



O.S.A.Nos.388 of 2011 and 43 of 2012

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 08.09.2023	Delivered on 20.10.2023
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CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS JUSTICE R.KALAIMATHI

O.S.A.Nos.388 of 2011 and 43 of 2012
and all connected Miscellaneous Petitions

K.S.Baburaj ...Appellant in OSA.No.388/2011

M.Senthil Kumar ...Appellant in OSA.No.43/2012

Vs.

- 1.The Union of India,
Represented by the General Manager,
Southern Railway, Chennai – 3.
- 2.The Divisional Railway Manager [Works],
Southern Railway, Park Town, Madras – 3.
- 3.Mr.Jusitce K.M.Natarajan [Sole Arbitrator],
136, L.B.Road, Kamaraj Nagar,
Thiruvanmiyur, Chennai – 41.

...Respondents



O.S.A.Nos.388 of 2011 and 43 of 2012

Prayer in both the appeals : Original Side Appeal filed under Clause 15 of the Letters Patent Act read with Order 36 Rule 1 of the Original Side Rules and Section 37(1)(b) of the Arbitration and Conciliation Act, 1996, against the common fair and decretal order dated 01.07.2011 passed in O.P.No.813 and 812 of 2010 respectively on the file of this Court on its Original Side.

For Appellants : Mr.M.K.Kabir, Senior Counsel
for Mr.S.Amalraj in both the appeals

For Respondents : Mr.V.Radhakrishnan, Senior Counsel,
for Mr.P.T.Ramkumar for R1 and R2 in both the appeals

R3 - Arbitrator

COMMON JUDGMENT

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

Both these appeals are by the contractors who had entered into a contract with the railways for supply of 50 mm stone ballast. The appellant in OSA.No.388 of 2011 had entered into a contract with the railways on 25.05.2005. The period of contract was for 12 months ending on



24.05.2006. The appellant in OSA.No.43 of 2012 had entered into a contract for supply of 50,000 cubic meters of 50 mm stone ballast on 26.05.2005. The period of contract was for 11 months and it expired on 25.04.2006. It is an admitted case of the parties that both the appellants did not complete the entire supply within the contract period and the railways terminated the contract on 11.01.2007 for non-performance.

2. Contending that the termination is illegal and that the railways was responsible for the non-performance since it had not provided the yard and the required wagons for transporting the ballast from the yard to the various locations, the contractors sought for arbitration. Since the railways did not respond to the request for arbitration, the contractors had filed Original petitions in O.P.Nos.581 and 584 of 2006 under Section 11 of the Arbitration and Conciliation Act for appointment of an Arbitrator. This Court by an order dated 24.03.2007 appointed a retired Judge of this Court as the Arbitrator. The parties made various claims before the Arbitrator.



3. The crux of the claim of the contractors before the Arbitrator

was that the delay in supplying the ballast was due to the failure on the part of the Railways to provide the yard and also the special BKH wagons that are required for transporting the ballast to various locations. The contractors also claimed that they had incurred expenditure in mobilising a massive establishment for the purposes of the contract by arranging the required machinery comprising of pay-loader, JCB earthmovers etc. and also they had entered into different arrangements with the quarry owners and crushers for procuring the required ballast. It was also their contention that apart from the failure on the part of the Railways the heavy monsoon that year also led to the delay in performance of the contract.

4. To sum it up the contentions of the contractors was that (i) there was delay on the part of the railways in providing the mandatory ground level certificate; (ii) there was delay on the part of the Railways in making available the required yard to store the ballast; (iii) there was delay on the part of the Railways in providing BKH Wagons (special type Wagons) to transport the ballast and (iv) heavy monsoon that occurred were the



contributing factors for the delay and the delay did not occur due to the fault of the contractors. Therefore, it was the claim of the contractors that the railways was not justified in terminating the contract at the risk and costs of the contractors on 11.01.2007 and going for re-tender making the contractors liable for the loss, if any. While the appellant in OSA.No.388 of 2011 claimed a sum of Rs.1,61,31,634/- as damages, the appellant in OSA.No.43 of 2012 claimed a sum of Rs.2,08,48,267/- under various heads. The Arbitrator by his award dated 20.04.2008 concluded that the Railways was responsible for the delay and its action in terminating the contract at the risk and costs of the contractors was not right. On the said findings the Arbitrator awarded a sum of Rs.90,04,477/- to the appellant in OSA.No.388 of 2011 and a sum of Rs.79,14,787/- to the appellant in OSA.No.43 of 2012. The Arbitrator also awarded interest at the rate of 12% per annum from the date of completion of the contract till the date of the award and at 18% thereafter till the date of realization.

5. Aggrieved by the awards, the Railways preferred O.P.No.812 and 813 of 2010 seeking to set aside the awards under Section 34 of the



Arbitration and Conciliation Act. The learned Single Judge who heard the

Section 34 Applications concluded that the Arbitrator has completely ignored the terms of the contracts between the parties, particularly the provision which enables extension of time without imposition of penalty. This failure on the part of the Arbitrator would render his award perverse. The learned Single Judge was also of the opinion that the Arbitrator had not considered the main question viz., the delay, but had gone on the question whether the termination of the contract was valid or invalid, overlooking the fact that the termination was accepted by the contractors and they had participated in the subsequent tender held at their risk and costs and they were also successful tenderers.

6. The learned Single Judge also held that the failure on the part of the Arbitrator to consider Clause 63 of the contract would vitiate the award. On the grant of *pendente lite* interest, the learned Single Judge relied upon the judgment of the Hon'ble Supreme Court in ***Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and others*** reported in **2010 (8) SCC 767** to conclude that the award was against



the dictum of the Hon'ble Supreme Court in the said judgment. On the above findings, the learned Single Judge allowed the original petitions setting aside the awards. The learned Single Judge also granted liberty to the petitioners to seek a fresh reference in accordance with law. Aggrieved the contractors are before us with these appeals.

7. We have heard Mr.M.K,Kabir, learned Senior Counsel assisted by Mr.S.Amalraj, learned counsel for the appellants and Mr.V.Radhakrishnan, learned Senior Counsel assisted by Mr.P.T.Ramkumar, learned counsel for the respondent Railways.

8. Mr.M.K.Kabir, learned Senior Counsel appearing for the appellants would vehemently contend that the learned Single Judge has transgressed the limits or the well defined contours laid down under Section 34 of the Arbitration and Conciliation Act. According to him, the learned Single Judge while considering the Section 34 application has re-appreciated the evidence and has come to his own conclusion, which is not available to him.



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9. The learned Senior Counsel would further submit that the order of the learned Single Judge made under Section 34 of the Arbitration and Conciliation Act is on the face of it in excess of the powers. The learned Senior Counsel would take us through the award and the various findings rendered by the Arbitrator on the question of delay, to justify the claim. He would also rely upon the principles laid down by the Hon'ble Supreme Court in *Associated Builders Vs. Delhi Development Authority* reported in **2015 (3) SCC 49**, reiterated in *Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)* reported in **2019 (15) SCC 131** as well as in *Emkay Global Financial Services Limited Vs. Girdhar Sondhi* reported in **2018 (9) SCC 49**. Reliance is also placed on other judgments of this Court to contend that a petition under Section 34 of the Arbitration and Conciliation Act is neither an appeal nor a revision. It is not even a full fledged judicial review. But it is a limited judicial review within the well defined contours of Section 34 of the Arbitration and Conciliation Act.



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10. Pointing out to the fact that the challenge to the award is held to be summary in nature, the learned Senior Counsel would contend that the learned Single Judge in the cases on hand travelled beyond the scope of Section 34 of the Arbitration and Conciliation Act to conclude that the award is liable to be set aside. Contending that the award cannot be termed as perverse Mr.M.K.Kabir, learned Senior Counsel would submit that in order to conclude that the award is perverse the Section 34 Court must come to a conclusion that the award lacks judicial approach or it is violative of the principles of natural justice and it suffers from irrationality. According to him, an award could be held to be perverse only when it is based on no evidence or evidence which is thoroughly inadmissible or a finding of fact is arrived at, by the Arbitrator, ignoring the available material or is opposed to the contract between the parties.

11. The learned Senior Counsel would also rely upon the judgment in *Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Corporation Limited* reported in *2010 (11) SCC 296* and *Kamarajar Port*



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Limited Vs. Chettinad International Coal Terminal Pvt. Ltd., reported in

MANU/TN/4287/2020, wherein Hon'ble Mr.Justice M.Sundar had held that

the challenge under Section 34 is limited to the eight grounds which have been adumbrated in sub-Section 2 of Section 34 as interpreted and as per the principles laid down by the Hon'ble Supreme Court in this regard. There could be no quarrel with the proposition of law that the scope of challenge to an award is severely restricted by the provisions of the Arbitration and Conciliation Act, particularly, Section 34 of the Act. The Hon'ble Supreme Court had time and again pointed out that the scope of an application under Section 34 is limited to the grounds adumbrated under the said provision and the Court sitting under Section 34 cannot go beyond the sweep of the said provision and set aside the award.

12. The learned Senior Counsel would also contend that the leaned Single Judge was not right in his conclusion that the Arbitrator had no jurisdiction to award damages in view of Clause 17(iii) of the Contract which provides that the delay on the part of the Railways will not entitle the contractor to damages or compensation therefor. In support of his contention



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the learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court in ***Bharat Drilling and Foundation Treatment Private Limited Vs. State of Jharkhand and others*** reported in ***2009 (16) SCC 705***, wherein, it was held that a clause in the contract which dis-entitles the principal from considering the claim on account of delay will not prevent the Arbitrator from considering such claim.

13. He would also invite our attention to the judgment of the Hon'ble Supreme court in ***Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age*** reported in ***1996 (1) SCC 516***, where the Court while dealing with the power of the Arbitrator to grant *pendente lite* interest concluded that absence of a provision in the the contract for grant of *pendente lite* interest or a prohibition contained in the contract restraining the Commissioner from granting interest will not bar the Arbitrator from granting *pendente lite* interest.

14. Reliance is also placed on the another of the judgment of the Hon'ble Supreme Court in ***Asian Techs Limited Vs. Union of India and***



others reported in **2009 (10) SCC 354**, wherein, also the Hon'ble Supreme Court expressed a similar opinion. The learned Senior Counsel would also rely upon the judgment of the Hon'ble Supreme Court in ***G.Ramachandra Reddy and Company Vs. Union of India and another*** reported in **2009 (6) SCC 414**, wherein, the Hon'ble Supreme Court had considered the effect of restriction/ exclusion clauses in Government contracts and tenders and held that the question as to whether the damages are payable for the illegal termination of contract cannot be subject matter of contract.

15. The learned Senior Counsel would also draw our attention to the judgment of the learned Single Judge of the Delhi High Court in ***Simplex Concrete Piles (India) Ltd., Vs. Union of India*** reported in **(2010) ILR 2Delhi 699**, wherein, after referring to various judgments of the Hon'ble Supreme Court and after considering the scope of Sections 73 and 55 of the Contract Act, it was held that the rights created by Section 55 and 73 of the Contract Act cannot be contractually waived since those two provisions which pertain to breach of contract are the very heart, foundation and basis for existence of the contract. The learned Judge while concluding so, relied



upon the judgment of the Hon'ble Supreme Court in ***G.Ramachandra***

Reddy and Company Vs. Union of India and another referred to *supra*.

16. It is also pointed out by Mr.M.K.Kabir, learned Senior Counsel that the claim based on Clause 17(iii) of the Contract was not raised before the learned Single Judge in the Section 34 application.

17. Contending contra, Mr.V.Radhakrishnan, learned Senior Counsel appearing for the respondent Railways would submit that the Railways always have the right to foreclose the contract without liability. In this regard he would invite our attention to clause 17(iii) of the General Conditions of Contract which reads as follows:-

(iii) Extension of time for delay due to Railway:--

In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause due whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the



character thereof or entitle the Contractor to damages or compensation therefor but in any case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

18. Mr.V.Radhakrishnan, learned Senior Counsel would also invite our attention to Ex.C19 dated 01.03.2006, wherein, the contractor had claimed compensation as per Clause 36(1)(c) of the General Conditions of Contract pointing out that there is a delay on the part of the Railways. He would also point out that the claim made that there was delay by the Railways was disputed under Ex.C16 dated 03.02.2006.

19. The learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court in ***Ramnath International Construction (P) Ltd., Vs. Union of India*** reported in ***2007 (2) SCC 453***, to contend that a jurisdictional error by the Arbitrator or the Arbitrator acting without jurisdiction or beyond jurisdiction would be a ground for setting aside the award. The learned Senior Counsel would also rely upon the said judgment to contend that if there is a clause which prohibits the contractor from



seeking damages or seeking compensation for the delay where he has sought for and obtained extensions, the same would bar the Arbitrator from awarding compensation for the delay.

20. Reliance is also placed by the learned Senior Counsel on the judgment of the Hon'ble Supreme Court in ***State of Chhattisgarh and another Vs. Sal Udyog Private Limited*** reported in **2022 (2) SCC 275**, wherein, it was held that if the Arbitrator fails to decide the matter in accordance with the terms of the Contract governing the parties then the award can be said to be patently illegal and setting aside the award on such ground would be justified. Reliance is also placed on the judgment in ***Union of India Vs. Varindera Constructions Limited and others*** reported in **2018 (7) SCC 794** to contend that when the contract specifically bars a claim of reimbursement, such a claim or reimbursement cannot be granted. Coming to the facts of the case on hand, sole ground on which the award has been set aside is that it is perverse, inasmuch as the Arbitrator has not adverted to the conditions of the contract between the parties. The clauses that have been invoked are Clause 17(iii) and Clause 62 of the General Conditions of



Contract. Clauses 17, 61 and 62 of the General Conditions of Contract

which apply to the parties read as follows:-

"17. Force Majeure Clause: if at any, during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of any war, hostility, acts of public enemy, civil commotion, sabotage, serious loss or damage by fire, explosions, epidemics, strikes, lockouts or acts of God (hereinafter referred to as 'events') provided, notice of the happening of any such event is given by either party to the other within fifteen (15) days from the date of occurrence thereof, neither party shall by reason of such event, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non-performance or delay in performance, and works under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, and the decision of the Engineer as to whether the works have been so resumed or not shall be final and conclusive, provided further that if the performance in whole or in part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding ninety (90) days, either party may at its option terminate the contract by



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giving notice to the other party.

17-A Subject to any requirement in the contract as to completion of any portion or portions of the works before completion of the whole, the Contractor shall fully and finally complete the whole of the works comprised in the contract (with such modifications as may be directed under conditions of this contract) by the date entered in the contract or extended date in terms of the following clauses:-

(i)Extension due to modification:- If any modifications have been ordered which in the opinion of the Engineer have materially increased the magnitude of the work, then such extension of the contracted date of completion may be granted as shall appear to the Engineer to be reasonable in the circumstances, provided moreover that the Contractor shall be responsible for requesting such extension of the date as may be considered necessary as soon as the cause thereof shall arise and in any case not less than one month before the expiry of the date fixed for completion of the works.

(ii)Extension for delay not due to Railway/ Contractor:- If in the opinion of the Engineer the progress of work has any time been delayed by any act or neglect of Railway's employees or by other contractor employed by the



Railway under sub-clause (4) of clause 20 of these conditions or in executing the work not forming part of the contract but on which Contractor's performance necessarily depends or by reason of proceedings taken or threatened by or dispute with adjoining or to neighbouring owners or public authority arising otherwise through the Contractor's own default etc. or by the delay authorised by the Engineer pending arbitration or in consequences of the Contractor not having received in due time necessary instructions from the Railway for which he shall have specifically applied in writing to the Engineer or his authorised representative then upon happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer within 15 days of such happening but shall nevertheless make constantly his best endeavours to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The Contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time. The Engineer on receipt of such request from the Contractor shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and



quantum of work affected thereby. No other compensation shall be payable for works so carried forward to the extended period of time, the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.

(iii)Extension of time for delay due to Railway:- *In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause due whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefor but in any case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.*

17-B. Extension of time for delay due to Contractor:- *The time for the execution of the work or part of the works specified in the contract documents shall be deemed to be the essence of the contract and the works must be completed not later than the date(s) as specified in the*



contract. If the Contractor fails to complete the works within the time as specified in the contract for the reasons other than the reasons specified in clauses 17 and 17A, the Railway may, if satisfied that the works can be completed by the Contractor within reasonable short time thereafter, allow the Contractor such further extension of time (Proforma at Annexure I) as the Engineer may decide. On such extension, the Railway will be entitled without prejudice to any other right and remedy available on that behalf, to recover from the Contractor as agreed damages and not by way of penalty, a sum equivalent to = of 1% of the contract value of the works for each week or part of the week.

For the purpose of this clause, the contract value of the works shall be taken as value of work as per contract agreement including any supplementary work order/contract agreement issued. Provided also, that the total amount of liquidated damages under this condition, shall not exceed the under noted percentage value or of the total value of the item or groups of items of work for which a separate distinct completion period is specified in the contract.

(i) For contract value - 10% of the total value of

up to Rs.2 lakhs the contract.



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(ii) *For contracts valued - 10% of the first 2 lakhs
above Rs.2 lakhs and 5% of the
balance*

Provided further, that if the Railway is not satisfied that the works can be completed by the Contractor and in the event of failure on the part of the Contractor to complete the work within further extension of time allowed as aforesaid, the Railway shall be entitled, without prejudice to any other right or remedy available in that behalf, to appropriate the contractor's security deposit and rescind the contract under clause 62 of these conditions, whether or not actual damage is caused by such default."

Determination of Contract

61 (1).Right of Railway to determine the contract:-

The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatsoever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such



determination and the reasons therefore shall be conclusive evidence thereof.

(2). Payment on determination of contract by Railway:- *Should the contract be determined under subclause (1) of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the works, the Railways shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive.*

The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract.

62. Determination of contract owing to default of Contractor:-

(1) If the Contractor should -

- (i) becomes bankrupt or insolvent, or*
- (ii) make an arrangement with or assignment in favour of his creditors or agree to carry out the*



contract under a Committee of Inspection of his creditors, or

(iii) being a Company or Corporation, go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or

(iv) have an execution levied on his goods or property on the works, or

(v) assign the contract or any part thereof otherwise than as provided in Clause 7 of these conditions or

(vi) abandon the contract, or

(vii) persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or

(viii) fail to adhere to the agreed programme of work by a margin o 10% of the stipulated period, or

(ix) fail to remove materials from the site or to pull down and replace work after receiving from the Engineer notice to the effect that the said materials or works have been condemned or rejected under clause 25 and 27 of these conditions, or

(x) fail to take steps to employ competent or additional staff and labour as required under clause 26 of these conditions, or



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(xi) *fail to afford the Engineer's representative proper facilities for inspecting the works or any part thereof as required under clause 28 of these conditions, or*

(xii) *promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent or servant to any officer or employee of the Railway or to any person on his or on their behalf in relation to the execution of this or any other contract with the Railway.*

(xiii) (A) *At any time after the tender relating to the contract has been signed and submitted by the Contractor, being a partnership firm admit as one of its partners or employ under it or being an incorporated company elect or nominate or allow to act as one of its directors or employ under it in any capacity whatsoever any retired engineer of the gazetted rank or any other retired gazetted officer working before his retirement, whether in the executive or administrative capacity, or whether holding any pensionable post or not, in the Engineering Department of any of the Railways for the time being owned and administered by the President of India before the expiry of two years from the date of retirement from the said service of such engineer or officer unless such engineer or officer has*



obtained permission from the President of India or any officer duly authorised by him in this behalf to become a partner or a director or to take employment under the Contractor as the case may be, or

(B) Fail to give at the time of submitting the said tender:-

(a) the correct information as to the date of retirement of such retired engineer or retired officer from the said service, or as to whether any such retired engineer or retired officer was under the employment of the Contractor at the time of submitting the said tender, or

(b) the contract information as to such engineers or officers obtaining permission to take employment under the Contractor, or

(c) being a partnership firm, the correct information as to whether any of its partners was such a retired engineer or a retired officer, or

(d) being an incorporated company, correct information as to whether any of its directors was such a retired engineer or a retired officer, or

(e) being such a retired engineer or retired officer suppress and not disclose at the time of submitting the said tender the fact of his being such a retired engineer or a



retired officer or make at the time of submitting the said tender a wrong statement in relation to his obtaining permission to take the contract or if the Contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor,

then and in any of the said cases, the Engineer on behalf of the Railway may serve the Contractor with a notice (Proforma at Annexure III) in writing to that effect and if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid to the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48 hours notice (Proforma at Annexure IV) in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and adopt either or both of the following courses:-

(x) to carry out the whole or part of the work from which the Contractor has been removed by the employment of the required labour and materials, the cost of which shall include lead, lift, freight, supervision and all incidental charges



(y) to measure up the whole or part of the work from which the Contractor has been removed and to get it completed by another Contractor, the manner and method in which such work is completed shall be in the entire discretion of the Engineer whose decision shall be final:

and in both the cases (x) and (y) mentioned above, the Railway shall be entitled (i) to forfeit the whole or such portion of the Security Deposit as it may consider fit, and (ii) to recover from the Contractor the cost of carrying out the work in excess of the sum which would have been payable according to the certificate of the Engineer to the Contractor if the works had been carried out by the Contractor under the terms of the contract, such certificate being final and binding upon the Contractor. Provided, however, that such recovery shall be made only when the cost incurred in excess is more than the Security Deposit proposed to be forfeited and shall be limited to the amount by which the cost incurred in excess the Security Deposit proposed to be forfeited. The amounts thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may become due to the Contractor by the Railway under this or any other contract or otherwise.

Provided always that in any case any of the powers



conferred upon the Railway by sub-clause (1) of clause 62 hereof shall have become exercisable and the same shall not be exercised, the non exercise thereof shall not constitute a waiver of any of the conditions thereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the Contractor for which his liability for past and future shall remain unaffected.

(2) Right of Railway after rescission of contract owing to default of Contractor:- *In the event of any or several of the courses, referred to in sub-clause (1) of this clause, being adopted-*

(a) the Contractor shall have to claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any commitments or made any advances on account of or with a view to the execution of the works or the performance of the contract and Contractor shall not be entitled to recover or be paid any sum for any work thereto for actually performed under the contract, unless and until the Engineer shall have certified the performance of such work and the value payable in respect thereof and the Contractor shall only be entitled to be paid the value so certified;

(b) the Engineer or the Engineer's



representative shall be entitled to take possession of any materials, tools, implements, machinery and buildings on the works on the property on which these are being or ought to have been executed, and to retain and employ the same in the further execution of the works or any part thereof until the completion of the works without the Contractor being entitled to any compensation for the use and employment thereof or for wear and tear or destruction thereof;

(c) the Engineer shall as soon as may be practicable after removal of the Contractor fix and determine ex-parte or by or after reference to the parties or after such investigation or enquiries as he may consider fit to make or institute and shall certify what amount (if any) had at the time of rescission of the contract been reasonably earned or would reasonably accrue to the contractor in respect of the work then actually done by him under the contract and what was the value of any unused, or partially used materials, any constructional plant and any temporary works upon the site.

(d) the Railway shall not be liable to pay to the Contractor any moneys on account of the contract until the expiration of the period of maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred



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by the Railway have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after deducting the said amount; but if such amount shall exceed the sum which would have been payable to the Contractor, then the Contractor shall upon demand pay to the Railway the amount of such excess and it shall be deemed a debt due by the Contractor to the Railway and shall be recoverable accordingly."

21. Clause 61 of the General Conditions of Contract enables the Railways to terminate the contract on certain grounds and clause 62 provides for determination owing to the default of the contractor. If we analyse the background which led to the termination of the contract by the railways we could see that the contractor has made several complaints regarding various deficiencies on the part of the Railways. Though acceptance of the contract was made in May 2005, the Railways was able to furnish the ground level clearance certificate for Depot A on 01.08.2005 and Depot B on 08.08.2005. On 15.10.2005 the claimant has complained about



the delay in testing procedures. On 21.10.2005 a fresh ground level clearance certificate was issued by the Railways for both the depots. On 12.12.2005, ground level clearance certificate for the third depot viz., Depot C was issued by the Railways. On 21.12.2005 the claimant had written to the Railways pointing out that the delay is only due to the failure on the part of the Railways to provide the ground level clearance certificate and also provide the Depots for storage of ballast and requesting the Railways to not to levy any penalty.

22. It could be seen that the Railways had on 22.12.2005 recommended that the delay is due to the Railways and also due to the unexpected heavy rains and therefore the penalty should be waived upto 22.12.2005. On 30.01.2006 the contractors complained about the failure on the part of the Railways to provide BKH Wagons in time and continuous failure on the part of the Railways to provide ground level clearance certificate and instructions issued by the Railways to stop further collection of ballast in C depot etc., Though these allegations were refuted by the Railways in its replies dated 05.05.2006, on 09.05.2006 there is another



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recommendation by the Senior Divisional Engineer (East) to waive penalty for the period and to levy token penalty. All these would show that the Railways was also partially or partly responsible for the delay in performance of the contract.

23. The Arbitrator has, as of fact, found that the Railways is responsible for the delay in performance of the contract and has also found that the termination of the contract by the Railways is illegal. Considering the scope of the jurisdiction under Section 34, a Court cannot revisit the said conclusion of the said Arbitrator. All that, that should be seen is as to whether the Arbitrator has acted against the contract between the parties. The learned Single Judge has found that in view of Clause 17(iii) and Clause 63 of the General Conditions of Contract, the Arbitrator had acted beyond the contract between the parties and therefore the award is perverse.

24. We will have to now test whether the award of the Arbitrator could be said to be perverse. The relevant clauses in the agreement have been re-produced. Let us now consider the decisions relied upon by the



learned counsel on either side in support of their submissions.

Mr.M.K.Kabir, learned Senior Counsel appearing for the appellants / contractors would rely upon the judgment of the Hon'ble Supreme Court in ***Bharat Drilling and Foundation Treatment Private Limited Vs. State of Jharkhand and others*** reported in **2009 (16) SCC 705**, wherein, the Hon'ble Supreme Court considered Clause 1.21 of the Contract between the parties which read as follows:-

“1.21.1. Payments for any additional items of work shall be given by Clause 11 (eleven) of PWD Form F-2 of the contract.

1.21.2. No claim for idle labour, idle machinery, etc. on any account will be entertained.

1.21.3. No claim shall be entertained for business loss or any such loss.

1.21.4. No claim shall be entertained for delays in communicating decision drawing or specifications by the Department. The Department may however consider the grant of extension of time in completion of work. If there is any such genuine reason of it.

In case it is not possible for the Department to make



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the entire site available on the award of the work, the contractor will have to arrange his working programme accordingly. No claim whatsoever for not giving the site on gradually will be entertained, however, suitable extension of time may be given at the discretion of the Engineer-in-charge considering the merits of the case.”

25. While interpreting the above clause the Hon'ble Supreme Court after referring to the judgment in ***Port of Calcutta Vs. Engineers-De-Space-Age*** reported in (1996) 1 SCC 516 held that such a Clause does not prohibit the Arbitrator from granting compensation for an illegal termination of the contract. In ***Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age*** referred to *supra*, the claim relating to award of *pendente lite* interest by the Arbitrator, Clause 13(g) of the contract which was the clause prohibiting the award of *pendente lite* interest reads as follows:-

“No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay on



the part of the Commissioners in making interim or final payment or otherwise.”

26. While examining the scope of the said Clause the Hon'ble Supreme Court held as follows:-

4. We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the arbitrator post reference. The short question, therefore, is whether in view of sub-clause (g) of clause 13 of the contract extracted earlier the arbitrator was prohibited from granting interest under the contract. Now the term in sub-clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words “no claim for interest will be entertained by the Commissioner” clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been



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delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite.

5. Looked at from another point, if there was a dispute as to whether under this term of the contract the arbitrator was prohibited from awarding interest pendente lite, that was a matter which fell within the jurisdiction of the arbitrator, as the arbitrator would have to interpret sub-clause (g) of clause 13 of the contract and decide whether that clause prohibits him from awarding interest pendente lite. In that case it cannot be said that the arbitrator had wandered



outside the contract to deny to him jurisdiction to decide the question regarding payment of interest pendente lite. Even if we were to accept the contention urged by the learned counsel for the appellant placing reliance on paragraphs 26 and 29 of the Associated Engineering Co. case [(1991) 4 SCC 93 : AIR 1992 SC 232] we think, that the arbitrator was well within his jurisdiction in awarding interest pendente lite.

27. Again in *Asian Techs Limited Vs. Union of India and others* reported in (2009) 10 SCC 354, the Hon'ble Supreme Court considered a bar under Clause No.11 in the contract which reads as follows:-

"11. Time, delay and Extension.-- (A) Time is of the essence of the contract and is specified in contract documents or in each individual Works Order.

As soon as possible after the contract is let or any substantial Works Order is placed and before work under it has begun, the GE and the Contractor shall agree upon a Time Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof, and/or the Contract or Works order as a whole.

(B) If the works be delayed:



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(a) *by reason of non-availability of Government stores mentioned in Schedule 13; or*

(b) *by reason of non-availability or breakdown of government tools and plant mentioned in Schedule 'C' then, in any such event, notwithstanding the provisions hereinbefore contained, the GE may in his discretion grant such extension of time as may appear reasonable to him and the Contractor shall be bound to complete the works within such extended time. In the event of the Contractor not agreeing to the extension granted by the Garrison Engineer, the matter shall be referred to the Accepting Officer (or CWE in case of contract accepted by Garrison Engineer) whose decision shall be final and binding.*

(C) *No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."*

28. The Hon'ble Supreme Court after referring to both the judgments in ***Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age*** referred to *supra* and ***Bharat Drilling and Foundation Treatment Private Limited Vs. State of Jharkhand and others*** referred to



supra concluded that the above clause would only prevent the Department from entertaining the claim in respect of compensation and it will not prohibit the Arbitrator from awarding compensation for delay.

29. In *K.N.Sathyapalan (Dead) by LRs Vs. State of Kerala and another* reported in *2007 (13) SCC 43*, the Hon'ble Supreme Court considered a similar provision relating to price escalation clause and concluded that even in the absence of a price escalation clause and despite a prohibitory clause in the supplementary agreement, the Arbitrator was well within his jurisdiction in allowing the contractors claims on account of escalation of costs under the said heads during the extended period of contract. In doing so, the Hon'ble Supreme Court observed at paragraph 31 and 32 as follows;-

31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the arbitrator



exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad's case (supra) and also Patel Engg.'s case (supra). As was pointed out by Mr. Dave, the said principle was recognized by this Court in P.M. Paul's (supra), where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George's case (supra).



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30. Our attention is drawn by Mr.M.K.Kabir, learned Senior Counsel, to the judgment of the Division Bench of the Kerala High Court in ***Southern Railway, Represented by its General Manager and others Vs. Santhosh Babu*** reported in ***2022 (1) Arb LR 514***, wherein, the Division Bench considered the contract by the Railways to which the General Conditions of Contract applicable to the case on hand would apply to contend that despite there being a prohibition, if the termination is held to be illegal the Arbitrator is at liberty to grant damages. The relevant clauses under the said agreement are set out in the said judgment in paragraph 23 and 24 that reads as follows:-

23. Clauses 15.1, 16.3, 44.0 and 44.1 of the Additional Instructions and Special Conditions of Contract read thus:

"15.1 The drawings for the works can be seen in the office of the Chief Administrative Officer, Construction, Southern Railway, Chennai-8 and in the office of Field Deputy Engineers Office. It should be noted that these drawings are meant for general guidens only and the Railway may suitably modify them during the execution of work according to the



circumstances without making the Railways liable for any claims on account of such charges.

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16.3 No claim whatsoever will be entertained by Railway on account of any delay or hold up of the works arising out of delay in approval of drawings changes, modifications, alterations, additions, omission and the site layout plans or detailed drawings and designed and/or late supply of such material as are required to be arranged by the Railway or due to any other factor on Railway accounts.

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44.0 PRICE VARIATION CLAUSE

Applicable for advertised tender value exceeding 25Lakhs and period of completion more than 12 months.

44.1 The rates quoted by the tenderer and accepted by Railway Administration shall hold good till the completion of work and no additional individual claim will be admissible (unless otherwise expressly stated elsewhere in the tender conditions) on account of fluctuation in market rates, increase in taxes/any other



levies/tolls etc., except that payment/recovery for overall market situation shall be made as per price variation clause given in para below"

24. Similarly, Clauses 17-A(ii), 39(i) and 42(i) of the Indian Railways Standard General Conditions of Contract read thus:

17-A(ii)- Extension for delay not due to Railway or Contractor: If in the opinion of the Engineer, the progress of work has any time been delayed by any act or neglect of Railway's employees or by other contractor employed by the Railway under sub-clause (4) of clause 20 of these Conditions or in executing the work not forming part of the contract but on which the contractors performance necessarily depends on or by reason of proceeding taken or threatened by or dispute with adjoining or to neighbouring owners or public authority arising otherwise through contractor's own default etc. or by the delay authorized by the Engineer pending arbitration or in consequences of the contractor not having received in due time necessary instructions from the Railway for which he shall have specially applied in writing to the



Engineer or his authorized representative then upon happening of any such event causing delay, the contractor shall immediately give notice thereof in writing to the Engineer within 15 days of such happening, but shall nevertheless make constantly his best endeavours to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time. The Engineer on receipt of such request from the contractor shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and quantum of work affected thereby. No other compensation shall be payable for works so carried forward to the extended period of time, same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.

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39(i) Rates for Extra Items of Works: Any item of work carried out by the Contractor on the Instructions of the Engineer which is not included in the accepted schedules of rates shall be executed at the rates set forth in the "Scheduled of rates of railway" modified by the tender percentage and such items are not contained in the latter, at the rate agreed upon between the Engineer and the Contractor, in as short a period as possible after the need for the special item has come to the notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at, the Railway shall be entitled to execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure.

XXXXXX

31. Despite such clauses, the Division Bench concluded that the Arbitrator is entitled to award damages, after referring to the judgment of the Hon'ble Supreme Court in ***Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy*** reported in ***2013 (8) SCC 345***, wherein the Hon'ble Supreme Court



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had held that since actions of public bodies bear public character and contain an element of public interest, it is necessary to strike down unconscionable, unfair and unreasonable clauses in the contract that has been entered into by the parties, who do not enjoy equal bargaining power, as violative of the Article 14 of the Constitution of India.

32. Similar question arose before the three Judge Bench of the Hon'ble Supreme Court in *Assam State Electricity Board and others Vs. Buildworth Private Limited* reported in (2017) 8 SCC 146, wherein, the Court after referring to the judgment of *P.M.Paul Vs. Union of India*, reported in 1989 Supp (1) SCC 368, concluded that escalation is a normal routine incident arising out of gap of time and the same will have to be granted even if there is a prohibition. The Bench also referred to the judgment in *K.N.Sathyapalan Vs. State of Kerala* referred to *supra* and *State of U.P. Vs. Patel Engineering Co. Ltd.*, reported in (2004) 10 SCC 566.

33. Mr.M.K.Kabir, learned Senior Counsel would also point out



that the delay on the part of the Railways in terminating the agreement also worked hardship to the contractors. The clauses of the contract, no doubt, particularly, clause 17(iii) states that the delay on the part of the Railways shall not affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefor, but in any case, the Railways may grant such extension or extensions of the completion date as may be considered reasonable. However, as seen above it has been the consistent view of the Courts that a defaulting party cannot take advantage of its own wrong and deny the sufferer the damages. In fact in ***Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy*** referred to *supra*, the Hon'ble Supreme Court had held that such unconscionable clauses will have to be read down or struck down as violative of Article 14 of the Constitution of India. No doubt, the Arbitrator is a creation of a contract between the parties and he is bound by the contract between the parties. But, as pointed out by the Delhi High court in ***Simplex Concrete Piles (India) Ltd., Vs. Union of India*** referred to *supra*, Section 55 and 73 are heart and soul of the Contract Act and rights available thereunder cannot be waived by the parties.



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34. If we are to analyse on the facts of the case on hand, in the light of the principles set out herein above, the fact that there was delay on the part of the Railways cannot be disputed and the termination happened long after the time prescribed under the contract had expired. In fact termination happened after the contractors had filed applications seeking appointment of the Arbitrator. As already pointed out, the Arbitrator has rendered a factual finding that the termination is illegal. The learned Single Judge has gone into the question of termination and has held that the interpretation of the Arbitrator regarding the termination is not correct. We do not think that this was permissible. The learned Judge has also concluded that in view of Clause 64.5 which reads as follows:-

“Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.”

the award of interest from the date of the expiry of the contract till date of award was impermissible. As we have already adverted to, a prohibition against the parties may not extend to the Arbitrator, but clause 64.5 is a



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prohibition against the Arbitrator and it is a contract between the parties to waive interest.

35. We must also point out at this juncture that there were about four contracts entered into at the same time for transport of ballast by the Railways and in respect of one of the contracts dated 16.08.2005 which was subject matter of OP.No.582 of 2006 filed under Section 11(6) of the arbitration and Conciliation Act, the Railways has complied with the award of the Arbitrator. As regards the agreement dated 14.06.2005 entered into with another contractor, OP.No.72 of 2011 filed by the Railways under Section 34 of the Arbitration and Conciliation Act was dismissed confirming the award, except the grant of *pendente lite* interest. The appeal in OSA.170 of 2021 filed under Section 37 was also dismissed by the Division Bench on 26.04.2021.

36. Therefore, out of the four contracts that were entered into at the same time, the damages granted to a contractor has been paid by the Railways without challenge and challenge to one of the awards has been



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dismissed by this Court, except a partial modification on the grant of *pendente lite* interest. In the light of the judgments of the Hon'ble Supreme Court and that of the Delhi and Kerala High Courts, we find that the learned Single Judge had in fact exceeded his jurisdiction and concluded that the Arbitrator had no power to award damages.

37. He had sought to interpret the provisions of the contract differently to enable interference with the award. We do not think that such an action can be sustained by us. However while advertng to the award of interest, we find that the Arbitrator has granted interest against the provisions of the contract. We have extracted Clause 64.5, it very clearly prohibits the Arbitrator from granting *pendente lite* interest. Therefore, we do not think that that portion of the award could be sustained.

38. The next question that would arise is whether we are modifying the award by interfering with a portion of the award. No doubt in ***Project Director, National Highways Authority of India Vs. M.Hakeem and another*** reported in (2021) 9 SCC 1, the Hon'ble Supreme Court had



held that the Court cannot modify the award. However, in ***J.G.Engineers***

(P) Ltd., Vs. Union of India reported in ***(2011) 5 SCC 758***, the Hon'ble

Supreme Court has pointed out that there is a difference between the modification and severance. If the award is severable, the Court can always interfere with that portion of the award that is severable. Grant of interest is definitely severable from the quantification of damages made by the Arbitrator. We therefore find that the Arbitrator had exceeded his jurisdiction in granting interest at 12% per annum from 18.05.2006 to 20.04.2008 and 18% per annum from 21.04.2008 till date of realization. That portion of the award alone is modified, by granting interest at 12% from 21.04.2008 that is the day after the award till the date of realization.

39. In fine, the appeals are **allowed** and the orders of the learned Single Judge is set aside, the awards of the Arbitrator are restored with the above modification on the interest alone. Considering the fact that the appellants are the highest bidders in the subsequent auction also, we do not impose costs.



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(R.S.M.,J.) (R.K.M.,J.)

20.10.2023

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Index : Yes

Internet : Yes

Neutral Citation : Yes

Speaking order



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To

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- 1.The General Manager,
Union of India,
Southern Railway, Chennai – 3.
- 2.The Divisional Railway Manager [Works],
Southern Railway, Park Town, Madras – 3.
- 3.Mr.Jusitce K.M.Natarajan [Sole Arbitrator],
136, L.B.Road, Kamaraj Nagar,
Thiruvanmiyur, Chennai – 41.



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R.SUBRAMANIAN, J.
and
R.KALAIMATHI, J.

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