

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.01.2021

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.261 of 2016

M/s.Empee Hotels Limited
124/1&2-Jawaharla Nehru Salai
Ekkattuthangal
Chennai- 600 032

... Petitioner

Vs.

1. M/s.NCC Ltd., (formerly M/s.Nagarjuna Construction Company Limited)
No.190A, Poonamalle High Road
8th Floor, Pettukollam Towers
Kilpauk, Chennai – 600 010

2.Mr.K.D.Arcot
Arbitrator
House No.U/46, Plot No.4185
Anna Nagar, Chennai – 600 040

... Respondents

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award passed on 31.10.13 by the second respondent and render justice.

For Petitioner : Ms.V.Rani
for Mr.J.Ravindran

For 1st Respondent : Ms.Hema Srinivasan

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) was presented in this Court more than half a decade ago, on 24.01.2014 to be precise.

2. Captioned OP is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, assailing an 'arbitral award dated 31.10.2013' (hereinafter 'impugned award' for the sake of brevity and convenience) made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole Arbitrator, who is a Chartered Engineer.

3. In this web-hearing, on a videoconferencing platform i.e., virtual Court, Ms.V.Rani, learned counsel representing the counsel on record for sole petitioner and Ms.Hema Srinivasan, learned counsel on record for contesting first respondent are before me.

4. Aforementioned both learned counsel consented for captioned OP being taken up for final disposal in this web hearing on a video conferencing platform i.e., Virtual Court. Therefore, captioned OP was taken up for final disposal and heard out.

5. Before I plunge into the crux and gravamen of the core challenge qua impugned award in the captioned OP, there are two peripheral aspects of the matter which need to be set out. The first peripheral aspect is, captioned OP has been presented in this Court on 24.01.2014 (as noted supra) and therefore, the same shall be governed by pre 23.10.2015 regime of A and C Act or in other words, it will be governed by A and C Act as it stood prior to its amendment by Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. The second peripheral aspect is, the sole Arbitrator, who is a chartered Engineer, who constituted the AT, has been arrayed as Respondent No.2 in the captioned OP. Owing to the nature of the submissions made today, this Court is of the considered view that the sole Arbitrator, who constituted the AT, need not be in the array of parties. I, therefore, follow 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] and delete Respondent No.2 from the array of parties in captioned OP (to be noted, deletion procedure is captured in order /record of proceedings of Hon'ble Supreme Court reported in 2007 SCC OnLine SC 4).

Therefore, the contractor, who has been described as contesting first respondent supra, now the lone respondent in captioned OP.

6. This Court having set out two peripheral aspects, now deems it appropriate to give short facts shorn of elaboration. To be noted, short facts or in other words factual matrix in a nutshell containing essential facts imperative for appreciating this order will suffice as captioned OP is one under Section 34 of A and C Act for which the statutory perimeter is very short and the legal landscape is very limited. To put it differently, the legal drill of testing a challenge to an arbitral award should perambulate within the limited contours and confines of Section 34 of A and C Act as it is neither an appeal nor a revision and therefore, short facts shorn of elaboration will suffice. Short facts are that protagonist of captioned OP i.e., petitioner in captioned OP was awarded a contract vide 'Letter of Award dated 23.08.2006 bearing reference EHL/PROJ/2006-07-021' (hereinafter 'said contract' for convenience) for civil and structural construction; that the contract value is little over Rs.15.97 crores (Rs.15,97,71,527/- to be precise); that the contract period is 550 days spanning from 24.08.2006 to 25.02.2008; that the contract ran into rough weather owing to alleged delay on the part of the contractor, who is now the lone respondent in captioned OP; that said contract provides

for dispute resolution by arbitration which is a 'Alternate Dispute Resolution' mechanism ('ADR' mechanism) or in other words, there is an arbitration agreement between the petitioner and contractor being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that owing to said contract running into rough weather, arbitration agreement was triggered; that AT was constituted; that AT entered upon reference and adjudicated upon the arbitral disputes; that petitioner made a claim of little over Rs.99.40 crores i.e., Rs.99,40,04,545/- to be precise and contractor made a counter claim of little over Rs.6.54 crores (to be precise Rs.6,54,44,933/-) besides certain actuals adumbrated in one of the heads of counter claim; that claims made by the petitioner were primarily predicated on 'Liquidated Damages' ('LD' for brevity), alleged excess costs incurred for completion of balance work, cost over run / consequences of delay, costs incurred for covering the building with external cladding facade work, bank term loan interest, interest on capital investment, reimbursement of certain payments said to have been made on behalf of contractor etc.,; that counter claim made by the contractor essentially turns on what according to the contractor is outstanding bills for work done, reimbursement of loss for idling owing to elongation of the work, loss of profit, loss of

expenses in the Head Office / Regional Office, loss of interest owing to these four categories and interest on actuals from a specified date to the date of actual payment etc.,; that there was oral and documentary evidence before AT; that the lis before AT turned heavily on delay/LD; that AT, after detailed oral and documentary evidence before it, made the impugned award negating some heads of claims, upholding some heads of claims, negating some heads of counter claims and upholding some other heads of claim; that the net result is, vide the impugned award, it was held that the petitioner is liable to pay a sum of little over Rs.1.07 Crores (to be precise Rs.1,07,76,416/-) to the contractor; that assailing the impugned award, captioned OP has been presented by the petitioner on 24.01.2014 as mentioned supra.

7. This Court having set out two peripheral issues and the factual matrix in a nutshell, now deems it appropriate to extract the claim, counter claim, issues, summary of award, conclusion from the impugned award and reproduce the same here in this order for the sake of convenience, clarity and ease of reference. The same are as follows:

'(i) Claim:

At para 141 claimant files a revised abstract of claims as below:

A.Claim payable by NCCL

a. Liquidated damages for whole works	Rs.79,88,576
(Rs.15,97,71,527 x5%)	
b. Liquidated damages for	Rs.8,80,00,000
Failure to achieve milestone targets	
considering 440 days delay per day	Rs.2,00,000
c. Excess cost incurred for completion	Rs.1,21,74,346
of balance work	
d. Cost over run and consequences of	Rs.4,00,00,000
delay on other contractors such as	
Service, Contracts, Facade contract etc.,	
e. Cost incurred for covering the building	Rs.10,22,18,579
with External cladding facade work	
(including material)	
f. Additional interest incurred	
till 31/12/2019 due to	
delayed completion	
(i) Bank Term Loan interest	Rs. 38,02,11,277
(ii) Interest on capital investment	Rs.36,30,00,000
g. Reimbursement of payment made	Rs. 11,44,996
to IPWT towards waterproofing	
work on behalf of NCCL	
TOTAL AMOUNT	Rs.99,47,37,774

B. Payable to M/s.NCCL

Total amount payable as per	Rs.7,33,229
valuation No.33'	

Total claim amount due (A-B) Rs.90,40,04,545

'(ii) Counter Claim:

Respondent submitted their counter claim along with their counter.

Salient features of the counter extracted from Vol.RV1 are enumerated below:

Contract of counter claim:

Claim No.	Description	Amount Rs.	Ref. To Annexure
1	Legitimate outstanding bill payment to be released for works done	1,88,69,982	I
2	Loss to be reimbursed for idle mobilization due to prolongation of contract	93,87,530	II
3	Loss of profit due to prolongation of contract	1,27,52,673	III
4	Loss on HO and RO expenses during prolongation period of contract	62,13,337	IV
5a	Loss of interest on the claimed amount for claim No. 1 to 4 from dates on which the claims are due upto 30-04-11 SBI PLR+2% compounded monthly	1,82,21,411	V
5b	Interest on the claimed amount from claim No.1 to 4 from 01/05/2011 to date of payment @ SBI PLR+2% compounded monthly	At actuals	
	Total amount in Rs.	6,54,44,933	

<i>Claim No.</i>	<i>Description</i>	<i>Amount Rs.</i>	<i>Ref. To Annexure</i>
		+5b	

'(iii) Issues Jointly Framed:

Based on above pleadings, claims and counter claims the following issues were jointly framed by both the parties:

Issue No.1

Was there a delay in execution of the contract?

If yes, who was responsible?

Issue No.2.

Whether or not time is the essence of the contract?

Issue No.3

Did the respondent abandon the contract or was the contract foreclosed by the claimant?

Issue No.4

Is the claimant eligible for recovery of Rs.79,88,576/- towards LD for delayed completion?

Issue No.5

Was there a delay in achieving milestone targets as stipulated in the contract? If yes, who was responsible for the delay?

Issue No.6

Is the claimant entitled to claim LD of Rs.8,80,00,000/- against delay in milestone also?

Issue No.7

What was value of incomplete works if any? Who was responsible for non completion of balance works? Is the claimant

eligible to claim Rs.1,21,74,346/- towards cost of executing balance works?

Issue No.8

Is the claimant eligible to claim a sum of Rs.4,00,00,000/- towards extra costs incurred in subsequent contracts viz service contracts, facade contracts, arising out of alleged delay in completion of main contract by the respondent?

Issue No.9

Whether the respondent rendered service ensuring quality as specified in the contract.

Issue No.10

Whether the claimant has established the existence of defects in the respondent's work.

Issue No.11

Is the claimant eligible to claim a sum of Rs.10,22,18,579/- towards cost incurred in covering the building with external facade work arising out of defective work?

Issue No.12

Is the claimant eligible to claim a sum of Rs.74,32,11,277/- towards interest on term loan and interest on capital investment arising out of alleged delay in execution by the respondent?

Issue No.13

Is the claimant eligible to recover a sum of Rs.11,44,996/- from the respondent on account of payment made by them on behalf of the respondent to water proofing agency?

Issue No.14

In any event is not the provision contained in the contract for

liquidated damages for the whole work, a cap on all liabilities arising out of alleged delays?

Issue No.15

What is the balance amount payable to the respondent for works executed?

Issue No.16

Is the respondent due a sum of Rs.93,87,530/- against reimbursement of idle mobilization due to prolongation of the contract?

Issue No.17

Is the respondent due a sum of Rs.1,27,52,673/- against loss of profit arising out of prolongation of the contract.

Issue No.18

Is the respondent due a sum of Rs.62,13,337/- against loss on HO and RO expenses due to prolongation of the contract.

Issue No.19(a)

Is the respondent due a sum of Rs.1,82,21,411/- as interest loss on amounts due as indicated in Items 10,11,12 and 13 of their counter claim (Issue Nos.15, 16, 17 and 18) up to 30.04.2011.

Issue No.19(b)

Is the respondent due a further interest on above items from 01.05.2011 till date of payment.

Issue No.20

Which party is to bear the cost of the arbitration or how is it to be apportioned?'

(iv) Summary of award

<i>Summary of Awards</i>					
ISSUES	Claimed by		Award in favour of		Remarks
Issue No.1	NIL	NIL	NIL	NIL	No monetary claim
Issue No.2	NIL	NIL	NIL	NIL	No monetary claim
Issue No.3	NIL	NIL	NIL	NIL	No monetary claim
Issue No.4	7,988,576.00		REJECTED		
Issue No.5	NIL	NIL	NIL	NIL	No monetary claim
Issue No.6	88,000,000.00		REJECTED		
Issue No.7	12,174,346.00		2,954,451.00		
Issue No.8	40,000,000.00		REJECTED		
Issue No.9	NIL	NIL	NIL	NIL	No monetary claim
Issue No.10	NIL	NIL	NIL	NIL	No monetary claim
Issue No.11	102,218,579.00		REJECTED		
Issue No.12	743,211,277.00		REJECTED		

<i>Summary of Awards</i>					
<i>Issue No.13</i>	<i>1,144,996.00</i>		<i>1,144,996.00</i>		
<i>Issue No.14</i>	<i>NIL</i>	<i>NIL</i>	<i>NIL</i>	<i>NIL</i>	<i>No monetary claim</i>
<i>Issue No.15</i>		<i>11,869,982.00</i>		<i>8,310,425.00</i>	<i>Excluding Retention Money</i>
<i>Retention Amount</i>		<i>7,000,000.00</i>		<i>6,565,438.00</i>	
<i>Issue No.16</i>		<i>9,387,530.00</i>		<i>REJECTED</i>	
<i>Issue No.17</i>		<i>12,752,673.00</i>		<i>REJECTED</i>	
<i>Issue No.18</i>		<i>6,213,337.00</i>		<i>REJECTED</i>	
<i>Issue No.19</i>		<i>18,221,411.00</i>		<i>REJECTED</i>	
<i>Issue No.20</i>	<i>NIL</i>	<i>NIL</i>	<i>NIL</i>	<i>NIL</i>	<i>Each party to bear their own cost of arbitration</i>
<i>TOTAL</i>	<i>994,737,774.00</i>	<i>65,444,933.00</i>	<i>4,099,447.00</i>	<i>14,875,863.00</i>	

'(v) CONCLUSION

GENERAL

Summary of award issue wise is at previous page

In analysing and arriving to a conclusion on each issue I have carefully gone through all the materials placed before me from time to time whether the same are mentioned in this award or not,

whether vital or trivial.

Due weightage was given to oral submissions made by witnesses from both sides.

Due consideration was given to oral arguments and written submissions of oral arguments submitted by both parties.

Where necessary interpretation of contract clauses was made to arrive at harmonious conclusion keeping the sanctity of contract concluded by both parties.

As tabulated, the respondent is to receive from the claimant a sum of Rs.14,875,863.00/-

Claimant is to receive from the respondent a sum of Rs.4,099,447.00

*Next amount payable by claimant to respondent is therefore:-
[Rs.14,875,863.00 – 4,099,447.00] = Rs.10,776,416/-*

The above amount shall be paid by claimant to respondent within a period of 30 days from date of receipt of this award. For any payment beyond 30 days, above amount shall carry constant simple interest at 16% P.A till payment [Rate of 16% is based on current SBLR + 2% which is as per normal industry practice. Copy enclosed)

This award in 257 pages (typed in one side) duly stamped and signed at CHENNAI on thirty first day of October 2013.

Original copy was handed over to the claimant while duly certified true copy handed over to the respondent.'

8. In the aforesaid backdrop, learned counsel for petitioner made submissions assailing the impugned award and a summation of the

submissions is as follows:

a) The work under said contract had to be completed within 550 days. There was delay, but this has not been considered by the AT in the impugned award;

b) AT fell in error in holding that time is not the essence of the contract;

c) AT failed to see that contractor abandoned the work;

d) Ex.C18 adumbrates the reasons for delay and this has not been appreciated in perspective by AT.

9. In response to the aforementioned pointed submissions, learned counsel for contractor, who is now the lone respondent, said she would confine her submissions to meet the grounds of challenge projected / articulated by learned counsel for protagonist in captioned OP. Submissions were made on these lines and a summation of the same is as follows:

a) Delay was not attributable to the contractor, but it was attributable to the petitioner *inter-alia* owing to very many reasons, such as delay in handing over the site;

b) AT has considered documentary and oral evidence before it elaborately discussed the delay aspect and has returned

findings on facts and there is nothing to demonstrate perversity or patent illegality within the contours of Section 34 warranting judicial intervention.

10. By way of reply, learned counsel for petitioner drew the attention of this Court to Ex.C143 and submitted that the same has not been appreciated by AT.

11. I now proceed to consider the rival submissions, discuss the same and set out my dispositive reasoning for arriving at a conclusion in the captioned OP.

12. I remind myself that I am not sitting on appeal. A challenge to arbitral award under Section 34 is neither an appeal nor a revision. It is not even a full-fledged judicial review. It is a limited legal review within the pigeon holes adumbrated in Section 34 and certain facets of the same as laid down / explained and elucidated by Hon'ble Courts from time to time. In other words, if a protagonist assailing an arbitral award is able to demonstrate that challenge to arbitral award snugly fits into one or more of the pigeon holes or one of the facets of the pigeon holes laid down / explained by various courts, protagonist of OP will be entitled to have the impugned award dislodged. Absent such demonstration by a

petitioner in a challenge to an arbitral award, it is axiomatic that there will be no judicial intervention.

13. I also remind myself that a Section 34 legal drill should not only perambulate within the short perimeter of Section 34, but it is also a delicate balance between sanctity of finality of arbitral awards ingrained in Section 35 of A and C Act dovetailed with minimum judicial intervention principle contained in Section 5 on one side of the scale and judicial review which is one of the bedrock principles in substantive due process of law on the other side of scale. In the light of such a delicate balance, I also remind myself that Hon'ble Supreme Court in ***Fiza Developers*** case [***Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited*** reported in (2009) 17 SCC 796] has held that Section 34 proceedings is a one issue summary procedure. To be noted, ***Fiza Developers*** principle was reiterated in ***Emkay Global*** case [***Emkay Global Financial Services Ltd., v. Girdhar Sondhi*** reported in (2018) 9 SCC 49] and ***Canara Nidhi Limited*** case [***M/S. Canara Nidhi Limited vs M. Shashikala*** reported in 2019 SCC Online SC 1244]. Hon'ble Supreme Court has also explained that by saying one issue summary procedure, it does not mean that the lis should turn on one

issue, but the arbitral award or impugned award being put to challenge under Section 34 itself becomes an issue in a Section 34 legal drill. In the legal canvass which is now fairly and firmly in place, a survey of the submissions made by petitioner in its campaign against the impugned award, leaves me with the considered view that it is more in the nature of an appeal. It has been repeatedly held by Hon'ble Supreme Court that a review on merits qua impugned award is not permissible in a Section 34 legal drill.

14. Be that as it may, this Court did examine the impugned award and test the same in the light of the submissions that were made. Owing to this not being an appeal, it will suffice to say that the delay aspect and LD aspect have been elaborately and extensively dealt with by AT in the impugned award. To be noted, 20 issues have already been extracted and reproduced supra. This Court deems it appropriate to extract and reproduce the manner in which Issue No.1 which deals with delay has been dealt with by AT. Answer to Issue no.1 is as follows:

'Issue No.1

Was there a delay in execution of contract. If yes, who was responsible

214) Claimant opened their arguments by refereeing to to various clauses of the contract as well as other evidence on record

to highlight delays on part of the respondent notably:-

Clauses 5.5 & 5.6 of contract viz submission of delay and weekly progress reports and photographs which was not complied by the respondent.

A reference was made to various MON from 18.08.2006 to 24.04.2009 to indicate various lapses on part of respondent which generally refers to delays:-

- 1.Delay in mobilization*
- 2.Delay in appointing Anti termite treatment agency*
- 3. Delay in initial mobilisation, delay in submission of various schedules, deployment of surveyor planning engineering, shortage of manpower etc.*
- 4. Delay in fabricating additional column boxes and deployment of additional carpenters barbenders*
- 5. Quality and safety of work requires attention. Strength of field supervisory staff to be increased.*
- 6. Claimant to revert as regards alternate arrangement required before ramp cutting.*
- 7. Slippages in progress are noticed in various programs given by the respondent from time to times due to shortage of manpower and materials work in 2nd shift is not organized by respondent.*
- 8. Slow progress in waterproofing work*
- 9. Delay in block work due to delay in renewal of shuttering etc.*
- 10. Back log statement as indicated in M O M dated 05.01.2008 and in subsequent meetings was brought to notice of respondent.*

11. *Vide M O M dated 27.06.2008 a list of balance works are appended.*

215) *Claimant concluded that above mentioned delays on part of the respondent are repeated in a number of M O M which is main cause of enormous delay in project completion. Claimant further reinforced their arguments by referring to various correspondences on the subject notably-*

216) *On examination*

Refers to Ex.C-7, Ex.C-17, Ex-C-22 and Ex.C-45

217) *On Non-availability of fronts*

It is responsibility of respondent to create required fronts by proper planning

218) *On Non availability of RMC*

Ex. R-307, Ex.R.310, Ex.C-271 Ex.R-315, Ex.C-259, Ex-316, Ex.C-253, Ex.C-73, C-256, Ex.C-74, Annexure C-V, CV-VI, CV-IX etc.

219) *On delay in supply of steel*

Ex.C-56, Ex.C-57, Ex.R-311, Ex.C-275, Ex.C-59, Ex.C-60 Ex.C-278, Ex.C-C-74

220) *On delay in issue of drawings*

Ex.C-257, Ex.C-216, Ex.215, Ex.218, Ex.C 219, Ex.C-223, Ex.C-247 Ex.C-244 (pre bid meeting) Ex.C-244, Ex.C-14 (raft thickness) Ex.R-289, Ex.R-290, Ex.C-18.

Ex.C-25, Ex.C-26, Ex.R-296 to 299, Ex.R-300, Ex.R-302, Ex.R-303, Ex.C-37, Ex.C-38 and Ex.C-44, C-48, Ex.C-49 & C-101, Ex.R 311 (Ramp) and C-275 Ex.R 313, Ex.R-319, Ex.C-71 Ex.C-75 & C-76, Ex.C92, Ex.C93 to Ex.C102 (accusations and counter accusations on reasons for delay).'

15. To be noted, the impugned award from paragraph Nos.211 onwards deals with delay. After paragraph 218, there appears to be a typographical error. Instead of Nos.219 and 220, paragraph Nos.210 and 211 have been given, but it may not be necessary to go into this aspect, suffice to say that a perusal of the manner in which the delay aspect has been dealt with by AT brings to light that it turns heavily on evidence before the AT. This is the case with regard to LD and with regard to the plea of whether the contractor abandoned the work also. This Court deems it unnecessary to burden this order by extracting all that extensively. Suffice to say that this is a classic case where **Hodkinson** principle [**Hodkinson Vs. Fernie** reported in **140 ER 712**] comes into play. **Hodkinson** principle was first propounded by an English Court way back in 1857. What is of relevance is **Hodkinson** principle was subsequently recognized by Indian Courts, particularly by Hon'ble Supreme Court in oft-quoted **Associate Builders** case [**Associate Builders Vs. Delhi Development Authority** reported in **(2015) 3 SCC 49**]. 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.'

16. To state **Hodgkinson** principle crisply, in simplistic terse terms it means that AT is the best Judge of the quantity and quality of

evidence before it. In the instant case, there is nothing to demonstrate patent illegality qua impugned award. To be noted, as already alluded to supra, captioned OP is governed by pre 23.10.2015 regime and therefore, patent illegality, which is a statutory provision vide sub-section (2-A) of Section 34 of A and C Act is not available, but nonetheless patent illegality is available by way of law laid down by Hon'ble Supreme Court in **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** vide Paragraph 31, which reads as follows:

'31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Remusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.'

17. The test for patent illegality, as laid down by Hon'ble Supreme Court prior to 23.10.2015, absent the two limbed proviso is, whether the view taken by the AT is a view which no reasonable person would take and which shocks the conscience of the Court. In other words, a mere erroneous application law and re-appreciation of evidence do not stand excluded qua patent illegality ground prior to 23.10.2015. Even on this wider scope, there is nothing to demonstrate that the view taken by AT is vitiated by patent illegality. There is nothing to demonstrate that the view taken is a view which no reasonable person would take in the facts and circumstances of the case, more particularly in the light of evidence before AT and therefore, this Court is unable to find that views which

shock the conscience of the Court have been taken by AT qua delay and alleged abandonment of work by the contractor. This takes us to time being essence of the contract. The question as to whether time is the essence of the contract is turns heavily on the facts and circumstances of each case. AT has framed a specific issue as to whether time is the essence of the contract, this is Issue No.2 and the same has been answered in the impugned award in the following manner:

' Issue No.2

Whether or not time is essence of contractor

212 Ex.C-102 (EOT sought upto 15-10-2008) Ex.C-104 (EOT sought upto 30.11.2008)

Ex.C-R-394 (EOT sought upto 30.11.2008), Ex.C-108 (EOT sought upto 31.01.2009 with conditions Ex.C-109 (EOT sought upto 31.01.2009 and 01.03.2009), Ex.C113 (EOT sought upto 30.04.09 and 31.05.09) Ex.C-115 (EOT sought upto 30-06-09)

Ex.C-118 letter from resp. seeking amount of Rs.1.7 crores or letter to be treated as demobilization.

18. Further elaboration on whether time is the essence of the contract in the impugned award is as follows:

' Issue No. 2

Whether or not time is the essence of the contract?

(1) This issue has to be analysed from two angles Viz

(a) Whether time was essence of the contract?

(b) If yes whether time continued to be essence of contract

during extended period.

(2) As per clause 6 of the contract Time is the essence of the contract .

In case works are not completed within scheduled date respondent is responsible to the claimant for **damages caused**. Vide clause 7 the respondent is eligible for extension of time under 5 different causes.

(3) Vide clause 8 there is a provision for levy of liquidated damages for delays beyond contractual period/approved extended period.

(4) From the above, it is clear that stipulated contract duration is subject to changes and hence the words **TIME IS ESSENCE OF THE CONTRACT** has lost its significance. It is no longer the essence.

(5) In this connection, Respondent have cited supreme court judgment No.AIR1979SC 720 between Hind Construction and State of Maharashtra and AIR 1999 SC 3804 between Aronsan Enterprises Vs. Union of India.

(6) The second aspect to be considered is whether Time continued to be essence of contract during extended period of contract. To answer this question one will to look into records approving extension of time.

(7) Respondent vide letter dated 18.05.2008 sought extension of time upto 15.10.2008 (Ref RV II page 371)

(8) Respondent vide letter dated 14.07.2008 cited more holds and sought further extension of time upto 30.11.2008 for renewal of labour license extension of CAR policy, WC policy and extension of bank guarantees etc.

(9) As per reply dated 17.07.2008 from claimant at page 391 of Vol.R.VII the subject matter is under consideration.

(10) Vide letter dated 19.03.2008 at page 394 in Vol RV II Respondent sent a reminder to claimant as regards delay in grant EOT as requested vide letter dated 14.07.2008.

(11) Vide letter dated 30.09.2008, Respondent agrees to complete works as per enclosed list by 31.01.2009 sought to claimant ensuring that there will be no more modification works.

(12) Vide letter dated 27.12.2008 at page 407 of Vol RV II claimant grants EOT upto 31.01.2009 for superstructure and 01.03.2009 for all external works. Conditions enumerated are:

a) This is not to discount various delays in achieving milestones but to facilitate completion of balance works.

b) This letter does not change scope of work as originally stipulated in the contract.

c) This letter has no commercial implications and respondent cannot claim any extras other than those specifically agreed.

d) Extension of time valid will hold good till commercial closure of contract.

e) All other terms and conditions of contract except project duration will hold good.

(13) Above letter was acknowledged by respondent vide reply dated 07-01-2009 at page 414 and clarifying that:-

a) Respondent agrees to complete frozen scope of work by stipulated date.

b) There shall be no commercial implications by either party arising out of this EOT except payment as per BOQ items and approved variations.

c) Vide letter dated 27-04-2009 page 419 of RV II claimant confirms that as per EOT granted all works in main building is to be completed by 30-04-2009 and works at STP and substation by 31-05-2009.

(14) From the above documents following facts emerge

Original contract completion date was 14.03.2008

1st request for EOT was made on 18.06.2008

2nd request for EOT was made on 14.07.2008

EOT was formally granted by claimant on 27.12.2008

(15) It is therefore obvious that contract was at large from 14-03-2008 till 27-12-2008.

(16) Question of time being essence of the contract during extended period therefore does not arise. A vague general statement by claimant in letter dated 27-12-2008 that “all other terms of the contract hold good” does not in any way restore time being essence of contract with retrospective effect.

(17) The condition at (a) of letter dated 27-12-2008 viz. “This is not to discount various delays in achieving milestones but to facilitate completion of balance work” is also vague since the causes of delay in achieving milestone was hotly disputed by both sides.

(18) The condition at para (e) of same letter states that “All other terms and conditions of contract except project durations will hold good” is also vague since contract provides for both i.e., EOT can be granted without LD for no faults of the respondent or EOT can be granted with levy of LD for respondent's fault.

CONCLUSION

(19) In the absence of any extension granted without any ambiguity and clearly specifying that EOT is granted with or

***without LD and that time continues to be essence of the contract;
the only conclusion that can be drawn is that Time is not the
essence of the contract during extended period also.'***

19. A careful perusal of the above leaves this Court with the considered view that the AT has noticed that extension of time has been granted to contractor, whether it is with or without LD has been examined and concluded that time is not essence of the contract. The language in which the extension of time letters were couched and mention about LD in the same have been examined by AT for arriving at a conclusion as to whether the time is the essence of contract. Therefore, it cannot be gainsaid that this is a view which no reasonable person would take. The sequitur is this argument that the finding of AT that time is not the essence of the contract vitiates the impugned award does not carry the petitioner any further considering the limited scope of a legal drill under Section 34 of A and C Act.

20. With regard to Ex.C18, it is not for me to re-appreciate evidence as I am not sitting on appeal. The discussion thus far impliedly covers the argument made by lone respondent that the delay is not attributable to the contractor. The findings of the AT with regard to delay (Issue No.1) and as to whether the time is essence of the contract

and (Issue No.2) speak for themselves and therefore, the submissions made by learned counsel for lone contractor that the finding returned by AT that contractor is not responsible for delay and that it is not for reasons that is attributable to the contractor cannot be found fault with, much less for a judicial intervention in a Section 34 legal drill. With regard to reference to Ex.C148 in reply the aspect of re-appreciation of evidence kicks in and this Court in a Section 34 legal drill would not re-appreciate evidence as in a regular first appeal under Section 96 of The Code of Civil Procedure, 1908.

21. In the light of the narrative, discussion and dispositive reasoning set out supra, the inevitable sequitur is , the petitioner's campaign against the impugned award fails and the captioned OP would stand dismissed.

In the light of the trajectory of the hearing and other attendant facts and circumstances, there shall be no order as to costs.

WEB COPY

06.01.2021

Speaking order: Yes

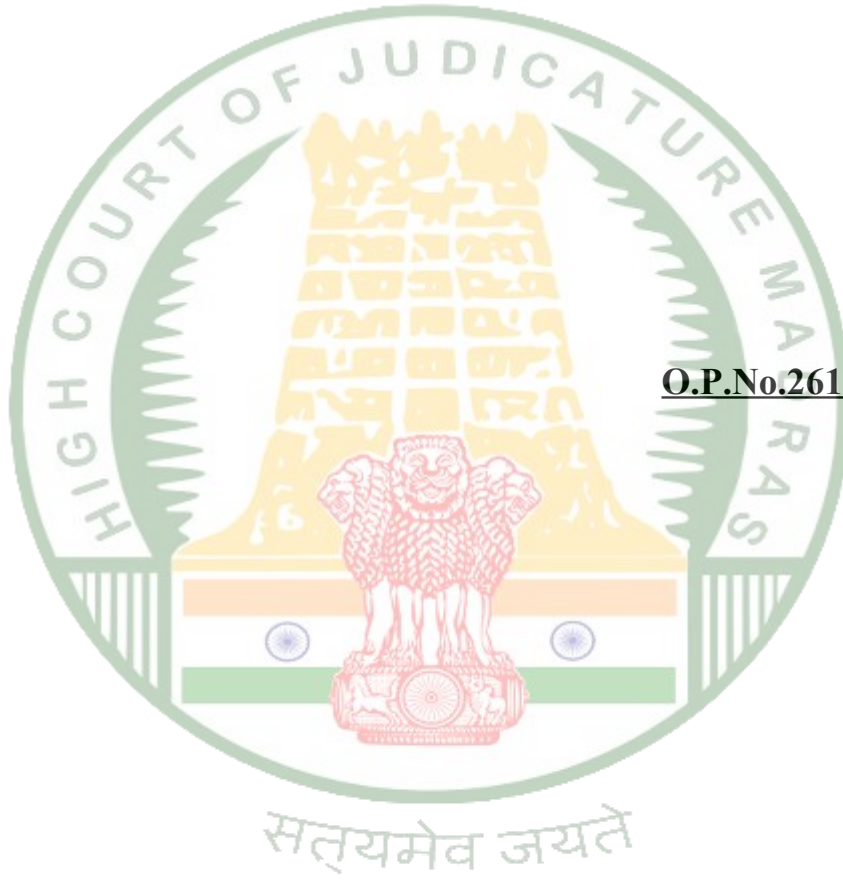
Index: Yes

gpa

O.P.No.261 of 2016

M.SUNDAR.J.,

gpa



O.P.No.261 of 2016

WEB COPY **06.01.2021**