

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.07.2020

Delivered on : 18.08.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P No.378 of 2014

M/s.R.S.Development and Constructions

India (P) Ltd., Erode

Rep. By its Managing Director

Registered Office at

No.133H, 3rd Main Road

Erode – 638 001

... Petitioner

Vs.

1.M/s.Neyveli Lignite Corporation Ltd.,

Rep. By its Executive Director (Planning /contracts)

Registered Office at

Neyveli House

No.135, EVR High Road

Chennai – 600 010

2.Justice E.Padmanaban (Retired)

Presiding Arbitrators

No.11, Madha Church Road

Mandavelipakkam

Chennai – 600 028

3.Justice K.Govindarajan (Retired)

Co-Arbitrator

No.5, Justice Ramanujam Street

Malavya Avenue

Shastri Nagar

Chennai – 600 041

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4. Mr.N.Subramaniyan
Co-Arbitrator
F-9, Vasanth Apartments
100 Feet By-Pass Road
Velachery
Chennai – 600 042

... Respondents

Original Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996 to set aside the majority Arbitration Award dated 14.09.2013 passed by the 2nd and 3rd respondent arbitrators.

For Petitioner : Ms.Chitra Sampath
Senior Counsel
for Mr.T.S.Baskaran

For Respondent : Mr.N.Nithianandam

ORDER

Instant application, which has been given the nomenclature 'Original Petition' ('OP' for brevity), has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1998)', hereinafter 'A and C Act' for brevity, assailing 'an arbitral award dated 14.09.2013 with a correction dated 04.11.2013 under Section 33 of A and C Act' (hereinafter 'impugned award' for the sake of brevity and clarity). Impugned award has been made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by three arbitrators and the impugned award has been rendered by 2:1 majority.

2. Nucleus of the lis qua impugned award is a contract dated 10.05.2010 and this Court is informed that the value of this contract is little over Rs.6.24 Crores (Rs.6,24,69,889/- to be precise). This contract shall hereinafter be referred to as 'said contract' for the sake of clarity. This said contract is for work of construction of roads numbering about 25 having various lengths, varying between 60 and 290 meters with the exception of two roads where the lengths are 1000 and 2300 meters. This Court is informed that said contract includes drain works, which involves construction of drains on either side of the small roads.

3. Said contract was preceded by a letter of award dated 05.02.2010 and the work had to be completed within 18 months from the date of letter of award i.e., by 04.08.2011.

4. Aforementioned said contract came to be executed pursuant to a tender notice dated 13.07.2009 being a tender (inviting bids) floated by 'Neyveli Lignite Corporation Limited' (hereinafter 'NLC' for brevity). The petitioner before me was L1 or in other words, petitioner company herein had

quoted the lowest rate and was awarded the aforementioned work, vide letter of award dated 05.02.2010 followed by execution of said contract on 10.05.2010. Petitioner in instant OP before me shall hereinafter be referred to as 'Contractor' for the sake of convenience and clarity.

5. This being an application under Section 34 of A and C Act, a short narration of facts will suffice. Said contract ran into rough weather and crux of the dispute centres around allegation of non-availability of work front at the site by contractor and denial of the same by NLC. It is the case of the contractor that various construction materials, equipment, machineries, including steel fabrication, dumped earth etc., were lying on all sides and therefore the work site was not readily available to commence the work. NLC disputed this, took the stand that work sites were available and there was delay in execution of work only owing to tardy and sluggish work on the part of the contractor. This being the crux of the dispute, the arbitration clause in said contract was invoked, AT was constituted and it entered upon reference. Before the AT, contractor was the claimant and NLC was the respondent. The contractor made claims under various heads in addition to the usual two heads of costs and residuary limb of any prayer.

6. The heads of claim and quantum of claim under each head as can be culled out from the case file before this Court are as follows:

Sl.No.	Head	Quantum
1	<i>Outstanding Bill amount</i>	<i>Rs.7,60,000/-</i>
2	<i>Liquidated Damages for the idling charges for men, machineries and materials with interest at 18% p.a</i>	<i>Rs.75,21,943/-</i>
3	<i>Liquidated Damages for the loss of profit at 15% of the value of the balance work with interest at 18% p.a</i>	<i>Rs.81,00,000/-</i>
4	<i>Liquidated Damages for the loss incurred due to intermittent and inordinate delay in release of work fronts</i>	<i>Rs.62,00,000/-</i>
5	<i>Refund of the encashed value of the Contract Performance Bank Guarantee with interest at 18% p.a from the date of encashment</i>	<i>Rs.62,46,988/-</i>
6	<i>To permit the claimant to remove their materials lying at site and in the alternative, for payment of</i>	<i>Rs.14,82,420/-</i>
7	<i>To pay the costs of the arbitral proceedings</i>	<i>-</i>
8	<i>Liquidated Damages</i>	<i>54,30,274/-</i>

7. NLC disputed aforementioned claims and made a counter claim in a sum of Rs.47,53,272/- (Rupees Forty Seven Lakhs Fifty Three Thousand Two Hundred and Seventy Two only) towards Liquidated Damages, costs and the

usual residuary prayer. AT embarked upon the exercise of adjudicating the disputes between the contractor and NLC. As many as 83 exhibits, namely Exs.C1 and C83 were marked on the side of the contractor and 39 exhibits, namely Exs.R1 to R39 were marked on the side of the NLC before the AT. No oral evidence was let in by both sides. Ultimately, vide impugned award (by 2:1 majority) AT dismissed the claims made by the contractor and allowed the counter claim made by NLC.

8. As already mentioned supra, contractor has now filed instant OP assailing impugned award under Section 34 of A and C Act. Learned senior counsel for Contractor submitted that the challenge to impugned award is posited on the grounds of patent illegality and conflict with public policy. To be noted, date of presentation of instant OP in this Court is 05.12.2013. As would be evident from the caption in opening page of this order, this OP is of the year 2014. The significance is, this OP is prior to 23.10.2015 on and from which date Section 34 stands amended. In this regard this OP will be tested as per **Ssangyong** principle on this aspect of the matter. To be noted, **Ssangyong** and **Hindustan** Construction principles are law laid down by Hon'ble Supreme Court in this regard vide **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India [(2019) 15**

SCC 131] and Hindustan Construction Company Limited Vs. Union of India [(2019) SCC OnLine SC 1520]

9. Furthering her submissions qua challenge to the impugned award, learned senior counsel submitted that notwithstanding very many pleas and grounds in OP her challenge is confined to above mentioned two grounds (patent illegality and conflict with public policy) which in turn is predicated and posited on three points and the same are as follows:

- a) Negation of evidence available on record;
- b) AT has re-written the contract which is impermissible.

To be noted, this argument is posited on Bar Chart vide clauses 15 of Section A and 8.4 of Section B forming part of said contract; and

- c) Liquidated Damages being awarded in addition to / after invocation of performance Bank Guarantee, is against obtaining legal position.

10. Adverting to patent illegality and conflict with public policy grounds, posited on aforementioned three points, learned senior counsel submitted that her sheet anchor submission qua challenge to impugned award on both these grounds is that it is hit by perversity.

11. With regard to the first point on negation of evidence available on

record, it was submitted that the impugned award proceeds on the basis that the contractor mentioned about work site/work front not being available for commencement of work for first time only on 12.05.2011 vide Ex.C54, whereas series of documents, namely Ex.C37 dated 10.09.2010, Ex.C38 dated 29.08.2010, Ex.C45 dated 17.01.2011, Ex.C46 dated 28.01.2011, Ex.C49 dated 04.02.2011, Exs.C50 to C53 dated 06.04.2011, 11.04.2011, 20.04.2011 and 26.04.2011, all of which are prior to 12.05.2011 clearly talk about work site /work front not being available for the contractor to commence work qua said contract. In this regard, advertent to Paragraph 31 of *Associate Builders* Case being *Associate Builders Vs. Delhi Development Authority* reported in *(2015) 3 SCC 49*, it was submitted that ignoring vital evidence is one of the facets of perversity.

12. With regard to the second point pertaining to impugned award re-writing said contract, it was argued out that impugned award proceeds on the basis that the Bar Chart is only for the convenience of the contractor and there is nothing in said contract to say that one should necessarily work in accordance with the Bar Chart. It was pointed out that this is wholly incorrect as Clauses 8.3 and 8.4 (besides clause 15 of Section A) of said contract being clauses under Clause 8 captioned 'CONSTRUCTION MANAGEMENT' make

a certain reference to Bar Chart and it has been covenanted that delays and problems shall constantly be marked in the Bar chart and viewed. It was also argued that as per activity/bar chart, consistent periodical progress is required and that construction shall be noted then and there. It was submitted that while said contract very clearly refers to the bar chart and as to how the work has to be done using the bar chart, AT has virtually re-written the said contract by holding that the bar chart is only for the convenience of the contractor. In this regard, learned senior counsel for the contractor pressed into service a recent judgment of Hon'ble Supreme in *Patel Engineering Ltd. Vs North Eastern Electric Power Corporation Ltd. (NEEPCO)* reported in **2020 SCC OnLine SC 466** for the proposition that covenants of a contract have to be interpreted in accordance with the fundamental law of the country and if that has not been done, it becomes one facet of patent illegality, which is a ground for setting aside an arbitral award.

13. With regard to the third point of attack, namely Liquidated Damages being awarded in addition to invocation of performance Bank Guarantee, after referring to various covenants and clauses in the performance Bank Guarantee, it was submitted that Liquidated Damages cannot be awarded after invocation of performance Bank Guarantee. In support of this contention, a case law

being *Kailash Nath Associates Vs. Delhi Development Authority* reported in *(2015) 4 SCC 136* was pressed into service and it was argued that even in a case where there is provision for liquidated damages in a contract, loss has to be proved by the claimant.

14. In response to the above, learned counsel for NLC made submissions which are as follows:

a) It was submitted by learned counsel for NLC that the entire case of the contractor is based on only two points. The first point is that, men and materials of other contractors were occupying the work site causing delay. The second point is that NLC did not provide work front to the contractor. It was submitted that both points are untenable;

b) Responding to negation of evidence available on record point, it was submitted that Exs.C37, C38, C45, C46, C49 and C50 to C53 cannot be classified as documents where contractor has raised the issue of NLC not making the work site available and it was also submitted that the communication chain has to be read as a whole in this regard. Referring to Ex.C37, it was submitted that it is a reply to Ex.C23. It was pointed out that Ex.C38 is a reply to

Ex.R22 and it was pointed out that Ex.C45 is a letter from NLC. Adverting to Ex.C46 it was submitted that under this letter, the contractor has actually submitted a programme and therefore, it cannot be gainsaid that this exhibit or exhibits prior to that, talk about non-availability of work site. Adverting to Ex.C49, it was submitted it was a letter from NLC dated 04.02.2011 and there has been no reply from the contractor with regard to Ex.C50. It was pointed out that to this contractor's letter dated 06.04.2011, NLC has sent a reply vide Ex.C51. More importantly, adverting to Ex.C52, which is a letter dated 20.04.2011 from the contractor it was submitted that the contractor has actually admitted the delay. In this letter, it was also pointed out that there is a discussion about Ex.C37 and Ex.C38 in the impugned award and that the same is contained in Paragraph 18 of the impugned award. On this basis, it was submitted that it is incorrect to say that there is negation of evidence available on record.

15. With regard to the second point pertaining to re-writing of the contract, it was pointed out that the most relevant provisions, which deal with bar chart are clause 15.1 of Section A and Clause 8.4 of Section B, which

form part of said contract. Clause 15.1 reads as follows:

'15.1. The Contractor shall prepare and submit a detailed PERT net work / BAR chart covering various Key phases of the work and field sequential erection/construction activities within 15 (Fifteen) days of the acceptance of Letter of Award. This PERT net work/BAR chart shall clearly indicate the interface facilities to be provided by the Purchaser and dates by which such facilities are required.'

Clause 8.4 reads as follows:

As per activity/ bar chart progress must be constantly and periodically reviewed and slippages /constraints shall be noted then and there. Remedial measure by the purchaser as well as the Contractor shall be taken not to allow it to be escalated further. The details must be marked in the bar chart. All such delays and problems shall be constantly marked in the Bar chart and viewed. This process shall help to identify the delays caused by each party. Then the charts are drawn out separately as delays by each and apportioned between them. This delay apportioned form a basis for deciding the quantum of Liquidated Damages leviable and time extension there upon.'

16. With regard to aforementioned clauses, this Court is informed that 'PERT' stands for 'Programme Evaluation and Review Technique'. Adverting to discussion in Paragraph 21 of the impugned award regarding bar chart, it was argued that AT has only stated that the bar chart referred to in the said contract does not by itself prescribe a schedule.

17. With regard to the third point of Liquidated Damages being awarded, notwithstanding invocation of performance Bank Guarantee, learned counsel for NLC drew the attention of this Court to Clauses 14 and 35.0 of the General Conditions of Contract (forming part of said contract), which deal with performance Bank Guarantee and Liquidated Damages respectively. The two clauses read as follows:

'14.0 CONTRACT PERFORMANCE GUARANTEE:

14.1. As a contract security, the successful Bidder to whom the work is awarded, shall be required to furnish Contract Performance Bank Guarantee(s) covering the warranty period/Defect Liability period in the form stipulated subject to approval of the Purchaser in favour of the Purchaser within 30 (Thirty) days from the date of Letter of Award. The Guarantee amount shall be equal to 10% (Ten Percent) of the contract price and it shall guarantee the faithful performance of the contract in accordance with the terms and conditions specified in these documents and specifications. The guarantee shall be valid till the expiry of 90 (ninety) days after the end of the Warranty period /Defect Liability period. The Guarantee amount shall, on demand, be payable without demur irrespective of any legal dispute between bank and the contractor and between the contractor and the purchaser without any condition or dispute whatsoever. Purchaser shall have the right to encash CPC in full or part thereof. Incase of part encashments, CPG shall be valid for the remaining period as per contract for the balance amount or for the period as requested by Purchaser.

14.2. *The Performance Bank Guarantee value shall be suitably adjusted towards the variation in the Contract price.*

14.3. *The Performance Bank Guarantee will generally be returned to the contractor without any interest after 90 (ninety) days from the expiry of Defect Liability period.*

14.4. *After expiry of Defect Liability period for any minor obligation such as, As built drawings etc. and other such minor pending obligations, the value of the CPG can be reduced to the extent of value of such pending obligations.'*

35.0: LIQUIDATED DAMAGES FOR DELAY:

35.1. *If the Contractor fails in the due performance of the contract within the time agreed the Purchaser shall levy liquidated damages not as a penalty at the rate of ½ (half) % per week of delay or part thereof of non-utilizable portion of the works/supplies subject to a ceiling of 10% (Ten percent) of the non-utilizable portion of works/supplies.*

35.2. *The Liquidated damages for time delay is independent of the Liquidated damages fixed for not meeting performance guarantee parameters as defined in the Technical Specifications, if any.*

35.3. *Before exercising the right to levy or waive Liquidated Damages the Purchaser shall clearly make sure the cause for delay, if the party to the cause of delay could not be clearly established, the Purchaser shall issue a letter granting Time Extension, however retaining the right to analyse the cause of delay and levy Liquidated Damages at the time of Final*

bill/Closure of contract.

35.4. *The owner may without prejudice to any other method of recovery deduct the amount of liquidated damages from any money in his hands due or becomes due to the CONTRACTOR either under this Contract or under any other contract.*

35.5 *The payment of deduction of such liquidated damages shall not relieve the CONTRACTOR from his obligation to complete the works or from any other of his obligations and liabilities under the contract.*

35.6. *The owner, however, reserves the right to levy Liquidated Damages even if extension of time for completion of works is granted.*

35.7. *If the reason for the delay is solely attributable to NLC adequate time extension will be given to the contractor to the extent of delay attributable to NLC.*

35.8 *If the reason for the delay is purely attributable to the Contractor, LD will be levied and extension of time may be granted.*

35.9 *If the decision regarding the reasons for the delay is required to be analysed and the same can only be determined after completion of the work or if the issue is likely to enter into dispute or required in depth study to fix the responsibility for the delay, then extension of time will be given to the contractor subject to levy of LD, if considered necessary. However, as a precaution the amount equivalent to the maximum LD leviable would be withheld from running bills at the stage where the balance payment may not be able to cover the LD and other*

obligations as per the provisions of the Contract.

35.10 In case the above arrangements causes difficulty to the Contractor in cash flow and progress of work, 90% of the withheld/leviable liquidated damages amount may be considered by the Purchaser for release against submission and acceptance of LDBG as per the format enclosed for 100% of the leviable LD amount. In such case, as soon as the work is completed, all efforts will be taken by the Purchaser, to settle the LD issue preferably within 6 months from the completion of work.'

18. It was pointed out that there is also a provision of advance payment Bank Guarantee under Clause 38, but that never came into play in the case on hand as the contractor did not take advance payment. Adverting to the aforesaid two clauses, it was argued that the performance Bank Guarantee is for 10% of the contract value, which is little over Rs.62.46 lakhs (Rs.62,46,988/- to be precise) and the same was invoked on 15.10.2011 as the contractor ceased to work and abandoned the site. This has nothing to do with the liquidated damages, as it is a genuine and fair pre-estimate in the light of work under said contract being part of expansion of Power Station II. It was argued that this expansion project consists of 18 packages and said contract is one of the 18 packages. It is so obvious that this resulted in loss as

the expansion programme was hampered is learned counsel's further say. It was pointed out that only 13% of work was completed when the site was abandoned on 06.08.2011.

19. I now embark upon the exercise of examining (in the light of contra submissions of learned counsel for NLC) the three-pronged attack qua the impugned arbitral award made by learned senior counsel for the contractor.

20. With regard to first point pertaining to negation of evidence available on record, as mentioned supra, learned counsel relied on the principles in *Associate Builders* Case reported in (2015) 3 SCC 49 and drew my attention to paragraph 31 for the proposition that ignoring vital evidence would tantamount to perversity.

21. As mentioned supra, it was submitted that as many as 9 communications marked as exhibits before the AT, which are all prior to 12.05.2011 and which, according to learned senior counsel for contractor, mention about non-availability of work front, have been ignored and AT has proceeded on the basis of 12.05.2011 (Ex.C.54), taking this as the first date on which contractor brought this issue up. In other words, AT has ignored vital evidence being at least 9 exhibits (prior to 12.05.2011) referred to supra, namely Exs.C37, C38, C45, C46, C49 and C50 to C53. In this view of the

matter, I have to necessarily examine whether this tantamounts to ignoring vital evidence.

22. A careful perusal of aforementioned 9 exhibits show that there is some mention about non-availability of work front and material being dumped thereat. Therefore, this submission of learned senior counsel may not be completely untenable. It may even be a compelling argument if it is a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity), but it is not compact enough to fit into Section 34, much less snugly fit into Section 34 as whether 9 exhibits would tantamount to the contractor raising the issue of non-availability of work site prior to 12.05.2011 is a matter of appreciation of evidence and the litmus test is whether this is an implausible view.

23. A careful perusal of relevant portions of impugned award leaves this Court with the considered view that the interpretation placed on Ex.C54 is a view which no reasonable person would have taken. Furthermore, it is not as if there is no discussion at all about the exhibits prior to Ex.C54. Only if an arbitral tribunal takes a view, which no reasonable person would have taken and when it is implausible, this Court will interfere under Section 34 of A and C Act. To be noted, even in cases where it is a plausible view, this Court will

not interfere even if this Court has a different view on the matter owing to the confines and contours of Section 34 of A and C Act. This is one such case as I am unable to persuade myself to believe that interpretation of AT is implausible. The reason is two fold. One is, it is not as if there is no discussion in the impugned award about Exs.C37 and C38 as contended. The other is, it is a matter of interpretation of contents of the exhibits and this is not a case where the interpretation is such that no reasonable person would make such an interpretation. In this regard, the discussion regarding Exs.C37 and C38, as rightly pointed out by learned counsel for NLC, is found in Paragraph 18 of the impugned award and the relevant portion reads as follows:

'18.....Some attempt was made to contend that only the work fronts mentioned in Ex.C37 dated 18.09.2010 were made available. But on a careful reading of Ex.C37 such a conclusion cannot be arrived at. There is no such pleading on the side of the claimant. Moreover, in the said letter, it is specifically stated that earlier work fronts availability was shown to the claimant. The Respondents reply (Ex.R23 dated 20.09.2010) to the Claimant letter dated 10.09.2010 (Ex.C38) will clearly establish the same.'

24. With regard to the interpretation not being such that no reasonable person would make such an interpretation in this case, it is to be noted that no oral evidence was let-in by both sides. Only exhibits were marked . Therefore,

at the end of the day, it is a case of reading the exhibits and making an interpretation without the parties deposing, without being marked through witness and therefore without the parties speaking on the same.

25. This takes us to the next limb of argument pertaining to re-writing said contract. A careful perusal of relevant clause of said Contract that has been extracted and re-produced supra, leaves this Court with the considered view that there is a mention about bar chart and use of the same in said contract, but the language in which the two covenants are couched makes room to make some interpretation regarding the purpose of bar chart in execution of said contract. In the considered view of this Court, the view taken by AT in the impugned award falls in this elbow space. The reason is, the discussion regarding barchart is contained in Paragraph 21 of the impugned award and the same reads as follows:

'21.Referring to Bar Chart, the Learned Counsel submitted that the same was approved by the respondent and according to the Bar chart and also the communications issued by the Respondent, the work had to be executed in all the roads simultaneously. The Bar Chart is the programme framed by the Claimant itself, to execute the work and complete the same within 18 months period. The Contract does not provide any time schedule for each and every work mentioned in the Contract or for every stage. As far as

this respondent is concerned, the work has to be executed and completed within 18 months from the date of LOA. So there is no clause in the contract or any other documents to show that the Claimant was compelled to execute the work simultaneously in all the roads and if it is possible, he can execute part of the work or one by one. In the absence of any time schedule for each and every part of the work fixed by the parties and over all completion time of 18 months is fixed under the contract, it is for the Claimant to programme its time schedule to execute and complete the work within 18 months. Further it is not as if the claimant had factually followed the Bar Chart nor the bar chart as stipulation of the contract as to schedule of execution as it is a mere proposal of the claimant as to its own schedule of execution during the 18 month period.'

26. A careful reading of the entire paragraph leaves this Court with the considered view that the argument of learned counsel of NLC that the impugned award has only said that bar chart emanates from the contractor and it is not a case of schedule itself being stipulated in the contract cannot be ignored. At the highest (owing to the last sentence of Paragraph 21 of the impugned award), it can be said with due respects that it is not happily worded. That by itself does not become a reason for accepting the argument that impugned award has re-written said contract. In the fact setting of this case, this Court is unable to persuade itself that this is a case of terms of

contract being re-written.

27. Therefore, instant case not being a regular first appeal under Section 96 of CPC, this interpretation of AT passes the test if 'a view which no reasonable person would take' rigour is applied. The moment it passes this test, it tantamounts to interpretation of a covenant in said contract, which is an exhibit before AT. If it is an interpretation of a covenant in an exhibit before AT, that again turns on appreciation of evidence. It thus becomes clear that this is not a case of no evidence or reliance being placed on irrelevant evidence or ignoring vital evidence. Therefore, on the facts and circumstances of the instant case, owing to the limited scope and contours of Section 34 of A and C Act, this Court is unable to sustain the argument that AT has re-written the contract qua bar chart.

28. This takes us to the last point of Liquidated Damages being levied in addition to invocation of performance bank guarantee. **Kailash Nath** judgment, which was pressed into service in support of this argument, is factually distinguishable as **Kailash Nath case** is one where forfeiture of Earnest Money Deposit fell for consideration and that was a case where the Court came to the conclusion that there was no breach. In the instant case, there is no dispute that only a part of the work was done and the dispute is

only with regard to who is responsible for the delay. Furthermore, as said contract pertains to work, which is part of expansion of Power Station II and as it contains 18 packages, the argument that loss should have been demonstrated pales into insignificance. Considering the facts and circumstances of this case in its totality, this Court is of the view that this does not fall in the category of something that shocks the conscience of the Court.

29. As would be evident from the rival submissions, discussion on the same and dispositive reasoning thus far, perversity is a common thread which runs across all three points. With regard to perversity, in *Associate Builders* case itself, a working test has been provided and this is contained in Paragraph 32 of *Associate Builders*, which reads as follows:

'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."

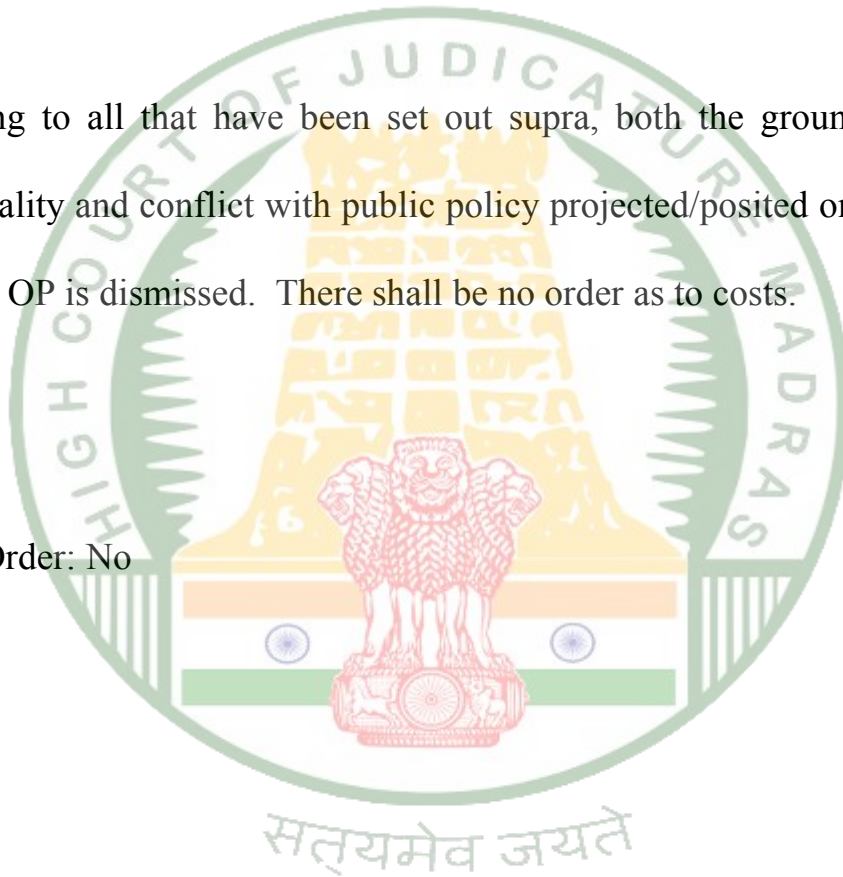
30. If the above working test is applied, in the light of the discussion supra on each of the three points, this Court is left with the considered view that perversity has not been made out. With regard to **Patel Engineering**, it is a case where it was held that Section 28(3) is essentially one of the facets of patent illegality, but that is a case where on facts it was concluded that irrelevant material was relied on for interpretation of covenants of a contract. Therefore, considering the facts of the case on hand, **Patel Engineering** is distinguishable on facts. In this regard, this Court deems it appropriate to notice that learned counsel for NLC drew the attention of this Court to various documents some of which are Ex.R14 dated 02.06.2010, Ex.R15 dated 05.06.2010, Ex.R19 dated 20.07.2010 and Ex.R20 dated 05.08.2010 and Ex.R23 dated 20.09.2010. These exhibits were referred to say that there is no mention whatsoever about hindrance and work front not being available by the contractor and this has suddenly popped up only vide Ex.C54 dated 12.11.2011. As already delineated, there is no oral evidence in this matter.

These exhibits have been interpreted, only appreciated i.e., appreciation of evidence by AT. This Court is not sitting in appeal and therefore, it will suffice to say that there were very many exhibits before AT for it to make the interpretation which ultimately made which is not implausible.

Owing to all that have been set out supra, both the grounds, namely patent illegality and conflict with public policy projected/posited on perversity fail and the OP is dismissed. There shall be no order as to costs.

18.08.2020

Speaking Order: No
Index: No
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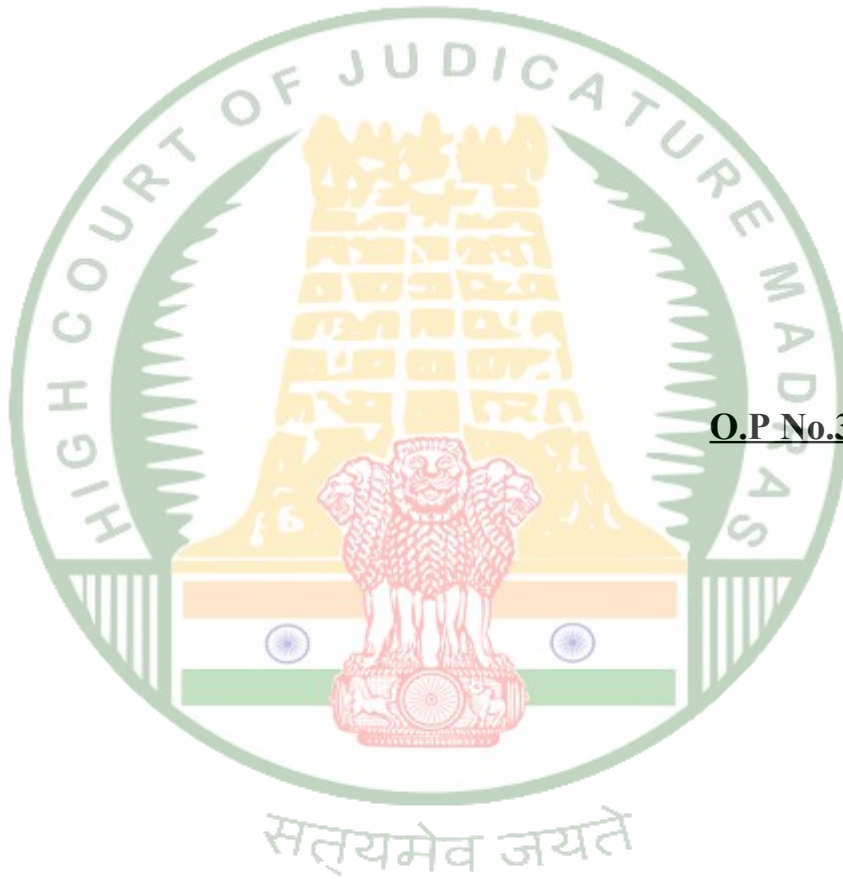


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