

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	16.10.2020
Pronounced On	01.04.2021

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

O.S.A.No.115 of 2020
and
C.M.P.No.5336 of 2020

(Through Video Conferencing)

M/s.G.A.Projects Private Limited,
No.3, K.H.Road,
Ennore, Chennai - 57.

... Appellant

Vs.

M/s.Kamarajar Port Limited,
Registered Office at Third Floor,
Jawahar Buildings,
No.17, Rajaji Salai, Chennai -1,
And Port Office at Valur Post,
Chennai - 120.

.... Respondent

Original Side Appeal filed under Order XXXVI Rule 1 of the O.S.Rules read with Clause 15 of the Letters Patent Act and Section 37(1)(c) of the Arbitration and Conciliation Act, 1996, to set aside the fair and decretal order dated 05.12.2019 passed by the learned Single Judge in O.P.No.679 of 2019. Original Petition filed under section, 34 of the Arbitration and conciliation Act, 1996 to set aside the award passed on 26.3.2018 and supplementary award passed on 18.5.2018.

For Appellant : Mr.K.Subramanian, Senior Counsel
for Mr.P.S.Amalaraj

For Respondent : Mr.G.Rajagopalan, Senior Counsel
for Mr.P.Chandrasekaran

J U D G M E N T

C.SARAVANAN, J.

The Original Side Appeal has been filed under Section 37 (1)(c) of the Arbitration and Conciliation Act, 1996. It is directed against the impugned order dated 05.12.2019 passed by

the learned Single Judge in O.P.No.679 of 2019 (hereinafter referred to as the impugned order). By the impugned order, the learned Single Judge has set aside the award passed by the learned Arbitrator.

2. The operative portion of the impugned order dated 05.12.2019 passed by the learned Single Judge in O.P.No.679 of 2019 allowing the application of the respondent is reproduced below:-

11.From the above, it is evident that the defect liability period is a 12 month period from the certified date of completion. In this case, the work was completed in April 2016 except for a minor portion and the road appears to have been put to use thereafter. However, the completion certificate was not issued in view of the defective workmanship. Nevertheless, even if the defect liability period is reckoned from May 2016, it would extend up to 30.04.2017. Therefore, it is necessary to examine whether the defects were noticed by the Petitioner within the said period and whether the said defects were brought to the notice of the Respondent. The case of the Respondent is that the work was satisfactorily completed by April 2016 except with regard to the unavailable work front, for which the Respondent is not responsible. As regards quality, the submission is that 528 successful cube tests were carried out during the course of execution of work and that only 3 cube tests were not successful. It is also the case of the Respondent that the contract specifies the mechanism for dealing with unsuccessful cube tests by providing that, in such eventuality, core tests would be conducted. In this case, such core tests were also successfully conducted as evidenced by the core test results at page 338 of Volume - III. Therefore, it is the Respondent's case that the alleged defects in quality are no more than an after thought. By contrast, the Petitioner's case is that the defects in workmanship were noticed in December 2015, i.e. during the original contract period, and notified by the PMC to the Respondent. However, the Respondent refused to even receive the letter and further failed to rectify the defects. It is further contended that the Respondent was called upon to participate in the conduct of core tests in April 2016 and that the Respondent refused to

cooperate. Therefore, the Petitioner was constrained to carry out such core tests independently. The results of the said core tests are the sheet anchor of the case of the Petitioner and the Petitioner has relied, mainly, on two exhibits, namely, Ex.R-55 series, which are the test certificates issued by the National Test House, Tharamani, Chennai (Pages 292 to 333 of Volume - I), and Exhibit R-79, which is at Page 505 of Volume - I. The latter test results have been provided by the Highways Research Station, Chennai. From the above documents, it is clear that the test results were published in September and October 2016 respectively. From the foregoing, it is clear that the tests were carried out during the defect liability period. It is also clear that this evidence was placed before the learned Arbitrator. However, the learned Arbitrator disregarded such evidence and decided the case entirely on the basis of the documentary evidence and the oral evidence of RW-1 with regard to the results of cube tests and core tests that were carried out during the contract period as opposed to the defect liability period. This is evident from a conjoint reading of paragraphs 22 and 24 of the Award. In fact, it becomes abundantly clear from the portion of paragraph 24, which is extracted at Paragraph 4 supra of this order, that the learned Arbitrator completely disregarded both Exs.R-55 and R-79. Instead, Ex.C19, i.e. the core test results dated 26.04.2016 and the oral evidence of RW-1 were relied upon.

12. Thus, it is clear that vital evidence was disregarded. In this case, such vital evidence goes to the root of the matter. Consequently, a case is made out to interfere with the Award both on the ground that the learned Arbitrator disregarded Clause 22 of the contract namely, the defect liability clause and Exs.R55 and R79 and also the letters whereby the Respondent was called upon to participate in the core tests. In effect, a case is made out to set aside the Award for disregarding vital evidence and disregarding the contract. In the ASSOCIATE BUILDERS case, the Hon'ble Supreme Court held at Paragraph 31 that disregarding vital evidence would amount to a violation of public policy and in paragraph 42 of Syangyong Engineering & Construction Co. Ltd.

v. NHAI 2019 SCC Online SC 677, it was held that it may not amount to a violation of public policy under the amended legal regime but such an award would be patently illegal under Section 34(2A), which was introduced by the Arbitration and Conciliation (Amendment) Act, 2015. Given the fact that the Arbitral Award could be interfered with for patent illegality even after the amendments that were made with effect from 23.10.2015, I am of the view that this is a fit case for the exercise of jurisdiction under Section 34 of the Arbitration Act.

13. For the foregoing reasons, the Award dated 26.03.2018 and the Supplementary Award dated 18.05.2018 are liable to be set aside. Consequently, the amount deposited by the Petitioner pursuant to the interim order dated 30.08.2019 and 24.09.2019, along with interest accruals thereon, is liable to be paid to the Petitioner. Notwithstanding the aforesaid conclusion, it is not possible to decide, in this Petition, whether the Petitioner incurred losses on account of the said defective work and, if so, the extent of such losses. The said alleged losses were the subject matter of the counter claims, which were rejected by the Arbitral Tribunal, as a consequence of allowing claims 1, 2, 6, 7 and 8. In the facts and circumstances of this case, severability cannot be resorted to so as to set aside the Awards in part and, therefore, the Award and Supplementary Award are liable to be set aside as a whole. Consequently, both parties are granted leave to initiate de novo arbitration proceedings, if so intended. If such proceedings are initiated, the party concerned would be entitled to the benefit of Section 14 of the Limitation Act, 1963 in respect of the time taken in the Arbitration Proceedings and in proceedings before this Court.

14. In the result, the Arbitration Award dated 26.03.2018 and Supplementary Award dated 18.05.2018 are hereby set aside subject to the above observations. No costs. Consequently, the connected Application is disposed of by directing that the sum deposited by the Petitioner pursuant to interim orders dated 30.08.2019 and 24.09.2019 be paid to the Petitioner along with interest accruals thereon.

3. The appellant who was the respondent in O.P.No.679 of 2019 is thus aggrieved by the impugned order of the learned Single Judge in as much as the awards passed by the learned Arbitrator in its favour has been set aside.

4. Earlier, the learned Arbitrator gave a favourable verdict to the appellant in the arbitral proceeding. In his award dated 26.03.2018, the learned Arbitrator gave following reliefs to the appellant by:-

i. Directing the respondent* to pay to the Claimant#, a sum of Rs.1,00,000/- (Rupees one lakh only) being the expenses incurred by the Claimant for conducting core test with interest at 9% p.a from 8.02.2017 till date of payment.

ii. Directing the respondent to pay to the Claimant a sum of Rs.1,43,18,479/- (Rupees one core forty three lakhs eighteen thousand four hundred seventy nine only) being the amount retained in I.P.C Nos 1 to 12 and directed to be paid to the Claimant with interest at 9% from 8.02.2017 till date of payment.

iii. Holding that the performance bank guarantee for Rs.62,25,657/- furnished by the Claimant is not liable to be invoked or enforced by the respondent and shall stand cancelled and consequently the original bank guarantees shall be returned to the Central Bank of India, Egmore Branch, Chennai 600 008 forthwith.

iv. All the other claims, namely, Claim No.3,4,5,9,10 and 11 shall stand rejected.

v. All the counter claims advanced by the respondent shall stand rejected.

vi. Both the parties are directed to bear their respective costs in the present Arbitration Proceedings.

Vii. The contempt petition filed by the Claimant against the respondent is ordered to be closed.

* the respondent herein
the Appellant herein

5. By a supplementary award dated 18.05.2018, the learned Arbitrator partly rejected and partly allowed the supplementary claims of the appellant. The operative portion of the supplementary award reads as under:-

i. In the result the application filed by the respondent M/s. Kamarajar Port Ltd., Under Section 33 of The Arbitration and Conciliation Act seeking clarification shall stand rejected.

And

ii. The application filed by the Claimant with respect to Claim no.6 deserve to be allowed and an additional award is passed directing the Respondent M/s. Kamarajar Port Ltd., to pay Rs.66,90,000/- (Rupees Sixty Six Lakhs Ninety Thousand only) with interest at 12% per annum from 26.03.2018 the date of the award to the Claimant till date of payment.

And

iii. Both the parties shall bear their respective cost in the present applications.

6. The learned Arbitrator had framed the following issues based on the pleadings of the appellant and the respondent for passing the above award which was impugned in O.P.No.679 of 2019:-

Issues framed and considered by the learned Arbitrator while passing award dated 26.3.2018

Issues framed and considered by the learned Arbitrator while passing supplementary award dated 18.5.2018

- i. Whether the claim of Rs.1,00,000/- advanced by the claimant towards core test is maintainable? To what consequence?
- ii. Whether the claimant is required to conduct the core test? If so, at what stage such core test is to be conducted? By which party, if at all?
- iii. Whether the claimant has executed the project in terms of the contractual stipulations entered between the parties? If not, to what consequence?
- iv. Whether the 12 part payment bills submitted by the claimant are yet to be settled? If not to what consequence?
- v. Whether during the course of execution design change was ordered by the respondent? Whether the same has resulted in delay in the execution of the project? To what relief, if any, the claimant is entitled to?
- vi. Whether the claimant has executed any additional or miscellaneous work apart from the works undertaken in terms of the contract entered between the parties? If so, to what consequence?
- vii. Whether the additional or miscellaneous work claimed to have been executed by the claimant was with the approval of the respondent?
- viii. Whether the respondent is obliged to issue 'Taking over certificate' in terms of the contractual stipulations? If so, at what stage?
- ix. Whether the claimant is entitled for additional payment for using 'M' sand instead of river

- i. Whether the Claimant is still bound to honour the agreement conditions and rectify damages as warranted by the terms of the agreement beyond defect liability period and compensate for the same? Whether on facts clarification sought for is sustainable?
- ii. Whether the award dated 26.03.2018 with respect to Claim No.6,7 and 8 require to be clarified?
- iii. Whether an additional award deserve to be passed with respect to claim No.6 by directing payment of Rs.73,59,614/- by Respondent to Claimant as prayed for?
- And
- iv. To what relief the parties are entitled to in the applications filed Under Section 33 of The Arbitration and Conciliation Act 1996?

7. These issues were considered and the above mentioned awards came to be passed in the background of an Agreement dated 24.10.2014 signed between the appellant and the respondent.

8. The said agreement was signed between the appellant and the respondent to construct a two lane concrete road connecting the existing "main gate road" and "west gate road" within the premises of the respondent Port Trust.

9. The appellant contractor was engaged by the respondent -employer to execute the contracted work. The total contract value was Rs.12,45,13,136/- (Twelve Crores Forty Five Lakh Thirteen Thousand One Hundred and Thirty Six Only). The work was to commence on 28.11.2014 and was to be completed within a period of 18 months by 27.04.2016.

10. The appellant submits that the respondent changed the design of the proposed two lane road (i.e. one side sloped road with widening of two meters on left hand side instead of the contract stipulated road with a centre camber), as a result of which, there was delay and the appellant incurred loss and therefore the respondent was required to compensate the appellant.

11. It is submitted that the Project Management Consultant (PMC) appointed by the respondent prepared a fresh design and drawing which were submitted for the respondent's approval. The respondent however approved the design with a delay of about two months.

12. The appellant submits that the aforesaid road was expeditiously constructed within the time stipulated by the respondent. It is further submitted that the respondent also published in its Official website under the caption "completed works" and thus acknowledged that the contract works was completed on 31.03.2016 ahead of the schedule on 27.04.2016.

13. It is submitted that the road constructed by the appellant for the respondent was opened to public traffic in April 2016. Despite the same, the respondent refused to settle the final bill of the appellant.

14. It is submitted that during the course of the construction, the appellant had conducted "cube test" in the presence of the respondent and their Project Management Consultants (PMC) as per Clauses 3, 4 and Section 4 (Technical Specification).

15. The test results were satisfactory. However, the respondent and its PMC issued letters dated 02.05.2016, 04.06.2016 and 01.07.2016 and insisted on conducting "Core

Test" nearly three months after the completion of work on 26.04.2016.

16. Under these circumstances, the appellant issued legal notice to the respondent on 20.06.2016 and called up the respondent to issue "Taking Over Certificate" under Clause 49.2 of the contract agreement and to pay the outstanding amount.

17. On 22.11.2016, the appellant received a letter from the respondent who stated that they conducted "Core Test" and received negative result. Clause 4 of Section 4 (Technical Specification) provides for conducting core test only in case of failure of cube test.

18. If the "Cube Tests" are unsuccessful, the appellant had to conduct the "Core Test" and if the test results were positive the respondent was liable to pay the cost to the appellant to conduct the core test.

19. The PMC conducted "Core Test" at 12 places on 24.03.2016 on 25.11.2015, 28.11.2015, 04.01.2016 and 07.01.2016. It is submitted that out of 12 places, in four places, cube test showed negative and therefore the appellant was forced to conduct the "Core Test".

20. It is submitted that the "Core Test" result satisfied all the technical parameters like thickness, strength requirement etc. and the results were intimated by PMC vide letter dated 25.4.2016. The respondent was therefore liable to pay sum of Rs 1,00,000/- for the cost of the core test.

21. The appellant had submitted 12 Part Bills to the respondent from 05.03.2015 till 05.03.2016. Internal Bill No.12 submitted on 05.03.2016 was for an amount of Rs.1,71,58,289/- which was partially paid Rs.1,25,44,000/- and remaining outstanding amount of Rs.46,14,289/- was not paid.

22. It is submitted that though the PMC appointed by the respondent also certified that the contract works were completed in all aspects on 26.4.2016, yet the respondent decided to conduct core test to defeat the rights of the appellant. It was the case of the appellant that the respondent failed in its obligation by issuing a "Taking Over Certificate" to the appellant.

23. Under these circumstance, the appellant issued IPC Bill No.13 (Ex.8) and called up the respondent to settle the payments which was returned by the respondent. Since the respondent did not respond, the appellant filed petition under Section 11 of the Arbitration and Conciliation Act 1996, on 03.02.2017 for appointment of an Arbitrator to resolve dispute.

24. Before the learned Arbitrator, the appellant stated that as per agreement, under Clause 3 of Section 4 (Technical Specifications), PMC may request for conduct such "Cube Test" at any place during the construction of the road.

25. It is submitted that the respondent deliberately refused to release the payment and withheld amounts towards retention amount even after completion of work. Therefore, the respondent was liable to pay total outstanding amount of Rs.84,91,191/- and the retention amount of Rs.58,27,288/- to the appellant. It is submitted that after considering the facts, the learned Arbitrator allowed the claim and awarded the amount to the appellant.

26. It is submitted that award passed by learned Arbitrator did not suffer from any of the infirmity and therefore, the learned Single Judge erred in interfering with the award under Section 34 of the Arbitration and Conciliation Act, 1996.

27. In this connection, the learned counsel for the appellant relied on the following decisions of the Court:-

- i. Ssangyong Engg& Const. Comp Ltd. Vs. NHAI, (2019) 15 SCC 131.
- ii. Associate Builders Vs. DDA, (2015) 3 SCC 49.
- iii. M.K Shah Engineers vs State of M.P, (1992) 2 SCC 594.
- iv. National Highways authority Vs. Bumihiway DDB Ltd., (2006) 10 SCC 763.
- v. Mrutunjay Pani and another Vs. Narmada Bala Sasmal & another, (1962) 1 SCR 290.
- vi. Kushehwar Prasad Singh Vs. State of Bihar, (2007) 11 SCC 447.
- vii. Municipal Corporation Vs. Jagan Nath Ashok Kumar, AIR 1987 SC 2316.
- viii. HRD Corporation Vs. Gail India Ltd., (2018) 12 SCC 471.
- ix. P.R. Shah Shares and Stock Brokers Vs. B.H.H Securities Private Ltd., (2012) 1 SCC 594.
- x. Suttlej Construction Ltd., Vs. Union Territory of Chandigarh, (2018) 1 SCC 718.
- xi. Union of India Vs. Susaka Private Ltd., and others, (2018) 2 SCC 182.
- xii. MD. Army Welfare Housing Organization Vs. Sumangal Services (P) Ltd., (2004) 9 SCC 619.
- xiii. N.JayaramanReddi Vs. Rev. Divnl. Officer, AIR 1979 SCC 1393.
- xiv. The Union of India Vs. M/s. D.N.Revery& Co. & others, (1976) 4 SCC 147.
- xv. Gas Authority of India Ltd., and another Vs. Ketu Constructions India Ltd., (2007) 5 SCC 38.
- xvi. Enercon (India) Ltd., Vs. Enercon GMBH and another, (2014) 5 SCC 1.

28. The respondent, on the other hand, denied that the actual date of completion of project by 26.04.2016. The respondent therefore submitted that the order the learned Single Judge has rightly interfered with the award vide the impugned order.

29. It is submitted that the PMC has not given any certification that the works were completed in all aspects on 26.4.2016 and more over the appellant had requested the Resident Engineer for extension of time on 23.04.2016 vide letter for a period of one month from 27.04.2016.

30. The respondent further stated that question of issuing "Take over certificate" to the appellant did not arise as the appellant failed to complete the work to the satisfaction of the respondent or its PMS. The respondent further submitted that the appellant had not completed the work and had not fulfilled the requirements for issue of "Taking over certificate".

31. The respondent further submitted that the Cube Tests were conducted in the presence of the respondents. It is submitted that though in the initial stages, the representatives of the respondent witnessed the cube test, but after December 31st 2015, on the day when the dispute arose between the appellant and the resident engineer of the PMC, the respondent had not witnessed any of the cube tests as claimed by the appellant.

32. The learned counsel for the respondent relied upon the following decisions of the court:-

- i. Ssangyong Engg& Const. Comp Ltd. Vs. NHAI, (2019) 15 SCC 131.
- ii. MMTC Limited Vs. Vedanta Limited, (2019) 4 SCC 163.
- iii. Associate Builders Vs. DDA, (2015) 3 SCC 49.

33. We have heard the arguments of the learned counsel for the appellant and the learned Senior Counsel for respondent and also perused the impugned order and the records. The contract contemplates "Cube test" and "Core test".

34. Clause 3 of Part III of Section 4 - Technical Specification of Materials and Works of Contract deals with Cube Test. It reads as under:-

WORKS CUBE TESTS

Sampling & Strength of Designed Concrete Mix and Acceptance Criteria shall be as per IS: 456-2000 or latest version.

35. Clause 4 of Part IV of Section 4 of Technical Specification of Materials and Works of Contract deals with Core Test. It reads as under:-

4. CONCRETE CORES

If the results of the cube tests do not fulfil the requirements as stated in the foregoing clause, or if, in the opinion of the Engineer defects of workmanship during construction give rise to doubt as to the strength, durability and/or safety of the structure or part thereof, supplementary testing shall be performed at the Engineer's request.

If, in the opinion of the Engineer, additional testing is necessary, at least six concrete cores shall, where ordered by the Engineer, be drilled or cut from the Works and tested in accordance with IS 516.

The cores shall be appropriately 150 mm in diameter and, where possible have a height / diameter ratio of two, the correction factor given in IS 516 shall be applied to give the equivalent strength of cylinder having a height / diameter ratio and age, fails to attain the characteristic compressive strength at 28 days as specified above, the concrete which they represent shall be cut out, and replaced to the satisfaction of the Engineer and at no extra cost to the Employer.

The cost of sampling, drilling and cutting and preparing cores, together with the provision of equipment and apparatus and the packing and transporting to the field laboratory (if applicable) and testing, shall be to the Contractor's account unless the results of tests ordered on the basis of suspected defects in workmanship demonstrate that adequate quality and strength were achieved during construction, whereupon the Employer shall pay such costs as are reasonably incurred by the Contractor in complying with the requirements of this Sub - Clause.

36. Thus, it is clear that testing shall be to the appellant's account unless the results of the tests ordered on the basis of suspected defects in workmanship demonstrate that adequate quality and strength were achieved during construction, whereupon, only the respondent shall pay such costs which were reasonably incurred by the appellant in complying with the requirements of this Sub-Clause.

37. From a reading of the terms of the contract, it is also noticed that the award of the Arbitral Tribunal allowing the respondent to bear the cost for the core test conducted

independently by the appellant was contrary to the terms of the contract. In this connection, reference may be made to Clause 5.3 of Part I of Section 4 Technical Specification of Materials and Works of the Contract which reads as under:-

Testing:

All materials intended to form part of the Works shall, unless otherwise directed by the Engineer, be tested in accordance with relevant standards and with the requirements of this specification. The contractor shall carry out such tests of his own as is necessary to ensure compliance with the Specifications.

The Contractor shall be entitled to be represented at all tests carried out by or on behalf of the Engineer in order to determine whether workmanship and materials meet the requirements of the Specifications. Sufficient notice shall be given to the Contractor to enable him should he so wish to be present during any control test. Should the Contractor not wish to witness or be present at any control test, it shall be assumed that the Contractor accepts the validity of the results of that test.

38. As per Clause 5.3, the Contractor shall carry out such tests on his own as is necessary to ensure compliance with the Specifications. Clause 5.3 of Part I of Section 4 further states that the contractor (Appellant herein) shall be entitled to be represented at all tests carried out by or on behalf of the Engineer of the respondent in order to determine whether workmanship and materials meet the requirements of the Specifications. Sufficient notice was to be given to the Contractor (appellant herein) to enable the appellant to be present during any control test. Should the Contractor not wish to witness or be present at any control test, it shall be assumed that the Contractor accepts the validity of the results of that test.

39. In this case, the core test conducted during April, 2016 by National Test House has shown that there were defective workmanships by the appellant and the appellant refused to co-operate with respondent. Under the agreement, the appellant was obliged to carry out the test and all the costs of such unless the test revealed the adequate quality and strength were to the account of the appellant. These are the essential terms of the contract. As per Section 28 of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal shall, in all cases, take into account the terms of the

contract and trade usages applicable to the contract. These provisions have been given a go by the learned Arbitrator.

40. The records indicate that the appellant not only refused to receive letter from respondent but also failed to rectify the defects pointed out by the respondent. The appellant was also called upon to participate in the conduct of core tests during April 2016. However, the appellant refused to co-operate in the said endeavour.

41. Therefore, the respondent carried out such core tests independently through the National Test House, Tharamani, Chennai. The test results were published during September and October 2016 respectively.

42. Thus, these tests were carried during the defect liability period. The learned Arbitrator however disregarded this vital evidence and decided the case entirely on the basis of the documentary evidence and the oral evidence of RW-1 with regard to the results of cube tests and core tests that were carried out during the contract period as opposed to the defect liability period.

43. There was a patent illegality. Therefore, the award passed by the learned Arbitrator was liable to be interfered as has been interfered in the impugned order by the learned Single Judge. As the learned Arbitrator completely disregarded both Exs.R-55 and R-79 and instead, Ex.C19, i.e. relied on the core test results dated 26.04.2016 and the oral evidence of RW-1, we find no reason to come to a different conclusion from the learned Single Judge.

44. The award passed ignoring the vital test carried out by the respondent during the defect liability period is liable to be set aside on the ground of patent illegality. These tests showed defective workmanship by the appellant and therefore, the learned Arbitrator ought to have discussed the same. Instead, the learned Arbitrator has merely instead relied documentary evidence of the appellant while passing the award.

45. Under Section 34, an award can set aside on the grounds stipulated in Section 34 of the Act. Though scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited, this was a fit case for interference under Section 34 of the Act.

46. In this case, the learned Single judge has, in our view, correctly concluded that vital evidence in Exhibits R55 and R79 was disregarded by the learned Arbitrator while passing in the awards. Therefore, we find no infirmity in the impugned decision of the learned Single Judge in as much as the award has been set aside based on the reasoning of the Hon'ble Supreme Court in Associate Builders Vs. DDA, (2015) 3

SCC 49 and in Ssangyong Engg& Const. Comp Ltd. Vs. NHA I,
(2019) 15 SCC 131.

47. Further, Section 28 of the Arbitration and Conciliation Act, 1996 mandates that the Arbitral Tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the contract. These provisions have been given a go by the learned Arbitrator.

48. We therefore find no irregularity or perversity in the impugned order of the learned Single Judge in as much as the learned Single Judge has found that the award suffers from patent illegality. We therefore do not find any reasons to come to a different conclusion in this appeal.

49. Accordingly, this Original Side Appeal is dismissed. While dismissing this Original Side Appeal, we leave it open for the appellant to work the remedy in terms of the decision of the Hon'ble Supreme Court in McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181. No cost. Consequently, connected Miscellaneous Petition is closed.

kkd / jen

-s/d-
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O.S.A.No.115 of 2020 and
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