

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

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 965 of 2013

Digha Shankarpur Development Authority

Versus

A.K. Enterprises

Mr. Indu Bhusan Das, Adv.

.....For the petitioner

Mr. Subhojit Saha, Adv.

Mr. Ishaan Saha, Adv.

.....For the respondent

Heard on : 17.05.2022

Judgment on : 13.07.2022

Krishna Rao, J.: The Diga Shankarpur Development Authority published a tender notice dt. 21.03.2007 for Construction of Bituminous road with culvert from Orissa Border to Permanent Picnic Spot at New Digha, Purba Medinipur. Pursuant to the tender notice, the respondent had participated in the said tender process and the petitioner accepted the rated quoted by the respondent. On acceptance of the rate quoted by the respondent, an agreement was entered between the petitioner and the respondent with respect of execution of the work on 2nd March, 2007. The estimated cost of

the said work was Rs. 64,54,792.00/- but the respondent was agreed to execute the work for an amount of Rs. 47,75,255/- which was 26.02% less than the estimated amount. As per the contract the respondent had to completed the work in all respect by 25th July, 2007.

The respondent had started the work for execution but in between the respondent had stopped the work for long time without any reasons and accordingly the petitioner had issued notice to the respondent on 28.09.2007 directing the respondent to complete the work before Puja.

A joint inspection was carried out and during the inspection it was noticed that the respondent had not executed the work as per the specification of the contract as the thickness of every layer was less than the proposed thickness and a notice was issued to the respondent on 7th December, 2007 by directing the respondent to execute the work as per the specification of the contract.

The work was completed on 26th February, 2008 but in a short span of time in the month of June, 2008 the road constructed by the respondent started getting damaged and on 25th July, 2008 a communication was made to the respondent for repair of the damage portion of the road.

The respondent had raised three bills including final bill and on receipt of the bills the petitioner has released an amount of Rs. 54,88,961/- and the respondent had accepted the same.

The respondent had also claimed amount for execution of additional work, added expenses due to increase of prices of materials, labours and fuel etc. and compensation.

The petitioner has not considered for the extra claim and compensation raised by the respondent and accordingly the respondent invoked the provision for appointment of Arbitrator and accordingly an Arbitrator was appointed.

The petitioner has raised the following claim before the Ld. Sole Arbitrator:-

LIST OF DISPUTES/CLAIMS

<i>Sl. No.</i>	<i>Particulars</i>	<i>Amount</i>
1.	<i>Compensation on account of prolongation of the job for reasons solely attributable to the employer.</i> <i>i) Towards on-site expenses incurred in the enlarged period.</i> <i>ii) Towards off-site expenses incurred in the enlarged period.</i>	<i>Rs. 2,52,000/-</i> <i>Rs. 49,000/-</i>
2.	<i>Compensation on account of depreciation of tools and plants, other unconsumables, machinery deployed at the site of work and blocked upto 31.1.2008 without any corresponding monetary return.</i>	<i>Rs. 11,76,000/-</i>
3.	<i>Compensation on account of additional cost of execution and/or added expenses in respect of works executed in spillover/enlarged period due to increment in price of materials, labour, fuel etc. in the market (except towards increment in price of bitumen and fuel which has been claimed separately in Sl. 10).</i>	<i>Rs. 8,91,000/-</i>
4.	<i>Compensation on account of idle/barren labour, detained at the site of works due to suspension of the job from time to time, for</i>	<i>Rs. 7,73,000/-</i>

	<i>various reasons attributable to the department.</i>	
5.	<i>Compensation towards business loss for being retained longer in the contract in question for an additional period of 7 months without any corresponding monetary benefit and without being free to move elsewhere during the extended stay to earn profit which the claimant/contractor could have otherwise made.</i>	<i>Rs. 12,53,000/-</i>
6.	<i>Amount payable on account of execution of extra and/ or additional items of works carried out on instruction from the Authority but not paid despite repeated requests and/ or reminders made for the same.</i>	<i>Rs. 8,00,000/-</i>
7.	<i>Amount payable towards refund of the sum deducted allegedly on account of cess.</i>	<i>Rs. 20,653/-</i>
8.	<i>Amount payable towards refund of the deposit lying towards security in respect of the instant contract.</i>	<i>Rs. 4,18,896/-</i>
9.	<i>Amount payable on account of unusual increment in price of bitumen and fuel in the market during execution of the job.</i>	<i>Bitumen:Rs.3,65,000/- Fuel : Rs. 2,70,000/-</i>
10.	<i>Compensation on account of interest on capital borrowed from Bank at an exorbitantly high rate of interest.</i>	<i>Rs. 93,000/-</i>
11.	<i>Interest @ 18 % per annum on due amount on Claim Nos. (1) to (10) as above from 01.04.2008 till payment.</i>	<i>As already accrued and to be accrued further.</i>
12.	<i>Cost of Arbitration Proceedings.</i>	<i>As to be found due.</i>

After conducting regular proceeding, the Arbitrator passed award on 10th July, 2013. The Ld. Arbitrator dealt with 12 claims raised by the respondent and the arbitrator allowed claim no. 1(i) in part, claim no.2 in part, claim no. 5 in part, claim no. 6 in part, claim no. 8 in full, claim no. 9 in full with respect of Bitumen and no award is passed with respect of Fuel, claim no. 11 interest @18% with effect from 1st September, 2008 till realization of amount and claim no. 12 with respect of cost. The arbitrator had rejected claim nos. 1(ii), 3, 4, 7 and 10.

Claim no. 1: Compensation on account of prolongation of the job for reasons solely attributable to the employer.

Finding of the Arbitrator:

“In my view, reasons for the said delay and /or prolongation cannot be ascribed exclusively to one of the parties, in other words, both the parties are partly responsible for delay occurred in the instant case.

It is thus clear that it is a case of partial prevention in as much as committed by the respondent have gone to the root of the contract, and as such, it can thus safely be construed that breaches were not fundamental particularly when the work in question could ultimately be completed by the claimant.

In the instant case, I am of the view that the claimant is entitled to be compensated on account of on-site expenses in respect of enlarged period in part on the ground that the respondent employer was not only responsible for the entire prolonged of 7 months. I have weighed both oral and documentary evidence adduced by the claimant and have come to conclusion that the claimant is entitled to an amount of Rs. 22,500/-.

As such I allowed an award of Rs. 22,500/- against Claim No. 1 (i) and the respondent DSDA is directed to pay the said sum to the claimant.

(ii). Towards off-site expenses incurred in the enlarged period Amount Claimed- Rs.49,000/-

Based on my observation against the against the above site expenses, I feel that the claimant is not entitled to be compensated on account of off-site expenses in respect of the enlarges period as claimed even in part and as such, no amount is allowed to the claimant against this item i.e. claim no. 1(ii).”

Claim no. 2 : Compensation on account of depreciation of tools and plants, other inconsumable, machinery deployed at the site of work and blocked up to 31st January 2008 without any corresponding monetary return.

Finding of the Arbitrator:

“Based on the observation made under claim no. 1 (in respect of onsite expenses), I feel that the claimant is entitled to this claim, of course, in part. I have scrutinized the details of the claim furnished by the claimant. According to me, the claimant is entitle to a sum of Rs. 2,50,000/-

The respondent DSDA is directed to pay sum of Rs. 2,50,000/-to the claimant against Claim no. 2.

Claim no. 5. Compensation towards business loss for being retained longer in the contract in question for an additional period of 7 months without any corresponding monetary benefits and without being free to move elsewhere during the extended stay to earn profit which the claimant/contractor could have otherwise made.

Finding of the Arbitrator:-

I have thoroughly scrutinized the break up furnished at page 44 of the bunch furnished by the claimant and have to the conclusion that the claimant is entitled to an award of Rs. 4,60,000/- against this claim.

Claim no. 6. Amount payable on account of execution of extra and/or additional items of works carried out on instruction from the Authority but not paid despite repeated request and/or reminders made for the same.

Finding of the Arbitrator:-

Considering submission of the parties and by weighing evidentiary value of the deposition of the claimant's only witness as well as the documents disclosed by the claimant in support of this claim, I am of the

view that the claimant is entitled half amount of this claim i.e. Rs. 4,00,000/-.

Claim no. 8. Amount payable towards refund of deposit lying towards security in respect of the instant contract.

Finding of the Arbitrator:-

From the records available to this Tribunal by the parties, it is observed that there was no instruction to rectify the defects cropped up on the completed works nor was there was any reply from the respondent indicating valid reason for withholding the amount of security deposit despite receipt of application from the claimant for refund of the same. I do not find any reason to disallow this claim.

Claim no. 9. Amount payable on account of unusual increment in price of Bitumen and Fuel in the market during execution of the job.

Finding of the Arbitrator:-

As regard Bitumen, I have scrutinized the matter thoroughly and according to me, the claimant is required to be compensated on account of price of Bitumen as demanded by the claimant.

Amount awarded on account of increment in Bitumen as follows:-

“Cost of 64.018 MT of Bitumen	Rs. 16,24,781/-	
Less 26.02 %	Rs. 4,22,768/-	Rs. 12,02,013/-

Less (-) cost of Bitumen contemplated at the time of making offer.

The work was completed on 26.02.2008 and the claimant has demanded interest from 1st April, 2008. Having considered the totality of the circumstances and keeping in view of the facts and various dates and all other materials on records as mentioned in the pregoing. I feel it to be equitable and fair to allow interest from 1st September, 2008. On careful examination of the legal impact and factual matrix of the instant case, I think that it would be reasonable to allow interest in the instant case from 1st September, 2008. Starting date of accrual of interest is in my view required to be fixed after allowing considerable length of time for finalization of the accounts and therefore, I have fixed the date as 1st September, 2008 keeping in view of six months time is enough for settlement of accounts after

factual completion of the job on 26th February, 2008. Rate of interest claimed by the claimant does not appear to me as rational.

Claim no. 12. Cost of Arbitration Proceedings.

Finding of the Arbitrator:-

The claimant had furnished the abstract of cost for the sum of Rs. 4,86,950/-. Considering the number of sitting held and other aspects relating to the instant arbitration proceeding, I find it just that the claimant is entitled to cost of arbitration proceeding of Rs. 3,00,000/-.

For the sake of convenience, amounts claimed by the respondent and the amount awarded by the Ld. Sole Arbitrator in brief are as under :-

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|----------------------|---|
| 1. Claim No. 1 (i). | Rs. 22,500/-. |
| 2. Claim No. 1 (ii). | Nil. |
| 3. Claim No. 2. | Rs. 2,50,000/-. |
| 4. Claim No. 3. | Rs. Nil. |
| 5. Claim No. 4. | Nil. |
| 6. Claim No. 5. | Rs. 4,60,000/-. |
| 7. Claim No. 6. | Rs. 4,00,000/-. |
| 8. Claim No. 7. | Rs. Nil |
| 9. Claim No. 8. | Rs. 4,18,896/-. |
| 10. Claim No. 9. | Rs.3,65,000/-. |
| 11. Claim No. 10. | Rs. Nil. |
| 12. Claim No. 11. |10% interest from the month of September 2008 till the realization of Awarded sums. |

13. Claim 12. Rs. 3,00,000/- as cost.”

Mr. Indu Bhusan Das, representing the petitioner submits that the award passed by the Ld. Sole Arbitrator is an unreasoned and nonspeaking award. The Ld. Arbitrator has allowed the claim no. 1 (i) in part but while allowing the said claim, the Ld. Arbitrator had not furnished any reason that how the Ld. Arbitrator come to conclusion that the respondent is entitled to get an amount of Rs. 22,500/-. The Ld. Arbitrator only stated that he had weighed both oral and documentary evidence adduced by the respondent but has not clarified that which documents and which evidence the Ld. Arbitrator come to the said conclusion. In the finding the Ld. Arbitrator has held that *“In my view, reasons for the said delay and /or prolongation cannot be ascribed exclusively to one of the parties, in other words, both the parties are partly responsible for the delay occurred in the instant case”*.

As regard the claim no.2 the Ld. Sole Arbitrator held that “Based on the observation as made under claim no. 1 (in respect of site expenses), I feel that the claimant is entitled to this claim, of course, in part.” but had not assigned any specific reason for allowing claim no. 2.

As regard claim no. 5, the Ld. Sole Arbitrator awarded the said claim in part by assigning the reason that *“Based on the reasoning shown in respect of Claim No.1 (on site expenses) and keeping in view of prolongation in particular, I find it proper and justified to allow this claim in part.”* The petitioner has raised plea that there exists no clause in support of the particular claim and all the bills of the respondent have been paid but the

Ld. Arbitrator has not decided the plea raised by the petitioner and on the basis of the reasons shown in claim no. 1 the claim no. 5 is allowed in part.

As regard claim no. 6, the Ld. Sole Arbitrator allowed claim no. 6 in part by stating that considering the submission of the parties and by weighing evidentiary value of the deposition of the claimant as well as the documents disclosed by the claimant, the claimant is entitled to get half amount of the claim but the Ld. Arbitrator has not assigned any reason by which document the arbitrator came to conclusion that the respondent has executed extra /additional work on the instruction of the authority.

As regard claim no. 8, the Ld. Arbitrator awarded the entire security amount on the reason that on record there is no instruction to rectify the defects cropped up on the completed works and there is no reason for withholding the amount of security deposit.

As regard claim no. 9, the Ld. Sole Arbitrator had awarded an amount of 3,65,000/- on account of increment in the price of Bitumen on the ground that the respondent had quoted 26.02% which was less than the actual cost of the bitumen.

As regard to claim no. 11 and 12, the Ld. Arbitrator had allowed @ 10% per annum with effect from 1st September, 2008 till realization and cost of Rs.3,00,000/- as cost without assigning any reason.

Ld. Counsel for the petitioner submits that the respondent had raised three bills and accordingly, the petitioner has released the entire amount of

Rs. 54,88,951/- as claimed by the respondent but the Ld. Arbitrator has not taken into consideration of the said fact.

Ld. Counsel for the petitioner relied upon the judgment reported in AIR 1997 SC 1376 (Tamil Nadu Electricity Board & Ors. –Versus- M/s Bridge Tunnel Constructions & Ors.) and had relied upon Para 22 of the judgment.

Mr. Subhojit Saha, the Ld. Counsel for the respondent submits that the Ld. Arbitrator on perusal of all the documents relied by the respondent and the submissions made on behalf of the respondent, the Ld. Arbitrator has passed reasoned and speaking award.

Ld. Counsel for the respondent submits that to prove the claim, the claimant has examined himself as witness before the Ld. Arbitrator and produced all the documents supported the claim but the petitioner has not adduced any evidence.

Ld. Counsel for respondent submits that the respondent had made all together 12 claims before the Ld. Sole Arbitrator and out of 12 claims, the Arbitrator has allowed only 8 claims that to in part.

Ld. Counsel for the respondent submits that the ground on which the petitioner has filed the instant application is not covered under any of the grounds as available under section 34 of the Arbitration and Conciliation Act, 1996.

Ld. Counsel for the respondent submits that the petitioner has unconditionally accepted the work executed by the respondent and have also issued completion certificate.

Ld. Counsel for the respondent relied upon the judgment reported in 2019 SCC Online SC 1656 (Dyna Technologies Pvt. Ltd. -versus- Crompton Greaves Ltd.) and submits that the provision of Section 31(3) of the Arbitration Act does not require an elaborate judgment to be passed by the Arbitrators having regard to speedy resolution of dispute.

Heard the Ld. Counsel for the respective parties, considered the documents available on record and the judgment relied by the parties.

Before proceeding further, it would be necessary for this Court to deal with scope of interference for the courts under Section 34 (2) (b) (ii) of the Act, reads as follows :-

“34. Application for setting aside arbitral award – Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if :-

(b) the Court finds that-

(ii) the arbitral award is in conflict with the public policy of India.”

“14. In ONGC Limited Vs. Saw Pipes Limited MANU/SC/0314/2003 : (2003) 5 SCC 705, the Hon'ble Supreme Court in Para No. 31, held as under:

"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory

provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [MANU/SC/0195/1994 : 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

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

15. In McDermott International Inc. Vs. Burn Standard Co. Ltd. MANU/SC/8177/2006 : (2006) 11 SCC 181, the Hon'ble apex Court in para 58 to 60 held as under:

"58. In Renusagar Power Co. Ltd. v. General Electric Co. this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. V. Saw Pipes Ltd. (for short 'ONGC'). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. V. Brojo Nath Ganguly wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Contract Act, 1872 and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Contract Act, 1872. In OnGC this Court, apart from the three grounds stated in Renusagar, added another

ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The Public Policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would comewithin the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See *State of Rajasthan v. Basant Nahata*).

16. In *DDA Vs. R.S. Sharma and Co.* MANU/SC/3624/2008 : (2008) 13 SCC 80, the Hon'ble apex Court held as under:

"21. From the above decisions, the following principles emerge:

(a) An award, which is

- i. contrary to substantive provisions of law; or
- ii. the provisions of the Arbitration and Conciliation Act, 1996; or
- iii. against the terms of the respective contract; or
- iv. patently illegal; or
- v. prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

(emphasis supplied)

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

17. In Associates Builders' case (supra), the Hon'ble Supreme Court after referring to the earlier Judgments of Apex Court analysed each of the heads contained in Saw Pipes's case and observed as under:

"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.

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator.

42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1: (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute__ (1) Where the place of arbitration is situated in India__

(a) In an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.

42.2: (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality _ for example if an arbitrator gives no reasons for an award in contravention of Section 31 of the Act, such award will be liable to be set aside.

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."

(emphasis supplied).

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."

18. In South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) Vs. Oil India Limited MANU/SC/0441/2020 : (2020) 5 SCC 164, the Apex Court in paras 17 & 30 of the said judgment while

dealing with interpretation of clause vis-à-vis circular issued by Government of India, observed as under:

"According to rule of construction of any document harmonious approach should be made reading or taking the document as a whole and exclusion should not be readily inferred unless it is clearly stated in the particular clause of the document. This is according to rule of interpretation. A consistent interpretation should be given with a view to smooth working of the system, which the document purports to regulate. The word, which makes it inconsistent or unworkable, should be avoided. This is known as beneficial construction and a construction should be made which suppresses the mischief and advances the remedies. So, the increase in the operational cost due to enhanced price of the diesel is one of the subject-matters of the contract as enshrined in Clause 23. It may be said that Clause 23 may be termed as "Habendum Clause". In the deed of the contract containing various granting clauses and the habendum signifying the intention of, the grantor.

That Clause 23 requires liberal interpretation for interpreting the expression "law" or change in law, etc. will also be evident from the facts that the respondents Oil India Limited. through its witness Mr. Pasrija has clearly stated that the change in diesel price or any other oil price was never done and by way of any statutory enactment either by Parliament or by State Legislature. So, it is clear that at the time when Clause 23 was incorporated in the agreement Oil India Ltd. was very much aware that change in oil price was never made by any statutory legislation but only by virtue of government order, resolution, instruction, as the case may be, on accepting that a condition of the appropriate committee, namely, OPC it is also clear to apply when there is change in oil price, here HSD, by the Government and its statutory authority as enacted in the above without resorting to any statutory enactment. Therefore that the interpretation of expression "law" or change in law, etc. requires this extended meaning to include the statutory law, or any order, instruction and resolution issued by the Central Government in its Ministry of Petroleum and Natural Gas."

30. From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion."

19. After referring to Associates Builders' case, the Apex Court in MMTC Vs. Vedanta Limited MANU/SC/0221/2019 : (2019) 4 SCC 163 held as under:-

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided Under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corporation, MANU/UKWA/0002/1947 : (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, MANU/SC/1076/2014 : (2015) 3 SCC 49. Also see ONGC Ltd. v. Saw Pipes Ltd., MANU/SC/0314/2003 : (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, MANU/SC/8095/2006 : (2006) 4 SCC 445; and McDermott International Inc. v. Burn Standard Co. Ltd., MANU/SC/8177/2006 : (2006) 11 SCC 181).

14. As far as interference with an order made Under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference Under Section 37 cannot travel beyond the restrictions laid down Under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court Under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court Under Section 34 and by the court in an appeal Under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

15. Having noted the above grounds for interference with an arbitral award, it must now be noted that the instant question pertains to determining whether the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, this question has been addressed by the courts in terms of the construction of the contract between the parties, and as such it can be safely said that a review of such a construction cannot be made in terms of reassessment of the material on record, but only in terms of the principles governing interference with an award as discussed above. (emphasis supplied).

16. It is equally important to observe at this juncture that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same. [See McDermott International Inc. v. Burn Standard Co. Ltd., MANU/SC/8177/2006 : (2006) 11 SCC 181; Pure Helium India (P) Ltd. v. ONGC, MANU/SC/0803/2003 : (2003) 8 SCC 593 and D.D. Sharma v. Union of India, MANU/SC/0419/2004 : (2004) 5 SCC 325].

17. We have gone through the material on record as well as the majority award, and the decisions of the learned Single Judge and the Division Bench. The majority of the Arbitral Tribunal as well as the courts found upon a consideration of the material on record, including the agreement dated 14-12-1993, the correspondence between the parties and the oral evidence adduced, that the agreement does not make any distinction within the type of customers, and furthermore that the supplies to HTPL were not made in furtherance of any independent understanding between the Appellant and the Respondent which was not governed by the agreement dated 14-12-1993".

(emphasis supplied)."

20. After referring to MMTC Ltd. Vs. Vedanta Ltd., the Hon'ble Supreme Court in Anglo American Metallurgical Coal PTY Limited Vs. MMTC Limited MANU/SC/0953/2020 : (2021) 3 SCC 308, observed as under:-

"54. All the aforesaid judgments are judgments which, on their facts, have been decided in a particular way after applying the tests laid down in Associate Builders (supra) and its progeny. All these judgments turn on their own facts. None of them can have any application to the case before us, as it has been found by us that in the fact situation which arises in the present case, the Majority Award is certainly a possible view of the case, given the entirety of the correspondence between the parties and thus, cannot in any manner, be characterised as perverse."

Considering the principles of law laid down in the judgments referred above now this court proceed to deal with the instant case.

The main contention raised by the Ld. Counsel for the petitioner that the award passed by the Ld. Arbitrator is without assigning any reason and the compensation granted for additional cost of expenses is not provided in the agreement.

The estimated cost of the work was Rs. 64,54,792/-and the tender amount was Rs. 47,75,255. The stipulated date of commencement of the work was 28th March, 2007 and the time of completion was 120 days i.e. 25th July, 2007 but admittedly the work was completed on 26.02.2008.

The Claim no. 1 (i) and 1(ii) was for compensation towards on-site expenses incurred in the enlarged period and towards off-site expenses incurred in the enlarged period for a total amount of Rs. 3,01,000/- (2,52,000 +49,000/-).

The Ld. Sole Arbitrator had passed an award for an amount of Rs. 22,500/-with respect of claim 1(i) out of total claim of Rs.2,52,000/- and no claim was allowed with respect of claim no. 1(ii).

The Ld. Sole Arbitrator while deciding the said claims of the respondent held that *“In my view, reasons for the said delay and /or prolongation cannot be ascribed exclusively to one of the parties, in other words, both the parties are partly responsible for delay occurred in the instant case.*

It is thus clear that it is a case of partial prevention in as much as committed by the respondent have gone to the root of the contract, and as such, it can thus safely be construed that breaches were not fundamental particularly when the work in question could ultimately be completed by the claimant.”

The Ld. Arbitrator while awarding part of the said claim recorded that *“I have weighed both oral and documentary evidence adduced by the claimant and have come to conclusion that the claimant is entitled to an amount of Rs. 22,500/-.”*

The Ld. Sole Arbitrator while awarding the part claim with respect of Claim No. 1(i) in favour of the respondent has categorically held that in the event, the party is able to substantiate that reasons for prolongation were attributable to the employer, the party is entitled to may claims on different components of damage and compensation of which the instant claim on account of site expenses is one. The Ld. Sole Arbitrator has categorically come to the conclusion after evaluating the evidence lead by the respondent and the document produced by the respondent.

After going through the award granted by the Ld. Arbitrator with respect of Claim No. 1 (i), this Court is of the view that the Ld. Arbitrator has awarded part claim in favour of the respondent by assigning appropriate reasons and thus the Claim No. 1 (i) awarded to the respondent does not require any interference.

As regard Claim No. 2, the respondent had made claim on account of depreciation of tools and plants, other un-consumable machineries deployed at the site of work and blocked up to the 31.01.2008 without any corresponding monetary return. The Ld. Sole Arbitrator has granted part claim to the tune of Rs. 2,50,000/- out of the total claim of Rs. 11,76,000/-. The Ld. Sole Arbitrator while awarding the said part award with respect of Claim No. 2, the Ld. Sole Arbitrator has not recorded any reason. The Ld. Arbitration only recorded that based on observation as made in Claim no. 1 (in respect of site expenses), the claimant is entitle to this claim in part. Claim no. 1 (i) was towards on site expenses incurred in the enlarged period and accordingly the Arbitrator has awarded an amount of Rs. 22,500/- but with respect to Claim No. 2 there is no reason as to how the Ld. Arbitrator has calculated and come to conclusion for an amount of Rs. 2,50,000/- without any finding and thus the decision of the Arbitrator is perverse. The award passed in Claim no. 2 is set aside.

Ld. Arbitrator while awarding part claim Rs. 4,60,000/- out of total claim of Rs. 12,53,000/- has recorded that the Ld. Arbitrator had thoroughly scrutinized the break up furnished at page 44 of the bunch supplied by the claimant. The petitioner herein only argued before the Ld. Arbitrator that there is no clause in support of the claimant's entitlement and all the bills have been paid to the claimant. The Ld. Arbitrator has held that the ground as urged by the petitioner does not help the case of the petitioner and thus this Court finds that the Ld. Arbitrator has assigned appropriate reason for awarding part claim with respect of Claim no. 5.

As regard Claim No. 5, the claimant has claimed Rs. 12,53,000/- being the compensation towards business loss for being retain longer in the contract in question for an additional period of seven months without any corresponding monetary benefit and without being free to move elsewhere during the extended stay to un-profit which the Claimant/Contractor could have otherwise made. While considering the Claim No. 5, the Ld. Sole Arbitrator has awarded the part claim of Rs. 4,60,000/- out of the total claim of Rs. 12,53,000/-.

As regard the Claim No. 6, the respondent has claimed an amount of Rs. 8,00,000/- on account of execution of extra and/or additional items of works carried out on instructions from the authority but not paid despite repeated request and/or reminders made for the same. The Ld. Sole Arbitrator has granted part claim amounting to Rs. 4,00,000/- out of Rs. 8,00,000/- and while awarding the said part claim with respect of Claim No. 6, the Ld. Sole Arbitrator has categorically held that on considering the submissions of the parties and weighing the evidentiary value of the depositions of the respondent and the document disclosed by the respondent, the Ld. Sole Arbitrator has awarded the said Claim. From the said reasons assigned by the Ld. Sole Arbitrator, it reveals that while awarding the part claim, the Ld. Sole Arbitrator has considered the evidence lead by the respondent and the documents brought on record during the evidence and as such this Court does not find any reason to interfere with the award passed by the Ld. Sole Arbitrator with respect of Claim No. 6.

As regard Claim No. 8, the respondent has claimed an amount of Rs. 4,18,896/- being the amount payable towards refund of deposit lying towards security in respect of the contract. The Ld. Sole Arbitrator has allowed the Claim No. 8 in full and directed the petitioner to refund the security deposit of Rs. 4,18,896/-. While awarding the said amount, the Ld. Sole Arbitrator has held that the petitioner has not proved through any evidence with regard to the instruction given to the respondent for rectification the defects alleged to have been cropped upon the completed works. The Ld. Sole Arbitrator further held that the respondents have not assigned any reason for withholding the security amount deposit though on the other hand, the petitioners have provided the Completion Certificate to the respondent and also released the bill amount raised by the claimant. It reveals from the award that the Ld. Sole Arbitrator by awarding the Claim No. 8 in favour of the respondent has assigned appropriate reason and thus the Claim awarded to the respondent with respect of the Claim No. 8 does not require any interference.

As regard Claim No. 9, the respondent has claimed an amount of Rs. 6,35,000/- on account of unusual increment in price of Bitumen and Fuel in the market during execution of the job. The Ld. Sole Arbitrator has awarded part claim of Rs. 3,65,000/- out of Rs. 6,35,000/- and held that the respondent is not entitled to get any award with respect of the fuel as claimed by the respondent. While awarding the Claim No. 9, the Ld. Sole Arbitrator has held that on scrutinization of the record and on analyzing the cost of the Bitumen as per the market rate, the Ld. Sole Arbitrator has

awarded an amount of Rs. 3,65,000/- and as such the Ld. Sole Arbitrator has assigned reason for awarding the part claim of the respondent with respect of Claim No. 9 and thus this Court does not find any reason to interfere with the Claim awarded in favour of the respondent.

As regard Claim No. 11, the claimant has allowed interest @ 10 % per annum of the total amount with effect from 01.09.2008 till the date of payment on the sum awarded to the respondent. As regard the interest, it is the prerogative of the Arbitrator for grant of interest as provided under Section 31 (7) of the Arbitration and Conciliation Act, 1996. The Ld. Arbitrator while awarding the interest as also assigned the reason by referring the orders passed by the Hon'ble Apex Court and as such this Court does not find any reason to interfere with the interest awarded in favour of the respondent.

As regard Part Claim No. 12, the Ld. Sole Arbitrator has awarded Rs. 3,00,000/- being the costs of the proceedings and this Court is of the view that the cost awarded by the Ld. Sole Arbitrator is appropriate and justified and does not require any interference.

The Ld. Counsel for the petitioner relied upon the judgment reported in (1997) 4 SCC 121 (Tamil Nadu Electricity Board –Vs- M/s. Bridge Tunnel Constructions & Ors.) Paragraph 22 which reads as follows:-

“22. Thus considered, we hold that the arbitrator, having been invested with the jurisdiction to decide the arbitrability of certain claims, has committed error of jurisdiction in not considering the arbitrability of the claims and passed a non-speaking award, awarding a sum of Rs. 70.83 lakhs and odd. It is difficult to ascertain as to what extent he has awarded the claims within the contract or the claims

outside the contract, of a total claim of Rs. 2.10 crores. Under those circumstances, we are constrained to hold that it is difficult to give acceptance to the award made by the umpire as upheld by the courts below. Equally, we find it difficult to accept the contention that out of a claim of Rs. 2.10 crores, only a sum of Rs. 70.83 and odd was awarded. So, it is not a fit case for interference on the basis of the mere fact that a lesser sum than was claimed has been awarded. An illegal award cannot be upheld to be valid or within jurisdiction.”

The Ld. Counsel for the respondent relied upon the judgment reported in (2019) SCC Online SC 1656 (Dyna Technologies Pvt. Ltd. –Vs- Crompton Greaves Ltd.) Paragraph 36 and 39 which read as follows:-

“36. *The mandate under Section 31 (3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regards to the speedy resolution of dispute.*

39. *In case of absence of reasoning the utility has been provided under of Section 34 (4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34 (4) of the Arbitration Act to cure defects can be utilized in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitral Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effected.”*

The judgment relied by the petitioner with regard to the non-speaking order but in the instant case, the Ld. Sole Arbitrator has passed the award by allowing altogether 8 claims out of 12 claims that to in part with respect of claims except Claim No. 8 and while awarding the claim, the Ld. Sole Arbitrator has assigned the reason except claim no. 2 and thus the

judgment relied by the petitioner is not applicable in the instant case with regard to Claim No. 1 (i), 5, 8, 9, 11 & 12.

As regard the judgment relied by the respondent in the said judgment, the Hon'ble Supreme Court has categorically held that it is mandate under Section 31 (3) of Arbitration Act is to have reasoning which is intelligible and adequate, which can be appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to there under if the need be. The said provision does not require an elaborate judgment to be passed by the Arbitrator having regard to the speedy resolution of the dispute. In the instant case, the Ld. Sole Arbitrator while awarding the award has categorically stated in each and every claim except Claim No. 2. The Ld. Sole Arbitrator has considered the evidence lead by the respondent and the document relied by the respondent but the petitioner has not adduced any evidence to support their claim and as such this Court is of the view that the judgment relied by the respondent is squarely applicable in the instant case.

This Court also kept in mind with regard to law enumerated in the judgments referred by this Court before going into merit of the matters and find that the Ld. Arbitrator for has assigned reasons after evaluating the evidence and materials available on record except claim no. 2.

In view of the above, this Court modified the award passed by the Ld. Sole Arbitrator on 10.07.2013 by setting aside the award of Claim No. 2 and

the Award with respect of Claim No. 1 (i), 5, 9, 10, 11 & 12 is not interfered with.

AP 965 of 2013 is thus **disposed of**.

(Krishna Rao, J.)