

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)**

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 142 of 2006

Ircon International Limited

Versus

M/s. Meumal Athwani

Mr. Jit Ray

Mr. A. A. Chakraborty

.....For the petitioner

Dr. Madhusudan Saharoy

Mr. Debasish Sutradhar

.....For the respondent

Heard on : 10.05.2022, 13.05.2022 & 17.05.2022

Judgment on : 13.07.2022

Krishna Rao, J.:

The petitioner had published tender for construction of Electric Loco shed for homing 15 Electric locos. The respondent had participated in the tender process and after negotiation between the petitioner and the respondent, the petitioner had accepted the rate

quoted by the respondent for an amount of Rs.1,32,24,100/- vide letter dt. 14.09.1987.

After acceptance of the rate on 13.01.1988, an agreement was entered between the petitioner and the respondent. As per the agreement, time of completion of the said work was 18 months. The respondent completed the work on 18.09.1989 i.e. after the period of 24 months and on completion of the work, sometime in the month of September, 1993, the respondent had raised bill and also claimed extra expenses incurred by the respondent during execution of the work.

As there was a dispute with regard to the payment and accordingly, the respondent had requested the petitioner for appointment of Arbitrator but the petitioner has not appointed an Arbitrator as per the request made by the respondent, accordingly, the respondent approached this Court for appointment of Arbitrator and accordingly Arbitrator was appointed.

The respondent being the claimant has raised altogether 25 claims before the Ld. Arbitrator which are as follows:-

- i. Claim No. 1 for Rs. 3,40,993.52 for balance amount against bill already prepared and signed, but not paid;*
- ii. Claim No. 2 for Rs. 11,267/- for balance quantities of fabrication and erection of structural steel, not reflected in the bill prepared by IRCON (1.90 MT).*
- iii. Claim Nos. 3 for Rs. 1,18,762.21 for balance escalation payment to be paid as per contract formula.*

- iv. Claim no. 4 for Rs. 35,000/- being balance of security deposit retained wrongfully;*
- v. Claim No. 5 for Rs. 42,219.33 for refund of cost recovered for holding down bolts;*
- vi. Claim No. 6 for Rs. 8,64,000/- for driving 500 mm dia. bored piled through hard rock and boulders;*
- vii. Claim No. 7 for Rs. 9,24,400/- for driving 500 mm dia. bored piles through soft rock and weathered rocks;*
- viii. Claim No. 8 for Rs. 94,000/- for cutting and removing permanent steel liner above cut off level to ground floor;*
- ix. Claim No. 9 for Rs. 4,62,750/- for clearing, re-fabricating driving, and cut steel liners;*
- x. Claim No. 10 for Rs. 9,481/- for bore abandoned for underground rail obstruction for piling at 11 metres from ground level;*
- xi. Claim No. 11 for Rs. 7,838/- for bore abandonment for obstruction of brick wall;*
- xii. Claim No. 12 for Rs. 8,016/- for bore abandonment and rig shifted to remaining underground and obstruction 1 metre to 2 metres below ground level;*
- xiii. Claim No. 13 for Rs. 4826/- for bore abandoned for pile forced to be driven without liner;*
- xiv. Claim No. 14 for Rs. 7,284/- for extra expenses on pile forced to be driven without liner;*
- xv. Claim No. 15 for Rs. 2,18,620/- for additional pile driven without liner;*

- xvi. *Claim No. 16 for Rs. 60,000/- for shifting of fabricated materials to facilities rail laying for inspection shed.*
- xvii. *Claim No. 17 for Rs. 40,000/- for dismantling of pucca site labour camp and fabrication yard to facilities completion of inspection shed;*
- xviii. *Claim No. 18 for Rs. 2,11,400/- for filling store dust as per direction;*
- xix. *Claim No. 19 for Rs. 1,11,640/- (reduced by Claimant – previously Rs. 1,21,522.30);*
- xx. *Claim No. 20 for Rs. 18,633/- for repayment of amount wrongfully recovered on account of issue of rails (subsequently not proceeded);*
- xxi. *Claim No. 21 for Rs. 7,71,400/- (reduced amount – previously claimed Rs. 8,37,526/- for compensation on account of business loss for being retained loner in the job without earning benefit, solely due to laches on the part of the Department (IRCON):*
- xxii. *Claim No. 22 for Rs. 6,42,838/- as compensation on account of accitional expenditure for overhead and establishment charges for executing the work during prolonged period due to laches of Department (IRCON).*
- xxiii. *Claim No. 23 for Rs. 6,31,858/- as compensation on account of blockage of admitted portion of the amount under Claim Nos. 1 to 4 upto date of issue of demand letter;*
- xxiv. *Claim for interest at the rate of 18 ½ per cent per annum from date of demand to date of realisation;*
- xxv. *Claim for Rs. 8,00,000/- as costs of arbitration, court fees etc.”*

The petitioner has also filed their statements of defense along with counter claim raising altogether four claims which are as follows:-

“26. In paragraph 63 of the Statement of Defence four counter claims raised as hereunder, (which is alleged to be adjustable against dues of Claimant amounting to Rs. 77,549/- and Rs. 35,000/- against final escalation bill and refund of security deposit).

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| 1. As detailed against Claim No. 1 – 59,988/- | |
| 2. Liquidated damages for
Claimant's failure to complete the work in
time. | Rs. 13,22,410.00 |
| 3. Interest pendent lite and
future. | as accrued. |
| 4. Costs. | as accrue.” |

On 31.12.2005, the Ld. Sole Arbitrator has passed the impugned award in which out of 25 claims, 9 claims i.e. claim no.10, 11, 12, 13, 16, 17, 21, 22 and 23 were rejected and the respondent has not pressed claim no. 20. The Ld. Arbitrator had rejected the counter claim raised by the petitioner.

During the pendency of the instant application, the petitioner admitted the award with respect of Claims no. 1, 2, 3 & 4 along with the interest and accordingly on 17.03.2010, the petitioner has released an amount of Rs. 13,13,763.08/- in favour of the respondent and the respondent had acknowledged the same.

Mr. Jit Roy, Ld. Advocate representing the petitioner submits that the respondent had relied some internal documents of the petitioner and the Ld. Tribunal has passed an Award relying upon the said internal documents of the petitioner company which is not permissible under law.

Ld. Counsel for the petitioner submits that the said internal documents are the internal notes and opinions of the department and the said documents were neither published nor communicated to the petitioner at any point of time.

Ld. Counsel for the petitioner submits that if the internal documents are allowed to be taken into consideration while deciding the dispute, the same would open the floodgates for the contractors.

Ld. Counsel for the petitioner submits that Claim no. 5 of the respondent is barred by limitation as the respondent requested for supply of materials for fabrication of Holding Down Bolts free of cost on 27th October, 1987 and the petitioner refused to supply the same on 6th November, 1987.

Ld. Counsel for the petitioner submits that claim nos. 6 and 7 are also barred by limitation as the respondent has claimed that in the year 1987, the respondent has executed the work of driving of piles on different strata of soil and the petitioner had refused to pay the said amount at the same time on the ground that the extra amount beyond the contractual rate aggrieved by both the parties and the payment would be made on the basis of the length of pile actually driven on board.

The Counsel for the petitioner submits that claim nos. 14 and 15 are also barred by limitation as in terms of the claims raised by the respondent, the respondent claimed the extra expenses on 01.04.1988 and the respondent has invoked provisions of arbitration on 12.07.1996 and as such the claim is barred by limitation.

Counsel for the petitioner further submits that the award passed by the Ld. Sole Arbitrator is without any reason. It is further submitted that the Ld. Arbitral Tribunal has not specified from which piece of evidence on record and from which item of schedule and negotiated terms of the contract reached to the conclusion that the respondent is entitled to get the award and as such the award passed by the Ld. Sole Arbitrator is required to be set aside under Section 31 (3) of the Arbitration and Conciliation Act, 1996.

The Ld. Counsel for the petitioner submits that the respondent was agreed to execute the work awarded to the respondent at the rate which includes supply of holding down bolts and apart from the same, the Ld. Arbitrator has not assigned any reason that the petitioner agreed to supply holding down bolts free of costs beyond the agreed terms and conditions of the contract.

Ld. Counsel for the petitioner submits that claim nos. 6 and 7 are relating to extra expenses incurred by the respondent while driving piles but as per item no. 1, read with item no. 2 of the Schedule A-1, the respondent agreed to execute the excavation work at the agreed rate in all classes of work including hard rock and soft rock.

Ld. Counsel for the petitioner further submits that according to the General Clause of Contract 19 (1) read with agreement dt. 13.01.1988, the respondent has submitted its tender after proper inspection of the site and on being satisfied by careful site inspection of the nature of surface, location, strata of soil and sub-soil and grounds and other conditions of the projects with his open eye and had entered into a contract and as such the

Ld. Sole Arbitrator has disregarded the terms and conditions of the contract entered between the parties.

Ld. Counsel for the petitioner submits that claim no. 8 of the respondent is relating to cutting and removing the permanent liner from pile cap cut off level to ground level and the claim of the respondent is extra expenses incurred by the respondent at the time of execution of the work but according to Schedule A, item no. 11 read with rate quoted by the respondent agreed for incasing column based, joints or other structural sectors including supplying, erecting, fixing, dismantling and removal of wood or steel frame work in all respects with contractor labours and materials but the Ld. Arbitrator has disregarded the terms and conditions of the agreement.

Ld. Counsel for the petitioner submits that while passing award with respect of claim nos. 14, 15, 18 and 19, the Ld. Arbitrator has not considered the terms and conditions of the contract.

Per contra, Ld. Counsel for the respondent submits that the Ld. Arbitrator has passed an award after considering the evidence, documents and the arguments of the respective parties.

The Ld. Counsel for the respondent submits that the Ld. Arbitrator had passed a reasoned order by justifying for awarding the claim in favour of the respondent.

Ld. Counsel for the respondent submits that the internal documents exchange in between the department was produced by the respondents

during the evidence and the petitioner has got an opportunity to cross-examine the said witness. The witness of the petitioner has admitted in evidence with regard to the document produced by the respondent and as such the Ld. Arbitrator had considered the said documents as the petitioner has admitted the said documents.

Ld. Counsel for the respondent submits that, Ld. Arbitrator is the ultimate master of quantity and quality of the evidence to be relied upon when the Arbitrator delivered Arbitrator award and as such the grounds raised by the petitioner cannot nullify the award passed by the Ld. Arbitrator.

Ld. Counsel for the respondent submits that the grounds as urged by the petitioner is not covered under any of the ground as available under Section 34 of the Arbitration and Conciliation Act.

The Ld. Counsel for the respondent submits that the Ld. Sole Arbitrator had considered the evidence and the documents available on record while passing the award and thus this Court cannot sit on appeal by re-appreciating the evidence.

The Ld. Counsel for the respondent submits that there is no bar upon the Arbitrator for grant of pre-reference and pendent lite interest as per Clause 16 (2) of the contract.

Heard, the Ld. Counsel appearing for the parties, materials available on record and the judgment relied by the parties.

Though the petitioner had made total 25 claims before the Ld. Sole Arbitrator out of which Claims no. 10, 11, 12, 13, 16, 17, 21, 22 and 23 were rejected and the claim no.1 to 9, 14, 15, 18 and 19, 24 and 25 have been challenged before this Court and during the pendency of the application, the petitioner has released the amount awarded to the respondent with respect of claim no. 1, 2, 3 and 4 and now this court is to consider with regard to claim no. 5 to 9,14,15,17,19,24 and 25.

Claim 5 is for refund of costs recovered for holding down bolts, amounting to Rs. 42,219.33/-.

Finding of the Arbitrator:

After considering argument, pleadings, documents and evidence on record looking into the true constructions of various items of Schedule and negotiated terms upon a true construction of the contract clauses, I hold that read with item no. 1, Schedule A was finally accepted for fabrication was not inclusive of costs of supply of any structural materials and reinforcement. All materials to be issued by the respondent free of costs. The respondent witness admitted representation to Railway in this regard as correct which supports the claim of the claimants. Claimant is thus entitled to payment. However, I have gone through Clause 62 and found that this particular Clause stipulates that any matter for which decision of an Officer is final and binding and are, therefore, are not arbitrable, but under the ambit of "Excepted Matter" only because a decision given by the respondent in this regard. The Clause itself has not put any final and binding provision on any decision whatsoever, of the respondent thus I am not inclined to

accept the submissions of the respondent that by virtue of Clause 62 of GCC particularly this Clause is coming within the ambit of expected matter. I accordingly, award a sum of Rs. 42,219.00 in favour of the claimant against claim no. 5.

Claim no. 6 and 7 are related to extra expenses for driving 500 mm board piles through hard rock/ blast as well as through soft rock/ weather rock respectively over contractual rate of Schedule.

Finding of the Arbitrator:

After considering pleadings, arguments, evidences, documents and judicial decisions of connecting clauses of contract relied by the parties, I hold that this particular claim is not hit by principle of excepted matter. The Clause relied by the respondent in this regard, after looking into the same in its right perspective, I am of the view that as per evidence on record, this claim is not maintainable and I am inclined to accept argument of the claimant which is clearly proved by evidence in regard to facts and reasonable rate admitted by the respondent witness. The rate admitted by the witness in fact is more. I thus accept the rates claimed by the claimant as correct. The claimant has proved this claim by evidence, and I am award a sum of Rs. 17,88,480./- in favour of the claimant in settlement of claim no. 6 and 7.

Claim no. 8 is for cutting and removal of permanent steel liner about pile cap cut off level to ground level amounting to Rs. 94,056/-.

Finding of the Arbitrator:

After considering pleadings, arguments, documents and evidences on record and true construction of terms and conditions of the contracts, item of Schedule, I hold that this claim is maintainable and the claimant is entitled to extra payment on this account. There is no Clause shown by the respondent from which it can be inferred that this particular claim is coming within the ambit of excepted matters, therefore, a decision not to pay by the respondent establishment a dispute cannot take out the said dispute from the ambit of the jurisdiction of the Arbitrator as an excepted matter. There is also no provision in the contract expressly barring this particular claim, therefore, objection of the respondent in this regard is rejected. The rate claimed by the claimant is less than reasonable rate ascertain by the respondent and accordingly, I award a sum of Rs. 94,050/- in favour of the claimant in settlement claim no. 8.

Claim no. 9 is with regard to operation of liner plate item was not inclusive of Schedule item of pile but was an optional item to be executed with steel materials to be issued free of costs by the respondents as required.

Findings of the Arbitrator

After considering pleadings, documents, arguments and evidence on record and true construction of the items of Schedule another terms and conditions of the contract, I hold that this claim is maintainable and the claimant is entitled to extra payment on account of this claim. No clause could be shown by the respondent from which it can be inferred that this particular claim is coming within the ambit of excepted matters. As per principal decision this claim is not barred by limitation. The claimant has

argued that respondents' assurance to consider the claim was not acted upon within reasonable time so, there was no clause for claimant to wait for an indefinite period for a decision. The claimant after reasonable time within period specified in arbitration clause, on 19.11.1996 invoked the arbitration clause, hence, I hold it can be said to be pre-matured claim without existence of dispute as wrongly contended by the respondents. I accordingly award Rs. 1,62,750/- in favour of the claimant against this claim.

Claim no. 14 is related to extra expenses for the pile to be driven without liner plate.

Finding of the Arbitrator:

After considering the pleading, argument, document, evidence, clause of contract, I hold that admissibility of the claim appear from admission of the respondent and I award a sum of Rs. 6,920/- at the rate accepted by the witness of the respondent as reasonable rate in settlement of claim 14.

Claim no. 15 is for additional piles driven without liner amounting to Rs. 2,18,520/-.

Finding of the Arbitrator:

After considering pleadings, arguments, documents and evidence on record, clauses of the contracts and construction thereof, I hold by virtue of admission of RW1 during cross-examination about admissibility of claim, this claim is maintainable and justified as per principal decision of this particular claim is not barred by limitation there is no specific clause from which this particular clause is coming within the purview of excepted matter

and the award has been allowed based on quantity and rate admitted by the respondent. I award a sum of Rs. 1,59,160/- accordingly in favour of the claimant.

Claim no. 18 is related to filing is stone dust as per the direction amounting to Rs. 2,11,400/-.

Finding of the Arbitrator:-

After considering pleadings, arguments, documents, evidence on record, clauses of contract and construction thereof, I am inclined to accept argument that in case there was any shortcoming any specification of any particular work there was no need for introducing a separate operation which was definitely for benefit of better specification. There is no evidence in support of contention of the respondent about its decision leading to bad workman ship. As per principal decision, the claim is not barred by clause 4 (1) of GCC. There is no clause shown by the respondents by virtue of which particular claim is coming within the ambit of accepted matters. As per principal decision of claim is not barred by law of limitation. I accordingly, award a sum of Rs. 2,11,400/- in favour of the claimant against claim no. 18.

Claim no. 19 is for discrepancies is vague of fabricated materials amounting to Rs. 1,21,522.30/-

Finding of the Arbitrator:-

After considering pleadings, arguments, documents, evidence on record, clauses of contract and construction thereof, I am inclined to accept

argument/claimant based on natural justice so, I award a sum of Rs. 1,14,642/- in favour of the claimant in settlement of claim no. 19.

Claim no. 24 is with regard to interest @ 18 %per annum on all claims from the date of demand till the realization.

Finding of the Arbitrator:-

After considering pleadings of the parties, case, clauses of contract and construction thereof, I am inclined to award pendent lite interest to the claimants on total awarded amount @ 12 % per annum from 27th November, 1996 to the date of award i.e. 31.12.2005. I further award future interest on awarded amount @ 12 % per annum from the date of award to the date of realization.

Claim 25 is related to cost of arbitration, Court Fee etc.

Finding of the Arbitrator:-

Both the parties have agreed that this is a matter of discretion of arbitrator, therefore, following the events I award cost in favour of the claimant of a sum of Rs. 800,000/- taking into account the number of days proceedings held and the fee paid to the Arbitrator, her staff and lawyers' fees paid.

The contention made by the petitioner with regard to internal documents relied by the Arbitrator, the petitioner relied upon the judgment reported in (1987) 3 SCC 34 (State of Bihar & Ors. –versus- Kripalu Shankar & Ors.) Paragraphs 12, 13 & 16 which read as follows:-

“12. *It cannot be disputed that the appeal raises an important question of law bearing upon the proper functioning of a democratic government. A government functions by taking decisions on the strength of views and suggestions expressed by the various officers at different levels, ultimately getting finality at the hands of the Minister concerned. Till then, conflicting opinions, views and suggestions would have emanated from various officers at the lower level. There should not be any fetter on the fearless and independent expression of opinions by officers on matters coming before them through the files. This is so even when they consider orders of courts. Officers of the government are oftentimes confronted with orders of courts, impossible of immediate compliance for various reasons. They may find it difficult to meekly submit to such orders. On such occasions they will necessarily have to note in the files, the reasons why the orders cannot be complied with and also indicate that the courts would not have passed those orders if full facts were placed before them. The expression of opinion by the officers in the internal files are for the use of the department and not for outside exposure or for publicity. To find the officers guilty for expressing their independent opinion, even against orders of courts in deserving cases, would cause impediments in the smooth working and functioning of the government. These internal notings, in fact, are privileged documents. Notings made by the officers in the files cannot, in our view, be made the basis of contempt action against each such officer who makes the notings. If the ultimate action does not constitute contempt, the intermediary suggestions and views expressed in the notings, which may sometimes even amount ex facie disobedience of the court's orders, will nor amount to contempt of court. These notings are not meant for publication.*

13. *In our considered view the internal notes file of the government, maintained according to the rules of business, is a privilege document. If the government claims privilege or quasi-privilege regarding the notes file we will not be justified in rejecting the claim outright. In this case, the notes file was brought to the court not voluntarily by the government. It was summoned for by the court. The court can always look into it. The right of the court to look into any file can never be denied. The contents of the notes file brought to court got communicated to the court because the court looks into it. It would be dangerous to found an action for contempt, for the views expressed in the notes file, on the discovery of unpleasant or unsavory notes, on a perusal of the notes file by the court after getting them summoned. This would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the government. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in some cases, technically speaking is in disobedience of an order of the court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon the notings in a file for the purpose of initiating contempt, in our*

view, therefore, would be to put the functioning of the Government out of gear. We must guard against being over-sensitive, when we come across, objectionable notings made by officers, sometimes out of inexperience, sometimes out of over-zealousness and sometimes out of ignorance of the nuances of the question of law involved.

16. *Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation. The notings in a notes file do not have behind them the sanction of law as an effective order. It is only an expression of a feeling by the concerned officer on the subject under review. To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression of a view in notes file cannot be the sole basis for action in contempt. Business of a State is not done by a single officer. It involves a complicated process. In a democratic set up, it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in notes file at different levels by concerned officers will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not bring it within the vice of sub-section (c) of [Section 2](#) of the Contempt of Courts Act, 1971, which defines civil contempt. Expression of a view is only a part of the thinking process preceding Government action.”*

The petitioner relied upon the judgment reported in (2009) 1 SCC 180 (Sethi Auto Service Station & Anr. –versus- Delhi Development Authority & Ors.) Paragraphs 14 and 16 which reads as follows:-

“14. *It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.*

16. *To the like effect are the observations of this Court in Laxminarayan R. Bhattad. v. State of Maharashtra, wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right.”*

The petitioner relied upon the judgment reported in (2018) 8 SCC 215 (Pimpri Chinchwad New Township Development Authority –versus- Vishnudev Cooperative Housing Society & Ors.) Paragraph 36 which reads as follows:-

“36. Our answer to the question is “no”. It is for the reasons that: first, a mere noting in the official files of the Government while dealing with any matter pertaining to any person is essentially an internal matter of the Government and carries with it no legal sanctity; second, once the decision on such issue is taken and approved by the competent authority empowered by the Government in that behalf, it is required to be communicated to the person concerned by the State Government. In other words, so long as the decision based on such internal deliberation is not approved and communicated by the competent authority as per the procedure prescribed in that behalf to the person concerned, such noting does not create any right in favour of the person concerned nor it partake the nature of any legal order so as to enable the person concerned to claim any benefit of any such internal deliberation. Such nothing(s) or/and deliberation(s) are always capable of being changed or/and amended or/and withdrawn by the competent authority.”

The petitioner relied upon the judgment reported in (2009) 15 SCC 705 (Shanti Sports Club & Anr. –versus- Union of India & Ors.) Paragraphs 43 & 52 which read as follows:-

“43. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77 (1) and (2) or Articles 166 (1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77 (2) or Article 166 (2). A noting or

even a decision recorded in the file can always be reviewed reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.

52. As a result of the above discussion, we hold that the notings recorded in the official files by the officers of the Government at different levels and even the Ministers do not become decisions of the Government unless the same is sanctified and acted upon by issuing an order in the name of the President or Governor, as the case may be, authenticated in the manner provided in Articles 77 (2) and 166 (2) and is communicated to the affected person. The notings and/or decisions recorded in the file do not confer any right or adversely affect the right of any person and the same can neither be challenged in a court nor made basis for seeking relief. Even if the competent authority records a noting in the file, which indicates that some decision has been taken by the authority concerned, the same can always be reviewed by the same authority or reversed or overturned or overruled by higher functionary/authority in the Government.”

The petitioner has raised the issue before the Ld. Arbitrator regarding internal document and before dealing with the each claims raised by the respondent, the Arbitrator has decided the preliminary issues out of which the instant issue was one. The documents were exhibited as “Ex. G” collectively on the production of the claimant at the time of evidence of the claimant. Ld. Arbitrator has also recorded that the petitioner has raised specific objection to the said letters stating that those internal documents between the petitioner and his clients or the other agencies which the respondent cannot relied in support of his claim because contract between the petitioner and his client are different between the petitioner and the claimant. It is also recorded that it was the case of the petitioner before the Ld. Arbitrator that the petitioner claim certain payments for his clients and got the payments therefore that cannot establish admissibility of claim of the claimant because issues are related to separate contract and claimant has to prove its own claim on the basis of its own documents. The said

documents were shown to the petitioner's witness during his examination as RW1 and the witness of the petitioner has admitted the correctness of the said documents and the said correspondence related to the particular dispute between the petitioner and the respondent arising out of the agreement entered between them. Ld. Arbitrator also recorded that the existence of the documents admitted by the petitioner and the contents of the documents were also admitted by the petitioner and thus there is no reason not to rely the said documents.

As per the judgments referred by the petitioner (supra) is settled law that noting in a notes file does not have the sanction of law to be an effective order. It is only an expression of feeling by the concern officer on the subject under review. In the instant case the claimant during his examination has produced letters exchange between the petitioner and his clients and the same was also admitted by the petitioner during cross-examination. During argument, before the Ld. Arbitrator, the petitioner has objected stating that the said documents are internal documents between them and their clients/ other agencies and during the cross examination the witness of the petitioner as RW1 admitted the said documents and thus the judgments relied by the petitioner is not applicable in the instant case and the Ld. Arbitrator has rightly relied the said documents which were marked as Exbt. G.

With regard to the contention that the Award passed by the Ld. Sole Arbitrator is without assigning any reason, the petitioner has relied upon

the judgment reported in (2009) 10 SCC 259 (Som Datt Builders Limited - versus- State of Kerala) Paragraphs 20 and 25 which read as follows:-

“20. [Section 31\(3\)](#) mandates that the arbitral award shall state the reasons upon which it is based, unless - (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award under [Section 30](#). That the present case is not covered by clauses (a) and (b) is not in dispute. In the circumstances, it was obligatory for the Arbitral Tribunal to state reasons in support of its award in respect of Claims 1 and 4-B. By legislative mandate, it is now essential for the Arbitral Tribunal to give reasons in support of the award. It is pertinent to notice here that the 1996 Act is based on UNCITRAL Model Law which has a provision of stating the reasons upon which the award is based.

25. The requirement of reasons in support of the award under [Section 31\(3\)](#) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write judgment like a court nor it is expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect thought process leading to a particular conclusion. To satisfy the requirement of [Section 31\(3\)](#), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed.”

The judgment reported in (2008) 13 SCC 80 (Delhi Development Authority –versus- R. S. Sharma & Company, New Delhi) Paragraph 27 which reads as follows:-

“27. As rightly pointed out by the learned Additional Solicitor General, the Division Bench proceeded on an erroneous premise that the appellant-DDA has nowhere stipulated where the stone was to be brought from. It is true that DDA had given certain specifications required to be conformed. Further, the cost of the work was irrespective of the source or lead from where the stone was brought. The award is completely silent on the relevant clause viz. Clause 3.16 of the agreement which makes it clear that the contractor is wholly responsible for all the extra leads. In fact, the Arbitrator has given no

reason whatsoever so far as the rate claimed for the extra lead by the claimant is concerned and has verbatim accepted the claim without giving any justification for the same. We are satisfied that this is an error apparent on the face of the record as well as contrary to the terms of the Agreement.”

The judgment reported in (2015) 3 SCC 49 (Associate Builders – versus- Delhi Development Authority) Paragraph 42.3 which reads as follows:-

“42.3. (c) *Equally, the third subhead of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:*

“28. Rules applicable to substance of dispute.— (1)-(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.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

The judgment reported in (2003) 5 SCC 705 (Oil & Natural Gas Corporation Ltd. –versus- Saw Pipes Ltd.) Para 13 which read as follows:-

“13. *The question, therefore, which requires consideration is - whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under [Sections 24, 28](#) or 31(3), which affects the rights of the parties. Under sub-section (1)(a) of [Section 28](#) there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the [Indian Contract Act](#), the [Transfer of Property Act](#) and other such laws in force. Suppose, if the award is passed in violation of the provisions of the [Transfer of Property Act](#) or in violation of the [Indian](#)*

Contract Act, the question would be - whether such award could be set aside. Similarly, under sub-section (3), Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34."

The petitioner has filed the statement of claim containing 25 claims and the Ld. Arbitrator has awarded 15 claims and the claimant has not pressed the claim no. 20. After filing of the instant application by the petitioner, the petitioners have admitted the amount awarded by the Arbitrator with respect of claim nos. 1, 2, 3 and 4 and accordingly, an amount of Rs. 13,13,763.08/- was paid to the claimant vide order dt. 17.03.2010.

This Court has perused the award passed by the Ld. Arbitrator and find that the Ld. Arbitrator has dealt with each and every claim separately. While passing the award, the Ld. Arbitrator has assigned well reason. It was also appearing from the award that the claimant to establish his case has examined himself as witness and brought several documents on record. The documents relied by the claimant with respect of his claim was also admitted by the respondent witness and while passing the award the Ld.

Arbitrator has categorically recorded the same and thus it cannot be said that the award passed by the Ld. Arbitrator is without any reason. It is settled law that this Court cannot sit in appeal over the award passed by the Ld. Arbitrator by re-assessing or re-appreciating the evidence. In the instant case, the Ld. Arbitrator has elaborately examined the facts and documents relied by the parties and has held that the petitioner is liable to pay the amount as claimed by the claimant and thus the judgment as relied by the petitioner is not applicable in the instant case.

The petitioner has also argued the matter with regard to “Expected Matters” and submits that all the matters are expected which is not covered under the contract but the Ld. Arbitrator has awarded the claim in favour of the claimant. To adjudicate the issue raised by the petitioner, Clause 62 of the General Condition of Contract is required to be dealt with.

Clause 62:- Matters finally determined by the Railway:-

“All disputes or differences of any kind whatsoever arising out of or in connection with the contract whether during the progress of works or after their completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decision thereon in writing. The decisions, directions and certificates with respect to any matters decision of which specifically provided for by these conditions, given and made by the Railway, or by the Engineer on behalf of the Railway, which matters are referred to herein after as Expected Matters shall be final and binding upon the contractor and shall not be set aside or be attempted to be set aside on account of any informality, omissions, delay or error in proceeding in or about the same or in any other ground or for any other reason and shall be without appeal”

The Ld. Arbitrator has also dealt with the contentions raised by the petitioner with regard to Expected Matters. While deciding the said issue, the Ld. Arbitrator has categorically held that mere reference to a clause of the agreement which provide that “Expected Matters” are not ad judicable and is not sufficient to draw a conclusion that any particular claim is coming within the ambit of Expected Matters. The Ld. Arbitrator has also held that mere refusal to pay any claim by the petitioner cannot automatically bring the claims under purview of “Expected Matters”. Before this Court also the counsel for the petitioner has not brought to the notice of any document to show that the petitioner had taken an appropriate decision by communicating the same to the claimant which can be said as Expected Matters. Hon’ble Supreme Court in the case reported in (2011) 5 SCC 758 (J.G. Engineers Private Limited –versus- Union of India & Ors.) the Hon’ble Supreme Court held that :-

“17. Clauses (2) and (3) of the contract relied upon by the respondents no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether Clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject-matter of arbitration. We will refer to and analyse each of the “excepted matters” in Clauses (2) and (3) of the agreement to find their true scope and ambit:

(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the contractor shall pay as compensation for everyday's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. What is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for everyday's delay that is, whether it should be 1% or

lesser. His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for everyday the due quantity of the work remains incomplete, subject to a ceiling of ten percent. This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.

(iii) The first part of Clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-Charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date, certain consequences as stated therein, will follow. What is made final by this provision is the decision of the Engineer-in-Charge as to whether the contractor will be able to secure the completion of the work by the due date of completion, which could lead to the termination of the contract or other consequences. The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the Department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of Engineer-in-Charge is made final.

(iv) The second part of Clause (3) of the agreement provides that where the contractor had made himself liable for action as stated in the first part of that clause, the Engineer-in-Charge shall have powers to determine or rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence of such termination or rescission. This does not make the decision of the Engineer-in-Charge as to the validity of determination or rescission, valid or final. In fact it does not make any decision of Engineer-in-Charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-Charge under his

signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined.

(v) After determination or rescission of the contract, if the Engineer-in-Charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the Engineer-in-Charge in regard to such excess shall be final and conclusive, shall be borne and paid by the original contractor. What is made final is the actual calculation of the difference or the excess, that is, if the value of the unexecuted work as per the contract with the original contractor was ₹1 lakh and the cost of getting it executed by an alternative contractor was ₹1,50,000/- what is made final is the certificate in writing issued by the Engineer-in-Charge that ₹50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-Charge is valid and legal and whether it was due to any breach on the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on which the decision of Engineer-in-Charge is made final.

18. *Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the Department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.*

22. *In view of the above, the question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator*

also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding Claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach.

23. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the arbitrator on Items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained.”

Hon’ble Supreme Court in the case reported in (2015) 3 SCC 49

(Associate Builders –versus- Delhi Development Authority) held that:

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

Claim no. 24 is related to pendent lite and future interest on awarded amount at the rate of 18 ½ % per annum but the Ld. Arbitrator has awarded interest @ 12 % per annum from 27 November, 1996 till the date of award i.e., 31 December, 2005 and future interest on the awarded amount @ 12 % from the date of award till the date of realization. This Court finds that the Ld. Arbitrator has awarded reasonable interest and thus there is no need to interfere with the said interest.

As regard claim no. 25, the cost of the Arbitration, Court Fee etc., the Ld. Arbitrator has awarded Rs. 8,00,000/- with the consent of both the parties and this Court does not find any reason to interfere with the same.

After going through the Award dt. 31.12.2015, it is found that the Ld. Arbitrator has taken into consideration of each and every contention relied by the petitioner and has elaborately discussed each and every claim made by the claimant and this Court does not find anything to interfere with the Award passed by the Ld. Arbitrator.

As per the judgments referred above it is settled law that this Court cannot sit on appeal over the Award passed by the Arbitrator by reassessing or the re-appreciating the evidence.

As regard the point of limitation raised by the petitioner, the bill for schedule item of work was prepared and signed in the month of September, 1993 by the claimant but the petitioner has neither accepted nor modified. As per Measurement book, initially the bill was technically checked and passed in December, 1995 and subsequently it was changed by the petitioner of their own and finalised on 12.03.1996. Only on 14.03.1996, the petitioner had informed about finalisation of final bill and thus there is no limitation as claimed by the petitioner.

The award passed by the Ld. Sole Arbitrator dt. 31.12.2005 does not required any interference.

A.P No. 142 of 2006 is thus dismissed.

(Krishna Rao, J.)