

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.02.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.34 of 2017

M/s.Qualtech Engineers Pvt. Ltd.,
Represented by its Managing Director Mr.T.J.Sankar
150, Tilak Street
Panner Nagar, Mugappair West
Chennai – 600 037 .. Petitioner

vs.

M/s.Mr.Ommayal Achi Mr.Arunachalam Trust
Represented by its Managing Director Ms.Valli Alagappan
Coral Manor, “A” Ground Floor
40/41, IInd Main Road
R.A.Puram
Chennai – 600 028 ... Respondent

Petition filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 31.08.2016 passed by the Hon'ble Sole Arbitrator to the extent as aggrieved by the petitioner herein in respect of Arbitration proceedings between the petitioner and the 1st respondent.

For Petitioners : Mr.P.J.Rishikesh

For Respondent : Mr.A.R.Karunakaran

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) has been presented in this Court on 11.11.2016, assailing an 'arbitral award dated 31.08.2016 bearing reference Arbitration Case No.7 of 2015' (hereinafter 'impugned award' for the sake of brevity), made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole Arbitrator.

2. Though obvious, it is deemed appropriate to mention that 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.

3. In this web-hearing on a video conferencing platform i.e., virtual Court today, Mr.P.J.Rishikesh, learned counsel on record for sole petitioner and Mr.A.R.Karunakaran, learned counsel on record for lone respondent are before me. To be noted, captioned OP was taken up for final disposal with the consent of both sides, it was heard in part in the last listing on 02.02.2021, final hearing arguments continued in this listing and it has been heard out fully today. Sole claimant before AT is the protagonist of captioned OP. In other words, sole claimant before AT is the petitioner in captioned OP and 'petitioner' in captioned OP shall

hereinafter be referred to as 'contractor' for the sake of convenience and clarity. Lone respondent before AT is the lone respondent in captioned OP also and from hereon, sole 'respondent' in captioned OP shall be referred to as 'said Trust' for the sake of convenience and clarity.

4. Captioned OP being an application under Section 34 of A and C Act is essentially a legal drill of testing an arbitral award. Any legal drill of testing an arbitral award under Section 34 of A and C Act should perambulate within the limited legal landscape of Section 34 of A and C Act. This is owing to the short statutory perimeter of Section 34 wherein sub-sections (2) and (2A) constitute an adumbration of the grounds of challenge, which have been repeatedly described by this Court as eight pigeon holes. The legal drill of testing an arbitral award, will be an examination as to whether challenge to the impugned award fits (fits snugly) into any of the 8 pigeon holes and/or the other extended facets explained and elucidated by Hon'ble Courts repeatedly. Owing to such limited legal landscape within which captioned OP should perambulate, short facts shorn of elaboration will suffice. Short facts are that, said Trust is *inter alia* running an educational institution; that there was an agreement dated 26.04.2010 (Ex.C2 before AT) between contractor and said Trust for construction of a nursing college and this construction

consists of a main block and a hostel block; that this 26.04.2010 agreement (Ex.C2 before AT) from hereon shall be referred to as 'said contract' in this order (for the sake of convenience); that the time line for construction under said contract started from work order dated 16.04.2010; that work ought to have been completed by January of 2011; that the work was ultimately and actually completed in June of 2011; that the nursing college was inaugurated on 18.06.2011 and it started functioning from 19.06.2011; that with regard to the construction, which is the scope of said contract, contractor raised 9 Running Account Bills being RA Bill Nos.1 to 9; that the said 9 Running Account Bills were certified on 30.05.2011. Thereafter, when Running Account Bills 10 and 11 (Ex.C13 and C18) came to be raised, the same ran into rough weather; that a final bill dated 04.08.2011 for a sum of Rs.2,55,13,638.42 (Ex.C28 before AT) came to be raised by contractor; that said Trust made deductions in this final bill and certified only a part of it on 03.09.2011 vide Ex.C31; that post deductions, the contractor was paid Rs. 1,17,19,392.74; that for the sake of convenience, it can be said that the contractor raised a final bill for little over Rs.2.55 crores (Rs.2,55,13,638.42 to be precise), but deductions were made from the same *inter alia* citing an architect's report and a sum of little over Rs.1.17

Crores (Rs.1,17,19,392.74 to be precise) was paid post deductions; that these deductions were under seven heads; that besides final bill, contractor made a claim for little over Rs.6.06 lakhs (Rs.6,06,03,31/- to be precise) also towards work done, but not included in the final bill; that contractor also made a claim of Rs.4,29,875/- owing to de-scoping of said contract; that contractor made a claim of little over Rs.90.31 lakhs (Rs.90,31,376/- to be precise) towards interest; that contractor made claims under these four heads; that said Trust made a counter claims *inter alia* by invoking clause 15 of said contract; that this counter claim was for little over Rs.42.41 lakhs (Rs.42,41, 390/- to be precise); that AT was constituted by an order made by this Court in O.P.No.221 of 2013 being an Original Petition under Section 11 of A and C Act; that AT entered upon reference, adjudicated upon the four heads of claim made by the contractor as well as the counter claim made by said Trust and made the impugned award; that vide the impugned award, AT acceded to 2 of the 7 heads of deductions made by said Trust to be bad, allowed (in entirety) claim of the contractor for work done, but not included in final bill, dismissed (in entirety) counter claim of said Trust, awarded future interest at 12%; that in effect vide the impugned award AT awarded to contractor a sum of little over Rs.18.06 lakhs (Rs.18,06,998/- to be

precise) together with interest at the rate of 12% p.a being future interest from the date of award to the date of payment; that contractor has preferred captioned OP assailing the impugned award; that said Trust has not preferred any OP assailing the rejection of the counter claim or other portions of the impugned award which went against them. This means that said Trust has accepted the impugned award, whereas the contractor alone has assailed the same vide captioned OP.

5. This Court, in the course of setting out factual matrix in a nutshell or in setting out essential facts imperative for appreciating this order has also captured the trajectory which this matter has taken thus far, besides capturing the essential aspects of the impugned award.

6. Therefore, this Court deems it appropriate to now set out the rival submissions.

7. Learned counsel for petitioner/contractor made submissions (assailing the impugned award), summation of which is as follows:

- a) Impugned award suffers from the vice of irrationality / perversity as in one breath it says that lis is arbitrable notwithstanding the Architect's report, in the same breath it also says that Architect's report is final.

b) The impugned award has not adhered to settled principles in not awarding *pendente lite* interest.

8. Summation of submissions made by learned counsel for said Trust (in response to the above contentions) is as follows:

a) The findings do not run into each other as the issue regarding Architect's report turns on whether it becomes an excepted matter qua arbitrability and the issue of interpreting the said contract and thereafter saying Architect's report is final operated in different realms.

b) Awarding of future interest alone is justified as this is not a case of retention.

9. In reply submission, learned counsel for petitioner/contractor reiterated that the impugned award is self-contradictory.

10. This Court before embarking upon the exercise of discussing rival submissions and giving its dispositive reasoning for arriving at a conclusion in the captioned OP deems it appropriate to a) extract and reproduce certain essential parts of the case file, which are imperative for appreciating this order and b) capture some peripheral aspects which are peripheral, but significant.

11. Abstract of claims as culled out from the Statement of Claim is as follows:

'ABSTRACT OF CLAIMS

Claim 1: Rs.1,60,44,711/-

Claim 2:Rs.6,60,031/-

Claim 3: Rs.4,29,875/-

Claim 4: Rs.90,31,376/-

TOTAL: Rs.2,61,11,993/-'

12. Prayer as extracted from the claim petition:

'Under such circumstances it is therefore prayed that this Hon'ble Tribunal be pleased to pass an AWARD by allowing the Claims of the Claimant and directing the Respondent to pay a sum of Rs.2,61,11,993/- along with interest until date of payment and thus render justice.'

13. To be noted, Claim No.1 is the difference between final bill of contractor of little over Rs. 2.55 Crores and the post deduction payment made by said Trust for little over Rs.1.17 crores. As already alluded to supra, deductions were under 7 heads and impugned award has held that seven deductions to be arbitrable. Claim No.2 is what according to the contract is the work done, but not included in the final bill. Claim No.3 turns on de-scoping and Claim No.4 is for interest.

14. The counter claim made by said Trust as can be culled out from the statement of defence/counter claim before AT reads as follows:

'Counter Claim.'

It is submitted that the Respondent has narrated the slipshod work performed by the claimant as detailed above and the immense suffering and hardship that the Respondent was put to solely due to the acts of omissions/commission by the Claimant. The important terms and conditions appended to the agreement (clause 15) reads as follows:

Clause 15 Liquidated damages at the rate of ½% of contract value per week of part thereof subject to a minimum of 5% of the value of the contract applicable for delay in individual phase completion.

Thus the amount payable by the claimant towards liquidated damages is restricted to 5% of the Rs.8,48,27, 825.38 amounting to Rs.42,41,391.27 rounded off to Rs.42,41,390/- which the claimant is lawfully bound to pay to the Respondent with interest thereon @18% p.a.

It is therefore prayed that this Hon'ble Tribunal may be pleased to dismiss the above claim statement with exemplary costs and allow the counter claim of the Respondent and direct the Claimant to pay to the Respondent a sum of Rs.42,41,390/- together with interest @18% thereon and thereby render justice.'

15. The peripheral, but significant issues are as follows:

(i) As already alluded to supra, the captioned OP has been presented in this Court on 11.11.2016. Therefore, captioned OP

will be governed by post 23.10.2015 regime of A and C Act. In other words, captioned OP will be governed by A and C Act as amended by amending Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015. To be noted, this is by applying **Ssangyong** principle regarding impact of 23.10.2015 amendment laid down by Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India** reported in [(2019) 15 SCC 131].

(ii) Captioned OP has already seen four anniversaries in this Court and is heading towards fifth anniversary. In other words, captioned OP is heading towards turning half a decade in this Court. Therefore, in the light of the observations made by Hon-ble Supreme Court in **Bhumi Vikas Bank** case law [**State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti** reported in (2018) 9 SCC 472], this Court notices that captioned OP can be described as a matter which is running late qua time line ingrained in Section 34(6). To be noted, one year time line has been ingrained in sub-section (6) of Section 34 for disposal of applications under Section 34 of A and C Act. This Court is

conscious of the obtaining position that **Bhumi Vikas Bank** case law is an authority for the broad preposition that sub-section (5) pre-application notice is directory and not mandatory, but 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 and the same reads as follows:

'26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act.'

As pre-application notice under sub-section (5) of Section

34 has been held to be directory, with regard to starting point of one year time line stipulated by sub-section (6) of Section 34, this Court has repeatedly held that one year time line in cases where Section 34 application is filed without a pre-application notice under sub-section (5) should be computed from the date of presentation of the OP. It is in this context that this Court observes that captioned OP is clearly running late qua time line statutorily ingrained in Section 34(6).

(iii) Next principle is captioned OP is not an appeal. It is not a revision and it is not even a full-fledged judicial review. It is a limited challenge to the impugned award within the contours and confines of Section 34. This Court has repeatedly held that Section 34 of A and C Act is a delicate balance between the sanctity of finality of arbitral awards ingrained in Section 35 read with minimum judicial intervention principle ingrained in Section 5 of A and C on one side of the scale and the sacrosanct judicial review forming part of substantive due process of law on the other side of the scale.

16. Based on the rival pleadings AT framed as many as 10 issues.

This is captured in Paragraph 17 of the impugned award, which reads as

follows:

'17.Based on the above averments this Tribunal framed the following Arbitral issues:

1. Whether the claim made by the claimant falls within the ambit of 'Excepted matters' regarding which the decision of the architect is final as per the clause 34 and other provision of the contract?

2. Whether the decision of the Architect with respect of other items where it was provided by the contract that the architect's decision on such matters are final, is arbitrable?

3. Was the Respondent justified in making various deductions in the final bill submitted by the claimant?

4. Was there any bad workmanship on the part of the claimant? If yes, to what extent and whether the same justified enormous deductions as made by the respondent?

5. Whether the claimant is entitled for the amount towards the unpaid bill amounts towards work done but not included in the final bill, and amounts towards loss of profit for de-scoping of certain works?

6. Whether the occupation of the building by the respondent would suggest that the building was completed satisfactorily as per specifications in the contract?

7. Whether the claimant accepted the final payment of Rs.1, 14,85,004.74 after deducting TDS from the respondent in full and final settlement of his duties?

8. Whether the claimant is entitled to any payments under various heads of claim?

9. *Whether the claimant is entitled for any interest?*

10. *Whether the respondent is entitled to the counter claim as prayed for?*

17. Issue No.1 was dealt with separately. Issue Nos.2 to 4 were dealt with along with Issue No.6. Issue No.5 was dealt with Issue No.8. Issue Nos.7,9 and 10 were dealt with separately one after the other.

18 As already alluded to supra, the sheet anchor submission of learned counsel for petitioner, as protagonist of captioned OP assailing the impugned award, was predicated on perversity/irrationality and that in turn was posited on self-contradiction plea. For this purpose, learned counsel drew the attention of this Court to a portion of paragraph 31 of impugned award and a portion of Paragraph 51 of impugned award, which read as follows:

'31.....The dispute relates to the RA Bill No.10 to 12. Sicne RA Bill No.10 and 11 were not processed by the architect the final bill no.12 dated 4.8.2011 had been submitted which include all the claim of the claimant. Though the claim was for Rs.2,55,13,638.42 a sum of Rs.1,50,40,790.89/- alone was certified by the site engineer. However, a sum of Rs.23,60,000/- had been further deducted on various other heads which is not covered for any measurement or work done. Therefore this Tribunal is of the view that the claim towards unpaid bill or raising any dispute against the manner of deduction does not fall under clause 34 of excepted

matter and therefore arbitrable Issue No.1 is decided in favour of the claimant.

'51.....Except the major deduction under five heads as reflected in the final certification of the architect, the final certificate relating to the work done cannot be questioned by the claimant as the decision of the architect has become final regarding the measurement, work done, rates for additional work and variation in the prior escalation.'

19. Learned counsel for petitioner pressed into service ***Associate Builders Vs. Delhi Development Authority*** case law reported in (2015) 3 SCC 49, ***Ssangyong Engineering & Construction Co. Ltd., Vs. National Highways Authority of India (NHAI)*** reported in 2019 SCC Online SC 677 and ***Patel Engineering Limited Vs. North Eastern Electric Power Corporation Limited*** reported in (2020) 7 SCC 167 regarding irrationality/perversity aspect of the matter.

20. Perversity, as elucidated by Hon'ble Supreme Court in Paragraphs 31 and 32 of ***Associate Builders*** case, has now to be read in the context of Paragraph 41 of ***Ssangyong*** supra. Paragraphs 31 and 32 of ***Associate Builders*** case law read as follows:

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

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

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

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

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

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

Paragraph 41 of Ssangyong case law:

'41.What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.'

21. The proposition that flows from a combined reading of Paragraphs 31 and 32 of **Associate Builders** case law and paragraph 41 of **Ssangyong** case law is that the perversity has now been moved from Section 34(2)(b)(ii) to Section 34(2-A) of A and C Act. This Court has observed that captioned OP is governed by post 23.10.2015 regime. If it is a matter of patent illegality under 34(2-A), then the two limbed proviso thereto kicks in. In and by this two limbed proviso, A and C Act now says that mere erroneous application of law cannot be a ground to dislodge an arbitral award qua patent

illegality. The second limb is to the effect that re-appreciation of evidence is forbidden. Therefore, perversity /irrationality plea in this case is now essentially a patent illegality plea under Section 34(2-A).

22. This takes us to evidence before AT. On the side of contractor, one witness was examined as CW1 and on the side of said Trust, two witnesses, namely RW1 and RW2 were examined. This Court is informed that one of the two witnesses is an agent of the Architect. On the side of contractor, who is claimant before AT, as many as 65 documents were marked as Exs.C1 to C65 and on the side of said Trust, which is respondent before AT, as many as 53 documents, namely Exs.R1 to R53 were marked. This is a classic case wherein **Hodgkinson** principle [*Hodgkinson Vs. Fernie* reported in **140 ER 712**] will apply. **Hodgkinson** principle was recognized by Indian Courts, particularly by Hon'ble Supreme Court in **Associate Builders** case (supra), 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.'

23. At the risk of over simplification, **Hodgkinson** principle from reductionist's perspective means that AT is the best Judge of the quantity and quality of evidence before it, but the caveat is **Hodgkinson** principle is not without exceptions and illustratively speaking, some exceptions are when vital evidence is not looked into, when evidence received behind the back of one of the parties is looked into etc., . It is nobody's case that the OP on hand falls under any of the exceptions to **Hodgkinson**

principle. To put the caveat differently it is not a absolute principle which neither needs any qualification nor admits of any exception. Be that as it may, a plea of patent illegality has to be tested without going into the realm of erroneous application of law or re-appreciation of evidence. The portions in two paragraphs from the findings of the AT in the impugned award extracted and reproduced supra, in the considered view of this Court, do not run into each other. The reason is, AT has come to the conclusion that the lis does not fall under excepted matter qua arbitrability owing to Architect's report. Merely because the lis does not fall under excepted matter, it does not mean that the AT cannot by interpreting terms of said contract take the view that the Architect's report is final. As rightly pointed out by learned counsel for said Trust, one of the two witnesses, who deposed on behalf of said Trust, is Architect's agent. AT also had the benefit of Architect's report as documentary evidence in this regard. Therefore, on an appreciation of oral and documentary evidence or in other words, on an appreciation of evidence, AT has come to the conclusion that out of the 7 heads of deductions made by said Trust, two heads are untenable and not valid. Five heads of deductions have been upheld. This by itself would demonstrate that there has been appreciation of evidence.

24. With regard to appreciation of evidence, this Court in **14 Reels Entertainment Private Limited Vs.Eros International Media Limited**, reported in **AIROnline 2020 Mad 1447** explained what is appreciation of evidence. Relevant paragraphs are paragraphs 26 to 28 and the same read as follows:

'26. This takes us to the question of what is appreciation and re-appreciation of evidence. Learned counsel on both sides very fairly submitted that they were unable to find a direct case law with regard to what is appreciation and re-appreciation of evidence at least in the context of Section 34 of A and C Act. Saying so, learned counsel submitted that it is desirable that this principle is discussed in the case on hand. This Court considers it appropriate to do so and for this purpose, this Court considers it appropriate to adopt an illustrative approach.

27. Solely for the sake of illustration, let us take a case where the issue to be tested is whether jural relationship between two parties is that of lessor and lessee or licensor and licensee. Let us assume that a document i.e., contract between parties which is inter alia an adumbration of covenants and clauses between the contracting parties is available before the Adjudicating Authority and that both sides have let-in oral evidence. The witnesses are inter alia the contracting parties and that deposition of these parties to the document turn on jural relationship between the parties. Proceeding with this illustration, one has to bear in mind that a mere caption to a document on hand will not conclusively decide

the jural relationship between the parties. Likewise, one should also bear in mind that the contents of the document by themselves do not prove a fact. In this backdrop, the Adjudicating Authority, which has the task of decoding and deciphering this document in the light of the document itself, which is an exhibit before it in conjunction with oral evidence, which is the deposition inter-alia of contracting parties to the document, examines at the question of whether there has been transfer of possession of demised portion from one party to the other, as this would be one of the extremely critical questions to decide whether the jural relationship is one of lease or licence. Let us assume that the deposition is to the effect that the demised portion is part of a larger property and that the question as to who controls the ingress and egress to the demised property also forms part of deposition. Let us also assume that there are some other exhibits in the form of sketches / photographs besides a topography sketch, which describe these aspects of the matter and that witnesses, who are inter alia contracting parties to the contentious document, speak about all this. If the Adjudicating Authority deploys a clinical, forensic approach, sifts through, analyses / scrutinizes all these oral/documentary evidence and comes to the conclusion that the ingress and egress to the immovable property (of which the demised portion is a part) is controlled by one party and that there is no transfer of possession by this party to the other party qua demised portion, the Adjudicating Authority may come to the conclusion that the jural relationship between the contracting parties is a license and not a lease. If sifting and scrutiny of oral/documentary evidence leaves the Adjudicating Authority with a contrary conclusion, the

Adjudicating Authority may hold that the jural relationship between the parties is that of a lease. In this illustration, when the matter is carried in appeal, it may well be possible for the protagonist of the appeal to point out certain inconsistencies in the oral evidence and contradictions qua evidence before the Adjudicating Authority. While sifting and scrutinizing of oral and documentary evidence by the original Adjudicating Authority to come to a conclusion about jural relationship between the contracting parties can be described as 'appreciation of evidence', the exercise of Appellate Authority going into the inconsistencies and contradictions in evidence pointed out by the appellant and having a clinical, forensic relook at the oral/documentary evidence before original Adjudicating Authority can be described as 're-appreciation of evidence'. This is a second bite at the cherry by the protagonist.

28. Continuing with the above mentioned illustration let us assume that the original Adjudicating Authority completely ignored all the exhibits i.e., documentary evidence before it and the oral evidence before it though the contracting parties themselves have deposed as witnesses, merely looks at the contentious document in isolation, goes by the caption, adumbration of covenants and terms used therein, it may well be possible for Appellate forum to hold that original Adjudicating Authority has committed patent illegality without any re-appreciation of evidence. This can be done by holding that the original Adjudicating Authority has ignored vital evidence before it and for this re-appreciation of evidence is not required. In contradistinction, this is a case of campaign by a protagonist for whom a second bite at the cherry is legally forbidden.'

25. To be noted, this **14 Reels Entertainment** judgment was penned by me and the same has been upheld by a Hon'ble Division Bench vide order dated 25.01.2021 in OSA No.223 of 2020. Therefore, this deductions aspect turns on appreciation of evidence and there is no scope for re-appreciation of evidence.

26. With regard to work done, but not included in the final bill, the same has been acceded to. This Court deems it appropriate to not to burden this order by extracting the relevant portions of the impugned award wherein the conclusions qua various issues have been articulated.

27. Interest aspect has been dealt with in paragraph 55 of the impugned award and the relevant portion reads as follows:

'55...The claimant has claimed an interest of 13.5% p.a from the date of such payments fallen due till the date of award and till the date of payment. Section 31(7) of the Arbitration and Conciliation Act 1996 as amended in 2015 deals with rate of interest. If the retention of payment is unjustifiable then the claimant is entitled for interest from the date on which the payment fallen due However, in the present case, the architect has exercised his right and power in making the deduction which this Tribunal found not justifiable in these proceedings. Therefore, it will be appropriate to grant interest only from the

date of Award not earlier. Therefore, the claimant is entitled for interest at 12% p.a on the above said amounts from the date of award till the date of payment. This issue is decided accordingly.

28. With regard to interest aspect, learned counsel for contractor pressed into service an order made by another Hon'ble single Judge of this Court in ***J.K.Ferner (India) Limited Vs. Neyveli Lignite Corporation*** reported in ***2020 (5) CTC 579***. Adverting to paragraph 27 of the said order, learned counsel for said Trust submitted that it is clearly distinguishable on facts as that was a case of retention which was held to be improper. A careful perusal of ***J.K.Ferner*** case leaves this Court with the considered view that the submission of learned counsel for said Trust that it is distinguishable on facts can be sustained. In this regard, this Court is of the view that judgments are not to be read as Euclid's theorem as held by Hon'ble Supreme Court in paragraph 5 of ***C. Ronald v. UT, Andaman & Nicobar Islands, (2011) 12 SCC 428***, which reads as follows:

'5.In this connection we would like to say that a judgment of a court of law should not be read as a Euclid's theorem nor as a provision in a statute, vide Bharat Petroleum Corpn. Ltd. v. N.R. Vairamani [(2004) 8 SCC 579 : AIR 2004 SC 4778] (vide paras 9 to 12), Rajbir Singh Dalal v. Chaudhari Devi Lal University[(2008)

9 SCC 284 : (2008) 2 SCC (L&S) 887 : JT (2008) 8 SC 621] , etc.'

29. In this regard, this Court reminds itself of the celebrated ***Padma Sundara Rao Vs. State of Tamil Nadu*** case reported in (2002) 3 SCC 533 and the most relevant paragraph is paragraph 9, which reads as follows :

'9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . '

30. Therefore, this Court finds no ground for judicial intervention with regard to future interest of 12% p.a qua impugned award.

31. Before parting with the matter, for the sake of capturing what unfurled in the hearing as comprehensively as possible, this Court deems it appropriate to mention that learned counsel for contractor pressed into service two case laws, namely ***Chettinad International Coal Vs. Kamarajar Port Limited*** reported in ***AIR 2018 Madras 119*** and ***K.M.Suresh Babu Vs. Sundaram Finance*** reported in

MANU/TN/2286/2020.

32. First of the above case law, namely **Chettinad International Coal**, is one wherein some principles were propounded and penned. Learned counsel drew the attention of this Court to paragraph 7(q) and 7(n) and 21 which read as follows:

'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 be 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.'

'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.'

33. This matter was carried to Hon'ble Supreme Court by way a Special Leave Petition (Special Leave Petition (C) Nos.6928- 6930/2018) and the same was dismissed vide order dated 19.03.2018. This only buttresses the view taken by this Court in this order i.e., the view that no ground has been made for judicial intervention qua patent illegality pigeon hole / ground.

34. With regard to **K.M.Suresh Babu** case law, that was also penned by the author of this order. That was relied on by learned counsel

for contractor for the purpose of scope of Section 34. This Court has already delineated supra scope of Section 34 and more particularly that facet of Section 34 by relying on the decisions of Hon'ble Supreme Court and therefore, this Court does not want to burden this order with case laws further on the same aspects.

35. Owing to all that have been set supra, more particularly discussion and dispositive reasoning, this Court has no hesitation in coming to the conclusion that there is no ground for judicial intervention qua impugned award.

In the result, campaign of the protagonist of captioned OP against the impugned award comes to an end, captioned OP fails and the same is dismissed. There shall be no order as to costs.

Speaking order: Yes/No

Index: Yes/No

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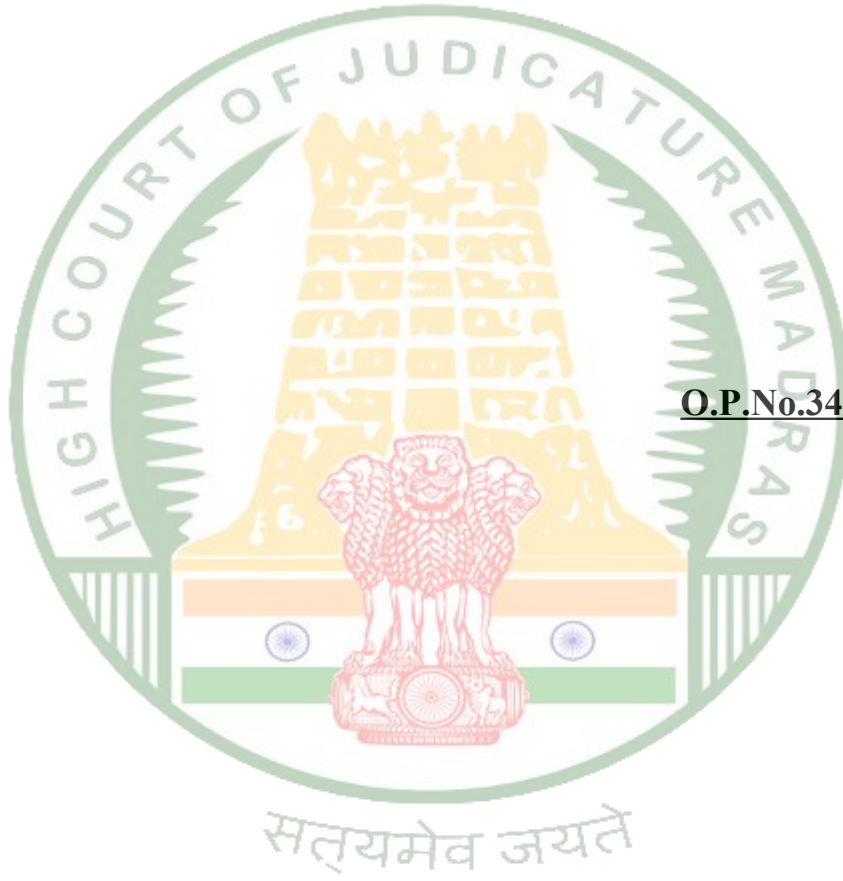
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