IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 11TH DAY OF FEBRUARY 2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P.No. 103 of 2010

In the matter of Arbitration and Conciliation Act, 1996;
&
In the matter of arbitration dispute between TNEB and M/s, Insulators & Electricals Co. In respect of agreement No. T-563 ADB Contract, Dated 29.09.1995 and the award dated 17.08.2009.

* Tamil Nadu Transmission Corporation Ltd
(TANTRANSCO)
Rep.by its Chief Engineer / Transmission,
No.144/800, Anna Salai,
N.P.K.R.R. Maaligai,
Chennai – 600 002. ... Plaintiff

(Amended as per order dated 16.03.2020 in
A.No. 1135 of 2020)

-Vs-

*1. M/s.Insulators and Electricals Company.
Proprietor M/s.Hindustan Urban Infrastructure Limited, at
Kanchenjunga, 7th Floor,
No.18, Bajukhamba Road,
New Delhi – 110 001.
(Amended as per order dated 05.01.2021
in A.No.1866 of 2020) And Time Extended
as per order dated 21.01.2021.

2. Lt. Gen. (Retd) S.K.Jain,
   Presiding Arbitrator,
   C-59, Preet Vihar,
   Vikas Marg,
   New Delhi – 110 092.

3. Mr.V.Natraj
   Arbitrator,
   No.14, (Old No. 95-A) Dr. Alagappa Road,
   Purasawakkam,
   Chennai – 600 084.

4. Mr. H.B.N.Shetty I.A.S.(Retd),
   New No.4(No.17), Indira Nagar,
   Chennai - 600 020. ... Respondents

Original Petition praying that this Hon'ble Court be pleased to (a) to set aside the award dated 17.8.2009 passed by the respondents 2 to 4 in favour of the first respondent. (b) award cost of this petition.

This Original Petition coming on this day before this Court for hearing in the presence of Mr.N.C. Ramesh, Senior Counsel For M/s.T.Sivaprakasam, Advocates for the petitioner herein and Mr.M.S.Krishnan, Senior Counsel for M/s. A.Thayaparan, Advocate for the 1st respondent herein and upon reading the petition filed herein and this Court having observed that as regards the levy of liquidated damages, the Arbitral Tribunal examined Clause 24, which enables the petitioner to

impose liquidated damages for delay, on such basis, the Arbitral Tribunal upheld the levy of liquidated damages in a sum of Rs.28,15,800/- although there is no consideration as to whether loss was caused by such delayed supply, since the first respondent herein has not challenged the Award, there is no basis to interfere with the Award as regards liquidated damages, and the Arbitral Award dated 17.08.2009 is neither Contrary to public policy nor patently illegal, hence, no interference is warranted,

<u>it is ordered as follows :-</u>

That the O.P.No. 103 of 2010, be and is hereby dismissed.

2. That there shall be no order as to costs of this Original Petition.

WITNESS THE HON'BLE MR.JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 11TH DAY OF FEBRUARY 2022.

Sd/-
ASSISTANT REGISTRAR (O.S.II)

//Certified to be true copy//
Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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

ED
25.02.2022

O.P.No. 103 of 2010

ORDER :-

DATED: 11.02.2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

FOR APPROVAL: 28.02.2022

APPROVED ON : 28.02.2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

D A T E D : 11.02.2022

C O R A M :

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

O.P.No.103 of 2010
and
W.P.No.30308 of 2004

O.P.No.103 of 2010

Tamil Nadu Transmission Corporation Ltd
(TANTRANSCO)
Rep. by its Chief Engineer / Transmission,
No.144/800, Anna Salai,
N.P.K.R.R. Maligai,
Chennai – 600 002.
(Amended as per order dated 16.03.2020 in
A.No.1135 of 2020) ... Petitioner

vs.

1.M/s.Insulators and Electricals Company.
Proprietor M/s.Hindusdan Urban Infrastructure Limitd,
Kanchenjunga, 7th Floor,
No.18, Bajukhamba Road,
New Delhi – 110 001.
(Amended as per order dated 05.01.2021
in A.No.1866 of 2021 Extended by order
dated 21.01.2021)

2.Lt. Gen. (Retd)S.K.Jain,
Presiding Arbitrator,

C-59, Preet Vihar,
Vikas Marg,
New Delhi – 110 092.

3.Mr.V.Natraj
Arbitrator,
No.14, (Old No. 95-A) Dr. Alagappa Road,
Purasawakkam,
Chennai – 600 084.

4.Mr.H.B.N.Shetty I.A.S.(Retd),
Arbitrator
New No.4(No.17), Indira Nagar,
Chennai - 600 020. ... Respondents

W.P.No.30308 of 2004

1.M/s.Insulators and Electricals Company.
Proprietor M/s.Hindusdan Urban Infrastructure Limited,
Kanchenjunga, 7th Floor,
No.18, Bajukhamba Road,
New Delhi – 110 001.
(Amended as per order dated 05.01.2021 made
in WMP.No.13367 of 2020 in W.P.No.30308
of 2004 by MSJ) ... Petitioner

vs.

1.The Chairman,
Tamil Nadu Transmission Corporation Ltd
(TANTRANSCO)
No.800, Anna Salai,
Chennai – 600 002.
(Amended as per order dated 16.03.2020
by MSJ)

2.TANTRANSCO
Rep. by its Chief Engineer /Transmission,
No.144/800, Anna Salai,
N.P.K.R.R. Maligai,
Chennai – 600 002. ... Respondents

Prayer in O.P.No.103 of 2010 This Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 17.08.2009 passed by the Respondents 2 and 4 in favour of the first Respondent and for costs.

Prayer in W.P.No.30308 of 2004 This Writ Petition has been filed under Article 226 of the Constitution of India, to issue a writ of mandamus to direct the Respondents to release the following payments due to the Petitioner with interest at the rate of 12.25% p.a., in respect of the concluded contract P.O. No.833 dated 09.08.2000.

Cash Security Deposit	Rs. 95,242.00
Security Deposit with Bank Guarantee	Rs. 3,80,967.00
Performance Bank Guarantee	Rs. 4,76,208.00
Supply Bill Amount	Rs. 47,62,081.00
	Rs. 57,14,498.00

For Petitioner : Mr.N.C.Ramesh, Senior Counsel for M/s.T.Sivaprakasam (Petitioner counsel in O.P.No. 103 of 2010 and Respondents in W.P.No.30308 of 2004)

For Respondens : Mr.M.S.Krishnan, Senior Counsel for M/s.A.Thayaparan (Ist Respondent in O.P.No.103 of 2010 and Petitioner in W.P.No 30308 of 2004)

COMMON ORDER

The Petitioner, the Tamil Nadu Transmission Corporation Ltd (TANTRANSCO), which was previously known as the Tamil Nadu Electricity Board (TNEB), was the respondent before the Arbitral Tribunal. An arbitral award dated 17.08.2009 (the Award) is assailed under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

W.P.No.30308 of 2004 was filed by the first Respondent herein for a direction to the Petitioner herein to release the sum of Rs.57,14,498/-. Since this claim was also the subject matter of arbitral proceedings, the writ petition is liable to be disposed of as per the decision in O.P.No.103 of 2010.

2. The first Respondent is a company engaged in the manufacture and supply of high tension porcelain insulators. The first Respondent was awarded Contract No.T-563, dated 29.09.1995(Ex.C-2), which is governed by the contract documents, including the General Conditions of Contract. Under Contract No.T-563, the first Respondent supplied insulators to the Petitioner between October 1995 and August 1997. In respect thereof, the

Petitioner made payments except for the 10% retention amount. Pursuant to complaints from the Petitioner with regard to the quality of insulators, the first Respondent replaced the defective insulators upon request by the Petitioner even after the applicable warranty period had expired.

3. Subsequent to Contract T-563, the Petitioner awarded about eight contracts for supply of insulators to the first Respondent between 1997 and 2000. Payments were withheld under the said contracts by the Petitioner without providing reasons therefor. Eventually, by letter dated 10.02.2004, the Petitioner informed the first Respondent that the following deductions were made towards Contract T-563 from amounts payable in respect of subsequent contracts: a sum of Rs.28,07,024/- as liquidated damages towards delayed supply; and a sum of Rs.83,64,782/- under the head 'other recoveries' on account of alleged expenditure incurred to replace the defective insulators. Thus, the total amount deducted by the Petitioner was about Rs.1.11 crore. By computing interest thereon at 12% per annum, the first Respondent made an aggregate claim for a sum of about Rs.1.52 crore. By invoking the arbitration clause in Contract No.T-563, a claim for a sum of Rs.1,52,35,938.33/- with interest thereon at 12% per annum was made. The Petitioner filed a counter statement by which the claims made by the first Respondent herein were refuted on the ground that the total

expenditure incurred by the Petitioner towards labour charges was a sum of

Rs.51,56,579/-, the amount deducted towards liquidated damages was a sum of Rs.28,15,800/- and a further sum of Rs.32,08,258/- was deducted on account of audit objections. The deductions under the above mentioned three heads were set out in Annexures A to C of the counter statement. A rejoinder was filed by the first Respondent herein.

4. Based on the pleadings, the Arbitral Tribunal framed 14 issues, which are set out in paragraph 9 of the Award. The first two issues pertained to whether the claims made by the first Respondent herein are arbitrable and whether the first Respondent could invoke the arbitration clause in relation to amounts deducted under other contracts. The third and fourth issues related to whether the claimant had supplied the insulators and replaced all the defective insulators. The sixth issue pertained to whether the Petitioner herein had the authority to recover and adjust its claims from amounts due under other contracts. The seventh issue related to whether the Petitioner herein is entitled to levy liquidated damages for delayed supply and rectification. The ninth issue related to whether the Petitioner herein had the right to recover a sum of Rs.83,64,782/- under the head 'other recoveries' and the tenth issue related to whether the first Respondent is entitled to the claim of Rs.1,52,35,938/- along with interest thereon. Both

parties adduced oral and documentary evidence. While the first respondent adduced oral evidence through one witness, who was examined as CW-1, the Petitioner examined five witnesses, who were examined as RW-1 to RW-5.

5. On the first and second issues, the Arbitral Tribunal entered the finding that the claims are arbitrable and that the first Respondent herein was entitled to invoke the arbitration clause in respect of deductions made under subsequent contracts. On the third and fourth issues, the Arbitral Tribunal concluded that the first Respondent herein replaced defective insulators, except for a small quantity for which no payment was made by the Petitioner. On issues 6, 8, 9 and 11, all of which relate to the recoveries made by the Petitioner herein, the Arbitral Tribunal examined contractual clauses such as Clause 3.7 of the Contract Agreement (ADB contract) and Clause 32 of the General Conditions of Contract in order to conclude that the Petitioner herein had the authority to recover and adjust the claims under other contracts. As regards the entitlement of the Petitioner herein to the sum of Rs.83,64,782/-, the Arbitral Tribunal held that the Petitioner was entitled to 60% of the sum of Rs.51,56,579/-, but was not entitled to any recovery on account of audit remarks or objections. On issue 12, which pertained to liquidated damages, the Arbitral Tribunal held that the

Petitioner is entitled to levy liquidated damages as per Clause 24 of the

General Conditions of Contract. Therefore, the levy of liquidated damages was upheld. TANTRANSCO challenged the Award, but the first Respondent herein/Claimant before the Arbitral Tribunal did not.

6. Oral submissions on behalf of the Petitioner were made by Mr.N.C.Ramesh, learned senior counsel, assisted by Mr.T.Sivaprakasam, learned counsel; and on behalf of the first Respondent by Mr.M.S.Krishnan, senior counsel, assisted by Mr.A.Thayaparan, learned counsel.

7. The first contention on behalf of the Petitioner was that the Arbitral Tribunal committed a patent illegality by disregarding Clause 34 of the General Conditions of Contract and by referring only to Clause 35 thereof. According to the Petitioner, Clause 34 deals with the effect of an earlier waiver. The Petitioner pointed out that by virtue of Clause 34, the Petitioner was entitled to make recoveries even it had failed to make recoveries earlier,whereas the Arbitral Tribunal did not take note of Clause 34.

8. The next contention of the Petitioner was that the Arbitral Tribunal recorded the arbitrary finding that the Petitioner was entitled to 60% of the amount deducted and that the first Respondent was entitled to 40%. The

Petitioner contended that both parties cannot be liable for breach of contract. Moreover, compensation for breach cannot be granted by apportioning 60% to the Petitioner and 40% to the first Respondent without indicating any basis for the same. On this issue, the Petitioner relied upon the following judgments:

i) *Union of India v. V. Pundarikaskshudu and Sons and another,* (2003) 8 SCC 168, and in particular, paragraphs 24 to 28 of the judgment for the proposition that the Arbitral Tribunal cannot travel beyond the boundaries of the contract.

ii) *M/s.S.Bedi Construction Co v. Delhi Development Authority,* (2009) 2 Arb.LR 584 (Delhi), and in particular, paragraphs 4 and 8 of the said judgment wherein the Delhi High Court held that the arbitrator is bound by the contract between the parties and cannot mechanically award 50% of each claim.

iii) *B.Radhakrishnan Murthi v. National Buildings Construction Corporation Limited,* (2013) 3 SCC 747, wherein the Hon'ble Supreme Court upheld the decision of the High Court that 10% should not have been awarded towards loss of profit without establishing that such loss arose from a breach of contract.

iv) *Phoenix Youll Limited v. Neyveli Lignite Corporation Limited* 2014 (5) R.A.J. 210 (Madras) wherein the award of liquidated damages at

50% was held to be invalid.

v) *Tamilnadu Electricity Board v. M/s.W.S. Industries (India) Ltd.,* judgment dated 18.06.2010 in O.S.A. No.210 of 2009, wherein the Division Bench of this Court concluded that the waiver clause was not given effect to by the Arbitral Tribunal.

9. The third contention of the Petitioner was that the first Respondent did not discharge the burden of proof while making a claim for Rs.1.52 crore. On this issue, the Petitioner referred to and relied upon the cross examination of C.W.1. With specific reference to questions 14 to 18; 21; 62; 83 to 85, the Petitioner contended that C.W.1 admitted that he had not filed invoices relating to Contract No.T-563. In addition, C.W.1 admitted that only Rs.11,16,065/- is payable towards Contract No.T-563. The Petitioner relied upon a recent judgment of the Hon'ble Supreme Court reported in *PSA Sical Terminals Pvt. Ltd. v. Board of Trustees of V.O.Chidambaranar Port Trust, Tuticorin, 2021 SCC Online SC 508* and, in particular, paragraphs 88 to 92 thereof and contended that an error outside the jurisdiction would qualify as being patently illegal.

10. By referring to Ex.R.75, the Petitioner pointed out that 91,658 insulators were defective and had to be replaced. The Petitioner also

referred to volume 5 which contains the evidence relating to labour charges incurred by the Petitioner for replacing defective insulators. In the face of such evidence, the Petitioner submitted that the Arbitral Tribunal committed a grievous error in making an award on percentage basis.

11. These contentions were strongly refuted by the first Respondent. The first contention of the first Respondent was that the burden of proof was on the Petitioner because of the nature of the claim made by the first Respondent herein. In order to substantiate this contention, it was submitted on behalf of the first Respondent that the entire principal claim of Rs.1.11 crore was towards deductions made by the Petitioner from amounts due and payable under this contract and eight subsequent contracts as compensation for expenditure incurred on labour to replace defective insulators under this contract. All these deductions were made several years after Contract No.T-563 was executed. Therefore, the Petitioner should have adduced evidence to justify the deductions. As regards the defective insulators, it was submitted that all defective insulators were replaced by the first Respondent and, therefore, the Petitioner's claim is not in respect of defective insulators but in respect of alleged expenses incurred in replacing the defective insulators.

12. The next contention of the first Respondent was that the Arbitral Tribunal recorded a categorical finding that the Petitioner did not comply with or adhere to Clause 35.1 of the General Conditions of Contract while making deductions. Therefore, the entire deduction made by the Petitioner should have been rejected. However, since the first Respondent has not challenged the Award, the Award should not be interfered with.

13. As regards the finding that the Petitioner is entitled to 60% of the sum of Rs.51.56 lakhs and that the first Respondent is entitled to 40% thereof, the first Respondent referred to Volume - V, which contains the documentary evidence submitted by the Petitioner before the Arbitral Tribunal in respect of the deductions. With specific reference to the abstract of deductions at page 252 of Volume - V, the first Respondent pointed out that the Petitioner admittedly produced documentary evidence for the deduction of a sum of about Rs.28.77 lakhs and did not provide documentary evidence for the deduction of Rs.22,19,502/-. Rs.28.77 lakhs is approximately 60% of the claim of Rs.51.56 lakhs. Therefore, the first Respondent submitted that the award of 60% to the Petitioner was not arbitrary although the reasoning in such regard may contain gaps. By relying upon the judgment of the Hon'ble Supreme Court in *Dyna*

Technologies Pvt. Ltd. v. Crompton Greaves Ltd. (2019) 20 SCC 1, it was submitted that the court should have regard to the documents submitted by the parties even if there are gaps in the reasoning of the Arbitral Tribunal. Similarly, by referring to the judgment in *Construction & Design v. Delhi Development Authority, (*2015) 14 SCC 263, it was submitted that the court may proceed on the basis of guess work and that it would be fair to award half the amount claimed as reasonable compensation. The judgment of the Hon'ble Supreme Court in *M.S.K Projects India (Pvt.) Ltd v. State of Rajastan and another* (2011) 10 SCC 573 was also relied upon for the proposition that a broad evaluation is sufficient for awarding compensation under section 73 of the Indian Contract Act, 1972.

14. By way of rejoinder, the Petitioner reiterated that the burden of proof was on the first Respondent/Claimant and that the first Respondent did not produce evidence that Rs.1.52 crore was deducted by the Petitioner herein.

15. At the outset, it is important to notice the nature of claim made by the first Respondent/Claimant before the Arbitral Tribunal. The entire principal claim of about Rs.1.11 crore relates to deductions made by the Petitioner from amounts payable under nine contracts. The said nine contracts comprise eight subsequent contracts, which were awarded

between 13.06.1997 and 09.08.2000, and Contract No.T-563, which is the contract under which the arbitral proceedings were instituted. In an annexure to the claim statement, the first Respondent/Claimant provided particulars of amounts deducted under each of the above mentioned nine contracts.

16. In response, by its counter statement, the Petitioner herein admitted that it made deductions. Indeed, the Petitioner annexed three annexures to the counter statement specifying details of deductions made under 3 heads: Rs.28,15,800/- as liquidated damages; Rs.51,56,579/- towards expenditure involved in the replacement work; and Rs.32,08,258/- towards recoveries made based on the AG audit remarks. These three deductions aggregate to about Rs.1.11 crore.

17. Thus, the admitted position is that a sum of about Rs.1.11 crore was deducted by the Petitioner. As an admitted fact, it was not necessary for the first Respondent/Claimant to prove the deductions. Therefore, the Arbitral Tribunal framed issues as to whether claims could be made in an arbitration under Contract No.T-563 in respect of deductions made under other contracts. After examining the contractual clauses and the evidence on record, the Arbitral Tribunal recorded the following findings:

"20. It is therefore held that (i) the claim is arbitrable; (ii) Invocation of the Arbitration clause by the Claimant is in order; and (iii) there was no settlement or accord and satisfaction vide letter dated 04.08.2004."

18. After recording the above findings, the Arbitral Tribunal also examined the question whether the first Respondent/Claimant had replaced the defective insulators. On such issue, the Arbitral Tribunal recorded a finding that the first Respondent/Claimant had replaced defective insulators. Against this backdrop, the Arbitral Tribunal examined the issues relating to the recoveries made by the Petitioner. This matter was examined under issue Nos. 6, 8, 9 and 11. On the entitlement to make deductions, the Arbitral Tribunal recorded that the Petitioner had the authority to recover and adjust the claims under other contracts.

19. Before examining the findings of the Arbitral Tribunal on recoveries, the contention of the Petitioner that the Arbitral Tribunal disregarded Clause 34 of the General Conditions of Contract should be examined. Clause 34 is set out below:

"Clause No.34.0 ENFORCEMENT OF TERMS

> The failure of the either party to enforce, at any time, the provisions of this contract or any right in respect thereto or the exercise any option therein provided, shall in no way be construed to be a waiver of such provisions, rights or options or in any way to affect the validity of the contract. The exercise by either party of any of its right herein shall not preclude or prejudice either party from exercising the same or any other right it may have under the contract."

This Clause is a standard clause in commercial contracts, which could be classified under the category of boiler plate clauses. By virtue of this Clause, the failure of a party to exercise its contractual rights in one instance should not be construed as a waiver of such contractual right, if exercised subsequently. In the specific context of recoveries, it was not the case of the first Respondent that the Petitioner had waived its right to make recoveries. Instead, the contention was that the procedure prescribed in Clause 35 for effecting a recovery was not followed, and this contention was accepted by the Arbitral Tribunal. Therefore, Clause 34 of the General Conditions of Contract was not material to the adjudication of the dispute. Consequently, the absence of findings on Clause 34 does not vitiate the Award inasmuch as the said clause is not material and undoubtedly does not go to the root of the matter.

20. This leads to the question whether the Petitioner had complied with contractual requirements to make deductions. On this aspect, the Arbitral Tribunal examined Clause 35.1 of the General Conditions of Contract which deals with deductions from contract price. The said clause is as under:-

> **"DEDUCTION FROM CONTRACT PRICE**
>
> 35.1 All costs, damages or expense which the Owner may have paid for which under the Contract, the Contractor is liable will be claimed by the Owner. All such claims shall be billed by the Owner to the Contractor regularly as and when they fall due. Such bills shall be supported by appropriate and certified vouchers or explanations to enable the contractor to properly identify such claims. Such claims shall be paid by the Contractor within fifteen (15) days of receipt of the corresponding bills and if not paid by the Contractor within the said period, the Owner may then deduct the amount from any monies due or becoming due by him to the Contractor under the contract or may be recovered by court of law or otherwise, if the Contractor fails to satisfy the Owner of such claims."

21. Upon considering the above Clause and after considering the oral and documentary evidence on this issue, the Arbitral Tribunal recorded the following finding:

> "33. The Claimant has contended that the mandatory provisions having not been followed, the Respondent is not entitled to any sum under the head 'other recoveries'. There is considerable force in the Claimant's submissions. In respect of any claims relating to cost, damages or expenses which the Respondent may have paid for, the Respondent ought to have given notice to the Claimant as and when they fell due supported by appropriate vouchers or explanations. There was no contemporaneous claim made, within 15 days of the event as required by Clause 35 of the ADB Contract...."

22. After recording a categorical finding that the Petitioner did not comply with the contractual requirement for making deductions, the Arbitral Tribunal would have been justified in rejecting the entire claim of about Rs.83.64 lakhs. Indeed, if the first Respondent/Claimant had challenged the Award, the first Respondent would have had a good case to contend that the contractual clause was disregarded by the Arbitral Tribunal. Since the first Respondent/Claimant has not challenged the Arbitral Award, there is no scope to interfere with the Award on such ground.

23. With this background, the contention of the Petitioner that the award of 60% of the sum of Rs.51.56 lakhs is liable to be interfered with should be examined. It bears repetition that the Petitioner admitted the deductions of an aggregate amount of about Rs.1.11 crore. Therefore, the Petitioner was required to adduce evidence before the Arbitral Tribunal to justify the deductions in terms of the contract. Towards such end, the Petitioner filed documents, which are contained in Volume – V before this Court. In Volume - V, the Petitioner enclosed invoices, vouchers and the like to support the deductions. These documents were filed for five circles: Chennai, Salem, Coimbatore, Trichy and Madurai under Ex.R-117A to R-117D. The Petitioner also adduced oral evidence for each circle through one witness. However, as correctly pointed out by learned senior counsel for the first Respondent, the abstract of deductions at page 252 of Volume V indicates that the documentary evidence was limited to the deduction of about Rs.28.77 lakhs, and that no documentary evidence was provided in respect of the deduction of Rs.22,90,502/-. This position is corroborated on examining Ex.R-117A to R-117D. The oral evidence of RW-1 to RW-5 also merely refers to these documents without providing any evidence that the Petitioner incurred the expenditure of Rs.22,90,502/- for which

documentary evidence was unavailable. In this context, after recording the categorical finding that Clause 35.1 had not been complied with or adhered to by the Petitioner, the Arbitral Tribunal recorded the following findings:

> "34. However, we are not oblivious of the fact that the Claimant supplied defective goods. The Claimant itself had admitted in paragraphs 6 and 7 of its claim statement that it had replaced defective insulators when called upon to do. The Claimant has stated that it did so to maintain cordial business relationship with the Respondent, even though, according to it, the period of warranty had expired. As the Respondent appears to have suffered loss due to the supply of defective insulators, we are of the view that the Respondent should be compensated, even though it had strictly not followed the norms prescribed in clause 35 of not having given 15 days notice. We hold that in the interests of justice, the Respondent would be entitled to 60% from and out of the sum of Rs.51,56,579/- being the balance amount available under the head 'other Recoveries'. This would amount to Rs.30,93,947/-."

24. As indicated earlier, the first Respondent herein could have challenged this conclusion in light of the finding that Clause 35 was not adhered to. However, the challenge is by the Petitioner and not by the first Respondent. By turning the spotlight on the 60:40 apportionment, the

Petitioner also contended that the Arbitral Tribunal committed a patent illegality in concluding that both parties committed breach. However, this contention is untenable and based on the fundamental misconception that the Arbitral Tribunal held that both parties committed breach on a 60:40 basis. On the contrary, the Arbitral Tribunal allowed 60% of the Petitioner's deduction towards expenses and rejected the remaining 40%. On the rejection of the deduction to the extent of 40%, the Petitioner is unable to controvert the contention that it had provided documentary evidence for only about 60% of the claim of Rs.51.56 lakhs. Thus, if examined in isolation, the award of 60% appears to be without basis. Even if there are gaps in reasoning, the Hon'ble Supreme Court instructed in *Dyna Technologies*, at paragraph 35, that the court should have regard to the documents submitted by the parties. If paragraph 34 of the Award is examined in light of the following: the abstract provided by the Petitioner, which is contained at page 252 of Volume-V; the documents in the said Volume, including Ex.R-117A to Ex.R-117D; and the oral evidence, the conclusion of the Arbitral Tribunal does not appear to be arbitrary since Rs.28.77 lakhs is about 56% of Rs.51.66 lakhs. In order to succeed in this challenge, the Petitioner should have demonstrated that it had adduced evidence for the rejected 40% of the claim of about Rs.51.66 lakhs;

however, such evidence was not placed before the Arbitral Tribunal and is not on record. In these facts and circumstances, the Arbitral Tribunal held that the Petitioner is entitled to Rs.30,93,947/- from and out of a sum of Rs.51,56,579/-, and that the first Respondent is entitled to the remainder. In effect, the Petitioner was granted monetary compensation which marginally exceeded the expenditure for which it adduced evidence. Hence, this finding does not warrant interference at the behest of the Petitioner.

25. The other deduction by the Petitioner was towards audit remarks or objections. A sum of Rs.32,08,258/- was deducted on such basis. After examining the provisions of the contract, the Arbitral Tribunal recorded the following finding in paragraph 33 of the Award:

> "33....Audit recoveries are not contemplated under the contract between parties and therefore, the Respondent would not be entitled to the sum of Rs.32,08,258/- claimed as audit recoveries. It is necessary to add here that the audit objections mentioned do not relate to the ADB Contract."

The above conclusion is based on a consideration of the terms of the contract. Such conclusion is eminently reasonable and does not call for interference.

26. As regards the levy of liquidated damages, the Arbitral Tribunal examined Clause 24, which enables the Petitioner to impose liquidated damages for delay. On such basis, the Arbitral Tribunal upheld the levy of liquidated damages in a sum of Rs.28,15,800/-. Although there is no consideration as to whether loss was caused by such delayed supply, since the first Respondent herein has not challenged the Award, there is no basis to interfere with the Award as regards liquidated damages.

27. For reasons set out above, the Arbitral Award dated 17.08.2009 is neither contrary to public policy nor patently illegal. Hence, no interference is warranted. In the result, O.P. No.103 of 2010 is dismissed without any order as to costs. Consequently W.P.No.30308 of 2004 is closed.

Sd./-S.K.R.J.,
11.02.2022

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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