



OSA.No.38 of 2011

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 24.07.2023	Delivered on 11.09.2023
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CORAM:

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

O.S.A.Nos.38 & 65 of 2011

O.S.A.No.38 of 2011

M/s.Engineering Projects (India) Limited,
(A Govt. of India Enterprise),
Head Office at Crore-3, Scope Complex,
7, Industrial Area, Lodhi Road,
New Delhi – 110 003.

...Appellant

Vs.

Tamil Nadu Generation & Distribution Corporation,
rep. By its Chief Engineer – Project-I,
NPKKR Maaligai, No.800,
Anna Salai, Chennai – 600 002.

...Respondent

(Cause title amended vide order of Court dt.18.04.2023
made in CMP.8389/2023 in OSA.38 of 2011)

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of the
Original Side Rules, against the order dated 29.07.2010 in O.P.No.34 of
2007.



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For Appellant : Ms.Hema Srinivasan

For Respondents : Mr.N.C.Ramesh, Senior Counsel
assisted by Mr.G.Dhyaneshwar
instructed by Mr.T.Sivaprakasam

O.S.A.No.65 of 2011

Tamil Nadu Generation & Distribution
Corporation Limited (TANGEDCO),
Rep. by its Chief Engineer / Project-I,
No.144/800, Anna Salai,
Chennai – 600 002.

...Appellant

(Cause title amended vide Court order dated 13.03.2023
made in CMP.3028/2018 in OSA.65/2011)

Vs.

1.M/s.Engineering Projects (India) Limited,
(A Govt. of India Enterprise),
Head Office at Crore-3, Scope Complex,
7, Industrial Area, Lodhi Road,
New Delhi – 110 003.

2.Dr.H.C.Visveswaraya,
Presiding Arbitrator,
“Chandrika” at 15th Cross,
63-64, East Park Road,
Malleswaram, Bangalore – 560 003.

3.Mr.G.Venkatraman,
Nominee Arbitrator,
G-102, Yamuna Apartments,



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Alakananda, New Delhi – 110 019.

4.Mr.R.V.Duraisamy,
Nominee Arbitrator,
Chief Engineer (Retired),
No.2-194, Second Main Road,
Gomathipuram, Madurai – 625 020.

...Respondents

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules r/w. Section 37 of Arbitration and Conciliation Act, 1996, against the order dated 29.07.2010 in O.P.No.34 of 2007.

For Appellant : Mr.N.C.Ramesh, Senior Counsel
assisted by Mr.G.Dhyaneshwar
instructed by Mr.T.Sivaprakasam

For Respondents : Ms.Hema Srinivasan

COMMON JUDGMENT

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

Challenge in these two appeals under Section 37 of the Arbitration and Conciliation Act, 1996 is to the order of the Hon'ble Judge made in Arbitration O.P.No.34 of 2007 dated 29.07.2010. By the said order, the Hon'ble Judge, while upholding the claim of the appellant in O.S.A.No.38 of 2011 with reference to certain parts of the award, rejected the same in respect of the other parts. Both the parties to the contract dated 12.08.1994,



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which is the foundation of the claim are, therefore, on appeal.

I. Factual Matrix:-

The parties are referred as per their rank in O.P.No.34 of 2007.

2.The petitioner, then known as the Tamil Nadu Electricity Board invited international competitive bids for construction of External Coal Handling System (ECHS) Phase-II of the Thermal Power Station, Tuticorin. The respondent namely, M/s.Engineering Projects (India) Limited, a Government of India Enterprise submitted its offer on 25.05.1992. The work was divided into three separate contracts by the petitioner. While the first part dealt with design and supply of mechanical / electrical equipment and steel, the 2nd part comprised of erection, testing and commissioning of mechanical / electrical equipment and fabrication / erection of steel structures and the 3rd part consisted with entire associated civil works and foundations of the project. While the 1st and 2nd parts of the contract were awarded to the respondent, the 3rd part of the contract was awarded to another agency called M/s.CemIndia later named as M/s.Trafalgar House India Limited on 12.08.1994.



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3. Two letters of intent / contracts were entered into between the petitioner and the respondent. The details are :-

i) Document No.412/94 dated 12.08.1994 dealt with design, engineering, inspection, testing of equipment & delivery to site for total value of US\$ 137,51,525 + Rs.10,00,000/-.

ii) Document No.413/94 dated 12.08.1994 for fabrication / erection of structurals and erection of mechanical / electrical equipment at site for a total value of Rs.12,37,59,000/- .

4. As per the time agreed between the parties, the entire work had to be completed by 11.08.1996. The contract contained the terms of payment of initial advance and payment based on the running bills. There was also a Clause for liquidated damages and terms for resolution of disputes by arbitration due to inevitable reasons attributable to both the parties (as found by the Arbitrators and the Section 34 Court). There was a total delay of 40 months in execution of the contract. Both the parties blamed each other for the delay as the delivery schedule of 24 months was



too tight and it required both the parties to discharge their reciprocal obligations with utmost accuracy, which is a near impossibility in construction contracts.

5.While the respondent blamed the petitioner for non-completion of the civil works, the petitioner blamed the respondent for its inability to complete the work within the time agreed. However, the contract was completed finally on 25.11.1999 and a performance guarantee test was also conducted on the said date. Even thereafter, there were several negotiations between the parties regarding the payment terms and there were various correspondence regarding the extension of time sought for by the respondent. Since the negotiated settlement could not be achieved, which according to the respondent is because of the unreasonable and unbending attitude of the Officials of the petitioner, the respondent invoked the arbitration Clause and sent a letter on 16.02.2001. This was followed up by the letter dated 12.04.2001, seeking arbitration as per Clause in 27.1 & 27.4 of the General Conditions of Contract. Each party nominated an Arbitrator as per Clause 26 of the General Conditions of Contract and the nominated



Arbitrators, chose an Umpire.

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6.The Arbitrators took up the issue and concluded that out of the 40 months of delay, 16 months is attributable to the respondent while 24 months is attributable to the petitioner. The claim for Arbitration consisted on a bundle of claims which can be conveniently, classified as follows:-

- 1) Extension of time and levy of liquidated damages.
- 2) Claims for revision in scope of work of DS/DW system.
- 3) Cost of arbitration.
- 4) Claim for overheads and loss of profit during the extended period of contract made by the respondent.
- 5) Claim for Bank charges for keeping alive the performance Bank Guarantees made by the respondent.
- 6) Claim for amounts withheld on account as liquidated damages by the petitioner and the cost of providing a Bank Guarantee for Rs.150 Lakhs.
- 7) Claim towards amounts withheld on account of interest on unadjusted initial advance by Tamil Nadu Electricity Board made by the respondent.



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8) Claim towards amount withheld on account of exchange variation.

9) Claim for reimbursement of excise duty.

10) Claim towards outstanding payments of running bills.

11) Claim for release of retention money amount.

12) Claim for the extra work for providing idler frames for the garland type idlers.

13) Claim for cast iron counter weights.

14) Claim for rack and pinion gates.

15) Claim for modification of discharge chute.

16) Claim for the extra structural works.

17) Claim for surplus material at site.

18) Claim for interest on delayed payments.

19) Counter claim for not providing Belt Vulcanizing Machine.

20) Counter claim for not providing Aluminium Windows.

21) Counter claim for not providing AC sheets in certain areas of conveyor galleries.

22) Counter claim for reduction of pump capacity for the DS



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system.

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23) Counter claim for non-erection of DS system pipes, values in raw Coal stock pile area.

24) Counter claim for refund on account of saving of cables due to location of LDB.

25) Counter claim for not providing valid ILMS, which failed twice during guarantee period.

7.By the award, the Arbitrators found that the respondent is entitled to Rs.18,44,39,582/- under various heads and interest of Rs.17,61,05,617/- and the petitioner is entitled to Rs.5,26,38,708/- towards the claim made by it with interest at Rs.6,10,38,272/-. The Arbitrators directed the petitioner to pay the differential amount. Aggrieved, the petitioner approached this Court under Section 34 of the Arbitration and Conciliation Act, seeking to set aside the award.

8.The Hon'ble Judge, who heard the Section 34 Original Petition, after considering the contents of the award and after hearing the counsel for



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the parties concluded that the award needs to be interfered with and set aside the award so far it relates to the claim of deduction on liquidated damages and interest there on. The Court also upheld the findings of the Arbitral Tribunal on the aspect of delay. However, held that the award is inexecutable, in view of the fact that the respondent had not sought for arbitration within the time stipulated in the contract. On the remaining issues, the Hon'ble Judge confirmed the award, while setting aside the award in respect of interest on two heads. As against the said order made under Section 34, both parties are on appeal.

II. Relevant clauses of the contract:

9.Clause 26 of the General Conditions of Contract deals with settlement of disputes and it reads as follows:-

26.0 Settlement of Disputes:-

“26.1. Any disputes or differences including those considered as such by only one of the parties arising out of or in connection with the 'Contract' shall be to the extent possible settled amicably between the parties.

26.2. If amicable settlement cannot be reached, then all



disputed issues shall be settled by arbitration as provided in Clause 27.0 below.”

10.Clause 27 of the General Conditions of Contract reads as follows:-

27.0. Arbitration:-

“27.1. If any dispute or difference of any kind whatsoever shall arise between the OWNER / PURCHASER and the VENDOR / CONTRACTOR, arising out of the 'Contract' for the performance of the 'Works', whether during the progress of the 'Works' or after the completion or whether before or after the termination, abandonment or breach of the 'Contract', it shall, in the first place, be referred to and settled by the OWNER / PURCHASER or the ENGINEER, who, within a period of thirty (30) days after being requested shall give written notice of his decision to VENDOR / CONTRACTOR. Provided that such references shall be made within the period stipulated below for various stages of Contract:

(a) Supply, erection and commissioning including performance testing – Ninety (90) days from the date of completion of performance test;

(b) Warranty – Ninety (90) days from the date of expiry of warranty period;

(c) For termination, abandonment of work, etc. - Ninety (90) days from the date of occurrence of such acts.



27.2. Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the 'Works' and shall forthwith be given effect to by the VENDOR/CONTRACTOR who shall proceed with the 'Works' with all due diligence, whether he or the OWNER / PURCHASER requires arbitration as hereinafter provided or not.

27.3. If after the OWNER / PURCHASER or the ENGINEER has given written notice of his decision no claim to arbitration has been communicated to him within thirty (30) days from the receipt of such notice, the said decision shall become final and binding on the parties.

27.4. In the event of the OWNER / PURCHASER or the ENGINEER failing to notify his decision as aforesaid, within thirty (30) days after being requested, or in the event of the VENDOR / CONTRACTOR being dissatisfied with any such decision, either party may require and claim within a further period of thirty (30) days after the expiry of the first mentioned period of thirty (30) days that the matter in dispute be preferred to arbitration as hereinafter provided.

27.5. All disputes or differences in respect of which the decision, if any of the OWNER / PURCHASER or the ENGINEER has not become final and binding as aforesaid, shall be settled by arbitration in the manner hereinafter



provided.”

The other portions are not very relevant for each parties.

11.Clause 22 of the Contract deals with delays by the Owner /

Purchaser or Authorised Agents, which reads as follows:-

22.0. Delays by Owner / Purchaser or his Authorised Agents:

“22.1. If in the opinion of the Owner / Purchaser or the Engineer, the work be delayed (a) by force majeure, or (b) by reason of proceedings taken or threatened by or disputes with adjoining or neighbouring owners or public authorities, or (c) by the works or delays of other Constructors, or tradesmen engaged by the OWNER / PURCHASER, or (d) by reason of the ENGINEER's instructions, or (e) in consequence of the VENDOR / CONTRACTOR not having received in due time necessary instructions from the OWNER / PURCHASER or the ENGINEER for which he shall have specifically applied in writing, or (f) by reason of non-payment of running bills within a reasonable period after issue of the certificate by the OWNER / PURCHASER or the ENGINEER, the OWNER / PURCHASER or the ENGINEER shall make a fair and reasonable extension of time for completion of the Contract 'Works'. In case of strike or lockout, the VENDOR / CONTRACTOR shall, as soon as possible, give written notice thereof to the OWNER / PURCHASER or the ENGINEER, but



the VENDOR / CONTRACTOR shall nevertheless constantly endeavour to prevent delay and shall do all that may reasonably be required to the satisfaction of the OWNER / PURCHASE or the ENGINEER to proceed with the work.

22.2. *In addition, the VENDOR / CONTRACTOR shall be entitled to claim demonstrable and reasonable compensation if such delays have resulted in any increase in the cost. The OWNER / PURCHASER shall examine the justification for such a request for claim, and if satisfied, the extent of compensation shall be mutually agreed depending upon the circumstances at the time of such an occurrence.”*

12.Clause 18 of the Contract, which deals with liquidated damages reads as follows:-

18.0. Liquidated damages for delay in completion

18.1. *The VENDOR / CONTRACTOR agrees that the work shall be commenced and carried on at such points, and in the order of precedence and at such times and seasons as may be directed by the OWNER / PURCHASER or the ENGINEER in accordance with the schedule for the completion of work as outlined in the 'Contract'. The VENDOR / CONTRACTOR declares that he has familiarised himself with the 'Site' and rights-of way, with all the local conditions, and with all the*



circumstances which may or likely to affect the performance and completion of the work, and that he has allowed for such conditions in the preparation of this schedule. The progress of work shall be checked at regular monthly intervals and the percentage progress achieved shall be commensurate with the time elapsed after the award of 'Contract'.

18.2. *However, it is not incumbent upon the OWNER / PURCHASER or the ENGINEER to notify the VENDOR / CONTRACTOR when to begin, to cease or resume work, nor to give early notice of the rejection of faulty work, nor in any way to superintend so as to relieve the VENDOR / CONTRACTOR of responsibility or of any consequence of neglect or carelessness by him or his subordinates.*

18.3. *No necessity for an extension of time is anticipates, but if untoward or extraordinary circumstances should arise beyond the control of the VENDOR / CONTRACTOR, which in the opinion of the OWNER / PURCHASER or the ENGINEER should entitle the VENDOR / CONTRACTOR to a reasonable extension of time, such extension may be granted but shall not operate to relieve the VENDOR / CONTRACTOR of any of his obligations.*

18.4. *The VENDOR / CONTRACTOR shall promptly notify the OWNER / PURCHASER any event of conditions which might delay the completion of erectio work in accordance with*



the approved schedule and the steps being taken to remedy such a situation.

18.5. *If the VENDOR / CONTRACTOR is delayed at any times in the commencement or during the progress of the work by any act, delay or neglect of the OWNER / PURCHASER or his employees, or by any other Contractor utilised by the OWNER / PURCHASER or by changes ordered in the work by the OWNER / PURCHASER or the ENGINEER, or by Force Majeure, the time of completion shall be extended by a reasonable period as may be mutually agreed, upon application from the VENDOR / CONTRACTOR at the time of such special circumstances occurring and not towards the end of the 'Contract Period'.*

18.6. *The OWNER / PURCHASER or the ENGINEER shall have the right to require the discontinuance of the 'Works' in whole or in part, for such time as may be necessary, should the condition of the weather or flood or other contingencies make it desirable to do so in order that the 'Works' shall be well and properly executed. Extension of time shall be granted to the VENDOR / CONTRACTOR for discontinuance of 'Work' so required, and the VENDOR / CONTRACTOR shall not claim for compensation or damage in relation thereto.*

18.7. *The time stipulated in the 'Contract' for the execution and completion of the 'Works' shall be deemed to be the*



essence of the 'Contract'. In the event the VENDOR / CONTRACTOR fails to execute, complete and deliver the 'Works' within the time specified in the 'Contract', the the VENDOR / CONTRACTOR shall pay to the OWNER / PURCHASER as and by way of liquidated damages. The OWNER / PURCHASER may, without prejudice to any method of recovery, deduct the amount for such damages from any amount due or which may become due to the VENDOR / CONTRACTOR. In the event of extension of time being granted by the OWNER / PURCHASER or the ENGINEER in writing for completion of the 'Works' stated in Clauses 18.3., 18.5 and 18.6 above, this liquidated damages clause will be applicable after the expiry of such extension period.

18.8. *If the VENDOR/CONTRACTOR fails to perform the 'Contract' within the time fixed, the VENDOR / CONTRACTOR shall pay to the OWNER / PURCHASER as liquidated damages, not as penalty, a sum equal to one tenth percent (0.1%) of the 'Contract Price' per day of delay.*

18.9. *However, the above amount of liquidated damages will be subject to a maximum of ten percent (10%) of the 'Contract Price'.*

18.10. *The rate of penalty to be levied and the maximum percentage of liquidated damage is as stipulated in Clauses 18.8 and 18.9 will be binding on the BIDDERS and no*



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deviation will be accepted from those stipulations.”

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III. The Dispute:

13. Though there are several claims, the main claim relates to the delay. As adverted to, earlier contract stipulates 24 months for completion, the contract was entered into on 12.08.1994 and the 24 months period expires on 11.08.1996 but, the work was not completed on the said date. The finding of the Arbitral Tribunal that both the parties were responsible for the delay, was confirmed by the Hon'ble Judge also. The respondent by its letter dated 08.10.1996 while faulting the petitioner for the delay in completion of the work, sought for extension, indicating the cause for delay and the party responsible for the delay. The petitioner by its letter dated 12.02.1997, wrote back stating that the reasons assigned by the respondent cannot form a basis for extension of time and hence, the request for grant of extension cannot be complied with. It was also indicated therein that the request to stop levy of liquidated damages and charging of interest on the advance payment cannot also be considered. However, on 26.04.1997, the respondent wrote to the petitioner assigning more detailed reasonings for



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the delay and requesting extension of time. This led to a meeting between the parties on 20.05.1997. The question of grant of extension of time, refund of liquidated damages, interest and advance already deducted was debated.

14.As regards the refund of liquidated damages and interest on advance already deducted, it was agreed that the respondent will come up with a proposal for deferment of further liquidated damages and interest on advance from the prospective bills and the respondent will not press for formal extension of time at this stage. It was also agreed that the petitioner will take up the examination of the request for extension of time at a later date subject to its merits. It is seen from the minutes of the said meeting that as many as 21 subjects were considered and it is seen that there were agreements reached on each point for completion of work within a particular time. The said meeting was attended by several senior Officials of both sides including the Member (Generation) of the Tamil Nadu Electricity Board and the Director (Projects) of the respondent namely, the Engineering Projects (India) Limited.



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15. There was an yet another meeting on 23.06.1997 between the parties and the question of deferment of LD interest on advance was again raised by the respondent and it was informed by the petitioner that the proposal of the respondent is under active consideration of the petitioner. These issues were taken up again at a meeting on 15.05.1998. There again, while agreeing on certain timelines, which is well beyond the stipulated period of 24 months on the issue of liquidated damages, the petitioner had assured the respondent that the issue will be examined at the earliest. With all the hickups around, finally, the project was completed and a performance guarantee test was conducted on 23.11.1999 to 25.11.1999.

16. After completion of the performance guarantee test, there was a meeting on 24.02.2000. At the said meeting, a specific request was made by the respondent for extension of further period and waiver of liquidated damages and interest on advance payment. The Member (Generation) of the petitioner had required the respondent to send a detailed proposal for



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consideration by the Board. On 03.03.2000, the respondent wrote to the petitioner seeking payment of the excess interest and the liquidated damages withheld by the petitioner. An application for extension of delivery period was also submitted on the same day. The reasons for the delay were also explained in the letter. It was also pointed out that at a meeting on 09.03.1998, it was agreed by the petitioner that it will not levy further liquidated damages, since it was realised that the petitioner had also contributed towards the delay. The respondent also made a detailed representation pointing out the reasons for the delay and insisted for the extension of the original delivery period.

17.In response to the said letter, the Member (Generation) of the petitioner wrote to the respondent on 18.05.2000 stating that the application for grant of extension of the delivery period is being examined by the petitioner and a decision will be intimated shortly. However, the request of the respondent for removal of surplus material at the Tuticorin site was rejected by the Superintendent of Engineering on the ground that the Chairman of the petitioner had directed that no payment should be released



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to the respondent, in view of the fact that they had sought for arbitration on the Integrated Coal Handling Project at North Chennai Thermal Power Station. The same was reiterated again on 13.11.2000. Thereafter, on 09.02.2001, the respondent made a claim for a sum of Rs.25,45,624/- towards additional costs incurred by it for defaults and disruptions by the petitioner, a sum of US Dollars 41,25,457/- for additional expenses in extension of Bank guarantees and Rs.3,71,83,666/- being the withheld liquidated damages interest on advance payments. Since there was no response, there was another letter dated 16.02.2001 giving details of the amount due under various heads and requiring a decision in terms of Clause 27.1 of the General Conditions of Contract. Since the said payment was not made and there was no attempt for amicable settlement of the dispute by the petitioner, the respondent invoked Clause 27.6.1 and 27.6.2 of the General Conditions of Contract and required the petitioner to nominate an Arbitrator. Thereafter, the parties nominated an Arbitrator each and an Umpire was nominated by the Arbitrators thus, leading to the Arbitration Proceedings.

IV. The Award:-

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18. Before the Arbitrators, an application was filed under Section

16(2) of the Arbitration and Conciliation Act, contending that the Arbitral Tribunal does not have jurisdiction in as much as the timelines prescribed under Clause 27 of the General Conditions of Contract have been breached by the respondent. The petitioner contend that the arbitration was not invoked within those timelines and therefore, the remedy of the respondent is under general law and not under the arbitration clause.

19. The Arbitral Tribunal concluded that, it cannot take a generalised decision in respect of the claims and it has to be decided after going into each and every claim on its merits. The Tribunal therefore, unanimously decided to proceed with arbitration on the claims submitted by Engineering Projects (India) Limited. It is admitted by the parties that arbitration went on for several hearings and finally, the Arbitrators passed an award on 24.08.2006 accepting certain claims of both the parties and rejecting others as adverted to above. This led to the petition under Section 34 at the instance of the petitioner and these appeal by both the parties.

V. Claims before the Arbitral Tribunal and its conclusions:-



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20.The Arbitral Tribunal grouped the issues that arose for its consideration under three headings namely, the preliminary issues three in number, issues of the claimant namely, the respondent 23 in number and issues of the petitioner 16 in number. The Tribunal found that some of the issues were interlinked and took them up together. The Tribunal also arrived at a broad agreed basis for consideration of the issues, which are Clause 5.2 & 27 of the General Conditions of Contract and the relevant provisions of the Arbitration Act. The Arbitrators took up each of the issues separately and after referring to the various documents and highlights provided by the parties concluded that of the total delay of 40 months, atleast 24 months was attributable to the petitioner, while the remaining 16 months were attributable to the respondent.

21.The other claims relating to excess cost incurred during the extended period of contract, interest, expenses incurred in keeping alive the Bank guarantees, expenses incurred in extra works, reimbursement of excise duty etc., were examined on the basis of the evidence placed before the Arbitrators and the Arbitrators found that while the petitioner is entitled to



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certain amounts under various heads, the respondent would also be entitled to certain amounts under various claims. After adjusting the amounts found to be due and payable to Tamil Nadu Electricity Board from the amounts that are found payable and due to the Engineering Products (India) Limited, the net amount was arrived at Rs.24,68,68,219/-.

22.Sitting in an appeal under Section 37 and knowing the constraints of our jurisdiction, we have not elaborately dealt with the findings of the Arbitral Tribunal on each and every issue or the correctness of it. Since the jurisdiction of a Court under Section 34 itself is severely circumscribed, in view of the pronouncements of the Hon'ble Supreme Court in various cases, which we will advert to while examining the contention of the learned counsel for the parties, our jurisdiction is also very limited.

VI. Section 34 Court order.

23.The Section 34 Court examined the award in detail, went to the extent of reappraising the reasons given by the Arbitrators for their



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conclusions and while accepting certain claims, rejected several of the claims. From the order of the Section 34 court, it can be easily gathered that the exercise done by it was a gruelling one, considering the fact that the Hon'ble Judge has in Paragraph 254 of the order observed that the hearing of the Section 34 application went on for over six months that was primarily because of the law as it stood at that time did not circumscribe the power of the Court under Section 34 to the extent as has been done by subsequent pronouncements of the Hon'ble Supreme Court. We must however, point out that our job has been made much easier, in view of the pronouncement of the Hon'ble Supreme Court in **Associated Builders Vs. Delhi Development Authority** reported in **2015 (3) SCC 49** wherein, the contours of the power of the Court dealing with an application under Section 34 have been defined.

VII. Appeal:-

24. We have heard Mr.Hema Srinivasan, learned counsel for the appellant in OSA.No.38 of 2011/respondent in O.P.No.34 of 2007 and Mr.N.C.Ramesh, learned Senior Counsel appearing for the appellant in



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OSA.No.65 of 2011 / the petitioner in O.P.No.34 of 2007.

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25.Mrs.Hema Srinivasan, learned counsel for the appellant in OSA.No.38 of 2011 would primarily contend that the Hon'ble Judge, who decided the application under Section 34 has overstepped the contours laid down by the Hon'ble Supreme Court and interfered with the award on grounds, that were not available to the Court under Section 34. According to the learned counsel, in view of the decision of the Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority**, the order of the Hon'ble Judge made in the application under Section 34 is liable to set aside. She would point out that the main ground on which, the Hon'ble Judge had set aside the award made under certain heads was that the Arbitrators have not given sufficient reasons for their conclusions and they have not considered the points raised by the petitioner before her.

26.Relying on the judgment of the Hon'ble Supreme Court in **Dyna Technologies Private Limited Vs. Crompton Greaves Limited** reported in **2019 SCC Online SC 1656**, the learned counsel would submit

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that in order to enable the Court to set aside the award on the ground of absence of reasoning, it must be demonstrated that there should be total absence of reasoning or there should be completely perverse. According to the learned counsel for the appellant, the award under consideration cannot be said to be either perverse or wholly unreasoned. She would also point out that the Arbitral Tribunal had while considering the issue 8(c)(2), for overheads and for loss of profit during the extended period of contract concluded that since a formal quantified claim was made only on 09.02.2001, the cause of action arose only on 09.03.2001 and therefore, the claim made was within time.

27.The learned counsel for the appellant would also point out that the Hon'ble Single Judge had refused to interfere with the findings of the Arbitrators on delay and the extension of time. She had, however, held that the award with reference to delay and extension of time is inexecutable, in view of the limitation prescribed under Clause 27 of the General Conditions of contract. One of the reasons attributed by the Hon'ble Judge to conclude that the Arbitrators have not considered the question of limitation and have



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not given reasons is that the highlights pointed out by the Tamil Nadu Electricity Board were not considered by the Arbitrators.

28.The learned counsel for the appellant would point out that the issue relating to delay and extension of time was considered as issue 8(c)(1) and the Arbitrators had concluded that both the parties have contributed to the delay and the damages or loss that occurred due to the delay should be apportioned between them. The reasoning of the Hon'ble Judge is that the Arbitral Tribunal has failed to consider the submissions of the petitioner and that there was no discussion on the import of Clause 26 & 27 of the General Conditions of Contract, according to the learned counsel, this is incorrect in as much as the contentions were considered by the Tribunal and reasons were recorded in the Arbitration Order Sheets (AOS), which were annexed to the award.

29.Drawing our attention to Page 154, Volume – III of the Arbitration Order Sheets, the learned counsel would submit that the Tribunal had specifically considered the objection of the Tamil Nadu



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Electricity Board on the ground of limitation in Paragraph 9, 10 and 11 and arrived at the conclusions that the issue of extension of time was kept alive by the petitioner and therefore, the claim made by the respondent is within time. The learned counsel would also invite our attention to the judgment of the Hon'ble Supreme Court in **Dyna Technologies Private Limited Vs. Crompton Greaves Limited** to contend that the Section 34 Court cannot go into the sufficiency or the insufficiency of the reasons assigned by the Arbitral Tribunal.

30.Our attention is also drawn to the judgment of this Court in **Chief Engineer / Metropolitan Transport Project (Railways) and Others Vs. Progressive-Alliens (JV)** reported in **MANU/TN/1644/2022** to submit that this Court had after considering various judgments of the Hon'ble Supreme Court concluded that sufficiency of reasoning should be tested on the balance of perversity or irrationality and inadequacy cannot be a ground for setting aside the award.

31.As regards the claim relating to loss of profits and additional



expenses, we find that the award under the said head was set aside by the Hon'ble Judge again on the ground that the violation of the procedure under Clause 27.4 of General Conditions of Contract has not been considered. There again, according to the learned counsel, the highlights of the arguments of Tamil Nadu Electricity Board were considered by the Arbitral Tribunal. As regards this claim of loss of profits is concerned, the Tribunal has arrived at a specific conclusion in its award at page 180 of the award to the effect that the claim regarding loss of profits can be raised at the end of the completion of the contract and it was raised within 30 days from the date, on which, the cause of action had arisen i.e. on 09.03.2001. Once the Tribunal had interpreted the contract and had come to conclusion, the Section 34 Court cannot interfere with the same even if a different interpretation is possible.

32. Similarly, the learned counsel would contend that on Issue No.8(3)(c) for which also, the award has been set aside by the Hon'ble Judge on the ground that though the arbitration clause was invoked on 16.02.2001, the claim was made only in 2004. The learned counsel would



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point out that the claim was made even in the statement of claim itself, which is reflected at Page 215 of the award. The learned counsel would also point out that in the arbitration order sheets, the Tribunal has specifically observed that the Tamil Nadu Electricity Board has specifically had admitted that the claim made on 09.02.2006 itself.

33.As regards the amounts deducted towards liquidated damages, the contention that the claim was not arbitral as it was rejected on 28.01.1997, cannot be accepted and the claim was made only on 16.02.2001. The learned counsel would point out that there is a contradiction in the orders of the Hon'ble Judge while considering the issue of liquidates damages deducted from the running bills. The Hon'ble Judge has upheld the claim of the respondent but, when it came to amounts deducted towards liquidated damages, she had chosen to non-suit the respondent on the ground of limitation.

34.On issue 8(c)(5) namely, deduction of 1.3 crores from the running bills towards the interest on unadjusted advance also, the Hon'ble



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Judge had held that it is barred by limitation and the Tribunal has failed to consider arbitality. The Hon'ble Judge failed to see that the issue was considered by the Tribunal at Page 247 of the Award wherein, the Tribunal has held that the issue was kept alive by the conduct of the petitioner (TNEB) and therefore, it cannot be to be barred by limitation.

35.The learned counsel would also point out that with reference to each and every other claim, which was rejected by the Hon'ble Judge, the Tribunal has found that the petitioner namely, Tamil Nadu Electricity Board was responsible for the delay and it had the habit of keeping issue alive and linking the issue with the other contract namely, construction at Chennai Thermal Power Plant. The learned Counsel would submit that the Hon'ble Judge had over stepped the contours of Section 34 to conclude that the Arbitration Tribunal has not considered the issue of limitation. She would contend that the Hon'ble Judge had even modified the award in certain cases, which she is not entitled to, inview of the judgment of the Hon'ble Supreme Court in **Project Director, National Highways Authority Vs. Hakkim reported in 2021 (9) SCC 1** and reiterated in **National Highways**



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Authority of India Vs. M.Hakeem reported in 2022 SCC Online SC 864.

Reliance is also placed on the judgment of the Hon'ble Division Bench of this Court in **Macro Marvel Projects Ltd. Vs. J.Vengatesh** reported in **(2022) SCC Online Mad 4702.**

36.Countering the submissions made by M/s.Hema Srinivasan Mr.N.C.Ramesh, learned Senior Counsel appearing for the respondent would submit that the Hon'ble Judge exercising power under Section 34 has not transgressed the contours that are prescribed by the Hon'ble Supreme Court in various judgments.

37.Adverting to the question of limitation, Mr.N.C.Ramesh, learned Senior Counsel would heavily rely upon Clause 27 of the General Conditions of Contract extracted supra to contend that it is incumbent upon the contractor to have raised an arbitration within 30 days from the date on which the owner/ purchaser or the engineer rejects the request or if within 30 days after being requested the owner/purchaser does not communicate the decision, the contractor should have reserved its rights to seek



arbitration. Failure to do so, would make the entire dispute un-arbitrable and the remedy of the contractor would be to approach the civil Court. In order to buttress his submissions on this issue, the learned Senior Counsel would rely upon Clause 27.4 of the General Conditions of Contract.

38.It is the further contention of the learned counsel that the respondent having not raised the issue relating to extension after the letter dated 12.02.1997, he is not entitled to seek waiver of the liquidated damages and interest on advance payments. As regards loss of profits and overheads incurred during the extended period, the learned counsel would submit that when there is no extension, the contractor would not be entitled to claim loss of profits and overheads during the extended period.

39.He would also point out that the claim for loss of profits during the extended period was made for the first time on 20.12.2001 beyond the 90 days period prescribed under Clause 22.1(a) and therefore the same is barred by limitation. Similar contention is also raised with reference to the claim for expenses incurred in keeping the Bank Guarantees alive. The



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claim was made only on 09.02.2001 and therefore the same is barred. The highlights made by the TNEB/ petitioner in respect of these claims, according to the counsel, were not considered by the Arbitral Tribunal and therefore the Hon'ble Judge was justified in interfering with the award.

40.On the claim for liquidated damages deducted from running bills also it is contended that the claim was made only on 16.02.2001 after more than 3 years from the date of rejection on 28.01.1997. As regards the other claims with reference to which the award was set aside by the Hon'ble Judge, the learned Senior Counsel would submit that none of these claims were projected within the time limit set out in Clause 27 of the General Conditions of Contract and therefore these claims were barred. In the absence of consideration of any of the contentions of the petitioner by the Arbitral Tribunal with reference to Clause 27, the Hon'ble Judge was justified in rejecting the claim.

41.Our attention is also drawn by the learned Senior Counsel to the judgment of the Hon'ble Supreme Court in **Union of India Vs.**



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M/s.V.Pundarikakshudu & sons and another reported in **2003 (8) SCC**

168, wherein, the Hon'ble Supreme Court had held that there cannot be a splitting up of the responsibility for the delay in execution of work and damages could be awarded to the contractor only on a finding that the principle was at breach and therefore awarding any damages to the principle cannot be justified.

42.The learned counsel would also invite our attention to the judgment of the Bombay High Court in ***Monarch Erectors Pvt. Ltd., Vs. Bhiwandi Nizampur City Municipal Corporation*** reported in **2012 (1) Arb. LR 232 (Bombay) (DB)**, wherein, the Division Bench of the Bombay High Court had held that when a document which is not proved in accordance with law is relied upon by the Arbitrators to grant an award, such award is in violation of public policy and therefore it is Patently Illegal and also arbitrary.

43.Reliance is also placed on the judgment of the Hon'ble Supreme Court in ***Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited*** reported in **2019 (7) SCC 236**, wherein, the



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action of the High Court in setting aside the award on the ground of lack of evidence was upheld by the Hon'ble Supreme Court.

44. Reliance is also placed on another judgment of the Division Bench of the Bombay High Court in *Edifice Developers and Project Engineers Ltd., Vs. M/s. Essar Projects (India) Ltd.*, reported in *2013 SCC Online Bom 5*, wherein, it was held that grant of overhead losses based on Hudson principle was set aside by the Hon'ble Division Bench of the Bombay High Court.

45. The learned Senior Counsel would also further submit that the reliance placed by the learned counsel for the respondent on the judgment in *Project Director, National Highways Authority of India Vs. M. Hakeem and another* reported in *(2021) 9 SCC 1* is wholly mis-conceived, as according to the learned Senior Counsel, the Section 34 Court has not modified the award. He would contend that it is open to the 34 Court to uphold the award under certain heads and set it aside on other heads applying the doctrine of severability. In support of his contention on



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severability, the learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court in ***J.C.Budhraja Vs. Chairman, Orissa Mining Corporation Ltd.***, reported in ***(2008) 2 SCC 444*** and ***J.G.Engineers (P) Ltd., Vs. Union of India*** reported in ***(2011) 5 SCC 758***. Reliance is also placed on the judgment of the Hon'ble Supreme Court in ***M.P.Power Generation Co. Ltd., Vs. ANSALDO Energia Spa*** reported in ***(2018) 16 SCC 661*** with reference to severability.

46.The sum and substance of the contentions of the learned Senior Counsel is that once Clause 27 of the General Conditions of Contract provides for a particular method for invocation of arbitration and there is a failure on the part of the respondent in complying with the requirements of Clause 27, such failure would make the dispute in-arbitrable, leaving it open to the respondent to have a recourse to the common law remedy.

47.He would also submit that the Hon'ble Judge had found that the Arbitrators have not considered the contention of the petitioner to the effect that the periods fixed under Clause 4 of Section 27 are unalterable



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and in the absence of invocation of arbitration within the time stipulated under the said Clause, the respondent is not entitled to seek arbitration. The learned counsel would also point out that several claims that were made before the Arbitrators were made for the first time in the claim petition.

Discussion on the submissions:-

48.We must, at the out set, point out that the law relating to the power of the Court under Section 34 of the Arbitration and Conciliation Act to interfere with the awards is by now very well settled. This award having been passed prior to the amendment introducing 34(2)-A by Act 3 of 2016, we cannot consider the question of Patent Illegality. Therefore, the only ground set out in Sub-Section 2 of Section 34 are available to the Court to set aside the award. The award can be set aside only if it falls within the four corners of Section 34(2).

49.Useful reference could be made to the judgment of the Hon'ble Supreme Court in *Associated Builders Vs. Delhi Development Authority* reported in **(2015) 3 SCC 49**, wherein, the Hon'ble Supreme Court had laid



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down the parameters that would enable the Court to set aside the award.

The following grounds specified under Section 34(2)-A are not available to the parties in the case on hand and it was also not the case of the parties that the award should be set aside on any of the grounds enumerated under sub-clauses 1 of 5 Clause (a) of sub-Section 2 of Section 35. Of the two grounds available under Clause (b) of sub-Section 2 of Section 34, the first one is not applicable therefore the only ground that was available to the Court under Section 34 is that the Arbitral award is in conflict with the Public Policy of India. Explanation to Section 34(2) as it stood prior to 23.10.2015 clarified the term 'in conflict with Public Policy of India' as 'if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Contract Act.

50.In *Associated Builders Vs. Delhi Development Authority* referred to *supra*, the Hon'ble Supreme Court of India has held that the term Public Policy of India would include the following sub-headings within its fold:

I) Fundamental Policy of Indian Law;



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II) Interest of India;

III) Justice

IV) Morality and

V) Patent Illegality

51. Insofar as the Fundamental Policy of Indian Law is concerned, the Hon'ble Supreme Court chose to quote the judgment in **ONGC Ltd Vs. Western Geco International Ltd.**, reported in **2014 (9) SCC 263**, wherein it was observed as follows:-

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether



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the offending part is or is not severable from the rest.”

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52.It was further observed that juristic principle of “judicial approach” demands that a decision be fair, reasonable and objective. Anything which is arbitrary and whimsical would fail to qualify as fair, reasonable or objective. Compliance with natural justice principles was also advocated by the Hon'ble Supreme Court in the light of Section 18 of the Act. The third juristic principle pointed out by the Hon'ble Supreme Court is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same. The Hon'ble Supreme Court further pointed out that for a decision to be termed as perverse there should be a finding based on no evidence or the Arbitral Tribunal taking into account something irrelevant to the decision which it arrives at or ignores vital evidence in arriving at its decision.

53.The Hon'ble Supreme Court referred to its earlier judgments in ***Excise and Taxation Officer-cum-Assessing Authority Vs. GopiNath and sons*** reported in ***1992 Supp (2) SCC 312*** and ***Kuldeep Singh Vs.***



Commissioner of Police reported in **(1992) 2 SCC 10**, wherein, the working test to determine the question of perversity was laid down. The following passage from the judgment in **Excise and Taxation Officer-cum-Assessing Authority Vs. GopiNath and sons** referred to *supra* was quoted with approval:

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

54.In **Kuldeep Singh Vs. Commissioner of Police** referred to *supra* it was observed as follows:-

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



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be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

55.It was also observed that the Court sitting under Section 34 while applying the Public Policy Test to an arbitration award must remember that it does not act as a Court of appeal and consequently errors of fact cannot be corrected. It was pointed out that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his arbitral award. Thus, an award based on little evidence or no evidence which does not measure up in quantity to a trained legal mind would not be held to be invalid on this score. It was also pointed out that once it is found that the Arbitrators' approach is not arbitrary or capricious, then his is the last word on facts.

56.Finally the Hon'ble Supreme Court observed that there cannot be a re-examination of facts to find out as to whether a different decision can be arrived at. After the above said exhaustive discussion, the Hon'ble



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Supreme Court in paragraph 34 of the decision in *Associated Builders Vs.*

Delhi Development Authority referred to *supra* held as follows:-

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

57. After having said so, the Hon'ble Supreme Court examined the scope of the term Interest of India. The Hon'ble Supreme Court pointed out that this ground concerns itself with India as a Member of world community in its relations with foreign powers. The said ground may not be available in domestic arbitrations.

58. The third sub heading of Public policy is, if an award is against Justice or Morality, the Hon'ble Supreme Court while dealing with the sub-heading of Justice held as follows:-

36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it



shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the

arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

59. Adverting to the term Morality it was held that the term Morality should be construed as it occurred in Section 23 of the Contract Act. After referring to two illustrations under Section 23 of the Contract Act which are as follows:-

“(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral,



though the letting may not be punishable under the Penal Code, 1860.”

and referring to the judgment of the Hon'ble Supreme Court in ***Gherulal Parakh Vs. Mahadeodas Maiya*** reported in ***AIR 1959 SC 781***, the Hon'ble Supreme Court observed in paragraph 39 as follows:-

39. This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. “Morality” would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.

60.The Hon'ble Supreme Court also considered the question of Patent Illegality as a sub-heading of Public Policy. The Hon'ble Supreme Court took note of the explanation to Section 34(2)(b) and two of its earlier judgments in ***MSK Projects (I) (JV) Ltd., Vs. State of Rajasthan*** reported in ***(2011) 10 SCC 573*** and ***Rashtriya Ispat Nigam Ltd., Vs. Dewan Chand Ram Saran*** reported in ***(2012) 5 SCC 306*** to conclude that even an error in



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construction of the contract is within the jurisdiction of the Arbitrator but if the Arbitrator wanders outside the contract and deals with the matters not allotted to him, he commits the jurisdictional error.

61.From the law laid down by the Hon'ble Supreme Court in *Associated Builders Vs. Delhi Development Authority* referred to *supra* it could be gathered that an arbitral award could be set aside on the ground of being opposed to Public Policy of India only

- a) if it is contrary to Fundamental Policy of Indian Law or
- b) the Interest of India or
- c) Justice or Morality or
- d) if it is Patently Illegal.

No doubt the Hon'ble Judge disposed of the OP on 29.07.2010 i.e.,prior to the judgment in *Associate Builders Vs. Delhi Development Authority* referred to *supra* as well as *Project Director, National Highways Authority of India Vs. M.Hakeem and another* referred to *supra*. It is the trite position of law that all judgments are retrospective unless they are made specifically prospective. Therefore, we will have to examine the correctness of the order of the Hon'ble Judge on the touchstone of principles



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laid down in *Associated Builders Vs. Delhi Development Authority* referred to *supra* as well as *Project Director, National Highways Authority of India Vs. M.Hakeem and another* referred to *supra*.

62.While elaborating on the above grounds, the Hon'ble Supreme Court had held that if it is shown that the Arbitrators had adopted a judicial approach and it followed the principles of Natural Justice and the award should not be perverse. As regards the Justice and Morality the Hon'ble Supreme Court pointed out that it can be said that an award is against Justice only when it shocks the conscience of the Court and Morality would cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. The Hon'ble Supreme Court also took care to caution that the interference on the ground of Morality would also be only, if it shocks the conscience of the Court.

63.While dealing with the question of Patent Illegality, the Hon'ble Supreme Court again emphasized the need to safeguard the independence of the Arbitrators, while holding that a contravention of a substantive law of the country would be termed as Patent Illegality.



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64.The reasons assigned by the Hon'ble Judge in respect of issue Nos.8C2, 8C3, 8C4, 8C5, 8C9 and 8C13, the award has been set aside on the ground of non-consideration of the issue of arbitrability on limitation. The defence to the claim on these issues is that the contractor viz., the respondent had not sought for arbitration within the time stipulated under Clause 27.4 of GCC and therefore those disputes are not arbitrable.

65.The Arbitral Tribunal has arrived at a conclusion that there had been series of serious breaches on the part of the TNEB/ petitioner by delaying payments which continued till actual completion date i.e, till end of December 1999. The Arbitral Tribunal has further recorded that the unilateral action of the TNEB/ petitioner to club contract payments of Tuticorin project with North Chennai project are serious defaults on the part of the TNEB/ petitioner.

66.In the arbitration order sheets which form part of the award as annexures, the Tribunal has referred to the highlights of the TNEB



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(petitioner) regarding the delay and failure on the part of the EPI (Respondent) to raise a dispute in terms of Clause 27. Ultimately, the Tribunal concludes that the claim is not barred by limitation, since the cause of action itself would arise only on 13.11.2000 and the claims were made within 90 days from the said date on 09.02.2001 and 16.02.2001. It is not as if the Tribunal has not assigned any reasons for coming to the said conclusion.

67.In ***Dyna Technologies Private Limited Vs. Crompton Greaves Limited*** reported in ***(2019) 20 SCC 1***, the Hon'ble Supreme Court considered the requirements of a reasoned award. After referring to Section 31 of the Act, the Hon'ble supreme Court has held as follows:-

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



35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards



are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards.

68.A reading of the above declared law would lead us to a conclusion that mere inadequacy of reasons cannot be a ground to set aside the award. It would be useful to refer to the judgment of this Court [Hon'ble Mr.Justice M.Sundar] in ***The Chief Engineer/ Metropolitan Transport Project (Railways) and others Vs. Progressive-Aliens (JV) in Arb.O.P.(Com.Div.) No.83 of 2022***, the Hon'ble Judge after referring to ***Dyna Technologies Private Limited Vs. Crompton Greaves Limited*** referred to *supra* held as follows:-

13. Elucidating the principle ingrained in Section 31(3) of A and C Act, it was held that there are three facets of the matter and those three facets are (a) proper; (b) intelligible; and (c) adequacy.

14. Regarding (a) proper, it was held that it is a case where there is a procedural flaw in making the award. Regarding (b) intelligible, it was made clear that it should be a case of perversity or irrationality. In the case on hand, it is neither (a) nor (b). Therefore, it turns on (c) namely,



adequacy. Regarding (c) adequacy, it was made clear that there can be no straight jacket formula and the matter i.e., arbitral award has to be tested on a case to case basis depending on the kind of reason that needs to be given.

69.Once it is found that the Arbitrators have assigned some reason for their conclusions, it cannot be said that mere inadequacy of those reasons would afford a ground to set aside that award. We must point out that on the impact of Clause 27.4 of GCC we are unable to persuade ourselves to agree with the contention of the learned counsel for the petitioner that a failure to seek arbitration within 30 days from the date on which the dispute arose would result in Clause 27.5 operating and the issue becoming in-arbitrable. The reasons are not far to seek. Clause 27.1 provides for 90 days from the date of completion of the performance test, if the dispute is with reference to supply, erection and commissioning. If the dispute is with reference to warranty as per Clause 27.1 the request for arbitration should be made within 90 days from the date of expiry of warranty. In case of termination, abandonment of work etc., in 90 days from the date of occurrence of such act. Admittedly the performance test was



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conducted on 26.11.1999 and the claim letters were sent on 09.02.1999 and 16.02.1999 and there was a meeting between the parties on 24.02.2000, wherein the TNEB/ petitioner had agreed to re-consider the issues relating to payment of balance of 10% and 5% that was retained on production of a valid guarantee and had requested the respondent to resubmit the bills. As regards permission to remove surplus materials from the site, again it was represented by TNEB/ petitioner that the same would be considered on orders being obtained from the Headquarters. The request of the respondent for release of excess amount of interest and advance payment withheld by the TNEB/ petitioner, it was agreed to put up the proposal to the appropriate Authorities for orders and the respondent was required to make a request again in that regard. On the request for refund of amount that was withheld for civil foundation works a promise was made by the petitioner TNEB/ petitioner to reconsider the above. On the claim for extra works again a promise was made to look into and do the needful. On the request of EPI/ Respondent for extension of delivery period and waiver of liquidated damages/ interest the member generation of the petitioner had sought for a detailed proposal for consideration by the Board.



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70.A reading of the above minutes would show that none of the claims were rejected and all the claims were kept open. The learned Senior Counsel appearing for the petitioner would however point out that the request for extension was specifically rejected on 06.02.1997. By that time, the original contract period had expired. Therefore, unless an extension is granted, the respondent cannot carryout any work in the site. Though the petitioner sent a formal letter rejecting the request for extension, subsequently at a meeting that was held on 20.05.1997, a request was made to the respondent to continue with the work and the minutes of the said meeting would show that the parties were *ad idem* on the performance of the contract by the respondent. Time was fixed for performance of various works and promises were made for payment, which undoubtedly lead to the conclusion that there was implied extension of time.

71.Again at a meeting that was held on 23.06.1997 also several promises and counter promises were made by both the parties regarding performance of the work. Again at a meeting held on 15.05.1998 there was



a promise by the petitioner to examine the issue regarding interest on advance and liquidated damages. It is also seen from the said minutes that TNEB / petitioner had not completed the work on the civil fronts for conveyor 61 and it was agreed that it would be released only on 15.06.1998. This conduct of the TNEB/ petitioner shows that it had waived its right to rely upon Clause 27.3 or 27.4. Despite the original time having expired and the request for extension having been rejected by it, the petitioner allowed the respondent to continue with the work and made promises for payments and for re-consideration of the claims. It will be useful to refer to Section 55 of the Contract Act which deals with time being essence of the contract. Section 55 of the Contract Act reads as follows:-

55. Effect of failure to perform at fixed time, in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.



Effect of such failure when time is not essential.—

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

72.As pointed out earlier though the contract was agreed to be completed within 24 months, both the parties had not kept up the time lines and they had agreed upon further time lines in subsequent meetings thereby



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substituting the original contract. As we had already pointed out, the contract is one which involves performance of mutual obligations by the parties within the strict time lines. From the material that is available, the Arbitral Tribunal has found that the petitioner was responsible for non-performance of certain of its obligations within the time stipulated which led to there being delay in performance of the obligations by the respondent.

73.In such case, as held by the Hon'ble Supreme Court in ***Arosan Enterprise Ltd., Vs. Union of India and another*** reported in ***(1999) 9 SCC 449*** time cannot be held to be an essence of the contract. Having said so, we will have to advert to the reasonings of the Hon'ble Judge that the Tribunal has not considered the issue of arbitrability and limitation in respect of certain issues while confirming the award on certain issues. The Hon'ble Judge had held that the fact that the petitioner was responsible for the delay is indisputable, but, she has held that in view of the non-consideration of the limitation and arbitrability the award would be in-executable.



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74.As far as certain issues are concerned, the Hon'ble Single Judge had infact modified the award, while confirming the award on certain issues, the Hon'ble Judge has cancelled the *pendente lite* interest for overheads and loss of profits. This, in our opinion, would definitely be a modification of the award. No doubt, in ***JG Engineers Private Limited Vs. Union of India and another*** reported in (2011) 5 SCC 758 the Hon'ble Supreme Court has held that if the award is severable, it is open to the Court to retain that part and set aside the other part.

75.A perusal of the order of the Hon'ble Judge shows that on certain claims the Hon'ble Judge has interfered with the interest and set aside the portion of the award which grants interest. We do not think the question of grant of *pendente lite* interest or interest after the award could be an issue which is severable from the main issue. The grant of interest is the integral part of the main issue. Therefore, the action of the Hon'ble Judge in modifying the interest and even principal awarded by the Arbitrators in certain claims, in our opinion, would definitely be a modification of the award and not setting aside of portion of the award



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which is severable.

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76.In ***Project Director, National Highways Authority of India Vs. M.Hakeem and another*** referred to *supra*, the Hon'ble Supreme Court had made it very clear that an award cannot be modified by the Court, it can either be set aside or affirmed as it is. The reduction of principle amount in the claim relating to extra structural works covered by issue No.8C19 and the reduction of interest in issue Nos.8C15, 8C17 and 8C18 would, in our opinion, definitely amount to modification of the award. The same cannot also be justified in the light of the categorical pronouncement of the Hon'ble Supreme Court in ***Project Director, National Highways Authority of India Vs. M.Hakeem and another*** referred to *supra*. Considering the fact that the Courts only declare the law and they do not enact the law, we find that the judgment of the Hon'ble Judge is opposed to the principles laid down for setting aside the award in ***Associated Builders Vs. Delhi Development Authority*** referred to *supra* as well as ***Project Director, National Highways Authority of India Vs. M.Hakeem and another*** referred to



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77.We are forced to conclude that the order of the Hon'ble Judge is in breach of the contours that are set out by the two pronouncements of the Hon'ble Supreme Court referred to above. Hence, the order needs to be necessarily set aside. Both the appeals will therefore stand allowed and the order of the Hon'ble Judge will stand set aside in its entirety and the award will stand confirmed in its entirety. We do not impose costs in these appeals considering the fact that we have interfered with the order on the basis of the law laid down in subsequent pronouncements of the Hon'ble Supreme Court. Consequently, the connected miscellaneous petitions are closed.

(R.S.M.,J.) (R.K.M.,J.)
11.09.2023

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Internet:Yes
Index:Yes
Speaking order
Neutral Citation : Yes

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