



WEB COPY

1

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 19TH DAY OF AUGUST 2021

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.709 of 2016

In the matter of Section 34 of the
Arbitration & Conciliation Act,
1996.

And

In the matter of Arbitration Award
dated 12th February 2016 received
by the Petitioners on 15th February
2016 passed by the Arbitral
Tribunal in the disputes arising out
of the four Contracts dated 10th
December 1998.

1. Ansaldo Energia S.P.A. duly organised
and existing under the Laws of Italy with
its Principal Office at Via N.Lorenzi,
8, 16152 Genova, Italy. Represented by its
authorized signatory Mr.Lorenzo Pesenti
2. Asia Power Projects Private Limited,
[formerly Known as Ansaldo Services Private Limited],
a Company incorporated under the Companies Act, 1956,
and having Registered Office at 6, Lakeside Residency,
4, Annaswamy Mudaliar Road, Bangalore – 560 042.
Represented by its Director
Mr.Lorenzo Pesenti

... Petitioners



M/s. Neyveli Lignite Corporation Ltd.,
a Company incorporated under the Companies Act, 1956,
and having its Registered Office at Neyveli House,
135, Periyar EVK High Road,
Kilpauk, Chennai – 600 010.

... Respondent

Original Petition praying that this Hon'ble Court be pleased to
(a) set aside the Impugned Award dated 12th February, 2016; and

(b) stay the effect and operation of the Impugned Award dated
12th February, 2016, pending the hearing and final disposal of the present
petition.

This Original Petition having been heard on 29/07/2021 in the
presence of Dr.Veerendran Tulzapurkar with Mr.Nikhil Sakhardane Nahush
Shah for Mr.M.N.Balaji, advocates for the petitioners herein and
Mr.T.R.Rajagopalan, Senior Counsel for Mr.N.Nithianandan, advocates for
the respndent herein and upon the reading the petition and the award dated
12/02/2016 filed herein and having stood over for consideration till this date
and coming on this day before this court for orders in the presence of the
said advocates for the parties hereto and this court having observed that this
court is unable to persuade itself to countenance the submissions made by
the learned Senior Counsel to hold that the award is vitiated and violates the
fundamental policy of India and Conflict to the public policy and none of
the grounds contemplated in Section 34 of the Arbitration and Conciliation



Act is made out to interfere the detailed award passed by the Arbitral

Tribunal and, **it is ordered as follows:-**

That the O.P.No.709 of 2016 be and is hereby dismissed.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
19TH DAY OF AUGUST 2021.

Sd/-

ASSISTANT REGISTRAR (O.S-II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies
of the Orders/Judgments/Decrees in this format.



ED

22.10.2021

WEB COPY

4

O.P.No.709 of 2016

ORDER

DATED :19.08.2021

THE HON'BLE MR.JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 27.10.2021

APPROVED ON : 27.10.2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

Reserved on	Delivered on
29~07~2021	19 ~08~2021

C O R A M:

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR**Original Petition No.709 of 2016**

1. Ansaldo Energia S.P.A. duly organised
and existing under the Laws of Italy with
its Principal Office at Via N.Lorenzi,
8, 16152 Genova, Italy.
2. Asia Power Projects Private Limited,
[formerly Known as Ansaldo Services Private Limited],
a Company incorporated under the Companies Act, 1956,
and having registered Office at Neyveli House, 135,
Periyar EVK High Road, Kilpauk, Chennai – 600 010. ... Petitioners

Vs

M/s.Neyveli Lignite Corporation Ltd.,
a Company incorporated under the Companies Act, 1956,
and having its Registered Officer at Neyveli House,
135, Periyar EVK High Road, Kilpauk, Chennai – 600 010. ... Respondent

Petition filed under Section 34 of the Arbitration and Conciliation
Act, 1996, to set aside the impugned award dated 12.02.2016.

For petitioners ... Dr.Veerendran Tulzapurkar with
Mr.Nikhil Sakhardane Nahush Shah
for M.N.Balaji

For respondent ... Mr.T.R.Rajagopalan, SC
for Mr.N.Nithianandan

**ORDER**

WEB COPY

Challenge has been made to the Arbitral Award passed by the Three Member Tribunal consisting of the former Judges of the Honourable Supreme Court. The parties are arrayed as per their own rankings before the Tribunal.

2. The Claimants Companies are the members of the Ansaldo Group of Companies and carry on business as power project engineers and power equipment suppliers. The Respondent is the Public Limited Company, invited global tenders for expansion of its First Thermal Power Station (TPS-I) at Neyveli by installation of two units viz., Unit-1 and Unit-2, each of 210 MW capacity for generation of Electricity. NLC, the Respondent invited global tender for the project which was huge work so the entire project was divided into 23 packages and divide among several contractors. The subject matter of the Contract under dispute in respect of the package called A-01 which involved erection of a Boiler encased in a furnace. Accordingly, tenders invited from global tenderers called for A1 main plan package on 02.04.1997. The claimants become successful bidders. Accordingly, Letter of Award (LOA) was issued on 10.08.1998.

The work covered by the letter of award was divided into four contracts.

Contract Nos.1 and 2 between the 1st Claimant and 1st Respondent i.e.,



Ansaldo and NLC; and the Contract No.3 and 4 between the 2nd Claimant and Respondent i.e., Asia Power Projects vs. NLC. Contract No.1 was in respect of design engineering, fabrication, manufacturing, procurement and supply of offshore equipment. Contract No.2 was in respect of Foreign Supervisory services related to supervision of erection, testing and commissioning and demonstration of performance parameters. Contract No.3 was in respect of design engineering, fabrication, manufacturing, procurement and supply of onshore equipment and Contract No.4 relating to construction of services, site engineering, civil engineering construction works and supply at site of all material and fabrication of building steel structures, erection, testing, commissioning, customs clearance in inland transportation of the equipment and material.

3. Effective date of contract was 10.12.1998. The commissioning of Unit-I was to be 39 months and Unit-II was to be 45 months from the effective date of the Contracts. The successful commissioning of units were determined in two stages. The first was the date of Provisional Take Over (PTO) which followed on the successful completion of the trial operation of the respective unit evidenced by a certificate signed by NLC, its consultant MECON and the concerned contractor. The second was the formal acceptance by NLC of the unit on its successful commissioning evidenced



by a similar certificate as the one above. As per the contract the dates for the PTOs of the two Units were 10.10.2001 for Unit No.1 and 10.04.2002 for Unit No.2 respectively. However, NLC granted extension three times on 31.01.2002, 29.04.2002 and 26.09.2002 upto 31.3.2003. These extensions were granted `reserving NLC's right to levy Liquidated Damages as per the terms contained in 4.9 in the contract. Hence, the main contention of the Claimant is that as a contract provides for extension of time for both the units the levy of Liquidated Damages by NLC was not justified and it is also contended by the claimant that the delay for completion of works only attributable to the respondent. The completion of work depends upon the work of the other 22 projects. Hence it is the contention of the claimant that reciprocal obligations has not been complied completion of other work in other packages has not been done. The claimant prayed the following relief for award ordering the extension of time for Provisional Take Over for Unit-I upto 05.06.2003 and for Unit No.2 up to 23.10.2003 or upto such further or other dates as the Tribunal may consider proper; to direct NLC not to levy any LD against the Claimants and to direct the NLC to pay the claimants amount of Rs.46,50,91,655 alleged to be remaining due to the Claimants on the invoices submitted by them.



with the permission of the Tribunal, which are as follows:-

WEB COPY

“(i) As time is of the essence of contracts, the claim of NLC for LD has to fail for want of prior notice by it at the time it accepted the works on 05.06.2003 and 09.10.2003 that it intended to claim LD from the Claimants for the delay in the completion of the contract.

(ii) Alternatively, if it is held that time is not of the essence of the contract, the claim for LD has to fail for the following reason. The contracts consisted of reciprocal obligations by both parties and the obligation of the Claimant to achieve the time target was dependant and conditional on the fulfilment, by NLC, of certain obligations to be performed by it simultaneously or prior in point of time. NLC, not having fulfilled those obligations, is not entitled to call upon the Claimants to fulfil their obligations on time.

(iii) Alternatively, if time is held to be not of the essence of the contracts, the failure of NLC to specify any extended date for the completion of the PTOs beyond 31.03.2003, sets the time element at large and permits the Claimants to achieve the targeted PTOs within a reasonable time after 31.03.2002. The Claimants have done this and so the claim for LD does not survive.



WEB COPY

(iv) Alternatively, the delay in the achievement of the target dates was in consequence of Cause Factors listed as A to O in the SOC attributable in NLC which prevented the completion of the works by the claimants in time. Even otherwise the delay was attributable to the NLC and hence the levy of LD by NLC was unjustified.”

5. Disputing the claim, NLC denied the contention of the claimant that delay on their part and has also stated that the Claimant has not taken clear stand whether the considered time was essence of contract which was their principal basis for contending that the claim of LD without issue of a proper notice in that regard was illegal and submitted that amendment made in the claim statement is after thought, contrary to the claimant's earlier case.

6. Though in the defence statement factual aspects have been narrated they need not be reproduced here. The very issue with regard to interpretation of Section 55 of the Contract Act, the claimant took two contrary stands. In early stand prior to amendment it was the specific case of the claimant that since the time for completion of the work is fixed, time is



work even after expiry of period they will not be entitled to compensation.

They have also taken a plea as the time was extended the claimant has completed the work within a reasonable time. Having taken such a stand, Learned Arbitral Tribunal considered the inconsistent pleas taken by the Claimant and after elaborate discussion rejected the claim by interpreting the contract on the basis of the various submissions made by the both sides which are contrary to their pleadings and finally concluded that time was not essence of contract and consequently requirement of giving notice prescribed by the third paragraph of Section 55 of the Contract Act is not attracted and also rejected alternative prayer also. Challenging the same the present Original Petition has been filed.

7. Learned Counsel Dr.Veerendran Thlzapurkar appearing for the Petitioners submitted that the Tribunal interpretation of Section 55 of the contract Act is not according to law, such interpretation is against the very statute and admittedly the work could not be completed within the time as agreed in the agreement. When the work is not completed within the specified time and the intention of the parties that 'time is essence of contract', the contract become voidable at the option of the promisee. When the time is essence of contract, when the promisee has failed to issue notice

at the time of acceptance, his intention to claim the compensation, the levy



of liquidated damages, would not be permissible under law. Hence, it is the contention of the learned counsel that Section 55(1) & 55 (3) of the Contract Act, squarely apply to the facts of the case. The works were completed beyond the period agreed, which was accepted. In such a case Section 55(3) of the Contract Act would come into play. There was no notice issued by the NLC at the time of acceptance of the work. This provision of law has not taken note of by the learned Arbitrators. Further it is his contention that there is no dispute with regard to the successful of work. Similarly, the contract also contained reciprocal obligations. Reciprocal obligations were not fulfilled by the Respondent. Such being the position, merely on the basis of the clause stipulating levy of liquidated damages, such levy is not permissible unless loss is proved. Further it is his contention that the learned Arbitrators have travelled beyond the pleadings and held that the parties have taken a mistake in legal stand. Hence it is his contention that the plea, whether the time is essence of contract or not has to be decided, after taking note of all factual aspects. Hence it is his contention that the learned Arbitrators' decision in this regard is beyond the pleadings as well as the contract and absolutely there is no evidence available on record to show the nature of damages sustained by NLC.

Therefore, levy of liquidated damages ought not to have been made by

NLC. Learned Arbitrators have not applied correct position of law in this



regard. Hence, the Tribunal making out a case which is contrary to the pleading pleaded by the Respondent is contrary to the basic norms to justice. Whether time is essence of contract or not is a question of fact and the real test is intention of the parties, which depends upon the facts and circumstances of each case. Therefore, the finding of the Tribunal which held such plea is a legal issue, is contrary to the settled position of law. Hence it is his contention that the Tribunal finding that since the parties agreed that completion of the PTO beyond the specified date would attract L.D., the very provision itself serves as a notice is contrary to Section 55 of the Contract Act. The Tribunal has ignored the binding judgments of the Apex Court. Therefore, the Award passed by the learned Arbitral Tribunal against public policy of India and is contrary to the fundamental policy of India. Merely because alternative plea taken that the time is not essence of contract, the main case of the petitioner that the time was essence of contract, could not have been ignored by the learned Arbitrators. Further submitted that there is no evidence to prove damages to levy Liquidated Damages. Hence prayed for setting aside the award.

8. In support of his contention he relied upon the following judgements:



2. *Project Director Vs. RNS Infrastructure reported in 2018 SCC Online Madras 418*
3. *Renusagar Power Co. Ltd., Vs. General Electric Co. reported in 1994 [Supp.] [1] SCC 644*
4. *Associated Builders Vs. Delhi Development Authority reported in [2015] 3 SCC 4*
5. *Ssangyong Engineering & Construction Co. Ltd., Vs. National Highway Authority of India reported in [2019] 15 SCC 131*
6. *Vindodkumar Arora Vs. Surjit Kaur reported in 1987 [3] SCC 711*
7. *Swarnam Ramachandran & Anr. Vs. Aravacode Chakungal Jayapalan reported in [2004] 8 SCC 689*
8. *State of Andhra Pradesh Vs. M/s.Associated Engineering Enterprises reported in AIR 1990 Andhra Pradesh 294*
9. *General Manager, Northern Railway Vs. Sarvesh Chopra reported in [2002] 4 SCC 45*



WEB COPY

*10.Fatehchand Vs. Balakrishna Dass reported in
AIR 1963 SC 1405*

*11.Maula Bux Vs. Union of India reported in 1969
[2] SCC 554*

*12.Kailashnath Associates Vs. Delhi Development
Authority reported in [2015] 4 SCC 136*

*13.Mayadevi Vs. Lalta Prasad reported in 2015 [5]
SCC 588*

*14.Tamun Impex Vs. Ozone Project reported in 2018
SCC Online Madras 11847*

*15.3i InfotechLtd. Vs. Tamil Nadu E Government
reported in 2019 SCC Online Madras 33295*

*16.Hindustan Petroleum Corporation Vs. Offshore
Infrastructure Ltd. reported in 2015 [6] Nag KH
287*

9. Whereas learned Senior Counsel Mr.T.R.Rajagopalan appearing for the Respondent submitted that the Claimant has taken inconsistent plea. One contention is `time is essence of contract` and another is `time is not essence of contract`. Learned Arbitrators, after considering the effect of both the pleas and the effect of non-issuance of notice under



Section 55 of the Contract Act, categorically found that the time is not essence of contract, therefore, the question of issuing notice under Section 55 of the Contract Act does not arise at all. Similarly, learned Arbitrators have also interpreted the contract and held that the clause itself amounts to notice. Therefore submitted that when the Arbitral Tribunal has considered the entire aspects and made threadbare analysis of all the submissions pleadings and interpreted contractual clause, it cannot be said that such interpretation is against the fundamental policy of India. Hence It is the contention that the learned Tribunal has considered all the Judgments in this regard and arrived a conclusion. Hence, submitted that Award passed by the three member Tribunal consisting of Judges of the Honourable Supreme Court, does not require any interference in this matter. Hence prayed for dismissal of the Petition.

10. In support of his contentions, the learned Senior Counsel for the respondent relied on the following judgments :

1. S.Pani Meenakshi Vs. Induja Leyland reported in 2019 SCC On line Mad 5415

2. M.R.Hi Tech Engineers Pvt. Ltd. Vs. UOI reported in 2020 SCC Online Mad 7127

3. Bachhaj Nahar Vs. Nilima Mandal reported in



WEB COPY

[2008] 17 SCC 491

4. *Hind Construction Contractors by its Sole Proprietor Bhikam-Chand Mulchand Jain [Dead] by LRs. Vs. State of Maharashtra reported in [1979] 2 Supreme Court Cases 70*

5. *Neyveli Lignite Corporation Limited Vs. M/s.Tenova India Pvt. Ltd. and 3 others of this Court in Civil Miscellaneous Appeal No.128 of 2020 and CMP.No.863 of 2020.*

11. It is relevant to extract the clauses in the contract governing the parties.

Clause 4.7

“4.7 – Completion of time :- The Contractor shall complete the whole of the works including successful commissioning in 45 (forty five) months from the effective date of Contract; whereas first unit of 210 MW shall be commissioned in 39 (thirty nine) months and 2nd Unit of 200 MW in 45 (forty five) months from the effective date of contract.”

Clause 4.9.1 and Clause 4.9.2:

“4.9.1 The time stipulated in the Contract shall be deemed to be the essence of the Contract. In



WEB COPY

case the completion of Provisional Take Over of the respective units specified in the Contract is delayed, for reasons not attributable to Purchaser, then L.D. will be levied by the Purchaser. The purchaser may without prejudice to any method of recovery deduct the amount for such damages from any amount due.

Liquidated Damages for delay will be based on the unit-wise time schedule. The delay period for the purpose of L.D. Will be reckoned from 38/44 months from the Effective date of Contract for Units 1 & 2 respectively till completion of “Provisional Take Over” of the respective units. L.D. shall be leviable by the Purchaser at the rate of 0.5.% of the aggregate Contract price of the four Contract Nos.1 to IV as adjusted to price variation for every week of delay or part thereof for each unit. The ceiling for both the Units put together shall be 7.5% of aggregate Contract price of the four Contract Nos.1 to IV as adjusted to price variation.

4.9.2. *Payment of Liquidated Damages shall in no way relieve the Contractor from his contractual obligations to complete the works.”*

12. Learned Arbitrators from para 37 to 54 devoted their attention



regard to Section 55 of the Contract Act. The primary contention of the claimant's is that time was an essence of contract. While seeking alternative relief they in fact contended as if time was not an essence of contract. Learned Arbitrators considering all the documents and finally found that time was not essence of contract and held that requirement of giving notice under Section 55 of the Contract Act not attracted. While arriving such conclusion, the learned Arbitrators also held that "the very Clause 4.9.1 expressly provides for levy of liquidated damages the period of such delay subject, of course, to a ceiling. Even at the inception of the Contract, and by mutual agreement between the parties, they have agreed that the completion of the PTO beyond the specified date would attract LD at the rate specified in Clause 4.9.1. This provision itself serves as a notice." Not stopping with that, the learned Arbitrators also held in para 47 that the "time of acceptance" referred to in the section 55 of the Contract Act, read in its context cannot mean the date on which the PTOs were eventually completed and accepted by NLC. In the context where it appears in the statute, it can only mean the point of time fixed in the contract for performance, for it is at this point of time that the promisee, instead of exercising his option to rescind the contract, proceeds to accept further performance thereof. In other words the notice should have been given at the time fixed for the performance of the contract. Having held so they have also referred the



nature of the extension of time granted by the NLC indicating the right to levy of LD as early as 26.08.2002.”

13. It is also relevant to note that the Claimant now relying on their first plea to the effect that as per clauses contained in the contract, time is essence of the contract. Therefore, in the absence of any notice by the promisee, they cannot claim any compensation. As indicated above, the learned Arbitrators have given a finding that the time is not essence of contract, by considering voluminous documents filed by both sides. It is relevant to note that in alternative plea which is taken by the claimant it is the case of the Claimant that the time is not an essence of contract. Such plea was incorporated by way of amendment made in the year 2004. Prior to that to cite an example, though this Court is aware of scope and limit of Section 34 in re-appreciating the evidence. To cite one document as example for the Arbitrators to arrive such a conclusion, has referring the notice issued by the claimant dated 18.11.2002, which is also marked as C-14 before the Arbitral Tribunal, wherein the claimants had taken the stand as follows:

“For the aforesaid and other substantial and compelling reasons AEN AND ASPL state that the original agreed date for the completion of the Project is no longer valid or binding on AEN or on ASPL.”



WEB COPY

14. They made their intention very clear that time was not an essence of contract. Such intention is gathered from their notice dated 18.11.2002 sent before the execution of the works were completed after extension of time granted. Considering various documents in this regard learned Arbitrators have finally concluded that time was not an essence of contract. Besides the learned Arbitrators also considered the scope and applicability of Section 55 of the Contract Act and held that notice contemplated Section 55 para 3 of the Act cannot mean that such notice should be given only after PTO (Provisional Take Over) and held that the notice is required only at the time of accepting the time for further performance thereon. Para 3 of Section 55 of the Contract Act reads as follows:

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.



15. Para 3 makes it very clear that in the event the contract was not performed within the time agreed, the promisee at the time of acceptance of such performance beyond the period of contract he has to given notice to the promisor of his intention to claim compensation. Only at the time of extending the performance of contract for a further period, notice is required to be given by promisee expressing his intention to claim compensation. Therefore the very contention of the learned Senior Counsel that such notice has to be given only at the time of accepting the completion of the work is not correct. The very section itself makes it very clear that any further period is agreed to perform the contract, though the contract become voidable, the promisee can reserve his/her right to claim compensation by issuing notice. Whereas in this case even assuming that time is an essence of contract, extension of time has been granted thrice, while granting extension of time, in fact the NLC has made the claimant known about their right to claim compensation. Otherwise time was extended for performance of the obligations by the Claimant with rider to claim compensation. Thereby they made known their intention to promisor to claim compensation which in fact satisfy the requirement of law. As rightly held by the Tribunal such extension also could be notice of intention of the promisee to claim compensation. Therefore, when the learned



contrary to the pleadings and contract taken note of all the submissions and interpreted the contract and found that time is not essence of contract.

Therefore, learned senior counsel's attempt to persuade this Court to take contrary view other than the Tribunal view has to necessarily fail.

16. With regard to cause factors for delay projected by the Claimant the learned Tribunal from Paragraph 55 to 224 after analysing all documents rejected the claim. It is relevant to extract final conclusion in this regard:

“225. As is the case with respect to other cause factors, the Claimants' case and the emphasis shifted substantially from the Statement of Claim to the stage of final submissions. The particular delay alleged in the Statement of Claim in respect of each cause factor has been practically given up and now the argument centres round “breach”, [see para 7(d) at page 12 of Part XXI of the Claimants' Final Rejoinder submitted on 22.09.2015] on the assumption that each and every delay in sending the reply or furnishing the information amounts to a breach of contract. This argument has been dealt with by us elsewhere and rejected. For the same reasons, the contention relating to “breach of Contract” merits no consideration.”

17. The above conclusion itself suffice that the claim projected by



the Claimant in that regard is not correct. That was the reason no much arguments have been advanced by the learned counsel before this Court with regard to various cause factors for delay on the part of Claimant.

18. Each cause factors were dealt separately by the learned Arbitrators and appreciated the evidence and held against the Claimant. Besides learned Tribunal also recorded specific reasons and what manner the said cause factors contributed in delay in conducting PTO and finally did not agree with the claimants and finally the Tribunal concluded that the claimants were guilty of several delays at several stages of work including delay in supply of steel, structurals, delay in erection, etc., The Tribunal also recorded its findings as under:

362 (i)

(ii)

(iii)

(iv) *The next ground, newly developed during the arguments that the other packages should have been ready on the contractual date of PTO and that since they were not so ready, the levy of LD is bad, is equally untenable. As pointed out by the Respondents in their several Notes including those on WS-C and D, no such plea was ever raised by the Claimants in their SOC Statement and, therefore, the Respondent had no*



WEB COPY

opportunity of meeting the same. This plea is not a pure question of law but a mixed question of fact and law and in the absence of any pleading in that behalf, the Claimants are not entitled to raise this plea raised during the course of arguments. The submission that this plea is implicit in the plea of 'reciprocal obligations' raised by the Claimants is equally untenable, as pointed out in the Respondent's reply to WS-C. In fact this plea was never in the mind of the claimants until the final arguments were commenced.

(v) It has been a "strange feature" of the Claimants' case that they have been introducing new and additional aspects, contentions and grounds, which have no basis in the pleadings, from time to time, before this Tribunal."

19. The Tribunal finally concluded that the Liquidated Damages levied as per the contract less than actual loss suffered by the Respondent. Only because of the ceiling contained in clause 4.9.1 of the contract, the Respondent could not claim damages beyond the said ceiling and finally concluded that the Respondent being a Central Public Sector undertaking has been made to incur huge expenditure by this unsustainable litigation initiated by the Claimants and therefore it is entitled to full costs.

20. Though the petitioner relied upon the judgment of the Apex Court



in ***Fatch Chand vs. Balkrishnan Dass [AIR 1963 SC 1405]*** to contend that without proving the loss or damages liquidated damages cannot be levied merely on the basis of the contractual procedures, absolutely there is no dispute with regard to the judgment. But the fact remains that the Learned Arbitrators factually concluded that various stages delay was caused by the claimant which led to the Respondent incurring the expenditure and loss which is less than the estimated damages agreed in the contract. Further in every stage, every work there were delay. Therefore, every stage to calculate damages is highly impossible. It is also not possible to prove the actual damages in every stage. But overall delay is in fact led to the finding by the learned Arbitrators that the Respondent has incurred heavy expenditure due to the delay by the Claimants.

21. In ***ONGC vs. Saw Pipes [(2003) 5 SC 705]*** the Apex Court has held that if the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.



4 SCC 45] the Honourable Apex Court has held that unless notice is issued at the time of acceptance compensation cannot be claimed. Similarly in ***Swarnam Ramachandraan & Anr. vs. Aravacode Chakungal Jayapalan [(2004) 8 SCC 689]*** wherein the Honourable Apex Court has also held that whether time is essence of contract is a question of fact and the real test is the intention of the parties.

23. In ***Project Director vs. RNS Infrastructure Ltd., [2018 SCC Online Madras 418]*** this Court has held that an award is in conflict with the public policy of India, Court is entitled to set aside the Award.

24. In ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honourable Apex Court has held that an Award can 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) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.



25. In the judgment in *Associate Builders Vs. Delhi Development*

Authority reported in 2015 (3) Supreme Court Cases 49 the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter, Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

26. In *Ssangyong Engineering and Construction Co. Ltd.*, case (supra) in paras 24 and 30 the Honourable Supreme Court has held as follows:

“24. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be



in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), 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.”

27. In Renusagar Power Co. Ltd., Vs. General Electric Co. with Civil Appeal No.379 of 1992 General Electric Co., Vs. Renusagar Power Co. Ltd. reported in 1994 Supp (1) Supreme Court Cases 644 the



WEB COPY

“32. With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public policy; the proceedings in which the judgment was obtained were opposed to natural justice. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Edn., pp. 368 to 392.)

33. Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognised or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice (See: Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 62-64, pp. 558



WEB COPY

& 559 and 571 & 572; *Cheshire & North, Private International Law, 12th Edn., pp. 446-447*). The English courts would not refuse to recognise or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law. (See : *Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. II, p. 565.*)

28. In *Hindustan Petroleum Corporation vs. Offshore Infrastructure Ltd., [2015 (6) Mh LJ 287]* it is held that if Arbitrator did not consider the submissions made by the petitioner totally overlooked evidence produced by him, then the findings rendered by the arbitrator are perverse and deserve to be set aside.

29. There is no dispute with regard to law declared by Apex Court in various judgments cited above. Whereas in the present case learned Arbitrators have thoroughly analysed every submissions and plea and recorded their findings.

30. The very relief sought in the Claim Petition earlier was only for extension of time. Thereafter they sought direction to release the final bill. Every submissions with regard to the levy of damages was also made without pleadings as noted by the learned Arbitrators. Every submission, made without pleadings were also dealt with by the learned Arbitrators.

Therefore, the Award in entirety was passed not only on the basis of



pleadings but also submissions of both sides. This Court is unable to persuade itself to countenance the submissions made by the learned Senior Counsel to hold that the Award is vitiated and violates the fundamental policy of India and conflict to the public policy. None of the grounds contemplated in Section 34 of the Arbitration and Conciliation Act is made out to interfere the detailed Award passed by the Arbitral Tribunal.

31. Accordingly the Original Petition is dismissed.

Sd./-N.S.K.J.

19/08/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.