IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.02.2021

CORAM:

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

O.P.No.886 of 2016
and
A.No.6299 of 2016

M/s.EDAC Engineering Limited,
Represented by its Legal Officer Mr.V.Balaji Pathak,
Having its registered office at
SPIC House, 88 Mount Road,
Guindy, Chennai-600 032.

... Petitioner

Vs.

M/s.Star World International Service (India) Private Limited,
Having its registered office at
New No.10, Old No.11/2, Dhanammal Street,
Chetpet, Chennai-600 031.

... Respondent

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the Award dated 18.07.2016 passed by the Arbitral tribunal and pass such other order or orders as this Hon'ble Court may deem fit and proper under the circumstances.

For Petitioner : Mr.Aravind Subramaniam

For Respondent : Mr.Sricharan Rangarajan

***

ORDER

Captioned 'Original Petition' ['OP' for the sake of brevity] has been filed assailing an 'Arbitral Award dated 18.07.2016 bearing reference Arbitration Case No.2 of 2014' [hereinafter 'impugned award' for the sake of brevity], which has been made by an 'Arbitral Tribunal' ['AT' for the sake of brevity], which was constituted by a sole Arbitrator.

2. Lone respondent before AT is the petitioner before me in the captioned OP and the sole claimant before AT is lone respondent before me in the captioned OP. Parties to captioned OP i.e., 'petitioner' and 'respondent', shall (hereinafter) in this order be referred to as 'EDAC' and 'Star World' respectively for the sake of convenience and clarity.

3. 'Siemens Limited' ['Siemens' for the sake of convenience] shall be described as 'owner', as EDAC is the contractor qua Siemens and Star World is the sub contractor qua EDAC. The sub contract given by EDAC to Star World vide a Work Order dated 22.02.2013 and 'Revised/Additional Work order dated 09.04.2013' [hereinafter collectively and compendiously referred

to as 'said contract' for the sake of convenience and clarity] is the fulcrum of the lis (before AT) between EDAC and Star World. If said contract can be described as the fulcrum when it was worked/operated, it can be described as epicentre when disputes erupted in the course of working / operation.

4. Owing to the short statutory perimeter of 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, which delineates the legal landscape within which a judicial drill of testing an arbitral award should perambulate, short facts shorn of elaboration or in other words factual matrix in a nutshell, containing minimum facts which are imperative for appreciating this order will suffice.

5. The work entrusted by EDAC to Star World has been described under the caption 'Scope of Work' in the said contract and a perusal of the same brings to light that it is erection of stainless steel small bore piping work including loading, transportation of materials from EDAC/Client's store to fabrication/erection site, unloading, handling, shifting, marking,

cutting, cleaning, leveling, grinding, safe erection arrangements, fit-up, erection, alignment, welding, supporting, joining of all flanges including insertion of gaskets/kits, orifice plates & bolts, joining by threading/welding, connecting system to equipment/nozzles, final inspection, manpower assistance for NDT works, etc., in all respects up to final clearance and handing over to client.

6. To be noted, the reference to 'client' in the aforesaid scope of work is a reference to Siemens. This is of significance qua lis (this will be adverted to infra elsewhere in this order) and therefore this Court deems it appropriate to mention this here.

7. As already alluded to supra, in said contract, disputes erupted between EDAC and Star World and AT came to be constituted. It will suffice to say that there is no disputation or disagreement that settlement of disputes is by way of arbitration vide Clause 9 of said contract. In other words, clause 9 of said contract serves as an arbitration agreement between EDAC and Star World being arbitration agreement within the meaning of Section 2(1) (b) read with Section 7 of A and C Act. To be noted, Clause 9

is adverbatim the same in work order as well as revised/additional Work order, which collectively and compendiously constitute said contract. There is no disputation or disagreement about the existence of this valid arbitration agreement between the parties and therefore, it is not necessary to dilate any further into this aspect of the matter. It will suffice to say that AT was constituted in and by an order dated 24.11.2014 in OP No.470 of 2014 by then Hon'ble Chief Justice of this Court and this OP No.470 of 2014 is obviously an application under Section 11 of A and C Act.

8. Short facts shorn of elaboration are that Star World claimed a sum of a little over Rs.27.60 lakhs [Rs.27,60,760.85 to be precise]; that this claim of a little of over 27.60 lakhs was constituted by what according to Star World amounts to first work order, second work order and interest on the same from the date on which these amounts fell due i.e., 01.08.2015 to the date of claim being 20.01.2015; that EDAC filed a statement of defence before AT; that EDAC did not make any counter claim, but it only resisted the claim; that this statement of defence of EDAC was responded to by Star World vide a rejoinder and the pleadings before AT, thus stood completed;

that EDAC took the stand that the work done or in other words said work of Star World was not satisfactory as evident from the coating damages report dated 26.07.2013; that EDAC took the plea that Star World has caused damage to internal coating and Star World with the intention of getting away from this liability, has raised these disputes; that AT entered upon reference adjudicated the lis between the parties. Before AT, Star World let in oral evidence, one witness CW-1 [Mohadum Niyaz] was examined, but no oral evidence was let in by EDAC; that on behalf of Star World as claimant, Exs.C1 to C27 were marked and on behalf of EDAC, Exs.R1 to R39 were marked; that AT on sifting through the evidence before it and after considering the rival submissions, made the impugned award, holding that Star World is entitled to little over Rs.23.66 lakhs [Rs.23,66,562.98/- to be precise], granted three months from the date of award as time for making good this payment and interest at the rate of 12% per annum on this sum was awarded from the date of award till the date of payment; that parties were left to bear their respective costs; that EDAC has presented captioned OP assailing the impugned award; that captioned OP has been presented in this Court on 17.10.2016.

9. This Court, having set out the factual matrix in a nutshell i.e., essential facts that are imperative for appreciating this order, which also captures the trajectory which this matter has taken in reaching this Court, now proceeds to capture the rival submissions.

10. Mr.Aravind Subramaniam, learned counsel for EDAC made submissions assailing the impugned award and a summation of his submissions is as follows:

a) AT failed to see that said contract between EDAC and Star World is back to back. This submission was made by relying on clauses 5.6 and 5.7 besides clause 7.3 of said contract;

b) the norms regarding internal coating has not been considered by AT, it travelled beyond the scope of said contract and arrived at a conclusion without examining an expert.

11. In response to the aforementioned submissions, Mr.Sricharan Rangarajan, learned counsel for Star World made submissions, a summation of which is as follows:

a) the submissions made by the protagonist of captioned OP is posited on section 28(3) of A and C Act and the ingredients necessary to attract an infarct of Section 28 (3) are absent in the case on hand.

b) without placing the contract between EDAC and Siemens, the plea that said contract is back to back is clearly untenable as there is no recital in this regard in said contract.

c) besides Star World, other sub contractors also worked qua work in said contract and therefore, anything said in the damage report cannot be attributed to Star World much less to Star World alone. It was pointed out that this has been articulated in pleadings i.e., paragraph 3(c) of rejoinder.

12. In reply submissions, learned counsel for petitioner drew the attention of this Court to communications between EDAC and Star World and submitted that the internal coating aspect has been completely misread in the impugned award.

13. This Court, having set out the factual matrix in a nutshell as well as rival submissions, has to now proceed with discussion and give dispositive reasoning, but before doing that, this Court deems it appropriate to set out a few extracts and also mention a few peripheral aspects, which are of significance.

14. The claim of EDAC is captured in paragraph 23 of the claim statement and the same reads as follows:

'***Claim before this Hon'ble Tribunal:***

23. The above clearly goes to show that the respondent has been making baseless and illogical claims to deny the Claimant of its rightful dues. In fact in respect of the 1st Work Order there have been no issues raised by the Respondent and yet these amounts have not been paid which only goes to show that the respondent does not want to make the payments rightfully due to the Claimant. The claimant is entitled to recover these amounts from the respondent. The amounts if paid on time to the Claimant the amounts would have been utilized by the Claimant for its business and therefore the Claimant is entitled to recover these amounts together with interest. The normal rate of interest for transactions of this nature is 12% p.a. and the Claimant is also entitled to the recovery of these amounts together with interest at the same rate. The particulars of the claim made by the claimant before this Hon'ble Tribunal are as follows:

S.No.	***Particulars***	***Amount***
1.	*Amounts due from 1st Work Order*	*13,91,336.79*

S.No.	***Particulars***	***Amount***
2.	*Amounts due from 2nd Work Order*	*9,75,226.19*
3.	*Interest at 12% from 01.08.2015 (date on which these amounts fell due) till 20.01.2015 (Date of claim)* *(1) For 1st Work Order* *(2) For 2nd Work Order*	*(1) 2,31,754.66* *(2) 1,62,443.21*
	Total	***27,60,760.85***

15. Three issues framed by AT have been set out in paragraph 6 of the impugned award and the same reads as follows:

> *'6. Based on the above facts, the following Arbitrable issues were framed:-*
>
> *1:- Whether the Claimant is entitled to the claims as mentioned in para 23 of the claim petition as due and payable?*
>
> *2:- Whether the Claimant has caused any damages which allegedly caused losses to the Respondent thereby disentitling the Claimant to make their claims?*
>
> *3:- If the Claimant are entitled for any dues from the Respondent, whether they are entitled for interest at 12% per annum?'*

16. To be noted, issue no.1 leads to paragraph 23 of claim petition and this Court has already extracted paragraph 23 of the claim petition also.

17. Peripheral issues of significance are, as already alluded to supra, captioned OP has been presented in this Court on 17.10.2016 and therefore, applying the ***Ssangyong*** principle being law laid down by Hon'ble Supreme

Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in **(2019) SCC OnLine SC 677** equivalent to ***(2019) 15 SCC 131,*** captioned OP will be governed by post 23.10.2015 regime of A and C Act or in other words, A and C Act as it stood post amendment by Act 3 of 2016 which kicked in with retrospective effect on and from 23.10.2015. To be noted, for the case on hand, Section 28(3) of A and C Act is of relevance and Section 28(3) post 23.10.2015 reads as follows:

> *'28..........*
> *(2) ....*
> *(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of contract and trade usages applicable to transaction.'*

18. Be that as it may, for the sake of convenience and ease of reference, this Court also deems it appropriate to reproduce Section 28 (3) as it stood prior to 23.10.2015 and the same reads as follows:

> *'28..........*
> *(2) ....*
> *(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.'*

19. Another peripheral aspect is, this Court reminds itself of ***Bhumi***

Vikas case law being judgment rendered in ***State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti*** reported in ***(2018) 9 SCC 472.*** Though **Bhumi Vikas** case law is an Authority for the broad proposition that pre application notice under sub-section (5) of Section 34 is only directory and not mandatory, the observation made in Paragraph 26 of ***Bhumi Vikas Bank*** case law that Section 34 Courts should endeavour to adhere to the one year time line is significant. Section 34 Courts should make every endeavour to adhere to this time line is of relevance to the case on hand as captioned OP has been presented in this Court on 17.10.2016, in about eight months from now, it will be half a decade old in this Court. Therefore, in the light of time frame ingrained and inbuilt in Section 34 and the observation made by Hon'ble Supreme Court in ***Bhumi Vikas*** case law, this Court deems it appropriate to mention that captioned OP is heading towards being classified as a vintage matter.

20. This Court deems it appropriate to extract the 26 grounds raised in the instant OP and the 26 grounds (scanned reproduction) read as follows:

<u>GROUNDS</u>

i) It is submitted that the impugned award is in conflict with the general public policy of India.

ii) It is submitted that the impugned award is in conflict with the most basic notions of morality or justice.

iii) It is submitted that the award is vitiated by patent illegality appearing on the face of the award.

iv) It is submitted that the Learned Arbitrator did not apply his mind judiciously the damages caused by the Respondent while executing the work.

v) It is submitted that the Learned Arbitrator has exceeded his jurisdiction while making the impugned award in favour of the Respondent/Claimant and against the Petitioner/Respondent.

vi) It is submitted that the impugned award being contrary to the substantive provisions of law or provisions of Arbitration Act is patently illegal hence is liable to be set aside.

vii) It is submitted that the impugned award proceeds under the facts that the works were completed which the Petitioner had at no point of time admitted.

viii) It is submitted that the Learned arbitrator failed to appreciate the fact that the Respondent/Claimant had caused huge damage to the Petitioner which has resulted in irreparable damages to the Petitioner.

ix) The Learned Arbitrator has failed to appreciate the significance of exhibits filed by the Petitioner and has ignored the same.

x) The learned Arbitrator failed to appreciate the fact that the Respondent has been awarded a sum of Rs. 23,66,562.98/- even though the Respondent had caused damage to the tune of Rs. 39,26,782/-.

xi) The impugned award passed by the arbitrator is against the basic notions of morality or justice.

xii) The impugned award is based on a rationale not drawn from established legal principles , but on the other hand opposed to such principles which ought to be set aside by this Hon'ble Court.

xiii) The Learned Arbitrator having accepted the fact that the damage had been caused by the Respondent/Claimant, has passed the award in favour of the Respondent/Claimant stating that there was no clause as regards damages caused due to welding splatters.

xiv) The Learned Arbitrator proceeds on the footing of certain admitted facts according to him, certain of which were never admitted by the Petitioner at any point of time. In fact it was always the case of the Petitioner/Respondent that the work was not completed by the Respondent/Claimant.

xv) The Learned Arbitrator has taken the Visual weld inspection report to be a completion certificate and has erroneously come to a conclusion that the work had been completed and has proceed to pass the award in favour of the Respondent/Claimant.

xvi) The Learned Arbitrator has awarded the amount claimed by the Respondent/Claimant despite the bills and invoices not having been submitted along with supporting documents.

xvii) The Learned Arbitrator failed to appreciate the fact that inspite of the Petitioner asking for the supportive documents, the Respondent/Claimant with the ulterior motive of enriching themselves unjustly at the expense of the Petitioner have neither provided them nor have they sought to take steps to provide them till the end.

xviii) The Learned Arbitrator has totally lost sight of the fact that the Respondent failed to prove that the work was completed by them and that all materials and punch list points were handed to the Petitioner for them release the payments.

xix) The Tribunal has over looked the fact that there was absolutely no explanation forthcoming from the Respondent as to the requiste documents to prove the completion of the work on the dates mentioned by the Respondent.

xx) The Learned Arbitrator has proceeded with the presumption that the work was completed eventhough the Respondent did not prove the same in spite of the Petitioner stating that the work was not completed as stated by the Respondent.

xxi) The Tribunal has committed grave error in ignoring the agreed terms by which payment was to be made. Further, the Tribunal has failed to appreciate the fact that the supportive documents could only substantiate the amounts claimed in the invoices claimed by the Respondent.

xxii) The Learned Arbitrator failed to appreciate the fact that in spite of asking for the same no reason has been provided for not producing the supportive documents.

xxiii) The Tribunal has totally ignored the Petitioner's right under the contract and has instead shown mis-placed sympathy to the Respondent's plea of the payment not being made.

xxiv) The Tribunal erred in law by awarding the amount claimed by the Respondent who has not completed the contract in all aspects.

xxv) The Tribunal has committed grave error in awarding the amount claimed by the Respondent when such damage was caused by the Respondent to the internal coating of the pipes who was a consultant in such work.

xxvi) Other reasons, if any, assigned by the Tribunal in passing the award, are unsustainable, baseless and opposed to the well established principles of law. The Petitioner reserves its right to file additional grounds, if advised so.

21. This Court, having set out the factual aspects, essential extracts and peripheral points of significance, now proceeds to discuss the rival submissions and give its dispositive reasoning for arriving at a conclusion in the captioned OP.

22. The first submission made by learned counsel for EDAC is that the contract between EDAC and Star World is back to back and the AT has not noticed this. This submission is not only the sheet anchor submission, but it is also a submission which is forcefully reiterated repeatedly in the course of the argument. Therefore, this Court deems it appropriate to describe this as the burden of song qua petitioner. In other words, burden of song of the petitioner's learned counsel in his campaign against the impugned award is that the said contract between EDAC and Star World is back to back and AT has overlooked this. In the considered opinion of this Court, this is no argument for the simple reason that EDAC, which was respondent before AT, did not file its agreement with Siemens as documentary evidence. As already alluded to supra, EDAC did not let in oral evidence before AT. The fact that this contract between Siemens and EDAC was not before AT is captured in paragraph 33 of impugned award, which reads as follows:

'33. However the terms and conditions of the contract between the parties would not envisage any such back charges to the sub-contractor. Moreover under issue No.2 this Tribunal has already found damages to the internal coating cannot be attributed to the sub-contractor in the absence of the main agreement between the client and the main contractor namely the Respondent herein. It is also found by this Tribunal that the agreement between the parties before this Tribunal is not a back to back contract. Therefore in the absence of agreement for back charges this Tribunal is of the view the Respondent had no valid reason to reject the invoices no.5 to 9 and the Claimant is entitled for the invoice amounts and Issue No.1 is decided in favour of the Claimant.'

(Underlining made by this Court to supply emphasis, highlight and for ease of reference)

23. To be noted, there is no disputation or disagreement before me in the captioned OP that the contract between Siemens and EDAC was not placed before AT as an exhibit. In fact, it was not before AT at all. Therefore, this back to back agreement argument clearly becomes a non-starter. The argument that the AT erred in not coming to the conclusion that the said contract is back to back contract by summoning the main contract is specious and EDAC after not placing the contract with Siemens before AT cannot now be heard to contend that AT should have summoned the said

contract. The burden of the song of the protagonist of OP on hand fades away into the din of the onus of producing its agreement with Siemens not being discharged by EDAC. The reference to clauses 5.6, 5.7 and 7.3 in said contract to buttress this back to back plea is no argument and the three clauses read as follows:

> *'5.6 The Sub-Contractor should ensure to obtain necessary job work permit before starting of job wherever required.*
>
> *5.7 The Sub-Contractor should adhere to the Quality standard stipulated by EDAC/Consultant/Owner. Any repair and rework due to non acceptance by quality Engineers/Siemens shall be done free of cost by the Sub-Contractor.*
>
> *7.3 The Sub-Contractor's personnel should adhere to the safety regulations as per EDAC/Client requirements.* ***Any penalty issued by SIEMENS for safety violation shall be back charged to Sub-Contractor.'***

24.The above covenants merely talk about reworking of sub contract in the event of quality engineers of Siemens saying that some repair is necessary. Even on a demurrer, this could have been gone into only if the agreement between Siemens and EDAC qua said work had been placed before AT. Absent this main contract between Siemens and EDAC, AT would have ventured into the realm of surmises and conjectures. Therefore, the view taken by AT captured in paragraph 33 of impugned award [extracted and reproduced supra] is clearly tenable and not an implausible view. To put it otherwise, AT would have embarked upon an exercise of venturing into the realm of conjectures and surmises. AT has returned a finding that the said contract is not a back to back contract by placing reliance on aforementioned clauses 5.6, 5.7 in said contract, which is not an implausible view as it cannot be gainsaid that no reasonable person would have taken this view on the facts and circumstances of this case. Clause 7.3 is clearly a non-starter as it finds its slot under clause 7, which is captioned 'SAFETY'. Entire clause 7 deals with safety features and that is not an issue before AT. Therefore, the burden of the song fails and pales into complete silence. This Court chooses to describe this as fading into not just silence, but pregnant silence as it is a clear indicator that the contention that AT erred and committed infarct of Section 28 (3) of A and C Act by going against the contract (in not holding that the said contract is a back to back contract) falls flat on its face owing to being a non issue before AT.

25. For the sake of capturing the hearing as comprehensively as possible, it is necessary to set out that the petitioner counsel placed plain reliance on the following case laws:

'1. ***Food Corporation of India v. Chandu Construction,***
(2007) 4 SCC 697;
2. Managing Director, Army Welfare Housing Organisation V. Sumangal Services (P) Ltd.,
(2004) 9 SCC 619 : AIR 2004 SC 1344
3. State of Rajasthan v. Nav Bharat Construction Co.,
(2006) 1 SCC 86 : AIR 2005 SC 4430.
4. Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises,
(1999) 9 SCC 283 : AIR 1999 SC 3627.
5. Sharma and Associates Contractors Private Limited v. Progressive Constructions Limited
(2017) 5 SCC 743 : AIR 2017 SC 847.'

26. Suffice to say that the above case laws do not come to the aid of the petitioner as the above turn on ignoring a categoric stipulation in a contract. This is in ***Chandu Constructions***. Like wise, ***Army Welfare*** is a case of a clause being ignored and the matter becoming a nullity i.e., without jurisdiction. With regard to ***Nav Bharat***, it was a case of travelling beyond the terms of contract. With regard to ***Rajasthan State Mines & Minerals Ltd*** Case and ***Sharma and Associates*** case laws, the facts are completely different (not on back to back being ignored plea) and therefore those are not

applicable to the case on hand. This is more so, as EDAC has admittedly not chosen to place before AT its contract with Siemens.

27. While on case laws, this Court also deems it appropriate to record that learned counsel for Star World placed reliance on a Division Bench judgment of this Court in ***Chettinad International Coal Terminal Private Limited Vs. Kamarajar Port Limited*** reported in ***2018 SCC OnLine Mad 638***. The most relevant paragraphs are 7(m) to 7(s) and 21 to 24, which read as follows:

> *' 7(m) The above list of case laws together with relevant paragraphs, clearly bring out the propositions / principles for which each one of them were pressed into service.*
>
> *7(n) As stated supra in the earlier part of this judgment, it is not in dispute before us (as between the Appellant and the 1st Respondent) that the entire controversy pertains to only one point and that one point is interpretation of clauses 14 and 15.1.4 of the said agreement by the Arbitral Tribunal. In our view, the entire appeal turns on a very narrow compass and it may not be necessary to go into each and every case law that was cited at the bar in the hearing. However, we have extracted all the judgments cited at the bar (though it is not imperative to do so) for the limited purpose of making this judgment complete in terms of indicating the trajectory of the hearing before us.*
>
> *7(o) Turning to the interpretation returned by the Arbitral*

Tribunal, it is the specific case of the appellant that clause 15.1.4 has not been applied at all and clause 14 alone has been applied. This according to the appellant is patent illegality.

7(p) A closer reading of clause 15.1.4 would show that it has been covenanted that revenue share shall not be claimed and levied for any equipment / machinery brought in by the licensee for the purpose of maintenance / augmentation of terminal after the commissioning thereof till the expiry of the licence period through terminal. CICTPL contended that the date of commissioning is also crucial. Our reading of the Award of Arbitral Tribunal, challenge to which was negatived by the learned Single Judge demonstrates the view and interpretation of the Arbitral Tribunal that clause 15.1.4 is not intended to serve as an exemption. In other words, the Arbitral Tribunal has proceeded on the basis that clause 14 operates and clause 15.1.4 is a mere reiteration of clause 14, particularly in the light of what has been noticed of clause 15.1.4. No doubt, clause 15.1.4 is captioned 'Exemption of Revenue Share'. However, it appears to be an assertion that equipment / machinery brought in for maintenance / augmentation of the terminal, post commissioning shall not be exempt from revenue share. Considering that this is an appeal under Section 37 of A and C Act, we do not delve further into this interpretation aspect of the matter. As held by the Supreme Court of India in ***Swan Gold Mining Limited****'s case supra (incidentally, it has been pressed into service by CICTPL also), wherein the Supreme Court postulates that interference in a petition under Sections 34 and 37 of A and C Act would arise only when parties have arrived at a* *concluded contract and acted on the basis of terms and conditions therein and thereafter new terms are substituted by the Arbitral Tribunal or the court. Nothing of that kind has happened in the instant case.*

7(q) Parties have acted in accordance with the covenants. No new term has been read into by the Arbitral Tribunal as confirmed by learned Single Judge. Further more, in this context, it is necessary to reiterate the obtaining legal position that an Arbitral Tribunal always has enough play at the joints qua interpretation of covenants of a contract. With regard to public policy, it was fairly submitted that the appellant CICTPL is not pitching itself on the same and that the appellant CICTPL is only on the patent illegality.

7(r) On an extreme demurer, even if there is another plausible interpretation to the covenant, that cannot become a ground for interference either under Section 34 or under Section 37 of the A and C Act. As set out supra, only when what has not been agreed upon by the parties or when the new covenant or new principle which was not the intention of the parties is read into a contract, can there by any scope for interference under Section 34 or section 37 of the A and C Act. As we find no such aspects in this appeal, we find no ground to interfere with the order of the learned Single Judge.

7(s) Referring to paragraph 49 of the judgment of the learned Single Judge, the appellant CICTPL contended that the learned Single Judge has been overwhelmed by the eminence of the members of the Arbitral Tribunal. Otherwise with regard to section

34 of A and C Act, there is nothing to show that there is any illegality much less illegality warranting interference with the order of the learned Single Judge. In our opinion, learned Single Judge has applied Section 34 of A and C Act in its right perspective. With regard to paragraph 49 of the order of the learned Single Judge, a detailed and close reading of the judgment which has been called in question before us demonstrates that the conclusions that have been arrived at by the learned Single Judge have not in any manner been impacted by the eminence of the Arbitral Tribunal as perceived by the learned single Judge. To be noted, paragraph 49 is the penultimate paragraph of the judgment called in question before us and paragraph 49 begins with 'Before parting with this case, ...'. Therefore, paragraph 49 is merely in the nature of a postscript after a detailed analysis and correct application of Section 34 of A and C Act.

*'**21**. There can be no question of interference with an interpretation of the agreement made by an Arbitral Tribunal, unless the interpretation is so perverse, unreasonable and fanciful that no body of persons instructed in law and acting reasonably could have interpreted the contractual provision in the manner that has been done. The award rejecting the claim in relation to exemption of augmentation charges is based on a reasonable interpretation of the provisions of the contract. On a careful reading of the application under Section 34 of the 1996 Act with the memorandum of appeal, it is patently clear that it is the appellant company's own case that the Arbitral Tribunal has given a possible interpretation of the language*

of the statutory provisions without going into the intent and object of the provision. A literal interpretation of words and expressions as used cannot possibly be a perverse interpretation.

***22**. In our view, the claim of the appellant company in respect of augmentation charges has rightly been rejected by the Arbitral Tribunal on a reasonable interpretation of the provisions of the contract, referred to herein above.*

***23.** As held in Fuerst Day Lawson Ltd. V. Jindal Exports Ltd., (2011) 8 SCC 333, cited by M.Sundar, J. all proceedings relating to arbitration are governed by the 1996 Act, including an appeal which is governed by Section 37 of the 1996 Act, and in deciding an appeal, the Division Bench is only to see if the judgment under appeal is patently erroneous. The Division Bench cannot substitute its view for the view taken by the Single Bench only because it prefers another view and it hardly needs mention that the scope of interference with an impugned award by the Appellate Court is restricted to the same grounds on which an impugned award can be interfered with in proceedings under Section 34 of the 1996 Act.*

***24.** I am in absolute agreement with M.Sundar, J that the appeal is liable to be dismissed. The appeal is dismissed.'*

28. To be noted, this Division Bench judgement of this Court was carried to Hon'ble Supreme Court by way of a Special Leave Petition (C) Nos.6928-6930/2018 and Hon'ble Supreme Court vide order dated 19.03.2018 refused to interfere. Another order that was placed before this

court is ***Hindustan Petroleum Corporation Ltd vs.M/s.Banu Constructions and anr.*** being order dated 03.08.2020. In ***Banu Constructions***, paragraph 21 was referred to and the same reads as follows:

> *'21. A perusal of paragraph 32 of Associate Builders, leaves this Court with the considered view that the working test laid down by the Hon'ble Supreme Court in turn is based on Gopi Nath principle and Kuldeep Singh principle. To be noted, both case laws have been set out and the relevant paragraphs have been extracted in paragraph 32 of Associate Builders itself. Therefore, for an award to be dislodged on the ground of perversity, the finding should be so outrageous that it defies logic or in other words the findings should be such that no reasonable person, would take such a view. In this regard, learned counsel for contractor, drew my attention to* ***Project Director, Tamil Nadu Road Sector Project II V. RNS Infrastructure Ltd-GPL (JC)*** *reported in* ***2018 (2) CTC 593*** *and* ***Chaudrhary Avadhesh Kumar V. Volleyball Federation of India*** *reported in* ***(2019) 5 CTC 155*** *regarding the scope of Section 34. For intervention under Section 34, merely because another possible or plausible view is preferred by the Court, an award cannot be set aside. In other words, the test is not which of the views is better, but the test is whether the view taken by the AT is implausible and so implausible that no reasonable person would have taken such a view. In the instant case, though this Court would have articulated differently if called upon to adjudicate on this lis impugned award being a possible view proceeding on admission, perversity plea*

fails.'

29. In paragraph 21, there is a reference to paragraph 32 of ***Associate* Builders** case being ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***. Paragraph 32 of ***Associate Builders*** has to now be read in the context of paragraph 41 of ***Ssangyong*** supra and these two paragraphs read as follows:

Paragraph 32 of Associate Builders

'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*** reads as follows:

*'**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.'*

30. A combined reading of ***Associate Builders*** and ***Ssangyong*** makes it clear that perversity as set out in paragraphs 31 & 32 of ***Associate***

Builders is no longer a ground for challenge qua 'conflict with public policy', but it is available as patent illegality ground. Therefore, statutorily speaking, what was under Section 34(2)(b)(ii) of A and C Act has now been moved to Section 34(2A) of A and C Act, but section 34(2A) is circumscribed by a two limbed proviso, wherein one limb says that mere erroneous application of law cannot be a ground to interfere under Section 34(2A) and the second limb forbids re-appreciation of evidence.

31. In the OP on hand, as challenge to impugned award turns on Section 28(3) of A and C Act, paragraph 40 of ***Ssangyong*** is instructive and the same reads as follows:

> ***'40.*** *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall*

within the new ground added under Section 34(2-A). '

32. Judgment of Hon'ble Supreme Court in ***Zonal General Manager, Ircon International Ltd. Vs. Vinay Heavy Equipments*** reported in ***(2015) 13 SCC 680*** was placed before this Court by learned counsel for Star World to buttress his submission regarding back to back agreement.

33. Attention of this Court was drawn to paragraphs 4, 5 and 9 of ***Vinay Heavy Equipments*** which read as follows:

*'**4.** Detailing the arrears claim, it is seen that the respondent incurred expenditure in the execution of the subcontracts on two categories of items: scheduled and non-scheduled. The respondent claimed Rs 61 lakhs as its due under both these heads. The appellant's principal rebuttal in resistance to the respondent's claim is that the main contract (between the appellant and SIPCOT) and the subcontracts are wholly of a "back-to-back" nature and therefore the liability of the appellant would be restricted to and coextensive of that which SIPCOT acknowledges. In other words, the acceptability and tenability of any claim made by the respondent against the appellant will depend first upon that claim's acceptability and tenability before SIPCOT in its capacity as the employer in the main contract. The appellant declined to pay the respondent for scheduled expenditures, claiming that the respondent had unauthorisedly performed additional and increased quantities of works, also challenging the rate claimed by the respondent for the same; that the*

respondent could not claim any amount in excess of what was agreed to be paid by SIPCOT in respect of each item of work covered under C1 and C2 subcontracts. The appellant also rejected the respondent's claimed dues under the non-scheduled head (which work the appellant itself had requested to be performed by the respondent), stating that SIPCOT had refuted its liability towards non-scheduled expenditures. Indeed, the arbitrator in his award detected two "general pleas" as resonating from the appellant: firstly, that the contracts C1 and C2 were on a "back-to-back" basis with IRCON's main contract with SIPCOT and unless SIPCOT paid for the amounts claimed by the respondent, the appellant was not legally liable for the same; and secondly, that back-to-back basis applied even to non-scheduled items.

***5.** The arbitrator found that the mention of "back-to-back" had been made only in the contract rider agreement for Package C2, and in subsequent epistles exchanged between IRCON and the respondent from whose analysis two significant factors emerge. Firstly, that "back-to-back" only meant that the terms and conditions relating to technical specifications, and quality, quantum, manner and method of work to be done by the appellant in the main contract, stood transposed on the subcontracts, C1 and C2; the primary liability of the appellant to the respondent, however, stood untouched, there having been no transference or transposition of this liability onto SIPCOT, either explicitly or implicitly. Secondly, the appellant had in its written statement before the arbitrator, reiterated the "back-to-back" nature and thereby agreed that the respondent* *would be entitled to payment of dues as and when the appellant received the payment for these from Sipcot, the respondent's claims having been "transmitted" by the appellant to Sipcot for the latter's consideration. The appellant has taken the stance that it had no objection to the arbitrator awarding a reasonable amount to the respondent, subject to the appellant being awarded the same amount by the arbitrator in its arbitration with Sipcot. The appellant was agreeable to a direction passed against it to make payment upon realisation of the sum from Sipcot, after a 10% deduction on the sum as the appellant's marginal profit. The arbitrator, unstirred by the appellant's gambit at foisting the primary liability onto Sipcot, located primary liability as resting with the appellant, being the "employer" in the subcontracts. The arbitrator also instanced the appellant's reprobative and approbative conduct, observing first the appellant's conditional willingness (supra) for the passage of a favourable award in the respondent's favour, and thereafter finding a retraction of the appellant's position viz. that— "Since Sipcot refused to pay for these claims, Ircon has taken up a new stand that works were not done fully and payment has been made for whatever work was done by the claimant." Having so observed, the arbitrator awarded as aforementioned.*

***9.** Insofar as the question of primary liability therein is concerned, the law on subcontracts and employer liability is amply clear. In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on the one hand and* *between the subcontractor and the main contractor on the other will be quite distinct and separate. No such clause to the contrary, existent in the main contract between the appellants and SIPCOT, has been highlighted before us by the appellants, which would persuade us towards a deviation from the presumption of distinct and sole liability of the appellant contractor as employer vis-à-vis the respondent subcontractor. On the contrary, much of the exercise in determining the existence of a "back-to-back clause" in the contracts C1 and C2 appears to be misplaced. Such an accommodation or transference of liability needs to be pinpointed in the main contract, for it is SIPCOT's acceptance of liability of subcontractor claims which is of the essence; even a clause indicating "back-to-back" liability in agreements C1 and C2 would not serve to novate the main contract and fasten payment liability on SIPCOT, prevented as it would be by privity, for it would be a matter of SIPCOT's acceptance of subcontractor's liability in the main contract, and not a matter of novation by imposition upon SIPCOT by two parties in a separate bilateral contract. Nothing presented before us suggests that SIPCOT's contract with the appellant provided for "back-to-back" subcontracts whereby SIPCOT would be directly answerable for the payment claims raised by the contractors. That sub-letting was provided for by the main contract, and indeed occurred, has been found by the arbitrator (in both arbitrations) and affirmed by the courts below. This however, is quite distinct from concluding that SIPCOT contractually (in the main agreement) assumed primary liability for the subcontractor respondent's* *payment claims in respect of agreements made with the appellant. The fact that the respondent was represented and present in parleys and meetings between SIPCOT and the appellant or that it was referred to in the correspondence exchanged between them does not lead to the conclusion that a tripartite contract had come into effect by evolution.'*

34.To be noted, paragraph 9 in ***Vinay Equipments*** in SCC journal is paragraph 10 in MLJ journal. The equivalent MLJ citation is **(2015) 4 MLJ 110.** This Court has deemed it necessary to mention this correlation and cross reference as AT in paragraph 24 of impugned award has noticed MLJ citation and the relevant portion of paragraph 24 of impugned award reads as follows:

'24. ....

The Learned Counsel for the Claimant relied on 2015 (4) MLJ 110 (SCC) wherein the Supreme Court has held, "10.In so far as the question of primary liability therein is concerned the law on sub-contracts and employer liability is amply clear. In the absence of covenant in the main contract to the contrary the rules in relation to privity of contract will mean that the jural relationship between the employer and the main contractor on one hand and between the sub-contractor and the main contractor on the other will be quiet distinct and separate".

35. This takes us to the issue of dimensions.

36. With regard to dimensions, EDAC had not let in oral evidence and as rightly pointed out by learned counsel for Star World, said contract is not a tripartite agreement. It is also rightly pointed out (as already alluded to supra) that in paragraph 3(c) of rejoinder, the question of other sub contractors working in the same project has been raised. At the end of the day, all these are clearly covered by ***Hodgkingson*** principle. To be noted, ***Hodgkinson*** principle is a principle, which was laid by an English Court way back in 1857 in ***Hodgkinson Vs. Fernie*** reported in ***140 ER 712***. ***Hodgkinson*** principle has been recognized by Indian Courts i.e., Hon'ble Supreme Court in ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***]. Relevant paragraph in ***Associate Builders*** case is Paragraph 41, which 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.'

37. Adopting a reductionist approach, without running the risk of over simplification put in simplistic terms, ***Hodgkinson*** principle is to the effect

that AT is the best judge of the quality and quantity of evidence before it. As the case on hand turns on evidence, this is a classical case where ***Hodgkinson*** principle is attracted as exceptions to ***Hodgkinson*** principle such as, as vital evidence being ignored, evidence received behind the back of a party being relied on etc., do not exist in the case on hand.

38. Before concluding, this Court deems it appropriate to refer to the 26 grounds raised in the captioned OP, which have been scanned and reproduced elsewhere supra in this order. All the 26 grounds, with the exception of grounds (i) to (vi) and (xi), none have the trappings of Section 34 of A and C Act. In any event, the matter turns only on Section 28(3) of A and C Act and Section 34(2A) both of which have been dealt with leaving grounds (i) to (vi) and (xi) flattened. In other words, the other 19 grounds are in the nature of wide grounds in a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1906' ('CPC' for brevity) as some are laced and others are loaded with fact scenarios. This Court is not sitting in appeal qua impugned award and it is well settled that an application under Section 34 of A and C Act is a legal drill of testing an arbitral award within the

contours and confines of Section 34. It is neither an appeal nor a revision, it is not even a full fledged legal review. It is a limited challenge to an arbitral award within the contours and confines delineated by the short statutory perimeter of Section 34 of A and C Act. This Court has repeatedly held that Section 34 is a delicate balance between sanctity of finality of arbitral award ingrained in Section 35 of A and C Act read with minimum judicial intervention principle ingrained in Section 5 of A and C Act on one side and the sacrosanct character of time honoured judicial review, forming part of substantive due process of law on the other side.

39. In this view of the matter, in the light of the narrative, discussion and dispositive reasoning set out supra, this Court has no hesitation in coming to the conclusion that there is no ground for judicial intervention qua impugned award in the captioned OP.

40. In the result, captioned OP fails and the same is dismissed. There shall be no order as to costs. Consequently, connected application is closed.

03.02.2021

Speaking order: Yes/No

Index: Yes/No

kmi

M.SUNDAR.J.,

kmi

O.P.No.886 of 2016
and A.No.6299 of 2016

03.02.2021