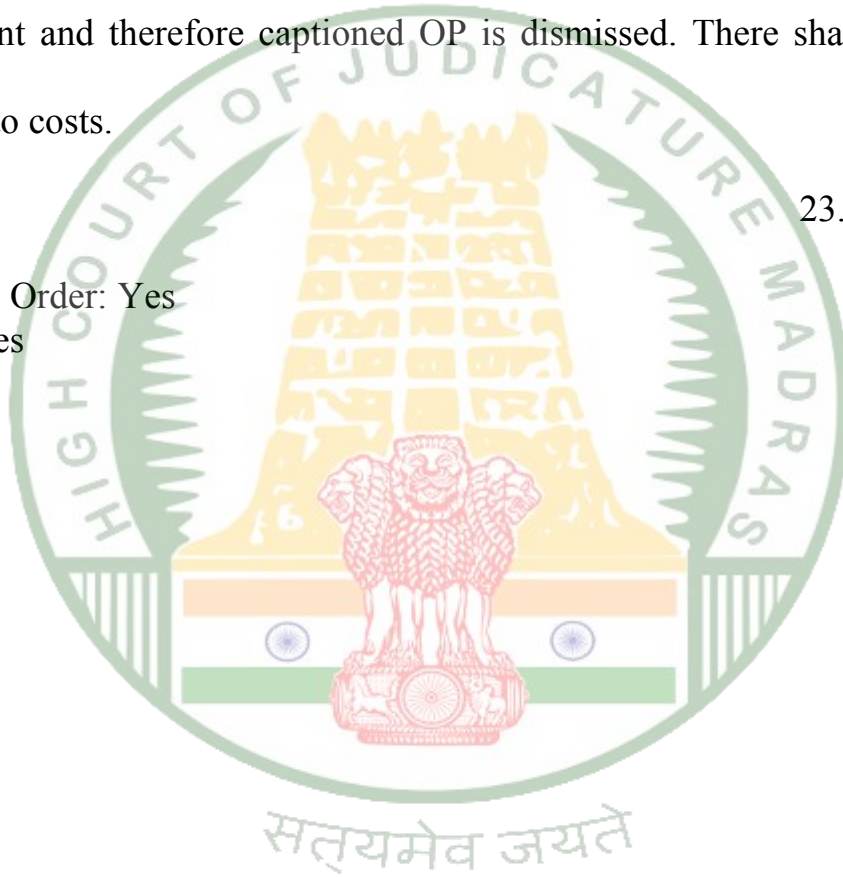
[*Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and another* reported in (1987) 4 SCC 497], *Tiwari Road Lines* case [*Iron and Steel Co.Ltd., Vs. Tiwari Roadlines* reported in (2007) 5 SCC 703] and *Motorola India* case [*Bharat Sanchar Nigam Limited and another Vs. Motorola India Private Limited* reported in (2009) 2 SCC 337]. *Jagan Nath Ashok Kumar* case was relied on for the principle that there shall be no re-appreciation of the matter and learned counsel for contractor submitted that this is under the old Act and it cannot be applied. In the light of the discussion and dispositive reasoning thus far, it is not necessary to go into this aspect and it is best left at that. The same applies to *Tiwari Road Lines* case, which was placed before me regarding the procedure for arbitration point and learned counsel for contractor said it was distinguishable as *Tiwari Road Lines* was rendered under Section 11 proceedings. Likewise, *Motorola India* case was pressed into service qua deduction of LD, but learned counsel for contractor said it is distinguishable as that was a case coming within the scope of excepted matters qua liability of supplier regarding LD. It was pointed out that this is not a case of expected matter. Similar to *Jagan Nath Ashok Kumar* case and *Tiwari Road Lines*, *Motorola India* case

laws also do not compel discussion in this order as the discussion and dispositive reasoning thus far itself clinches the captioned OP in favour of IIT.

Owing to all that have been set out supra, this Court finds for the respondent and therefore captioned OP is dismissed. There shall be no order as to costs.

23.12.2020

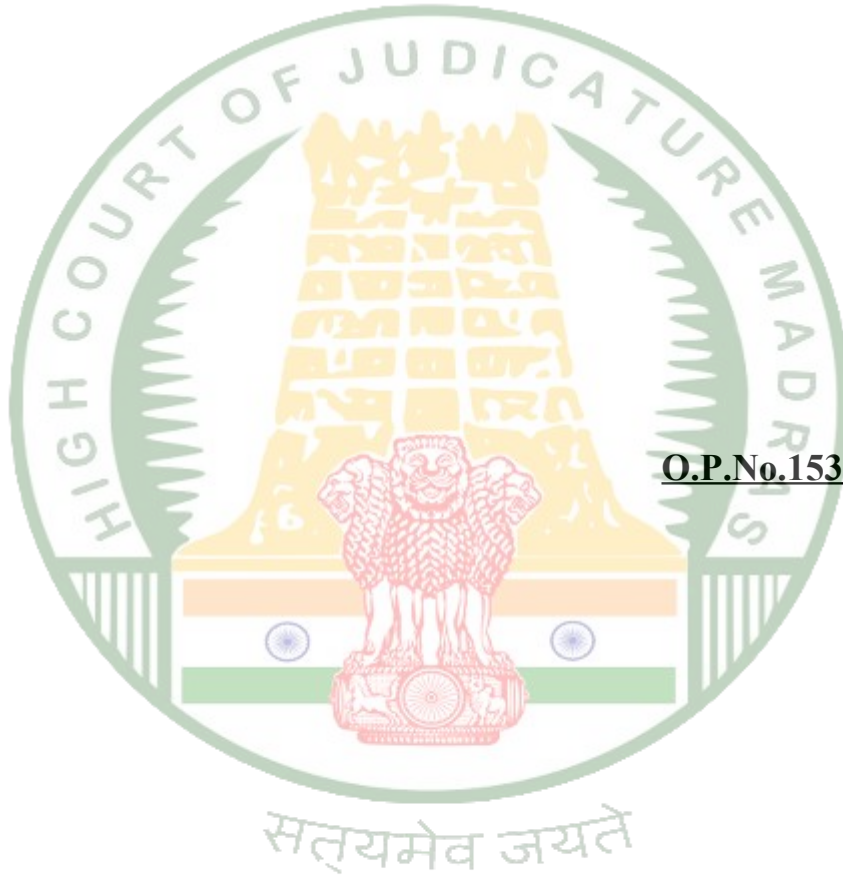
Speaking Order: Yes
Index: Yes
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M.SUNDAR, J.

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order in
O.P.No.153 of 2015

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