IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **10.03.2020**

CORAM

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

O.P.No.753 of 2013

M/s.Best and Crompton Engineers Projects Ltd.,
A Company incorporated under the
Companies Act, 1956,
having its Head Office at
No.A-20, Thiru Vi Ka Road,
Near Police Station, Guindy Industrial Estate,
Chennai-600 032.
Represented by its Authorised Signatory.

Also at:
No.40/15, II Floor, "Geeta Mansion",
Kempegowda Road, Bangalore-560 009.

... Petitioner

- Vs -

1. M/s.Kavcon Engineers Pvt. Ltd,
A Company incorporated under the
Companies Act, 1956,
having its Registered Office and Factory at
No.20, Km, Mysore Road,
Kumbalgod, Bangalore-560 074.
Represented by its Managing Director
Mr.Krishan Chopra.
2. Mr.A.Balraj,
Ld. Presiding Arbitrator,
No.76, J-Block, 4th Main Road,
Behind 14-Shops, Anna Nagar East,
Chennai-600 102.

3. Mr.K.D.Arcot,
   Ld. Co-Arbitrator,
   House No.U-46,
   Plot No.4185, Anna Nagar,
   Chennai-600 040.

4. Mr.D.V.Nagabhushan,
   Ld. Co-Arbitrator,
   No.43/1, 4th Main, 15th Cross,
   Malleshwaram, Bangalore-560 003.

... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 16.05.2013 passed by the respondents 2 to 4 as against the petitioner.

For Petitioner : Ms.Vandana Raheja of M/s.Surana & Surana

For Respondents : Mr.Sanjay Ramaswamy for R1

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ORDER

PREFATORY NOTE:

Challenge to an arbitral award under Section 34 of 'The Arbitration and Conciliation Act 1996' (hereinafter referred to as 'A and C Act' for brevity), going by the language in which Section 34 of A and C Act is couched, is by way of an 'application', but this Court is giving the nomenclature 'Original

Petition' ('OP' for brevity) for such applications under Section 34 of A and C Act. Therefore, this Court will continue to refer to instant matter as 'OP'. A OP under Section 34 of A and C Act is neither an appeal nor a revision. It is not even a full-fledged judicial review, but it is a limited judicial review within the contours and confines of Section 34 of A and C Act. By contours and confines of Section 34 of A and C Act, this Court refers to 8 slots adumbrated in Section 34 of A and C Act. This Court chooses to deploy the term 'slots' in preference to 'grounds', as instant OP is neither an appeal nor a revision and it is not even a full-fledged judicial review as already mentioned. 5 slots are adumbrated under Section 34(2)(a), 2 slots are adumbrated under Section 34(2)(b) and one slot figures under Section 34(2-A). To put it differently, instant OP is a mere challenge to an award. When it comes to 'challenge to an award', the principle is, if a petitioner/applicant is able to fit his case into any one or more of the eight slots snugly and neatly, the award will be dislodged/set aside. If that not be so, the award will not be interfered with. This is owing to 'minimum judicial interference' in 'Alternate Dispute Resolution' ('ADR' for brevity) mechanism, which is the sublime philosophy and salutary principle qua scheme of A and C Act. In this context, this Court chooses to describe the eight slots adumbrated in

Section 34 as eight pigeon holes. To be noted, two of these pigeon holes i.e., conflict with public policy and patent illegality slots are even in the nature of keyholes/pinholes, as they have been further circumscribed by limiting factors, such as (a) not entailing review on merits, (b) making re-appreciation of evidence impermissible and (c) eliminating even erroneous application of law as a ground.

2. **FACTUAL MATRIX AND TRAJECTORY:**

2(i) In the light of aforementioned prefatory note, elaborate facts need not be set out. Short facts shorn of elaboration or in other words facts, which are imperative to appreciate this order will suffice, such short facts are that petitioner entered into a contract for supply of materials/equipments with 'Karnataka Power Transmission Corporation Limited' ('KPTCL' for brevity); that the petitioner entered into back to back arrangement with the first respondent for supply of some of these materials to KPTCL; that the materials to be supplied by the first respondent is covered by three purchase orders being Purchase Order Nos.SS/KPTCL/101/PO-09, SS/KPTCL/102/PO-10 and SS/KPTCL/107/ PO-08 all dated 30.05.2008; that the terms of supply qua three purchase orders are governed by 'General

Terms and Conditions' (GTC for the sake of brevity) and 'Special Terms and Conditions' (STC for the sake of brevity); that certain disputes erupted between the petitioner and first respondent regarding the mode of payment; that a meeting was held on 12.12.2008 in this regard and the meeting was minuted; that ultimately, the claimant resorted to Arbitration Clause between the parties by making certain claims; that three Arbitrators constituted a three member Arbitral Tribunal; that three member Arbitral Tribunal entered upon reference, adjudicated the issues and returned a verdict largely in favour of the first respondent or in other words, acceded to many of the claims made by the first respondent in its capacity as Claimant before the Arbitral Tribunal; that the petitioner has assailed the award made by the Three Members Arbitral Tribunal being 'award dated 16.05.2013' ('impugned award' for the sake of brevity) by way of instant OP under Section 34 of A and C Act; that instant OP was presented in this Court on 03.10.2003, i.e., half of the decade ago and the instant OP is being taken up for disposal now.

3. **SUBMISSIONS:**

3(i). Ms.Vandana Raheja of M/s.Surana and Surana (Law Firm) appearing for the petitioner, adverting to the impugned award submitted that the three member Arbitral Tribunal has framed as many as 15 issues. It was pointed out that this is articulated in paragraph 10 of the impugned award.

3(ii). It was pointed out that 15 issues have been framed by the Arbitral Tribunal and issue no.2 touching upon novation of contract is the point, which needs to be looked into in instant OP. As answer to issue no.2 will answer the other issues, Issue No.2 is extracted/reproduced infra and the same reads as follows:

> '*Issue No.2*
>
> *Whether the Minutes of Meeting dated 12.12.2008 between the parties supersedes the terms of the three purchase orders and amounts to novation of the contract?'*

3(iii). To set out issue no.2 with specificity, it only means whether Ex.C26 being Minutes of Meeting between the petitioner and first respondent dated 12.12.2008 substitutes STC and GTC governing the aforementioned three purchase orders.

3 (iv). A scanned copy of the three purchase orders are as follows:

Best & Crompton

HVSS DEPARTMENT

	PURCHASE ORDER	ORDER # :	SS/KPTCL/101/ -0-09	DATE :	30.05.2008
OF S.S		LOI # :		DATE :	
		YOUR REF:	KV/P/8016/2008-09	DATE :	27.05.2008

PROJECT REFERENCE : 66/11KV - KPTCL - SUBSTATION PACKAGE 101 - TLSS 275

TO

M/s. Kavcon Engineers Pvt.Ltd
#206, Rajesh Comrlex, 1st Floor,
6th Phase, 1 st Stage
Bangalore - 560 044
Tele : 080-23149007
Fax: 080-23149510

Please supply/render the under mentioned articles/services :

Sl.No.	Description	Unit	Quantity	Unit Rate	Total Amount (Rs.)
1	Galvanized Station Structure for 66KV Dc Transmission Line (As per Annexure)	MT	17.4	54250.00	943950.00
2	Galvanized HDG Bolts,Nuts and Washers for 66KV Dc Transmission Line (As per Annexure)	MT	0.62	63000.00	43705.00
	TOTAL				986790.00

ED & VAT extra are applicable, the prevailing rate of ED is 14.42% and VAT at 4%

1. Your offer KV/P/8016/2008-09 dated 27.05.2008

TERMS & CONDITIONS: As per STC and GTC enclosed.

TOTAL VALUE OF ORDER Rs. 1174177 /- Including ED & VAT

Rupees Eleven lakhs seventy four thousand one hundred and seventy seven Only

OUR SALES TAX NOS: Karnataka TIN No.29670976524

STATE OF CONSIGNEE : Karnataka

FOR BEST & CROMPTON ENGINEERING PROJECTS LTD.

Prepared By:R.Sathyamurthy

NAME : R.Srinivasan
DESGN : GM - Procurement

Original Duplicate Stores Sales Tax Accounts

Best & Crompton Engineering Projects Limited

BEST & CROMPTON ENGINEERING PROJECTS LTD

HVSS DEPARTMENT

CF S.E	PURCHASE ORDER	ORDER # :	SS/KPTCL/182/PO-10	DATE	30.05.2008
		LOI # :		DATE	
		YOUR REF:	KV/F/0016/2008-09	DATE	27.05.2008

PROJECT REFERENCE : 66/11KV - KPTCL - SUBSTATION PACKAGE 102 - TLSG 375

TO

M/s. Kavoor Engineers Pvt.Ltd.
#286, Rajesh Complex, 1st Floor,
5th Phase, I st Stage
Bangalore - 560 044
Tele : (080-3314[illegible])
Fax: 080-25 [illegible]

Please supply/render the undermentioned articles/services :

Sl.No.	Description	Unit	Quantity	Unit Rate	Total Amount (Rs.)
1	Galvanized Station Structure for 66KV DC Transmission Line (As per Annexure)	MT	176	34250.50	6035305.00
2	Galvanized HDG Bolts, Nuts and Washers for 66KV DC Transmission Line (As per Annexure)	MT	4.5	39000.00	[illegible]
	TOTAL				71460[illegible]

ED & VAT : Extra and applicable. The prevailing rate of ED is 14.42% and VAT at 4%.

Ref: 1. Your offer : KV/F/0016/2008-09 dated 27.05.2008

TERMS & CONDITIONS: As per STC and GTC enclosed.

TOTAL VALUE OF ORDER Rs. 8503511 /- Including . ED & VAT

Rupees Eighty five lakhs three thousand five hundred and eleven Only

OUR SALES TAX NOS: Karnataka TIN No.29870376534

STATE OF CONSIGNEE : Karnataka

FOR BEST & CROMPTON ENGINEERING PROJECTS LTD.

NAME : D.Srinivasan
DESGN : GM - Procurement

Best & Crompton

BEST & CROMPTON ENGINEERING PROJECT's LTD

HVSS DEPARTMENT

PURCHASE ORDER				
	ORDER # :	35/KPTCL/107/PO-18	DATE :	30.05.2008
	LOI # :		DATE :	
	YOUR REF:	KV/F/8016/2008-09	DATE :	27.05.2008

PROJECT REFERENCE : 66/11KV - KPTCL - SUBSTATION PACKAGE 107 - TLSS 275

TO

M/s. Kavton Engineers Pvt.Ltd
#386, 'Rajesh Complex', 1st Floor,
6th Phase, 1 st Stage, Rajajinagar Industrial Town
Bangalore - 560 044
Tele : 080-23149587
Fax : 080-23149588

Please supply/render the undermentioned articles/services :

Sl.No.	Description	Unit	Quantity	Unit Rate	Total Amount (Rs.)
1	Galvanized Station Structure for 66KV Dc Transmission Line (As per Annexure)	MT	180.0	54250.00	9765000.00
2	Galvanized HDG Bolts,Nuts and Washers for 66KV Dc Transmission Line (As per Annexure)	MT	6.1	69000.00	420900.00
	TOTAL				10185900.00

ED & VAT extra (as applicable, the prevailing rate of ED is 14.42% and VAT 4%)

Your offer KV/F/8016/2008-09 dated 27.05.2008

TERMS & CONDITIONS: As per ETC and STC enclosed

TOTAL VALUE OF ORDER Rs. 12120895 /- Including . ED & VAT

Rupees One crore twenty one lakhs twenty thousand eight hundred and ninety five Only

OUR SALES TAX NOS: Karnataka TIN No.29870376524

STATE OF CONSIGNEE : Karnataka

FOR BEST & CROMPTON ENGINEERING PROJECTS LTD.

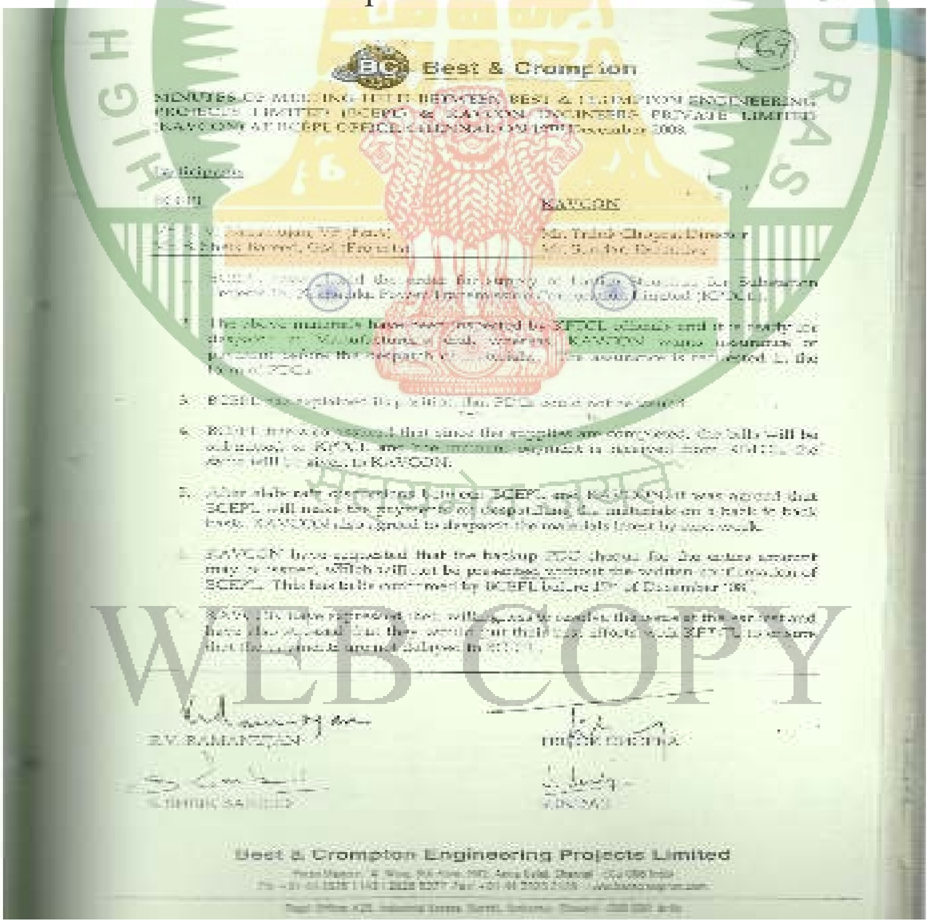
NAME : G.Srinivasan
DESGN : GM - Procurement

Best & Crompton Engineering Projects Limited

3(v). Payment terms in STC is adumbrated in **Clause 8** and the same reads as follows:

> ***'8.0 Terms of Payment***
>
> *1.100% payment with taxes and duties shall be paid through Letter of Credit @ 75 days credit period 30 days charges to our account and 45 days charges to your account.*
> *2. LC opening charges will be to our account and all other charges will be to your account.'*

3(vi) It is submitted that the all too crucial minutes has been marked as the Ex.C26 and a scanned and reproduction of same is as follows:



Best & Crompton

KAVCON

Best & Crompton Engineering Projects Limited

3(vii) Learned counsel submitted that the terms of payment, which was by way of Letters of Credit, stood substituted vide Ex.C26 and therefore, the first respondent ought to have despatched the materials without waiting for LC (Letter of Credit) or PDC (Post Dated Cheques).

3(viii). Adverting to the portions of the impugned award which deal with Issue No.2, learned counsel for petitioner submitted that it was contrary to principles laid down in **Ratna Commercial Enterprises Ltd., Vs. Vasu Tech Ltd., and others** reported in MANU/DE/3168/2009 being a judgment rendered by the Delhi High Court as well as principles laid down in **Bijayshree Resources Ltd., Vs. Subasree Real Estates** by a Hon'ble Division Bench of this Court reported in **MANU/TN/2368/2016**.

3(ix). In the light of the critical nature of Issue No.2, this Court deems it appropriate to extract and reproduce that portion of the impugned award which deals with Issue No.2 and the same reads as follows:

*'**<u>Issue No.2</u>***

(1) As per Ex.C11 a pro-forma invoice was raised but respondent did not honor the same.

(2) In fact respondent in their counter at para 5(vii) admitted that materials were inspected by KPTCL and was ready for dispatch.

(3) In view of the above a meeting was arranged. As per this meeting claimant agreed to arrange for payment on back to back payment from KPTCL provided respondent issued post dated cheques and this arrangement to be confirmed by 17.12.2008.

(4) As per claimant; in meeting held of 12/12/08 at Ex.C-26, a novation took place with respect to whole of the 3 purchase orders and not only to payment terms as contended by the respondent.

(5) The claimant cites Ex.C-28 dated 15.05.2009 wherein respondent goes on record to state that due to administrative reasons they cannot open LC.
In view of above and as per section 62 of Indian Contract Act a novation of whole PO took place.

(6) Claimant cites AIR 2003 SC 623 for perusal

Claimant then interprets literary meaning of various points discussed and recorded in MOM dated 12.12.08.'

Finding of Issue No.2:

Issue No. 2

Whether the Minutes of Meeting dated 12-12-2008 between the parties supersedes the terms of the three purchase orders and amounts to novation of the contract?

To find answers to this question it is necessary to traverse through contract agreement clauses , correspondences exchanged and conduct of the parties.

(1) Contract was awarded in 30-05-2008 with various clauses in SCC and GCC. To be implemented by both parties. Order by M/s KPTCL on the respondent was as early as 2-02-2008.

(2) Scope consists of supply of towers for PO Nos 101 102 and 107 along with stubs and bolts and nuts. Each PO has an annexure giving more details of various components of members involved.

(3) Delivery period was short i.e 45 days for PO No. 101 30 days for PO No. 102 and 70 days for PO No.107.

(4) There is a liquidated damage clause of 10% (max) at rate of 0.5% for each week.

(5) With such a short period for delivery and heavy LD clause claimant had procured all materials from the market immediately and commenced fabrication. As per site requirements stubs for all PO.s are to be delivered first (to ensure that foundations works are not held up) followed by super structure.

(6) Claimant has produced proof of materials purchased at Ex. C-31

(7) On 27-06-2008 claimant writes to respondent that stubs and cleats for PO No.102 are ready (Ref Ex. C-7) Requests for arranging for inspection and opening LC. Materials were inspected only on 6-09-2008 along with tower components. Ref Ex.C-16

(8) LC was opened only for stubs on 22-07-2008

(9) Three final invoices were raised on 28.07.2008 for stubs and hardware (bolts and nuts) and materials dispatched Ref Ex. C-08 to Ex. C-10

30

(10) Even the LC opened did not cover the full amount of 3 invoices . there was a short fall of Rs 1,36 285.00/- Ref Ex. C-19.

(11) Fabrication of tower components for PO 102 was also ready and inspection call was given on 1-07-2008 Ref. Ex C-11

(12) Proforma invoice No. 140 dated 01-07-2008 for an amount of Rs.81,34,447/- was raised with a request for arranging inspection and request for opening LC. Ref Ex.C-11

(13) Both stubs and hardware and tower components for PO No102 was ready for inspection. Proforma invoice was also raised. LC was yet to be opened.

(14) LC for stubs only was opened on 22-07-2008.

(15) Final invoice was raised on 28-07-08 for stubs and hardware and materials dispatched on same day.

(16) No action by respondent to arrange for inspection of tower components or for opening of LC.

(17) Since huge amount of money was blocked up claimant held discussions with the respondent on 5-08-08 and requested for early action for lifting materials and releasing payments. Ref Ex C-12

(18) As there was no reply from respondent to any of the letters from the claimant nor was any LC opened the claimant in desperation again had a meeting with V. P Finance of the respondent on 25-08-08 and made another request for early payment. Ref C-13. There was no reply to this letter.

(19) On 26-08-08 M/s KPTCL Mysore writes to M/s KPTCL Bangalore to inspect all components of PO No. 102 including stubs and bolts

(20) On 27-08-08 claimant once again writes to respondent to arrange for payment. Ref Ex C-18

There was no reply from respondent to this letter

(21) On 6-09-08 inspection was carried out and cleared for dispatch. Ref Ex.C- 16

(22) On 9-09-08 claimant brings to notice of respondent that since inspection was also over requests for payment.

There was no reply from respondent to this letter

(23) On 23-10-08 claimant informs that all materials were ready since 24-06-08 but no payment received against Proforma invoice dated 1-07-08. In spite of inspection clearing all materials no action taken by respondent to release payment. Hence claimant is forced to charge demurrage of Rs. 2,72,250/- upto 22-10-08. Ref Ex.C-21

There was no reply from respondent to this letter.

(24) On 20-11-08 there was a meeting with respondent. Requests for early release of payment. Ref Ex. C-22.

There was no reply from respondent to this letter.

(25) On 15-10-08 claimants writes to 3 different officers of the respondent complaining that in spite of several meetings with various officers of respondent and even after all materials were inspected and cleared no payment was received. Hence claimant is forced to charge interest and also take other suitable steps to recover the money. Ref C- 23 TO 25.

There was no reply from any of the 3 officers of respondent to this letter.

(26) It was against this background a meeting took place on 12-12-08 and discussions recorded Ref Ex C-26.

In this meeting Respondent was represented by their V.P (F&A) and GM (Projects) while the claimant was represented by Director and Executive.

Contents of this MOM are reproduced below:

1) Respondent have placed the order for supply of lattice Structure for substation Projects for Karnataka Power Transmission Limited (KPTCL)

2) The above materials have been inspected by KPTCL officials and it is ready for dispatch at manufacturers end whereas Claimant wants assurance of payment before dispatch of materials. This assurance is requested in form of Post Dated Cheques (PDC,s)

3) Respondent has explained its position that PDC,s could not be issued

4) Respondent assured that since the supplies are completed, the bills will be submitted to KPCTL and the moment payment is received from KPTCL the same will be given to the claimant.

5) After elaborate discussions between Respondent and Claimant it was agreed that Respondent will make payments on dispatching the materials on Back to Back basis. Claimant also agreed to dispatch the materials latest by next week

6) Claimant have requested that the back up PDC cheque for the entire amount may be issued which will not be presented without written confirmation of the respondent. This is to be confirmed by respondent by 17th December 2006.

7) Claimant have expressed their willingness to resolve the issue at the earliest and have stressed that they would put their best efforts with M/s KPTCL to ensure that payments are not delayed to the respondent.

Sd
For respondent

Sd
For Claimant

(27) An analysis of above MOM reveal the following
Points of agreement by both parties
Both parties agree that the materials are inspected by M/s KPTCL and is ready for dispatch

Points left open ended

a) Claimant wants assurance of payment by way of PDC's
b) Respondent indicated that issue of PDC's is not possible
c) Respondent have suggested that since the supplies are completed, the bills will be submitted to M/s KPTCL and the moment payment is received from M/s KPTCL the same will be given to the claimant

This was only a suggestion by respondent, MOM does not indicate that the claimant has accepted the same

d) At point No. 5 both parties have agreed that respondent will make payment on dispatching the materials on back to back basis. Claimant agreed to dispatch the materials latest by next week.

Neither party has clarified what is meant by 'back to back' terminology. Is it that the whole PO as per KPTCL's order on the respondent is transferred to the claimant lock stock and barrel with all terms conditions and conditions and liabilities and payments?

Or

Is it only payment terms transferred as per KPTCL' order ?
In any case details of KPTCL's order on the respondent is not on record

e) Claimant have requested for PDC cheques for entire amount which will not be presented without written confirmation of the respondent.

This has to be confirmed before 17th Dec

Sd

Records do not show that any such confirmation was provided by the Respondent.

By reading clauses (c), (d) and (e) above it is clear that no concrete agreement has been arrived by both parties.

f) Point No. 7 – is a generalized statement as regards "willingness to resolve the issue". It obviously means that the issue is still pending.

(25) From the reading of this MOM as a whole it is clear that no jointly agreed, workable, implementable decision was arrived at. Hence by no stretch of imagination can this MOM be termed as a Novation – be it as a novation of payment terms only as assumed by the respondent or a novation of the whole contract as assumed by the claimant.

(26) Answer to Issue No 2 is that no novation has taken place either to the contract as a whole or to any part of the contract

3(x). To be noted, Issue No.2 has already been extracted and reproduced supra. The elaborated version of Issue No.2 with specific reference to the Purchase order in STC has also been set out.

3(xi). In response to the aforesaid submissions, learned counsel for first respondent Mr.Sanjay Ramaswamy submitted that Ex.C26 has not arrived at any conclusive, workable decision and therefore, it cannot be gainsaid that Ex.C26 brings in doctrine of novation. It was urged that the Arbitral Tribunal erred in coming to the conclusion that Ex.C26 cannot be termed as novation qua terms of supply by first respondent.

4. **DISPOSITIVE REASONING:**

4(i) This Court carefully considered the issues. A perusal of the OP placed before this Court reveals that OP has been filed by invoking Section 34 of A and C Act without mentioning which of the specific slot which instant OP is predicated on. Learned counsel for petitioner submitted in arguments at the hearing that instant OP is predicated on conflict with public policy and patent illegality slots.

4(ii) This Court embarks upon the exercise of examining the impugned award in the light of the two slots on which instant OP is now being predicated in the hearing today.

4(iii) This takes us to the two judgments, which were pressed into service by learned counsel for petitioner. **Ratna Commercial Enterprises Ltd., Vs. Vasu Tech Ltd., and others** reported in MANU/DE/3168/2009, is a decision made by learned Single Judge of Hon'ble High Court and therefore, it has only persuasive value. Be that as it may, it does not come to the aid of the petitioner as it deals with the effect of Section 62 of the Indian Contract Act,1872. Section 62 of the Indian Contract Act talks about the effect of novation and rescission and alteration of contract. In the instant case, the question is whether there is novation at all. Therefore, Ratna Commercial Enterprises case law does not aid the petitioner in the case on hand.

4(iv). With regard to what is novation, a Division Bench judgment of this Court in **Bijayshree Resources Ltd., Vs. Subasree Real Estates** reported in **MANU/TN/2368/2016** (pressed into service by learned counsel for Petitioner) is of relevance. This **Bijayshree** judgment authored by Hon'ble Mr.Justice Sanjay Kishan Kaul, as Chief Justice of this Court (as His Lordship then was) deals with this aspect of the matter and the same is articulated in Paragraph 20, which reads as follows:

> *'20.Learned Senior Counsel also sought to contend that novation of the contract extinguishes the original contract and referred to the judgment of the Hon'ble Supreme Court in Union of India vs. Kishorilal Gupta and Bros., AIR 1959 SC 1362. It was opined that one of the modes by which a contract can be discharged is by the same process which created it, i.e. by mutual agreement and the parties may enter into a new contract in substitution of the old one. We reproduce the relevant para 5 as under:*
>
> *"5.The law on the first point is well-settled. One of the modes by which a contract can be discharged is by the same process which created it, i.e., by mutual agreement; the parties to the original*

contract may enter into a new contract in substitution of the old one. The legal position was clarified by the Privy Council in Payana Reena Saminathan v. Pana Lana Palaniappa (1) [1914] A.C. 618 622. Lord Moulton defined the legal incidents of a substituted contract in the following terms at p. 622:

> *" The 'receipt' given by the appellants, and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the 'receipt'. It is a clear example of what used to be well known in common law plea ding as " accord and satisfaction by a substituted agreement ". No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it. "*

The House of Lords in Norris v. Baron and Company [1918] A.C. 1. 26 in the context of a contract for sale of goods brought out clearly the distinction between a contract which varies the terms of the earlier contract and a contract which rescinds the earlier one, in the following passage at p. 26:

> *"In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. "*

Scrutton, L.J., in British Russian Gazette and Trade Outlook Limited v. Associated Newspaper Limited [1933] 2 K.B. 6i6, 643, 644, after referring to the authoritative text-books on the subject, describes the concept of 11 accord and satisfaction " thus at p. 643:

> *" Accord and satisfaction is the purchase of a ,release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. Formerly it was necessary that the consideration should be executed Later it was conceded that the consideration might be executory The consideration on each side might be an executory promise, the two mutual promise making an agreement enforceable in law, a contract I An accord, with mutual promises to perform, is good, though 'the thing be not performed at the time of action; for the party has a remedy to compel the performance', that is to say, a cross action on the contract of accord if, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made. "*

The said observations indicate that an original cause of action can be discharged by an executory agreement if the intention to that effect is clear. The modern rule is stated by Cheshire and Fifoot in their Law of Contract, 3rd Edn., at p. 453:

> *"The modern rule is, then, that if what the creditor has accepted in satisfaction is merely his debtor's promise to give consideration, and not the performance of that promise, the original cause of action is discharged from the date when the agreement is made.*

This, therefore, raises a question of construction in each case, for it has to be decided as a fact whether it was the making of the promise itself or the performance of the promise that the creditor consented to take by way of satisfaction. "

So too, Chitty in his book on Contracts, 31st Edn., states at p. 286:

" The plaintiff may agree to accept the performance of a substituted consideration in satisfaction, or he may agree to accept the promise of such performance. In the former there is no satisfaction until performance, and the debtor remains liable upon the original claim until the satisfaction is executed. In the latter, if the promise be not performed, the plaintiff's remedy is by action for the breach of the substituted agreement, and he has no right of resort to the original claim."

From the aforesaid authorities it is manifest that a contract may be discharged by the parties thereto by a substituted agreement and thereafter the original cause of action arising under the earlier contract is discharged and the parties are governed only by the terms of the substituted contract. The ascertainment of the intention of the parties is essentially a question of fact to be decided on the facts and circumstances of each case.'

4(v). Paragraph 20 of **Bijayshree's** case is elusidative and instructive qua what is novation.

4(vi). In sum and substance, novation of contract is a process by which the contractual obligations of parties under the original contract are substituted with fresh set of obligations and therefore, the original contract stands extinguished. Whether that has happened in the instant case is the critical point.

4(vii). A careful perusal of Ex.C26, which is scanned and reproduced supra brings to light that the parties have sat down to explore the possibility of rewriting the contract, but they never concluded or never succeeded in doing so going by minutes qua Ex.C26. There is more than one reason for this Court to come to this conclusion. A perusal of Ex.C26 reveals that there are very many open ends in the minutes. For an illustration, the issue as to whether PDC is to be given is completely left out. While No.3 of the minutes makes it clear that the petitioner cannot issue PDC minute No.6 makes it clear that the petitioner would confirm whether PDCs can be issued as back up the same shall be confirmed by 17.12.2008. To be noted, the meeting took place on 12.12.2008. This by itself brings no conclusive decision arrived at on 12.12.2008. It is nobody's case that there was any confirmation one way or the other by 17.12.2008. To be noted, this is only an illustration. A complete and composite reading of Ex.C26 leaves this Court with the considered view that the finding returned by the Arbitral

Tribunal that Ex.C26 is not workable and is not a implementable decision is sound and there is nothing to demonstrate that this is in conflict with public policy or that it is vitiated by patent illegality. To be noted, Arbitral Tribunal has answered point no.2 with clarity and specificity (extracted and reproduced elsewhere supra in this order).

4(viii). Before concluding, this Court deems it appropriate to make it clear that conflict with public policy plea is to be decided by applying principles laid down by Hon'ble Supreme Court in ***ONGC Ltd. v. Western Geco International Ltd.,*** reported in ***(2014) 9 SCC 263*** followed by ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49*** and reiterated in ***Contratrade Minerals and Metal Inc. Vs. Hindustan Copper Ltd.,*** reported in **(2017) 2 SCC 228.** Dealing with public policy qua A and C Act three distinct juristic principles were culled out. Not only three distinct juristic principles were culled out, but the litmus test for each of the three distinct juristic principles were also laid down. The three distinct juristic principles and respective litmus tests qua public policy culled out by Hon'ble Supreme Court are

Juristic Principles	***Litmus Test***
a) Judicial approach	a) fidelity to judicial approach;
b) Natural Justice Principle (NJP for brevity	b) *audi alteram partem*
c)Irrationality/perversity	c) time honoured *Wednesbury* principle of reasonableness.

4(ix). In the instant case, it is nobody's case that the second juristic principle i.e., NJP has been violated. Therefore, the other two juristic principles i.e., judicial approach and irrationality/perversity need to be tested.

4(x). A careful perusal of manner in which issue no.2 has been dealt with by the Arbitral Tribunal leaves this Court with considered view that the Arbitral Tribunal has traced the entire trajectory of the intention of the parties as well as correspondence exchanged between the parties, set out the same by way of a detailed adumbration and thereafter, embarked upon the exercise of examining Ex.C26 on the touch stone of intention of parties and came to the conclusion that no workable, conclusive, substitute arrangement has been arrived at qua Ex.C26. Therefore, there is fidelity of judicial approach, it passes the *Wednusbury* principle of reasonableness test and as a sequiter patent illegality plea pales into insignificance. In any event, as already alluded to elsewhere in this order, there is nothing to demonstrate conflict with public policy or patent illegality qua impugned arbitral award in instant OP.

4(xi). Therefore, this Court has no difficulty in coming to the conclusion that the impugned award is not in conflict with public policy and is not vitiated by patent illegality, which are the two slots on which instant OP was projected in the hearing today.

5. **<u>CONCLUSION</u>**

As the two slots which are projected in the hearing of instant OP do not find favour with this Court, in the light of instructive tests in this regard laid down by Hon'ble Supreme Court in ***Western Geco, Associate Builders*** and ***Centrotrade Minerals and Metals,*** the impugned award cannot, but be sustained and does not deserve to be interfered with.

6. **DECISION**

Instant OP is dismissed. Parties are left to bear their respective costs.

10.03.3020

Speaking Order

Index : Yes/No

kmi

M.SUNDAR. J.,

kmi

O.P.No.753 of 2013

10.03.2020