

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.01.2021

Delivered on: 25.02.2021

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.866 of 2013

Nadippisai Pulavar K.P.Ramasamy
Co-OP, Sugar Mill' rep. By its
Administrator
Thalainayar
Mayiladuthurai Taluk
Nagapattinam Dist.

... Petitioner

Vs.

1. M/s.Binny Engg. Ltd.,
Meenambakkam
Chennai 600 114
Rep. By its Vice President

2. Hon'ble Justice P.R.Gokulakrishnan, Retd.,
Sole Arbitrator
Bakthavatchalam Nagar
Adyar, Chennai – 600 020

... Respondents

(Second respondent deleted vide order dated 10.07.2020)

Prayer: Petition filed under Section 34(2A) of the Arbitration and Conciliation Act, 1996 Order XXI Rules 2 and 3 of O.S.Rules of High Court praying to set aside the arbitration award dated 16.04.2012 against the petitioner with a cost of this petition and for further or other relief as

this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.S.R.Rajagopal
Additional Advocate General
assisted by Mr.R.Bala Ramesh
Special Government Pleader and
Ms.Tanya Kapoor, Government Advocate

For 1st Respondent : Mr. Rahul Balaji

ORDER

PREFACE:

Captioned 'Original Petition' (hereinafter 'OP' for the sake of brevity) going by its year of registration (2013) and date of presentation (13.02.2012 to be precise) is clearly a vintage matter owing to time line stipulated in sub-section (6) of Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)' and this statute shall hereinafter be referred to as 'A and C Act' for the sake of brevity. However on reading the case file, it comes to light that it may not just a vintage matter, it can even be described as ancient, as appointment of Hon'ble Sole Arbitrator was made by this Court more than one and half decades ago i.e., more than 15 years ago and it is actually more than 16 years ago, as 26.03.2004 is the date on which this Court made an order in O.P.No.909 of 2000 appointing a Hon'ble former Chief Justice of a High

Court, who was also a former Hon'ble Judge of this Court, as Sole Arbitrator. This means that the trigger qua arbitration itself is in the previous millennium as the OP in which the sole Arbitrator was appointed is of the year 2000. A further careful perusal of the case file brings to light that the genesis of the matter is an agreement which was made more than quarter of a century ago. To be precise, the genesis of the matter is an agreement dated 25.08.1994 (Ex.C5 before the Arbitral Tribunal). To be noted, 'Arbitral Tribunal' from hereon shall be referred to as 'AT' for the sake of brevity. It is for this reasons that this Court has chosen to say that captioned OP can be described as not just a vintage matter, but it can be described even as an ancient matter.

2. Be that as it may, Hon'ble Sole Arbitrator made an 'arbitral award dated 16.04.2012' (hereinafter 'impugned award' for the sake of brevity). Hon'ble sole Arbitrator, who constituted the AT, was originally arrayed as second respondent in the captioned OP, but this Court following the procedure adopted by Hon'ble Supreme Court in ***Vinay Heavy Equipments*** case [Zonal General Manager, Ircon International Limited Vs. Vinay Heavy Equipments reported in (2015) 13 SCC 680] deleted the Hon'ble sole Arbitrator from the array of parties vide earlier proceedings dated 10.07.2020 (to be noted, deletion procedure is

captured in order reported in **2007 SCC OnLine SC 4**). Therefore, now there is a sole petitioner and a lone respondent in captioned OP. Sole petitioner in captioned OP was the respondent before AT and the lone respondent in captioned OP was the sole claimant before AT. Therefore, sole petitioner in captioned OP shall be referred to as 'Sugar Mill' and lone respondent (now) in captioned OP shall be referred to as 'Binny', both for the sake of brevity, convenience and clarity. The arbitral proceedings are mammoth, mountainous and a marathon of sorts. The reason is, post constitution of AT on 26.03.2004, pleadings were completed by Sugar Mill and Binny on 23.07.2005. Thereafter, as many as 415 documents, namely Exs.C1 to C415 were marked on the side of Binny as claimant, though only one witness was examined as CW1. On the side of Sugar Mill (as respondent before AT), as many as 541 documents were marked, namely Exs.R1 to R541 (series) and two witnesses deposed on behalf of Sugar Mill (RW1 and RW2). One Mr.S.Swaminathan deposed as CW1 on behalf of the claimant, one Mr.K.Rajendran, Senior Clerk of Sugar Mill deposed as RW1 and one Mr.S.Lakshmi Narayanan, Senior Manager (personnel & Administration) deposed as RW2. It is also clear that the pleadings have been amended multiple times in the course of arbitral proceedings. 27 issues, two

additional issues and one issue during reply arguments were drawn up and this adds upto 30 issues. Ultimately impugned award running to 554 pages in 3 volumes (Volume 1 deals with claims of Binny, Volume 2 deals with counter claims of Sugar Mill and Volume 3 is an adumbration of oral and documentary evidence/witness before AT) came to be made on 16.04.2012. In this over six year time span between date of completion of pleadings and impugned award i.e., between 23.07.2005 and 16.04.2020, there have been a large number of sittings. This is the reason why this Court has chosen to say that captioned OP can be described as ancient, has also chosen to describe the arbitral proceedings itself as mammoth, mountainous and a marathon.

ESSENTIAL FACTS:

3. This Court has chosen to give the aforementioned preface as, though the case file comes across as voluminous, the captioned OP turns on a narrow compass. Mr.S.R.Rajagopal, learned Additional Advocate General on behalf of Sugar Mill and Mr.Rahul Balaji, learned counsel on behalf of Binny, who were before this Court in web-hearings on a video-conferencing platform i.e., virtual hearings, consented for captioned OP being taken up for final disposal, both learned counsel narrowed down the points for consideration and made crisp submissions (on the

narrowed down points) within the limited landscape of Section 34 of A and C Act. To be noted, both sides submitted that captioned OP can be decided on the basis of these crisp submissions made in the oral hearings (captured infra) notwithstanding verbose pleadings and mass of material before this Court.

4. Captioned OP being a challenge to an arbitral award i.e., impugned award, under Section 34 of A and C Act, bare minimum facts, which are imperative for appreciating this order will suffice. Short facts are that Binny, under aforementioned genesis contract i.e., contract dated 25.08.1994 (Ex.C5) had to supply machineries for expansion of Sugar Mill capacity; that such supply of machinery included supply, commissioning and erection; that this exercise had to be completed within a period of 18 months from genesis contract or in other words, on or before 24.02.1996, but it was ultimately completed only on 10.05.1996; that Binny claimed escalation in price of raw materials, refund of EMD, certain sums towards supply of, what according to Binny, is outside the scope of genesis contract, besides this, Binny also claimed fee for supervising erection/commissioning and interest on belated payments. These claims were resisted by Sugar Mill, which also made a counter claim on 08.09.2004 before the AT. Counter claim was

essentially predicated on a plea that Binny has to make good the loss of Sugar Mill, being income which it would have got if there had been no delay/default in commissioning the expansion project. To be noted, counter claim also included interest paid by Sugar Mill owing to non-payment of loan availed by it from the Sugar Development fund; that AT *inter alia* on the basis of documentary and oral evidence before it, made the impugned award acceding to some of the claims of Binny totalling about Rs.2.61 crores, allowing counter claim only to the extent of Rs.52,667/- holding that it is far-fetched/time barred and also mulcting Sugar Mill with costs for having compelled Binny to face this counter claim over such a long period of time over very many hearings. This Court has found that Binny has not assailed the impugned award and Sugar Mill alone has assailed the impugned award vide captioned OP.

RIVAL SUBMISSIONS: सत्यमेव जयते

5. Mr.S.R.Rajagopal, learned Additional Advocate General, assisted by Mr.R.Bala Ramesh, learned Special Government Pleader and Ms.Tanya Kapoor, learned Government Advocate appearing for the Sugar Mill, which is the protagonist in captioned OP, made pointed submissions, summation of which is as follows:

a) Impugned award is outside the contractual perimeter

of genesis contract and is therefore liable to be dislodged;

b) Novation was never pleaded, but AT has invoked novation principle and this is impermissible.

c) AT has proceeded broadly on what can be described as 'parole evidence' as it has travelled outside the written contract;

d) AT erred in dismissing the counter claim of Sugar Mill in its entirety on the ground of limitation.

6. In response to the above submissions, Mr.Rahul Balaji, learned counsel for Binny advanced arguments, summation of which is as follows:

a) AT has rendered a clear finding (on the basis of evidence before it) but the lack of intention stood superseded by the contract as every clause has been varied or modified in the agreement. It was emphasized that Clause 9.6 in the agreement states that obligations stood fastened upon the claimant from the date of signing of the agreement.

b) It is incorrect to say that AT erred in dismissing the counter claim of Sugar Mill in its entirety on the ground of

limitation by adopting different dates for Sugar Mill and Contractor to test limitation. To emphasis this point, reliance was placed on *Voltas Limited Vs. Rolta India Limited* case law reported in (2014) 4 SCC 516 to say that Sugar Mill had not made the counter claim earlier and some vague reference in a letter will not arrest limitation.

DISCUSSION AND DISPOSITIVE REASONING:

7. This Court now embarks upon the exercise of discussion qua arguments advanced before it, setting out its dispositive reasoning and arriving at a conclusion.

8. As a prelude to this discussion for the purpose of giving dispositive reasoning, this Court deems it appropriate to mention that both sides have placed before this Court tabulations set out in landscape form of papers. There would be reference to it infra. Be that as it may, suffice to say that these tabulations submitted in landscape form of the papers go into every finding of AT in the impugned award with specific reference to paragraph numbers followed by contentions and counter contentions as to why and how AT erred / not erred. To be noted, these tabulations also have cross reference to the evidence before AT in the

form of reference to exhibits before AT. If this Court were to examine every such contention, it would tantamount to an exercise akin to a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). To be noted, these contentions turn heavily on facts. This Court, while commending the effort that has gone into making these tabulations, makes it clear that only those of the contentions which come within the purview of Section 34 statutory perimeter or which at best have the trappings of a Section 34 challenge are being considered. The reason for adopting such an approach is fairly simple and straightforward. The reasons can be articulated in terms of facets of a Section 34 legal drill. One facet is, it is not an appeal under CPC as already mentioned herein. The second facet is, a Section 34 Court cannot function as an Appellate Arbitral Tribunal. In this regard, this Court is reminded of some two tiered and three tiered arbitration clauses in 'National Stock Exchange' ('NSE') Bye laws. This Court is of the considered view that embarking upon the exercise of examining the tabulations ('para and verse' in every sense of the term) with cross reference to evidence before AT will clearly amount to functioning as an Appellate Arbitral Tribunal. Therefore, the course that would be adopted by this Court is to narrow down those of the issues which come within

the purview of a Section 34 challenge to an arbitral award. In this regard, this Court deems it appropriate to remind itself of the ***Fiza Developers*** principle being law laid down by Hon'ble Supreme Court in ***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796. This ***Fiza Developers*** principle, to put it in simplistic terms means that a Section 34 legal exercise is a one issue summary procedure. Hon'ble Supreme Court has made it clear that by referring to 'one issue' it does not mean that the lis before AT itself should be tested on one issue, but it only means that arbitral award being put to challenge by itself becomes an issue and that is the lone issue in a Section 34 proceedings. Elucidating summary procedure, it was made clear that letting in evidence or introducing new documents at a Section 34 stage are clearly impermissible. This Court also reminds itself that this ***Fiza Developers*** principle was reiterated by Hon'ble Supreme Court in ***Emkay Global*** case, being ***Emkay Global Financial Services Ltd., v. Girdhar Sondhi*** reported in (2018) 9 SCC 49 as a step in the right direction qua arbitration as an 'Alternate Dispute Resolution' mechanism ('ADR' mechanism). This ***Fiza Developers*** principle reiterated in ***Emkay Global*** case is further reiterated by Hon'ble

Supreme Court in ***Canara Nidhi Limited case [M/S. Canara Nidhi Limited vs M. Shashikala]*** reported in ***2019 SCC Online SC 1244*** wherein it was made clear that no document, which was not before the AT can be introduced in a Section 34 exercise without leave of the Court and leave of the Court will be given only when it is imperative and inevitable.

9. This Court has repeatedly held that a Section 34 application is neither an appeal nor a revision. It is not even a full-fledged review, but it is a limited judicial review within the slots adumbrated in sub-section (2) and sub-section (2-A) (now) of Section 34, besides facets of the same and other provisions of A and C Act as explained by Hon'ble Supreme Court. To be noted, captioned OP has been presented in this Court on 13.07.2012. Therefore, by applying ***Ssangyong*** principle i.e., principle laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131***, captioned OP will be governed by pre 23.10.2015 regime of A and C Act. By saying pre 23.10.2015 regime of A and C Act, this Court refers to A and C Act as it stood prior to amendment by amending Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. This is of relevance and

significance as prior to 23.10.2015, there was no sub-Section (2-A) of Section 34 though patent illegality was added as a ground to challenge to an arbitral award under Section 34 by Hon'ble Supreme Court vide ***Saw Pipes*** principle being law laid down by Hon'ble Supreme Court in ***Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.***, reported in ***(2003) 5 SCC 705***.

10. Be that as it may, reverting to the discussion on one issue summary procedure and the characteristics of a Section 34 exercise, this Court has repeatedly held that Section 34 application, which is a mere challenge to an arbitral award is an extremely delicate legal balance. In this legal balance, on one side of the scale you have the sanctus finality philosophy attached to arbitral awards ingrained in Section 35 read with minimum judicial intervention philosophy ingrained in Section 5 of A and C Act balancing itself against judicial review forming part of substantive due process of law on the other side of the scale and this legal principle of delicate balance is propounded on sublime legal philosophy and salutary principles underlying the A and C Act. AT itself is a private Tribunal, which is a creature of a contract based on party autonomy. Therefore, if parties, after exercising party autonomy and choosing for arbitration as an ADR mechanism, are allowed to have a

second bite that would tantamount to having the cake and eating it too as it would run counter productive to the very basis of ADR mechanism, which is an edifies built on the platforms of a) Party autonomy, b)Expeditious resolution of disputes, c) Finality of arbitral awards rendered by AT and d) Minimum judicial intervention.

11. This Court having set out a preview, now plunges into the crux and gravamen of the matter on hand.

12. Submissions on behalf of Sugar Mill can be described as a plea of wandering. In other words, the sheet anchor or pivotal submission on behalf of Sugar Mill is that AT has wandered qua genesis contract and therefore, the impugned award is liable to be dislodged. As an extension of this argument, it was submitted that wandering has been based on parole evidence. It is also to be noted that two specific findings of AT were assailed. One is, the finding of AT that time is not the essence of the contract and the second is that the genesis contract is not a turnkey project.

13. For the purpose of buttressing the wandering plea, a 38 page tabulation was placed before this Court. For the purpose of visualizing the tabulation, this Court deems it appropriate to scan and reproduce the first page of 38 page tabulation and the same is as follows:

Issue No.	Framed	Findings in Award or relevant Paragraph	The amount claimed in the Claim Statement	Conclusion/ Amount	Exhibits referred	Remarks
3	Whether letter of intent forms part of the contract.	Letter of intent stands superseded by agreement dated 25.08.1994. Para - 00 (Page 50) - Volume-I	NA	NA	C-3 LOT; C-5 Agreement; R-1 Letter by the Respondent to Claimant to execute the Agreement; R-414; R-4 Respondent asserts no modification shall be carried out R-386, R-403, R-3	
2	Whether Agreement dated 25.08.1994 is a supply and commissioning contract or a turnkey contract.	Agreement dated 25.08.94 is a supply and commissioning contract and not a turnkey contract. Para -14 (Page 65) Vol-I Para-126 (Page 77) Vol-I	NA	NA	C-5 - Agreement Clauses: 1(b), 1(c), 7.5, 10.7, 2.1, 3.1, 9, Annex-II; 9.1, 9.3, 9.4, 9.6, C-1, C-2, C-3, C-4, R-599, R-145, R-223, R-380(A), R-380(B), R-380, R-382, R-383, R-414, R-417, R-164	
1, 4, 11	1. Whether there is the essence of the contract. 2. Whether there is a delay in the supply & commissioning, who's responsible. 3. Whether there is delay in approving the drawings	1. Time is not the essence of the contract. 2. Delay is due to finalising the layout and plans. Para-157, 158, 159 (Page 106) Vol-I Section 51 of Indian Contracts Act, 1872.	NA	NA	C-5 Agreement Clauses:- 3-12, 18, 11(d), 3.2, 3.6, 8, 10.1, 10.2, C-9, C-11, C-16, C-17, C-34-40, C-18, 19, 32, 23, R-7, R-50, R-1, R-414, 5-9, R-381, C-6, C-277-278, C-280-291, R-9, C-3, R-55, R-387, R-372, R-175, R-257, R-264.	
5	Whether claimant is entitled to escalation in price of raw material.	Claimant is entitled to price escalation at 22% p.a.	40,90,932/-	40,90,932/- Interest @ 22%	C-5 Agreement Clauses: 2.3, 10.5, C-	

14. This Court deems it appropriate to have a look at the clause adverted to (in the time line) being clause in a Letter of Intent dated

27.04.1992 (Ex.C3) and Genesis Agreement dated 25.08.1994 (Ex.C5). With regard to whether Letter of Intent forms part of genesis contract, AT returned a finding that it stands superseded by genesis agreement. This is clearly not an implausible view. With regard to whether genesis contract is a turnkey project or a mere supply and commissioning project, attention of this Court was drawn to Clauses 1(b), 1(C), 7.5, 10.7, 2.1, 3.1, 9, Annex-II, 9.1, 9.3, 9.4, 9.6, C-1, C-2, C-3, C-4, R-198, R-145, R-223, R-380(A), R-380(B), R380, R-382, R-383, R-414, R-417, R-164. To be noted, the above are clauses in Ex.C5 agreement. Besides this, attention of this Court was also drawn to certain other exhibits, namely Exs.C1 to C4 and Exs.R145, R164, R198, R223, R380(A), R380(B), R380, R414 and R417.

15. Before proceeding further, it is necessary to have clarity on what is parole evidence. To put it in simple terms, proving a subsequent oral agreement, modifying, rescinding, altering or varying a written document by letting in oral evidence can be broadly described as parole evidence. To be noted, this description of parole evidence shall not be construed as definition of parole evidence. It is also to be noticed that proviso 4 to Section 92 of 'Indian Evidence Act, 1872' ('Evidence Act' for

brevity) is of relevance and the same reads as follows:

'Proviso (4): The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents.'

16. In other words, in cases where a contract is not required to be reduced to writing, but has been reduced to writing or in cases where the contract is oral, oral evidence can be let-in to prove that earlier practice was varied by a new oral agreement. Only in cases where a contract is required to be in writing and the same has been reduced to writing, its terms cannot be modified or varied by a oral contract. It is in such cases that parole evidence will not be admissible.

17. In serial No.2 in the tabulation which pertains to the issue as to whether the genesis agreement is a turnkey project or a mere supply and commissioning project, a perusal of the clauses in the context of findings returned vide impugned award become necessary. The clauses have already been alluded to supra. The findings returned by AT vide impugned award are contained in Paragraphs 114 and 126 of the

impugned award, which read as follows:

'114. I have carefully gone through the pleadings, documents and arguments in respect of this issue as to whether the agreement dated 25.08.1994 is a supply and Commissioning contract or a turnkey contract. The categorical assertion by the learned counsel appearing for the claimant is that the contract is not a turnkey contract but is only supply and commissioning of the machineries. On the other hand, Mr.Subramanian, learned counsel appearing for the respondent asserted that the contract is a turnkey contract and it is incumbent upon the claimant to see that the Mill crushes 3500 TCD. To substantiate their contentions both the parties pressed into service the documents available on record.'

'126. For the forgoing facts it is very clear that the contract by the respondent with the claimant for the expansion of the Sugar Mills is pure and simple, a contract for supply and Commissioning of the machineries and equipments only as seen from Ex.C-5 agreement and not a turnkey contract. I answer issue No.2 accordingly,'

18. A careful perusal of the clauses and finding returned by AT vide impugned award, which have been extracted and reproduced supra, bring to light that what AT has done is appreciation of evidence, which includes exhibits before it and it is not a case of parole evidence. In any event, AT is not bound by 'The Indian Evidence Act, 1872 (1 of 1872)',

('Evidence Act' for the sake of brevity) and this is clearly ingrained in sub-section (1) of Section 19 of A and C Act, which reads as follows:

'19. Determination of rules of procedure._

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).'

19. In this regard, learned Additional Advocate General pressed into service ***Tuff Drilling Private Limited*** case [***SREI Infrastructure Finance Limited Vs. Tuff Drilling Pvt. Ltd.***, reported in (2018) 11 SCC 470] and attention of this Court was drawn to Paragraph 12, which reads as follows:

'12. We have considered the submissions of the learned counsel for the appellant and the learned Amicus Curiae and have perused the record. From the submissions, the following issues arise for consideration in this civil appeal:

12.1. (i) Whether the Arbitral Tribunal which has terminated the proceeding under Section 25(a) due to non-filing of claim by the claimant has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?

12.2.(ii) Whether the order passed by the Arbitral Tribunal under Section 25(a) terminating the proceeding is amenable to

jurisdiction of the High Court under Article 227 of the Constitution of India?

12.3. (iii) Whether the order passed under Section 25(a) terminating the proceeding is an award under the 1996 Act so as to be amenable to the remedy under Section 34 of the Act?

20. A careful perusal of the findings returned by AT reveal that besides appreciation of evidence not being parole evidence it can at best turn on construction of covenants of the contract. The test for wandering plea is whether the AT has entered into or made foray into forbidden areas which are completely outside the contemplation of the parties qua genesis contract and whether AT has completely ignored the express covenants therein but both are absent in this case.

21. In ***M.Venugopal Pillai***'s case being law laid down by Hon'ble Supreme Court in ***S.Saktivel Vs. Venugopal Pillai and Others*** reported in **(2000) 7 SCC 104**, relevant paragraph is paragraph 5 and the same reads as follows:

'5. Learned counsel appearing for the appellant urged that the view taken by the High Court in decreeing the suit of the plaintiff was erroneous inasmuch as the settlees under Ext. A-1 got the suit property and by the subsequent oral arrangement, they agreed to work out their rights without varying or substituting the

terms of Ext. A-1 and, therefore, the High Court was not right in not considering the oral arrangement as pleaded by the defendant-appellant. It is not disputed that disposition under Ext. A-1 in the present case is by way of grant and under the said disposition all the sons of Muthuswamy Pillai acquired rights. It is also not disputed that the settlement deed is a registered document and by virtue of alleged subsequent oral arrangement, the other sons of Muthuswamy Pillai were divested of the rights which they acquired under the settlement deed. Under such circumstances the question that arises for consideration is as to whether any parol evidence can be let in to substantiate subsequent oral arrangement rescinding or modifying the terms of the document which, under law, is required to be in writing or is a registered document, namely, Ext. A-1. Section 92 of the Evidence Act reads as thus:

“92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in

which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.”

A perusal of the aforesaid provision shows that what Section 92 provides is that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced in the form of a document, have been proved, no evidence of any oral agreement or statement is permissible for the purpose of contradicting, varying, adding or subtracting from the said written document. However this provision is subject to provisos (1) to (6) but we are not concerned with other provisos except proviso (4), which is relevant in the present case. The question then is whether the defendant-appellant can derive any benefit out of proviso (4) to Section 92 for setting up oral arrangement arrived at in the year 1941 which has the effect of modifying the written and registered disposition. Proviso (4) to Section 92 contemplates three situations, whereby:

- (i) The existence of any distinct subsequent oral agreement to rescind or modify any earlier contract, grant or disposition of property can be proved.*
- (ii) However, this is not permissible where the contract, grant or disposition of property is by law required to be in writing.*
- (iii) No parol evidence can be let in to substantiate any subsequent oral arrangement which has the effect of rescinding a contract or disposition of property which is registered according to the law in force for the time being as to the registration of documents.*

22. In **Chandu construction** case, being law laid down by Hon'ble Supreme Court in **Food Corporation of India Vs. Chandu Construction and another** reported in (2007) 4 SCC 697, relevant paragraphs are paragraphs 11 and 12 and the same read as follows:

'11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93] and Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises [(1999) 9 SCC 283]).

12. In this context, a reference can usefully be made to the observations of this Court in Alopri Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588] wherein it was observed that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

*The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [AIR 1968 SC 522] this Court had observed that where there is an express term, the court cannot find, on construction of the contract, an implied term inconsistent with such express term.'*

23. On facts, ***M.Venugopal Pillai's*** case is one where there was a claim to the property in dispute under a registered Settlement Deed and trial Court permitted the defendant to lead oral evidence by relying on proviso (4) to Section 92 of the Evidence Act and believed oral arrangements among family members plea set up by the defendant. Therefore, this case does not buttress the arguments advanced on behalf of Sugar Mill, but the principle laid down in Paragraph 5 therein is of relevance and therefore, the same has been extracted and reproduced supra.

24. On facts, ***Chandu Construction*** case is one where work was not completed within the stipulated time (though time was extended once) resulting in termination, contractor assailed the termination, in

such a lis, finding was that it had been clearly stipulated that the work has to be carried out and provided at a rate which includes cost of materials and labour. In this view of the matter, awarding payment for supply of sand was held to be outstepping the confines of the contract by Hon'ble Supreme Court. Therefore, this **Chandu construction** case law also does not come to the aid of the arguments advanced by learned Additional Advocate General though it was pressed into service. However, the principles in Paragraphs 11 and 12 are of immense significance and therefore, this Court has extracted and reproduced the same supra. Suffice to say that a careful perusal of other parts of the tabulation reveal that there is nothing before this Court to demonstrate that AT has outstepped the contract. Likewise, from the covenants and findings pertaining to whether it is a turnkey project, it comes to light that it is not a case of parole evidence and this holds good throughout the impugned award. The reason is, these and other pleas cannot be countenanced as there can be no re-appreciation of evidence and this is not an appeal much less a regular first appeal under Section 96 of CPC as already delineated to supra. The observation about tabulation placed before this Court by Sugar Mill applies to the contractor i.e., Binny also. For an illustration a part of the tabulation is reproduced infra:

S.No.	Issue	Findings	Ground	Submission of Respondent
1	Issue (2): Whether the letter of intent forms part of the contract	Tribunal has rendered a finding LOI is superseded by the Contract in as much as every clause has been varied or modified in the subsequent agreement. While the LOI specifies the time period for completion as May 1993, the Agreement states that the contract has to be completed by October 2013, Clause 9.6 of the Agreement states that the obligations fasten upon Claimant from date of signing of Agreement. (Para 89-90, Page 711, Volume III)	The Award is opposed to public policy and patently illegal as the Learned Arbitrator has re-written the terms of the Contract. The LOI has not been taken into consideration. LOI and the contract must be read together. The Learned Arbitrator erred in saying that it stood substituted. Rule of Parole Evidence Ignored: Section 92 & 65 of the Evidence Act not followed, therefore, fundamental policy of Indian law ignored. Conclusion of the Arbitrator only based on secondary evidence, contra to the terms of the written contract. Arbitrator has re-written the contract only based on parole evidence	• Interpretation should be perverse to warrant an interference Dyna Technologies Pvt. Ltd. Vs. Crompton Greaves Ltd., (2019) 20 SCC 1, reaffirmed in South East Asia Marine Engineering and Constructions Limited (SEAMEC) v Oil India (2020) 5 SCC 164 • Interpretation / construction of Contract is within the realm of the Arbitral Tribunal. View taken by the Tribunal is a plausible view. Rashtriya Ispat Nigam Ltd., v. Dewan Chand Ram Saran (2012) 5 SCC 306 • Respondent cannot seek for a reappraisal of evidence. The Tribunal is the best judge of quantity and quality of evidence before it. Hodgkinson principle discussed in Associate Builders v. Delhi Development Authority (2015) 3 SCC 49; Ion Exchange India Limited v. Angeripalayam Common Effluent Treatment Plant Limited (Order dated 30.04.2019 in O.P.No.942 of 2018) • Section 19(1) of the Arbitration and Conciliation Act, 1996 – Tribunal is not bound by Evidence Act
2	Issue (3) Whether the Agreement dated 25.08.1994 is a supply and commissioning contract or a	The Tribunal has rendered a finding that the contract is not a turnkey contract. There is no provision in the Contract which specifies that it is a turnkey contract	That the contract is a turnkey contract. That the Tribunal failed to examine documents that show that the	• Interpretation should be perverse to warrant an interference. The ground raised does not satisfy the test of perversity contained in Excise and Taxation

S.No.	Issue	Findings	Ground	Submission of Respondent
	turnkey contract	The Tribunal has taken into consideration the evidence on record (Para 115-118, Page 729, Volume-III) The Tribunal has also considered the provisions of the Contract (Ex.C-5), including the preamble, Clause 1(d), Clause 2.1, 3.1, 5.2, 6, 10.7, 12.1, Annexures I & II to the Contract (Para 119-123, Page 734-737, Volume III)	contract is turnkey contract	Officer – cum-Assessing Authority v. Gopi Nath & Sons (1992) Supp (2) SCC 312, cited in Associate Builders v. Delhi development Authority (2015) 3 SCC 49 • Interpretation/construction of Contract is within the realm of the Arbitral Tribunal. View taken by the Tribunal is a plausible view. • Respondent cannot seek for a reappraisal of evidence. The Tribunal is the best judge of quantity and quality of evidence before it.
3	Issues (I)(4) & (11): (1) Whether time is the essence of the contract. (4) Whether there is a delay in the supply & commissioning and if so who is responsible. (11) Whether there is delay in approving the drawings	(1) Tribunal referred to clause 3.6 of the Contract which sets out the consequence of delay in supplying materials and the fact that the agreement has been executed much after the LOI, and rendered a finding that time is not the essence of the contract (Para 139-140, Page 753 Volume III) (4) There has been a delay in supply and commissioning of the machinery and the Petitioner is responsible. Section 51 applicable as the Respondent has failed to perform its reciprocal obligation under the contract (Para 157 & 158 Page 767-769, Volume III) (11) Delay was mainly caused by Petitioner in framing the technical specifications and in approving the drawings (5 revisions in the lay out drawings). Reference made to Clause 8.8 on the consequence of delay in approval of drawings (Para 156 & 159 Page 766 & 769, Volume III)	That there is no provision of Extension of Time (EOT) in the Agreement. That the contract itself is of such a nature wherein time is of the essence. The Learned Arbitrator has taken the view that time is not the essence of the Contract, which is a perverse finding.	• Interpretation should be perverse to warrant an interference. • Interpretation/construction of contract is within the realm of the Arbitral Tribunal. View taken by the Tribunal is a plausible view. • Respondent cannot seek for a reappraisal of evidence. The Tribunal is the best judge of quantity and quality of evidence before it.

NARROWING DOWN AND CONCLUSION:

25. Owing to the mammoth and mountainous material before this Court, it is deemed appropriate to formulate what the challenge turns on. As already alluded to supra, going by *Fiza Developers* principles, challenge to the arbitral award is the lone issue in this summary procedure and that lone issue has three facets which are as follows:

- a) Is impugned award vitiated for wandering (wandering qua terms of the contract) in testing the issue as to whether it is a turnkey project or construction and erection project;
- b) Whether the impugned award is vitiated owing to being in conflict with public policy of India in testing the issue of who is responsible for delay;
- c) Whether the impugned award is vitiated by being in conflict with public policy in testing limitation.

26. This Court has already discussed the case laws pressed into service on behalf of Sugar Mill. On the question of whether the contract is a turnkey project or a commissioning and erection project, it is

nobody's case that this has been spelt out with clarity and specificity as a covenant or recital in the contract. In other words, the question as to whether it is a turnkey project or commissioning and erection project has to necessarily be decided by the AT on the basis of/appreciation of evidence. While Sugar Mill, as a protagonist of captioned OP, contends that AT should have decided on the basis of covenants in the contract, but has wandered by making forays outside the contract, contractor (Binny) contends that AT had to necessarily decide this issue on the basis of evidence before it, it has done so and there is no error in the same. To be noted, this Court has observed that it is nobody's case that it has been set out with clarity and specificity in the contract whether it is a turnkey project or mere commissioning and erection project. Sugar Mill has not been able to point out any specific covenant or recital in the contract which demonstrably puts this question beyond the pale of controversy. On the contrary, it has only been argued that this question does arise, but AT has wandered and applied parole evidence. This takes us to the question as to how the AT has clinched this aspect of the matter.

27. The relevant portion of the impugned award is paragraphs 115 to 123, which read as follows:

'115. I will presently consider both the arguments and the evidence on record to decide as to whether the contract is a turnkey contract or contract for supplying the machineries and commissioning the machineries supplied. In the tender notice Ex.C-1 which is dated 29-4-1991, The Tamil Nadu Sugar Corporation Limited which floated the tender notice stated that the tender is for the supply of machinery on turnkey basis for the expansion/modernization of N.P.K.R.R Co-operative Sugar Mills. M/s.Binny Engineering Limited acknowledged Ex.C-1 and sent a reply which is marked as Ex.C-2. This reply is dated 15th May, 1991. In this reply under the Heading "Quotation", Binny has stated "manufacture, supply and erection of Boiling House Eqpt/Boiler/Milling Plant for expansion/modernization of Sugar Mill – NPKRR." No doubt in Ex.C-2, it is stated "NPKRR old Plant expansion turnkey". In Ex.C-2, Binny & Co. has also given the basic price of the machineries to be supplied along with the excise duty and special excise duties leviable on machineries. It has also given the transport charges and also packing, forwarding and handling charges. In the first page of Ex.C-2, Binny has simply stated that the quotation is for manufacture, supply and erection of Boiling House equipment etc., In its next page, it is stated "NPKRR Old Plat Expansion Turnkey". Whether M/s.Binny Engineering Ltd., accepted the contract on turnkey basis or loosely added the word "turnkey" in its quotation as "NPKRR Old Plat Expansion Turnkey", is to be seen. If it is turnkey contract, Ex.C-2 which is a letter from Binny Limited for getting the order would have definitely added the necessary expansion for updating and rectifying the existing machineries on the date of the tender floated by the Mills.

But, on the other hand, Ex.C-2 simply gives the basic price as Rs.1745 lakhs. It further gives towards excise duty Rs.119 lakhs, towards transport Rs.30 lakhs, towards packing, forwarding and handling Rs.10 lakhs. Ex.C-2 further states that CST/TNGST including SC on TNGST is Rs.150 lakhs and erection charges is Rs.60 lakhs. The grand total given in Ex.C-2 is Rs.2185 lakhs. Such quotation makes it clear that it is for manufacture and supply of machineries only and it is not on turnkey basis. Then we have the letter dated 27-4-1992 from the Tamil Nadu Sugar Corporation Limited addressed to M/s. Binny Engineering Limited. This is a Letter of Intent by Tamil Nadu Sugar Corporation Limited. This Letter of Intent Ex.C-3 is in response to the offer made by Binny Limited under Ex.C-2. No doubt, in this Letter of Intent it is stated that supply is to be made for successful commissioning of the expansion project on turnkey basis of the machineries mentioned therein. The description of the machineries to be supplied is also mentioned in this Ex.C-3. It is further stated in Ex.C-3 that the specifications of the machineries mentioned shall be as per the tender documents issued for the expansion of the N.P.K.R.R Co-operative Sugar Mills from 1250 TCD to 3500 TCD. In this Letter of Intent-Ex.C-3, it is further stated that the supply should be commenced not later than June, 1992 and completed on or before May, 1993, to enable respondent factory to commission the equipments by October, 1993. This Letter of Intent-Ex.C3 after mentioning the terms of payment etc., requested Binny Limited to enter into necessary agreement with the Special Officer, N.P.K.R.R Co-operative Sugar Mills Limited, before 15-6-1992.

116. The mentioning of turnkey basis in this Letter of Intent-Ex.C-3, in substance is only for supply of machineries described therein for the purpose of expansion of the N.P.K.R.R Co-operative Sugar Mills from 1250 TCD to 3500 TCD. Further, this Letter of Intent wants Binny and Company Limited to enter into necessary agreement with the Special Officer, N.P.K.R.R Co-operative Sugar Mills, before 15-6-1992. Then comes Ex.C-4 letter dated 5th May 1992 written by Binny Limited to the General Manager, M/s.Tamil Nadu Sugar Corporation Limited. Even in this Letter, we find that Binny & Company Limited after acknowledging the receipt of the Letter of Intent-Ex.C-3 dated 27-4-1992, mentions that the price offered by the TASCO excludes the erection charges, spares, cost of optional items. This letter further makes it clear that the supply and erection have been delinked and that erection work was given to a separate contractor, with a separate agreement with him by the TASCO. Thus, it is clear from Ex.C-4 that erection contract is not with Binny & Company Limited. Though we find the word “turnkey” loosely worded and the contract is the supply of machineries only and its guaranteed performance, the de-linking of the erection from the supply of machineries also fortifies the contention of the claimant that the claimant's contract with N.P.K.R.R Co-operative Sugar Mills was only for supplying the machineries for its expansion project.

117. No doubt Mr.Subramanian, learned counsel appearing for the respondent, submits that even though there is a separate contract for erection work, it is the claimant who suggested the contractor for erection work and that the claimant alone was

supervising the erection work. For this erection work, Mr.Subramanian adds, that a sum of Rs.20 lakhs was given. Hence, according to Mr.Subramanian, the turnkey contract cannot be watered down simply because the erection work had been given to some other person. Since that person was the Contractor suggested by the claimant and since the claimant had the right to supervise the erection work, the contract which is a turnkey contract will not become the contract for supply and Commissioning the machineries supplied. This argument of Mr.Subramanian cannot be appreciated in as much as there is a separate agreement for erection work and that erection work has been done by a different contractor. Simply because the claimant has suggested the name of contractor for erection work and simply because the claimant had a right to supervise the erection work, the contract given to a third party for the erection work cannot be said that the contract for erection is with the claimant. While dealing with issue No.3, which is to the effect "Whether the Letter of Intent dated 20-4-1992 forms part of the contract?", I have decided that the contract entered into between the parties under Ex.C-5 is an independent contract and that the Letter of Intent cannot be part of the contract-Ex.C-5. In view of this finding, I am of the view that Ex.C-3 which is earlier to Ex.C-5 cannot bind the claimant. Ex.C-5 is a simple contract for supplying the machineries for the purpose of expansion project of the existing Mill. No where in Ex.C-5 it is stated that the contract given is on the turnkey basis. The reference to Ex.R.380-A which is a letter dated 3-4-1992 written by the Secretary to Government to the Chairman and Managing Director of TASCO, there is mentioning of "turnkey offer" by the claimant. It is the say of

Mr.Subramanian that the Government accepted the offer of the claimant because Binny accepted the turnkey offer made in the tender. Even here, I find that Ex.R.380-A, is before the contract Ex.C-5. Likewise, the reference to Exs.R-380-B, R-381, R-382, R-383, R-408 and R-414 are all correspondence before the date of Ex.C-5 agreement and even though the word “turnkey” is mentioned therein, it cannot have any effect subsequent to entering into an agreement under Ex.C-5 dated 25-8-1994. Further, clause 8 of Ex.C-5 deals with purchaser's responsibility. The purchaser is the respondent - Mills. Clause 8.3 of Ex.C-5 states thus:

“The purchaser shall arrange for the erection and commissioning of the machinery and equipments through a competent agency.”

In a turn-key contract, the clause of this nature will not find place. Such a clause clearly visualizes that erection and commissioning of the machineries will be left to some other competent agency and that the work of erection and commissioning will be done by the purchaser i.e., the Mills in this case and such a clause will not be there if the contract is on the basis of a turn-key system.

118. Mr.Subramanian learned counsel appearing for the respondent asserts that even after the agreement - Ex.C-5, the parties understood that the Contract is on the basis of “turnkey” system. For that purpose, he refers to Ex.R-145, R-164 and R-417, Ex.R-145 is a draft proposed by N.P.K.R.R Co-operative Sugar Mills Limited addressed to M/s.Binny Engineering Limited who is

the claimant herein. This letter is only with regard to the working of the erected Simplex made vaccum filter. This machinery was not working satisfactorily. While complaining about the non-working of this machinery, the respondent in Ex.R-145 states that the claimant supplied and erected 2 Nos. of 10" x 20" size vaccum filter - Simplex made in their Mill on "turnkey basis" for expansion. Such statement, in my opinion, cannot be taken that Binny has accepted the supply of the machineries for the expansion project of the Mill on turnkey basis. On other other hand, the letter complains only with regard to the non-working of the simplex made vaccum filter. Therefore, the working or non-working of the said machineries supplied alone is the subject matter of this letter. Hence, the mentioning of "turnkey basis for expansion" in this letter will not in any way supersede the agreement-Ex.C-5 and make the contract as a turnkey contract. Then the next document referred by Mr.Subramanian is Ex.R-164 which is subsequent to the date of Ex.C-5. This is the Minutes of the Meeting held on 15-9-1998. Reading the Minutes, Mr.Subramanian states that the Mill was not able to crush 3500 TCD inspite of the fact that the claimant undertook the expansion work on turnkey basis. Reading this Ex.R-164, it is clear that the respondent, in the Minutes, pointed out various defects in the machineries supplied and wanted the claimant to rectify all those things. This Minutes Ex.R-164 cannot be taken as a document which spells out that the contract was on the basis of turnkey system. The next document referred by Mr.Subramanian which is after Ex.C-5 is Ex.R-417. This is a letter by the Mills to the Principal Secretary to the Government of Tamil Nadu, Industries Department regarding the sanction of the

expansion project cost to the claimant. In the subject portion of this letter, it is stated

“NPKRR CSM-Expansion – Orders placed with M/s.Binny Ltd., for supply of Machinery and Equipment on Turnkey Basis – Claim of escalation cost – reg.”

No doubt, this letter is objected to by the claimant on the ground, it is an inter-departmental correspondence. I do not think this letter will in any way substantiate the contention of the respondent that the contract is a turnkey contract. This letter clearly states that the order placed with the claimant is for supply of machineries and equipments on turnkey basis. The L.O.I -Ex.C-3 is much before the date of agreement- Ex.C-5. As discussed above, the erection contract was given to some other person in this case. Subsequent to Ex.C-3-L.O.I, the contract came to be executed and nowhere in the contract, it is stated that the contract is a turnkey contract. Thus, all these letters which are pushed into service by Mr.Subramanian as if they are subsequent to the contract agreement - Ex.C-5 have not made any impact on the contention of the claimant to the effect that the contract is pure and simple, a supplying and commissioning contract. This contention of the claimant that the contract is a supply and commissioning contract is fortified by the agreement-Ex.C-5.

119. Further the preamble of Ex.C-5 clearly states that Binny agreed to design, manufacture, procure and supply the machineries and equipments, components and other goods as specified in the enclosed Annexure I for the price of Rs.2119.69 lakhs. Thus, the

contract is pure and simple a supply and Commissioning contract and not turnkey contract. Ex.C-5 in clause 1(b) states that the machineries and components are to be supplied for the expansion of the Mills as per the specifications given in Annexure I to the agreement-Ex.C-5. In this case, agreement-Ex.C-5 which is between the parties herein, clearly defines the contract in clause 1(d) stating that the contract means an independent contract for sale of machinery and equipment and other goods required therefor. Therefore, it is clear that the contract is for sale of machineries for the purpose of the expansion of the respondent-Mill.

120.Clauses 2.1 and 3.1 of the agreement Ex.C-5, clearly establish that the agreement is the supply of the machineries and equipments alone and not anything regarding the working of the Mill. As far as the supplies are concerned, the claimant is responsible for the proper working of the machineries supplied and stands guarantee for the same. As correctly put forth by Mr.Srinath, if the contract is for making good, the old machineries that are existing in the respondent - Mill in order to see that the expanded N.P.K.R.R.Co-operative Sugar Mills crushes 3500 TCD, the contract price would not be Rs.2119.69 lakhs, but it would have been definitely much higher than this amount. Thus, the very fact the price quoted is relatable to the machineries supplied and not even for the erection, to term the contract as 'turnkey contract' cannot be accepted. If we read clause 3.1 of the agreement, it says supply of the machineries and equipments alone and not regarding anything about the working of the Mill. This also establishes that the contract is not on turnkey basis. Reading the contract-Ex.C-5 as a whole, it is clear that the contract is not on turnkey basis but it is for supply and Commissioning of the

machineries that are required by the respondent as per Annexure I to Ex.C-5. Even the supply of machineries and the cost to be paid for that are systematically stated in the agreement and that also indicates that the contract is for supply and Commissioning of the machineries only and not on turnkey basis contract.

121. Annexure II of the contract Ex.C-5 contains performance norms. The machineries accepted for supply by the claimant such as cane loader, cane carrier, cane-leveller, cane cutter and fibrizor etc., shows that the contract is only for the supply of the machineries mentioned in Ex.C-5 and that the claimant takes the responsibility for the perfect working of those machineries. Even other machineries to be supplied by Binny & Company are only for supply and Commissioning those machineries and seeing that those machineries work perfectly. Nowhere in Ex.C-5 the contract contemplated turnkey contract. It is necessary for me to catalogue all the machineries which we find in Ex.C-5 and in Annexure I and II. As a matter of fact Annexure II to Ex.C-5 deals only with performance norms of the machineries supplied by the claimant. Mr.Srinath, learned counsel appearing for the claimant correctly submitted that for the Mill to crush 3500 TCD, the boilers which are old should be capable of giving required steam. If the capacity of the steam produced by the existing two boiler is less than 15 tonnes per hour (24 tonnes), the total norms cannot be achieved. As correctly put forth by Mr.Srinath, the claimant is responsible only to see that the boilers supplied by them produce 60 tonnes of steam and the claimant is not responsible with respect to production of steam by the other two boilers already existing in the Mill. If the said two boilers produce less than the norms for Items.4,5,6 and 7 of the Annexure-II, blame cannot be attributed to the claimant. Mr.Srinath correctly stated that the performance norms

mentioned in Annexure II to Ex.C-5 is only for the equipments supplied by the claimant. Nowhere it is stated that the performance of the complete Mill will be taken into consideration to fasten the responsibility upon the claimant. When especially the claimant fixes norms for the performance of individual machineries supplied by the claimant, it cannot be stated at any stretch of imagination that the contract is a turnkey project.

122. The annexure spells out the norms, only in respect of the machineries supplied by the claimant. Hence this cannot tantamount to the Mills to get total quantity of 3500 TCS since the norms fixed is only for the machineries and equipments supplied by the claimant and not with regard to the machineries already existing in the Mills. 3500 TCD crushing can be achieved only when the machineries supplied by the claimant and the machineries already existing in the mills both adhere to the norms. Thus clause 10.7 of Ex.C-5 visualizes payment of 5% on basic price after one month from the date on which the supplier proves performance of the machinery guaranteed as per the norms laid down in the agreement.

123. Further in this case, the bagasse carrier and return bagasse carrier were purchased by the respondent and used in the Mill. If such materials were not purchased through Binny & Company, Binny & Company cannot be made responsible for the working of these machineries purchased by the respondent from third parties and used in the Mill. This also fortifies the contention of the claimant that the contract is not a turnkey project but only a contract for "supply and commissioning of the machineries" Mr.Srinath referred to Ex.C-5 and also referred to the definition of contract given in Ex.C-5 agreement. The definition in the contract agreement for the

contract entered into is “contract means an independent contract for sale of machinery and equipment and other goods required therefor”. Referring this, Mr.Srinath asserted that the contract between the parties is for supplying the machineries and for commissioning the same. In spite of this, as correctly put forth by Mr.Srinath, I am of the view that the word “turnkey” is loosely worded in various correspondence both prior to the date of Ex.C-5 and after the date of Ex.C-5. Such reference is due to the fact that in Ex.C-3-L.O.I, the word “turnkey” is used. Subsequent to Ex.C-3, the agreement Ex.C-5 came into force. The definition of the “contract” in Ex.C-5 as stated above establishes that the contract is not a turnkey contract. Annexure I and II to Ex.C-5 clearly gives the norms and other particulars of the machineries that are being supplied by the claimant – Binny. If it is a turnkey contract, there would not have been separate norms for each of the machineries except stating that in the ultimate result, the Mill as to crush 3500 TCD. Therefore, subsequent contract (Ex.C-5) supersedes Ex.C-3 and there is a novation in respect of the contract in Ex.C-3 by executing Ex.C-5 contract. In Ex.C-5 clause 5.1 states that the purchaser shall have the right to visit the place of manufacture and assembly of the machinery and equipments and inspect the same. Further, Clause 5.2 gives the right to inspect by the purchaser i.e., the Mill. Because there is a provision given for inspection by the respondent-Mills in the contract, the contract cannot be construed as turnkey contract, because the supply and commissioning is relatable only to the machinery supplied and not the ultimate result. Apart from this, the contract-Ex.C5, in clause 6, gives the performance guarantee. In that it has been specifically stated that the seller guarantees that all the machinery and equipments will work as specified in Annexure forming part of this agreement-Ex.C-5. Further, Clause 6.1(b) of

Ex.C-5 states that the machinery and equipments supplied by the seller shall achieve the performance norms specified in clause 12.2 of Ex.C-5. Clause 12.1 deals with penalty for non-delivery of the machinery in time and clause 12.2 spells out liquidated damages for any shortfall in the performance. All these clauses amply justify the contention of the claimant that the contract is for supply and commissioning and not a turnkey contract. After elaborately discussing the contentions of the respective parties, I have while dealing with Issue No.3 which is to the effect "Whether the Letter of Intent dated 27-4-1992 forms part of the contract?", held that the Letter of Intent does not form part of the contract-Ex.C-5. As correctly put forth by Mr.Srinath the obligations fastened upon the claimant fall only from the date of signing of the agreement-Ex.C-5 and it cannot date back to the letter of intent much earlier to the date of agreement herein. Further, as seen while dealing with issue No.5, each and every clause in the Letter of Intent has been supplemented or varied and modified in the agreement. Therefore, as soon as the agreement comes into existence, the conditions stipulated in the Letter of Intent has no legs to stand. In this connection, Mr.Srinath also referred to Section 62 of the Indian Contract Act.'

28. A careful perusal of the manner in which AT has dealt with this aspect of the matter to clinch the issue as to whether the contract is a turnkey project or not, brings to light that AT has considered the provisions of the contract which was Ex.C5 before it, besides appreciation of evidence before it. There is nothing to demonstrate that this is an implausible view. It is certainly not a view which shocks the

conscience of this Court. In this regard, Paragraphs 89 and 90 of the impugned award are also relevant and the same read as follows:

'89. I have carefully gone through the arguments and the documents regarding issue No.3. No doubt the Letter of Intent – Ex.C-3 was issued as early as 27-4-1992 and in this Letter of Intent, TASCO wanted the supply and successful commissioning of the expansion project on turnkey basis of the following machineries which are (1) Milling Tandem – 36" x 78" - 4 Nos., (2) 55 I Bagasse Fired Boiler 45 Kg/cm²; (3) 2 Two Nos. of 3 MW Turbo Set with BHEL Alternator, Electronic Governor and sophisticated AVR etc., (4) Boiling House Equipments; (5) Clarifier and Filter; (6) Centrifugals; and (7) Drier Hall Equipments at a total cost of Rs.2119.49 lakhs. Ex.C-3 is very specific with regard to the supply of named machineries and they have to be supplied on turnkey basis. Subsequent to this Ex.C-3 there are various correspondence between the parties and finally, Ex.C-5 agreement was entered into on 25th day of August, 1994. There are various clauses in the agreement which are different from the clauses mentioned in the Letter of Intent-Ex.C-3. As I have already pointed out, Mr.Subramanian has referred to certain documents to show that the claimant wanted certain modifications to be incorporated in the agreement- Ex.C-5 and because of that, there was delay in executing the agreement. Nevertheless Mr.Subramanian asserts that Ex.C-3 is an integral part of Ex.C-5 and it cannot be stated that the Letter of Intent is different from Ex.C-5 agreement. The very fact the respondent insisted upon execution of the agreement and the fact that such an agreement was

entered into, though belatedly, shows that the parties are governed only by the agreement. The respondent is very eager to incorporate everything in the agreement, which will be governing the duties and obligations on either side. Subsequent to the Letter of Intent, the agreement-Ex.C-5 has incorporated the complete obligations on either side. As correctly put forth by Mr.Srinath, the parties are governed only by the agreement and their contractual obligations will be only as per the conditions of the agreement.'

90. Further, in the Letter of Intent, it is stated that the supply has to be completed by May, 1993, but in the contract agreement-Ex.C-5, it is stated that the machinery and equipments has to be commissioned and made ready for commercial use by the Mill by October, 1993. Therefore, the Letter of Intent cannot be said to be part of Ex.C-5 since in the Letter of Intent, the date of completion for supply of machinery and equipments is mentioned as May, 1993; but, in the agreement, it is mentioned as October, 1993. In the agreement, it is stated that the machineries have to be supplied and commissioned by October 1993. In clause 9.6 of the agreement Ex.C-5, it is stated that the obligations fastened upon the claimant fall only from the date of signing of the agreement and it cannot date back to the Letter of Intent which is much earlier to the date of agreement. Thus, I am able to see that each and every clause in the Letter of Intent has been substantially varied and modified in the agreement. I am of the view that as soon as the agreement comes into existence, the conditions stipulated in the Letter of Intent recedes to the background. Further, in the Letter of Intent, escalation of price for certain items are given. But, in the contract

agreement, elaborate expansion is given as to how escalation is available to the claimant on certain circumstances. In this connection, we can look into Section 62 of the Indian Contract Act, which says,

“If the parties to a contract agree to substitute a new contract or to rescind or to alter the original contract, the original contract need not be performed.”

Accordingly, the original contract is the Letter of Intent and it has been substituted by the agreement-Ex.C-5 and Ex.C-5 agreement alone will govern the parties and not Ex.C-3. In view of all these facts, there is absolutely no difficulty in coming to the conclusion that the Letter of Intent dated 27-4-1992 is superseded by the contract-Ex.C-5 agreement and as such, the Letter of Intent cannot be treated as part and parcel of the agreement-Ex.C-5 and I answer this issue accordingly.'

29. On evidence before AT, **Hodgkinson** principle comes into play. None of the exceptions to **Hodgkinson** principle, such as vital evidence being ignored or evidence being received behind the back of a party etc., are available in the case on hand. **Hodgkinson** principle, in simple terms only means that AT is the best judge of the quality and quantity of evidence before it. **Hodgkinson** principle was first laid down by an English Court in **Hodgkinson Vs. Fernie** reported in **140 ER 712**. This principle was recognized by Indian Courts, particularly by Hon'ble

Supreme Court in oft-quoted *Associate Builders* case (supra) and the relevant paragraph in *Associate Builders* case is paragraph 41 and the same reads as follows:

'41. This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down: (IA pp. 330-32)

"The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]

'The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.'

Now the regret expressed by Williams, J. in *Hodgkinson v. Fernie* [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [*Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co.*, ILR (1920) 44 Bom

780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous.”

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.'

30. This leaves us with the question as to whether aforementioned interpretation of AT is so perverse that it warrants dislodging of the impugned award by judicial intervention. As already alluded to supra, captioned OP is governed by pre 23.10.2015 regime of A and C Act and therefore, perversity as elucidatively explained by Hon'ble Supreme Court in *Associate Builders* case, more particularly in Paragraphs 31 and 32 operate (this has to read with paragraph 41 of *Ssangyong* to appreciate pre and post 23.10.2015 regimes) and the same read as follows:

'31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

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

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

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

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

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

Paragraph 41 of Ssangyong case law:

'41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality

appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.'

31. Hon'ble Supreme Court has also set out a good working test for perversity. Subsequently, Hon'ble Supreme Court vide Paragraph 41 of ***Ssangyong*** case law explained that perversity post 23.10.2015 will not be available under Section 34(2)(b)(ii), but it will be available only under Section 34(2-A) as a patent illegality ground. It is not necessary to delve into that aspect of the matter as this OP is clearly governed by pre 23.10.2015 regime of A and C Act. A careful perusal of the findings of AT, which have been copiously extracted and reproduced supra, leaves this Court with the considered opinion that it definitely does not answer in the affirmative if the working test for perversity is applied and if this Court addresses itself to the question as to whether it fails to pass the test. The simple reason is, it is not an implausible view or a view that no reasonable person would take. Furthermore, interpretation of contract is well within the realm of AT. A careful perusal of the preamble and

various covenants of the contract which have been interpreted by AT namely Clauses 1(d), 2.1, 3.1, 5.2, 6, 10.7, 12.1 and annexures make it clear that it had to necessarily fall back on evidence/appreciate evidence to interpret the contract to say whether the parties intended the same to be a turnkey project or a mere construction and erection project. Therefore, this Court has no hesitation in coming to the conclusion that AT has neither re-written the contract nor wandered. In this view of the matter, the submissions of Sugar Mill predicated on parole evidence plea pales into insignificance.

32. This takes us to the next question pertaining to delay. The Sugar Mill and contractor (Binny) have blamed each other for delay and several factual details and particularities have been adverted to before AT in this regard. To be noted, this issue in turn turns on entitlement qua escalation of price plea. With regard to the delay aspect, AT has addressed itself to the question as to whether time is the essence of the contract and rendered a finding that time is not the essence of the contract and then dealt with various factual particularities regarding who is responsible for the delay. All this is contained in Paragraphs 139, 140 and Paragraphs 156 to 159 of the impugned award, which read as

follows:

'139. From the arguments extracted above, it is clear that the commissioning of the expanded Mill got delayed and that in the agreement-Ex.C-5 it is mentioned that the work should be completed and Mill should be commissioned by October 1993. Ex.C-5 agreement itself is dated 25th August 1994. The delay in executing this agreement is attributed to the claimant by Mr.Subramanian and for that purpose, he referred various letters which have been extracted above. Finally, he referred to Ex.C-8 dated 25th May 1992. This is much earlier to the agreement Ex.C-5. In this letter written by Binny (i.e., the claimant) which is earlier to the agreement no doubt Binny has stated in paragraph 6 that if there is any delay in supplying a particular component beyond a stipulated period which does not affect the prescribed commissioning date, 'Liquidated Damages clause would not be applicable for the above delay in the supply of the component. Binny has further stated that in case delayed supply of the component causes delay in commissioning, liquidated damages will be applicable after the 16th month itself, for that item only. This letter spells out that the time is not the essence of the contract. In the contract itself, in clause 3.6 it is stated as follows:

“In the event of any abnormal delay on the part of the Seller in supplying any critical item of machinery and equipments with reference to the delivery schedule, without valid reason, and if no alternative arrangement is made within a reasonable time, which could ultimately result in the purchaser postponing the date of

commissioning, the purchaser shall have the right to arrange to procure such machinery and equipments and other related materials from other sources. The incidence of additional cost, if any, involved in such cases shall be settled by mutual discussions between the parties to the contract.'

'140. Such clause makes it clear that time is not considered to be the essence of the contract. If time is the essence of the contract, the agreement would have been executed immediately after the Letter of Intent. But in this case, the Letter of Intent is dated 27-6-1992 while the agreement is dated 25th August 1994. The correspondence for modification of the clauses referred by Mr.Subramanian and the fact that the agreement was executed much later to the Letter of Intent clearly establishes that the parties never intended time to be the essence of the contract. Accordingly, I hold on issue No.1 that time is not the essence for supply and commissioning of the Mill.'

'156. I have carefully gone through the pleadings in respect of the contentions regarding the delay. There is absolutely no whisper anywhere that the respondent repudiated the contract on the ground that the claimant has not kept up the time schedule. On the other hand, there were numerous correspondence between the parties to establish that the delay has occurred either by the respondent or by the claimant. In this connection, I can appreciate the submissions made by the claimant which I have extracted while narrating the contention of the claimant in the paragraph supra. The claimant has established by numerous documents referred above as to how the delay was caused by the respondent in framing

the technical specifications, approving the drawings, ascertaining the requirements, signing of the agreement and release of payments. The claimant has further clarified as to how the delay has occurred in rectification of foundations wrongly cast by the respondent and also the delay in procurement of the machinery under the scope of the respondent. Apart from the above facts, the claimant has also referred to the transport strike in the pleadings and also the delay in inspection and clearance by the respondent. Taking into consideration all these available materials, it is clear that the delay was mainly caused by the respondent in framing the technical specifications and in approving the drawings. There are as many as 5 revisions in the Lay out drawings and the same has been extracted in the paragraphs above while dealing with the submissions of the learned counsel appearing for the claimant. Further, clause 8.8 of Ex.C-5 agreements clearly states that

“If there is a delay in approval of the drawings beyond 60 days of its submission to the purchaser such delay will be taken into account for determining the extension of delivery period.”

This itself shows that the parties never intended time to be the essence of the contract. Taking all these aspects into consideration, I find on issue No.1 that time is not the essence for supply and commissioning of the Mill.

157. As regards the issue No.4 the delay, as found from various documents on record, is mainly due to finalising the Lay out plan, foundation plans and supply of the items which the claimant

has to supply as per the agreement. As contended by the claimant, the delay in supply of certain critical items which were meticulously referred by the respondent is due to the fact the Lay out plan and foundation plan was delayed considerably and, as a matter of fact, the agreement itself is dated 25-8-1994 while the Letter of Intent was given on 27-4-1992 itself.

158. Ex.C-3 gives the description of the machineries to be supplied and states that the specification of these major machineries shall be as per the tender documents issued for the expansion work. It also refers to the technical discussion held at the office of the Tamil Nadu Sugar Corporation Ltd. In spite of Ex.C-3, supplies got delayed due to various reasons. These reasons I had elaborately discussed with reference to the documents in the paragraphs supra as to how the specifications had to be wetted by the authorities of TASCO before the claimant placed orders for such machineries. I need not repeat those letters referred to above once over again. They speak for themselves as to how the delay in approval by the respondent for supply of some of the machineries has resulted in belated delivery. Apart from the fact that the respondent has delayed in specifically earmarking the areas in which the machineries had to be installed, the changes made by the respondent regarding the locations, drawings and specifications and delay in approvals are also the causes that led to delay in supply of machineries. It is not only the technical specifications that decide the action to be pursued by the claimant for supply of machineries but also the approval by TASCO was necessary before delivery of the machineries is effected by the claimant. The chronology of

events with reference to the documents referred to in the paragraphs supra amply establish the delay caused by TASCO in this respect. As a matter of fact, the discussion I have made above shows that even though Ex.C-3 Letter of Intent is dated 27-4-1992, the supply of the materials was being dragged on due to various causes mentioned above and the agreement Ex.C-5 which is the basis on which the contract is spelt out, came into existence only on 25-8-1994. The absurd position is that the contract Ex.C-5 states that the supply and commissioning contract awarded to the claimant should be finished even much earlier to the date of Ex.C-5 contract. All these aspects, coupled with the documents I have referred to above, clearly make out that the delay in commissioning of the machineries is purely due to the delay on the part of the respondent. Further, Mr.Srinath stresses the point that the delay caused and the default committed by the respondent are failures on the part of the respondent to perform their reciprocal obligations under the contract which naturally led to the delay in completion of the contract work by the claimant. Mr.Srinath in this connection, drew my attention to Section 51 of the Indian Contract Act which reads as follows:

“Promisor not bound to perform, unless reciprocal promises ready and willing to perform... When a contract consists of reciprocal promises to be simultaneously performed, no promiser need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.”

My discussion in paragraphs supra and reference to various

documents regarding the failure of the respondent to keep up their obligations, squarely fits in with the arguments advanced by Mr.Srinath and makes it clear that the respondent has not kept up their reciprocal obligations. Therefore, Section 51 of the Contract Act, as submitted by Mr.Srinath, will squarely apply to the facts of the case and as such, the respondent has to be blamed for not keeping up their reciprocal obligations and thereby causing the delay in the execution of the contract. I therefore find under issue No.4 that there has been delay in supply and commissioning of the machineries and the respondent is responsible for the delay.

159. In paragraphs supra, I have already found that the delay was mainly caused by the respondent in framing the technical specifications and in approving the drawings. Further, I have found there were as many as 5 revisions in the lay out drawings. For those reasons, I find that there is delay on the part of the respondent in approving the drawings. Issue No.11 is found accordingly. '

33. A perusal of the above findings of AT make it clear that AT has noticed that the contract itself has been executed after Letter of Intent and on this basis rendered a finding that time is not the essence of the contract. Therefore to say that merely because there is no provision for extension of time in the contract, this finding becomes perverse is unacceptable. A further perusal of the aforementioned paragraphs of the impugned award makes it clear that AT has come to the conclusion that Sugar Mill has failed to perform its reciprocal obligations under the

contract besides holding that there has been delay in approval of the drawings. AT has also referred to several revisions of the lay out drawings. All these turn heavily on facts. There is nothing to demonstrate perversity.

34. In this regard, as captioned OP is governed by pre 23.10.2015 regime, *Associate Builders* case which reiterates *Western Geco* case [*ONGC Ltd. v. Western Geco International Ltd.*, reported in (2003) 5 SCC 705] can be safely relied on. In *Western Geco* with regard to challenge to an arbitral award, three distinct juristic doctrines were culled out. Three separate tests for each of the doctrines were also laid down. The three juristic doctrines culled out by Hon'ble Supreme Court are a)judicial approach, b) 'Natural Justice Principle' ('NJP' for brevity) and c) irrationality/perversity. The three tests in a Section 34 legal drill with regard to these three doctrines are a) fidelity of judicial approach; b) time honoured *audi alteram partem* and c) celebrated *wednesbury* principle of reasonableness respectively.

35. With regard to fidelity of judicial approach, a perusal of the aforementioned paragraphs of impugned award (extracted and reproduced supra) leaves this Court with the considered view that it

cannot be gainsaid that there is lack of fidelity as there is overwhelming examination of details and particularities which makes it clear that there is fidelity qua judicial approach of AT in making the impugned award. Regarding the second doctrine of NJP, it is nobody's case in the instant OP on hand that there is violation of NJP and therefore, there is no need to dilate on that aspect of the matter. Regarding third doctrine, namely irrationality/perversity, if *wednesbury* principle of reasonableness is applied, the impugned award passes the same with ease like a breeze as there is nothing demonstrable to come to the conclusion that no reasonable person would have taken such a view.

36. As the contract itself was entered into much after the Letter of Intent and mere absence of EOT does make time the essence of contract viewed in the light of several revisions in the lay out drawings *inter alia* make it clear that the finding that Sugar Mill has failed in reciprocal obligations qua delay is unimpeachable, this clinches the matter in favour of Binny and therefore this Section 34 Court with limited supervisory jurisdiction has no difficulty in finding for the contractor/Binny. To be noted, it is made clear that these are only illustrative and not exhaustive. Suffice to say that there is nothing to show that the dispositive reasoning

of the AT is unreasonable or in other words, the dispositive reasoning is such that no reasonable person would arrive at such conclusion on the available material before him.

37. This leaves this Court with the last of the arguments turning on limitation. Limitation certainly is founded on public law, but the question is whether limitation has been misapplied in the instant case.

38. With regard to the claim of contractor/Binny which was claimant before AT, vide the impugned award, AT has noticed that the mill was commissioned on 10.05.1996, cause of action therefore arose on that date, the trigger notice was issued on 04.06.1998 and therefore, the claim is not barred by limitation. This was done by taking the date of trigger notice as base date for the purpose of Section 21 of A and C Act as date of receipt of notice was not readily available and obviously noticee could not have received it prior to the date of the notice. To be noted, though both sides did not advert to the specific article under Limitation Act that would apply, there is no dispute or disagreement that period of limitation is three years from the date on which cause of action arose. Therefore, the test is whether the arbitral proceedings commenced within three years from the date on which the cause of action

arose. No elucidation is required to say that the date of commencement of arbitration proceedings is the date of receipt of the trigger notice by the noticee and this principle is ingrained in Section 21 of A and C Act. In this case, the trigger notice is dated 04.06.1998 and the cause of action has arisen on 10.05.1996. As the date of receipt of the trigger notice is not readily available (as mentioned herein), the date of the notice itself has been taken and obviously the noticee could not have received the notice prior to the date of notice. Therefore, it is clear that impugned award is not vitiated owing to holding that the claim of the contractor is not time barred. Regarding the counter claim of Sugar Mill, AT has taken the date on which the counter claim was filed as 08.09.2004 as the date on which the counter claim was made. To be noted, the impugned award was made on 16.04.2012 and on that day ***Praveen Enterprises*** case being ***State of Goa Vs. Praveen Enterprises*** reported in (2012) 12 SCC 581 was governing the field as ***Praveen Enterprises*** was rendered on 04.07.2011. In this view of the matter, this Court is unable to find any error in AT holding that the counter claim of sugar mill is barred by limitation. Be that as it may, post impugned award in ***Rolta Vs. Voltas Limited***, rendered on 14.02.2014 wherein Hon'ble Supreme Court

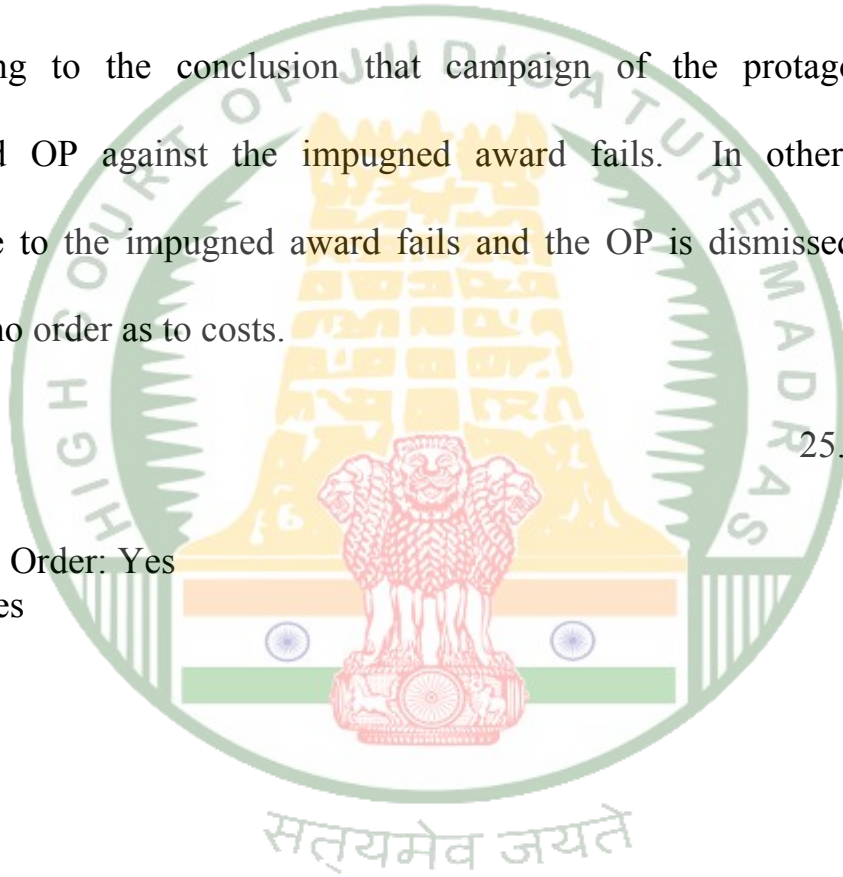
clarified **Praveen Enterprises** and said in cases where the counter claimant has not already made the claim at an earlier point, it is necessarily the date of filing of the counter claim. Though **Rolta Vs. Voltas** was not available before AT on the date on which the impugned award was made, on an extreme demurrer, even if this principle is applied it does not enure to the benefit of Sugar Mill as there is nothing to demonstrate that Sugar Mills has made the claim earlier, as the mill was commissioned on 10.05.1996 (as mentioned supra) and the final performance trial was completed in the venue between 15.03.1999 and 31.03.1999. The counter claim being essentially one for Liquidated damages, made on 08.09.2004, is obviously time barred even if **Rolta Vs. Voltas Limited** principle is applied. In this regard, this Court has borne in mind that a vague reference made in a notice / letter will not arrest limitation for the purposes of **Rolta Vs. Voltas Limited** principle. This Court is clear in its mind that a judgment is prospective. This **Rolta Vs. Voltas Limited** was not available before the AT, but as a matter of abundant caution this Court has tested the impugned award on a demurrer with regard to counter claim being barred by limitation finding by hypothetically applying this **Rolta Vs. Voltas Limited** principle also.

DECISION:

39. All other issues are either dovetailed or are corollaries/sequitters to the aforementioned three facets or narrowed down points for consideration and therefore, this Court has no hesitation in coming to the conclusion that campaign of the protagonist of captioned OP against the impugned award fails. In other words, challenge to the impugned award fails and the OP is dismissed. There shall be no order as to costs.

25.02.2021

Speaking Order: Yes
Index: Yes
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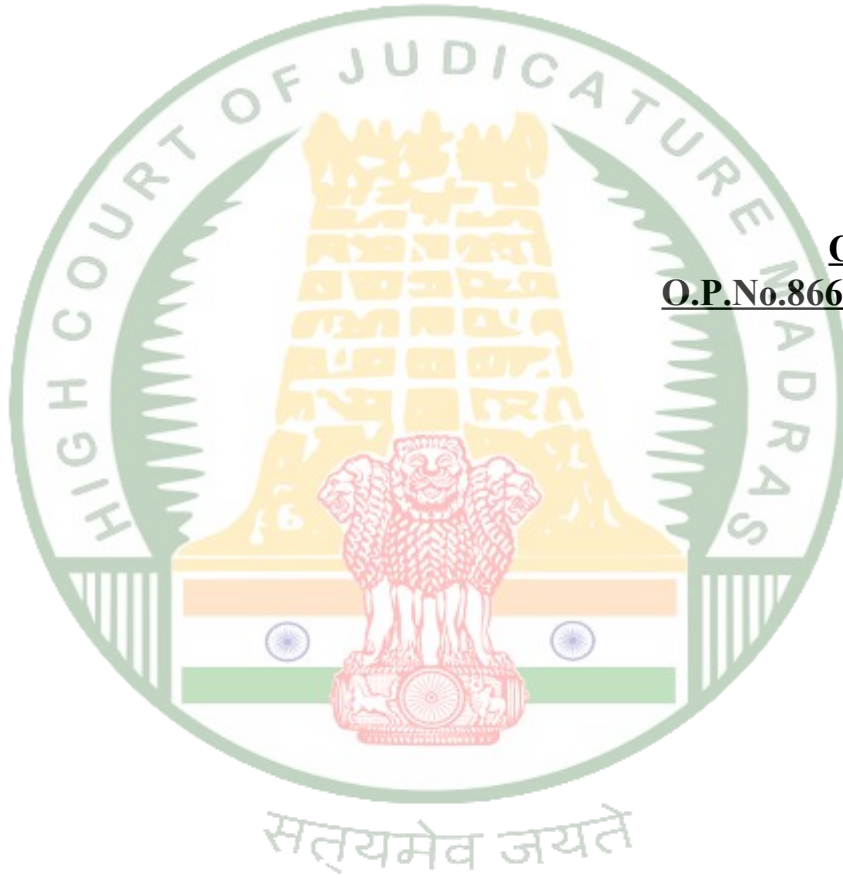


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O.P.No.866 of 2013

M.SUNDAR.J.,

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Order in
O.P.No.866 of 2013

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