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O.S.A.No.51 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:03.03.2023

Delivered on: 24.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

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Tamil Nadu Generation and
Distribution Corporation Limited (TANGEDCO)
rep. by its Chief Engineer/Hydro
No.144/800,
Anna Salai, Chennai-600 002
(cause title amended as per
the order of this Court
dated 19.04.2018 in C.M.P.No.2917 of 2018
by IBCJ&AQJ)

.. Appellant

Vs.

M/s. CG Power and Industrial Solutions Limited
rep by its Senior General Manager
having its office at
Village Post
Channo District Sangrur
Punjab-148 026
(cause title amended as per
the order of this Court
dated 19.04.2018 in C.M.P.No.4455 of 2018
by IBCJ&AQJ)



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2. Hon'ble Mr.Justice T.Somasundaram (Retd)
Presiding Arbitrator

3.Mr.J.S.Grewal
Joint Arbitrator
Engineer-in-Chief (Retd)

4.Er.M.Sudamani
Joint Arbitrator
Chief Engineer (Retd)
respondent s

.. 1st

Prayer:- Original Side Appeal filed under Order 36 Rule 1 of the Original side Rules read with Section 37 of Arbitration and Conciliation Act, 1996 against the order and decree dated 19.11.2010 made in O.P.No.727 of 2003.

For Appellant : Mr.N.C.Ramesh, Senior Counsel
for
Mr.T.Sivaprakasam

For respondents : Mr.T.V.Ramanujam Senior Counsel
for
Mr.C.Jagadish for R1

R2 to R4 given up



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JUDGMENT

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(Judgment of the Court was made by P.B.BALAJI,J.)

This is a peculiar case, where the Electricity Department viz., the TANGEDCO, the appellant herein suffered a “shock” as a result of nebulous contractual obligations and counter obligations.

2. To put the claim of the appellant/electricity board in a nut shell, the appellant, for the purpose of installing a power house at Parson's Valley unit, Kundha Ultimate Stage Hydro Electric Project in the State of Tamil Nadu, invited tenders for design, manufacture, supply, erection and commissioning of a 30 M.W generation unit, together with associated accessories.

3. The 1st respondent herein was one amongst many persons who offered bids. As the 1st respondent's bid was the lowest, the appellant issued a letter of acceptance on 24.02.1995, followed by the Purchase Order on 28.03.1995.



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4. The disputes between the parties arose on primarily one issue as to whether who was liable to pay/meet the difference in Foreign Exchange rate-U.S. \$ vis-a-vis Indian Rupee. It is the case of the appellant that the contract awarded to the 1st respondent was a fixed/firm price contract and the words and phrases used in the contract in so many words clearly indicated that there could be no bargain with regard to the total price of Rs.17,23,16,160/-, which was agreed between the parties. Yet another issue that was not reconcilable between the parties was whether the appellant was entitled to claim interest on unadjusted portion of advance paid to the 1st respondent for delay occasioned beyond the delivery period and completion period agreed to in the contract.

5. Even though the agreement did not contain an arbitration clause, in the meeting between the parties on 29th and 30th of October 1998, the appellant as well as the 1st respondent unilaterally and voluntarily agreed to refer the above two issues to arbitration. Ultimately, the appellant, for various reasons set out in the claim petition sought for refund of a sum of Rs.3,20,00,104/- being the excess amount paid on account of Foreign Exchange variation and custom change variation in respect of import of



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machineries and a further sum of Rs.75,85,725/- towards interest on unadjusted advance amount paid by the appellant, together with future interest.

6. The 1st respondent filed a counter denying the liability sought to be saddled on them, by the appellant on both heads viz.,

- (1) Foreign Exchange variation and
- (2) Interest on unadjusted advance.

7. The 1st respondent contended that from the Purchase Order it was very clear that the appellant had agreed to pay the cost of the imported equipments in CIF value (in U.S.\$) and therefore the appellant alone was liable to absorb the excess amount that arose on account of the variation in Foreign Exchange rate. The 1st respondent also stated that they never agreed to the exchange rate being firm at Rs.31.61 for 1 U.S. \$ throughout the contract period. In so far as the second claim with regard to interest on unadjusted advance, the 1st respondent denied its liability to meet the same. All other claims made besides the two claims on account of Foreign Exchange rate variation and interest on adjusted advance were stated by



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the 1st respondent to be non-arbitrable and outside the scope of the arbitration proceedings.

8. Apart from the above objections, the 1st respondent also contended that there were delays occasioned only due to the acts of omissions and commissions on the part of the appellant and therefore, in any event they cannot be called upon to pay any interest on the unadjusted portion of advance. The 1st respondent initially made a counter claim to the tune of Rs.9,24,82,047/- under various heads. Subsequently, the 1st respondent made an additional claim to the tune of Rs.7,23,428/- together with interest totalling in all Rs.9,00,130/-.

9. The appellant filed a reply to the counter claim denying the liability to refund the said amount of Rs.9,00,130/- by way of counter claim, besides also reiterating their averments and allegations in the claim statement.

10. It is also seen that the 1st respondent filed an additional counter claiming interest on delayed payments beyond 15 days of receipt of



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materials, and other miscellaneous claims. To this, the claimant filed an additional reply statement denying the liability on all counts.

11. It is to be noted that with the mutual consent of the appellant as well as the 1st respondent, a three member Arbitral Tribunal was constituted and taking into account the respective pleadings of the parties, the Arbitral Tribunal framed the following issues:

“ 1. Whether the 1st respondent agreed to the Exchange rate to be FIRM at Rs.31.61 Per U.S.\$ throughout the period of contract, i.e., whether the 1st respondent has accepted that their prices of imported equipments are FIRM irrespective of exchange rate variation and whether the exchange rate variation is to the account of the 1st respondent or claimant.

2. Whether the claimant Board as per the purchase order dated 28.03.1995 agreed to pay the price of imported equipment in C.I.F value of U.S.\$ and whether the exchange rate variation is to the account of claimant Board or the 1st respondent ?

3. Who is liable, whether the claimant or 1st respondent to pay the excess amount arising



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out of the difference in exchange rate variation of U.S \$ vis-a-vis Indian Rupee prevailing at the time of import of equipments and the exchange rate of U.S.\$ 1= Rs.31.61 prevailing as on 16.05.1994 which is specified in the Purchase Order No.POH 219 dated 28.03.1995.

4. Whether the claim made by claimant Board against the 1st respondent on account of custom duty variation is arbitrable and outside the scope of arbitration agreement between the parties?

5. Whether the custom duty variation is to the claimant's account or the 1st respondent's account?

6. Whether the claims made by the claimant Board against the 1st respondent on account of interest on Foreign Exchange rate variation and custom duty variation are beyond the scope of arbitration agreement between the parties?

7. Whether claimant is entitled to an award against the 1st respondent for a sum of Rs.3,20,00,104/- together with interest at 22% from the date of claim namely 23.07.2000 till the date of award and future interest on the



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said amount at 24% from the date of award till the date of realization.

8. Whether the claimant is entitled to recover from the 1st respondent , the interest on unadjusted portion of advance paid to the 1st respondent as per the Annexure-II of the claim statement?

9. Whether the claims made by the claimant Board for the interest on unadjusted portion of advance paid to the 1st respondent is outside the provision of POH No.219 dated 28.03.1995 and maintainable?

10. Whether the claimant is entitled to an award against the 1st respondent for a sum of Rs.75,83,725/- on the claim made upto 23.07.2000 towards interest on unadjusted advance amount, till the date of award and future interest at the rate of 24% from the date of award till the date of realization?

11. Whether the claimant is entitled to claim interest on interest as per the terms of Arbitration?

12. Whether the claimant Board is liable to refund an amount of Rs.7,23,428/- said to have been spent by the 1st respondent for the



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validating of the Bank Guarantees for advance and Security Deposit and further amount that will be incurred towards the extension of validity of Bank Guarantees, from the claimant and whether such claim for Rs.7,23,428/- is beyond the scope of the Arbitration agreement?

13. Whether the 1st respondent is entitled to make the claim mentioned in para 5 of the Additional Counter Statement dated 25.02.2001 against the claimant and whether such claims are arbitrable and within the scope of the Arbitration agreement?

14. Whether the claimant is entitled to recover the cost of the Arbitration proceedings?

15. To what relief the parties are entitled in this Arbitration proceedings?

12. In view of the objections taken by the appellant, the Tribunal chose to decide issues 4,6,12 and 13 as preliminary issues, besides also framing an additional issue viz.,

“ Whether the counter claim of 1st respondent for Rs.9,24,82,047/- against the claimant Board is beyond the scope of arbitration agreement and whether this Tribunal has jurisdiction to decide the same”



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13. Answering the preliminary issues and the additional issue framed, the Arbitrary Tribunal held that the Tribunal has no jurisdiction to decide claims arising out of customs duty variation and interest on excess amount and ultimately found that the counter claim was not arbitrable and the Tribunal had no jurisdiction to decide the counter claim. However, issue No.12 with regard to the question as to who should bear the cost incurred for the extension of bank guarantees, the Tribunal held that the claim for refund of Rs.7,23,428/- together with interest, totalling in all Rs.9,00,130/- made by the 1st respondent was within the scope of the arbitration agreement and therefore the same was arbitrable. On consideration of the pleadings, documents and evidence adduced by the parties, two of the Arbitrators passed a majority award holding that the appellant was not entitled to either of the reliefs claimed under the heads viz., difference in Foreign Exchange variation and interest on unadjusted advance. In so far as the counter claim of the 1st respondent to the tune of Rs.7,23,428/- together with interest totalling in all Rs.9,00,130/- in and by the majority award, it was held that the 1st respondent was alone liable to bear the charges incurred for getting the validity of the bank guarantees extended and the 1st respondent was not entitled to recover the same from the



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appellant. However, interestingly in and by a minor award, the third Arbitrator for various reasons assigned came to the conclusion that the appellant was entitled to refund to the tune of Rs.17,23,16,160/- from the 1st respondent. In so far as the claim under the interest on unadjusted portions of advance the said minority award found that the claimant was entitled to the same. In so far as the counter claim made by the 1st respondent, the minority award also concurring with the majority award, rejected the counter claim.

14. Aggrieved by the denial of the claims, by a majority award passed by the Arbitral Tribunal, the appellant filed Arbitration Original Petition in 727 of 2003 before this Court. The 1st respondent supported the majority award and sought for dismissal of the Original Petition filed U/s. 34 of the Arbitration and Conciliation Act, 1996(in short 'Act').

15. The learned Single Judge of this Court, after appreciating and taking into account all relevant documents and the respective arguments put forth on the side of the appellant as well as the 1st respondent, held that the majority award did not require any interference. The learned Single



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Judge, while dismissing the Arbitration Original Petition, also took note of the fact that the role of the High Court exercising jurisdiction U/s. 34 of the Act was limited and the High Court cannot substitute its views which would amount to exercising powers not vested in it U/s. 34 of the Act.

16. Aggrieved by the dismissal of the Arbitration Original Petition, confirming the majority award of the Arbitral Tribunal the appellant, Tamil Nadu Generation and Distribution Corporation Limited has preferred the above Original Side Appeal on the following grounds:

(1) The learned Single Judge has failed to appreciate that the contract was a 'firm price' contract and ought not have held that the appellant had to bear the variation in Foreign Exchange rates.

(2) The learned Single Judge ought not to have made a distinction between “total price and firm price” in coming to a conclusion that the 1st respondent was not liable to meet the variation in Foreign Exchange rates.

(3) The learned Single Judge failed to see that the Arbitral Tribunal is not entitled to add any words to the contract which would amount to creating a new contract altogether and that the Arbitral Tribunal should act only within the terms of the contract.



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(4) The learned Single Judge has not even considered the arguments with regard to the parties agreeing that even the prices of spares were also made firm during the period of contract.

(5) The learned Single Judge ought to have interfered U/s. 34 (2) of the Arbitration and Conciliation Act, 1996.

(6) The learned Single Judge failed to take into account the draft Purchase Order and the changes made by the parties in furtherance of mutual discussions and deliberations.

(7) The learned Single Judge erred in holding that the appellant was liable to pay the difference in Foreign Exchange rate since the appellant had opened the letter of credit without taking into account Ex.C60, minutes of meeting, wherein the parties had categorically agreed to refer the matter to Arbitration and that subject to the decision of the Arbitral Tribunal alone the appellant opened the Letter of Credit.

(8) The learned Single Judge ought to have seen that there is no specific clause in the contract that provided for the appellant to bear the difference in Foreign Exchange rate.

(9) The Arbitral Tribunal as well as the learned Single Judge erred in not giving significance to the mentioning of value of 1 U.S. \$ at Rs.31.61



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in the contract and failed to see that the only object of mentioning it was because the contract was a “firm price” contract.

17. Heard Mr.N.C.Ramesh, learned Senior counsel for Mr.T.Sivaprakasam appearing for the appellant and Mr,T.V.Ramanujan, learned Senior Counsel for MR.C.Jagadish appearing for the 1st respondent .

18. Having heard the leaned Senior counsel on either side, this Court feels that there are only two major points that will have to be addressed viz.,

(A) whether the contract was indeed a “firm price” contract and if so, whether the appellant was justified in making the claim for refund, seeking excess amounts paid to the 1st respondent , over and above the contract value of Rs.17,23,16,160/-, which has been arrived at fixing a \$ rate at Rs.31.61.

(B) Whether this Court, sitting in appeal U/s.



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37 of the Act is entitled to set aside the majority award and accept the minority award, despite the learned Single Judge dismissing the Arbitration Original Petition, finding no grounds for interference U/s. 34 of the Act.

Point A

19. Learned Senior counsel for the appellant took this Court to the Purchase Order dated 28.03.1995 and drew our attention to the acceptance which is extracted usefully hereunder:

ACCEPTANCE

With reference to specification HE 1972, subsequent correspondences your offer, supplementary price bid and revised price bid, I, acting for and on behalf of and by the order and direction of TNEB accept your offer for supply of 1 X 30 MW generating machinery indoor switch-gear and accessories for the Parsons Valley Power House VI HE project, at total price of Rs.17,23,16,160/- (Rupees Seventeen Crores, twenty three lakhs sixteen thousand one hundred and sixty only). The prices are FIRM for indigenous equipment and CIF value in U.S. Dollar.



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The price comprises Ex-works price, freight & Insurance, Excise Duty and Central Sales Tax on the indigenous equipment, Customs duty on the CIF Value (USD) of imported equipment. The prices accepted which are indicated below are after allowing a discount of 4% on quoted all inclusive FOR (D) price including taxes and duties, of your offer.

The broad split up prices of various supply of items are indicated in Table-A.

The CIF value in US Dollars indicated is to be kept firm during the period of Contract. The prices of spares are also firm during the period of Contract.”

20. Learned Senior counsel pointed out that if it was not a “firm price” contract, the parties would not have arrived at a total price at all viz., Rs.17,23,16,160/- and that the clause viz., “the price are firm for indigenous equipment and CIF value in U.S. Dollars” read with the further clause that “ the CIF value in U.S.Dollars indicated is to be kept firm during the period of contract. The prices of spares are also firm during the period of contract” also indicate that the prices of indigenous equipment and imported equipment were only agreed to be firm. The learned Senior



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counsel also took this Court through clause 1.4.2 which reads thus:

“1.4.2: Import content

It is noted that you have proposed to import the following items of equipments (1) Turbine parts such as runner, shift, guide bearing, turbine sealing, (2) Governor, (3) Main Net valve (spherical valve) optionally 4) Generator, 5) Excitation system and 6) Spare parts of generator and excitation system, Governor. Inlet valve (optionally) turbine partly including runner from the overseas supplier. Exchange rate considered in one U.S. Dollar =Rs.31.61 (Indian Rupees) as on 16.05.1994. Customs duty at the rate of 20% on CIF value as applicable for initial setting up of Power Project. The COIF value of the imported equipment in USD 25,06,860/- (US Dollars twenty five lacs six thousand eight hundred and sixty only) and in addition USD 3,11,000/- (US Dollars three lacs eleven thousand only) in MIV (spherical valve) is imported will remain FIRM during the currency of the contract.

You have agreed to furnish backup guarantee as indicated below in addition to your own guarantee for complete supply and subsequent performance of the equipment. It is also noted that the turbine of CKD Blansko, Czech Republic. As agreed you have to furnish backup guarantee from



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the Czech supplier for satisfactory performance of the equipment. The offer for both turbine and generator has been obtained from Skoda Czech Republic who will have the single point responsibility to guarantee the satisfactory performance of turbine generator. ”

21. Referring to the said clause, the learned Senior counsel appearing for the appellant pointed out that the parties had categorically agreed that even for imported items, the prices would only remain FIRM.

22. Learned Senior counsel for the appellant also invited the attention of this Court to Exs.C6,C16,C17,C18,C20, C21,C33 and C55 to show that at all points of time, the parties had clearly agreed and understood that the total price would be Rs.17,23,16,160/- and nothing more. He also put forth a contention that specific deliberations were held regarding this issue and the appellant never agreed to bear the difference in Foreign Exchange rate at any point of time. He also argued that the mere fact there is no specific clause in the Purchase Order stating that the appellant would have to bear the difference in Foreign Exchange rate would only go to show that the 1st respondent alone was liable to meet the difference in Foreign Exchange



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rate and not the appellant. The learned Senior counsel also contended that one another bid was made by Bharat Heavy Electricals Limited and the appellant's bid alone was accepted since it was slightly lower than the bid given by BHEL and if the liability of on account of Foreign Exchange variation was cast upon the appellant, the appellant would not have even agreed to accept the offer as it would become unworkable for the appellant, which is a State owned Electricity Board. The learned Senior counsel also referred to Sec.28(3) of the Act, which runs thus :

*“ 28. Rules applicable to substance of
dispute.—*

.....

*3.In all cases, the arbitral tribunal
shall decide in accordance with the terms of the
contract and shall take into account the usages of
the trade applicable to the transaction.”*

23. It is the contention of the learned Senior counsel that the majority award did not follow the mandate of Sec.28(3) and ought not have read down the contract between the parties, when the contract clearly mentions



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that it is a “firm price” contract. In support of his contentions, the learned Senior counsel also placed reliance on the following judgments:

1. *Florrie Edridge and others Vs. Rustomji Danjibhoy Sethna*, reported in *AIR 1933 Privy Council 233*, for the proposition that construction of a contract must depend on only the intention of the parties when it was made and not based on subsequent conduct of any party.

2. *Rajasthan State Industrial Development and Investment Corporation and another Vs. Diamond & Gem Development Corporation Limited and another*, reported in *(2013) 5 SCC 470*, for the proposition that a contract being a creature of an agreement between two or more parties, interpretation of the same should be on the basis of literal meaning, in the absence of any ambiguity and should be in a manner so as to not vary the terms and that such interpretation should be without outside aid and strictly without altering the nature of the contract.

3. *Numaligarh Refinery Ltd Vs. Daelim Industrial Co. Ltd*, reported in *(2007) 8 SCC 466* for the proposition that the Court has power to set right things when the Arbitrator has acted without jurisdiction, by giving an interpretation to a clause of the agreement, running wholly contrary to law.



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4. ***Thawardas Pherumal and another Vs. Union of India***, reported in ***AIR 1955 SC 468***, for the proposition that when an Arbitrator infers or implies any contractual obligation, it would amount to an error in law.

5. ***Rajasthan State Mines & Minerals Ltd Vs. Eastern Engineering Enterprises and another***, reported in ***(1999) 9 SCC 283***, for the proposition that the Arbitrator cannot disregard the terms of the contract and that the Arbitrator cannot ignore the law or misapply it for the sake of what the Arbitrator may think as just and reasonable.

6. ***Hindustan Zinc Ltd vs. Friends Coal Carbonisation***, reported in ***(2006) 4 SCC 445***, for the proposition that when an award is contrary to the terms of the contract, it would be open to interference by the High Court U/s. 34(2)(b)(ii) of the Act as being patently illegal and also opposed to the public policy of India.

7. ***Dakshin Haryana Bijli Vitran Nigam Limited Vs. Navigant Technologies Private Limited***, reported in ***(2021) 7 SCC 657***, for the proposition that dissenting opinion of a minority Arbitrator can be relied upon by the party seeking to set aside the award in order to buttress its submissions U/s. 34 of the Act and also that the Court is not precluded from considering the findings and conclusions of the dissenting opinion of



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the minority member of the Arbitral Tribunal.

8. *The Board of Trustees of Chennai Port Trust Vs. Chennai Container Terminal Pvt Ltd, 2014 (1) CTC 573*, for the proposition regarding relevancy of opinion of minority award and to reinforce the argument that the learned Single Judge while dealing with the application U/s.34 of the Act is not barred from referring to minority view.

24. Learned Counsel also relied on the judgments of the Hon'ble Supreme Court in the case of *V.G.George Vs. Indian Rare Earths Ltd and another*, reported in *1999 (2) Arb.L.R. 46 (SC)*; *Nabha Power Limited Vs. Punjab Spcl Limited*, reported in *(2018) 11 SCC 508*; *State of Orissa Vs. Sudhakar Das (Dead) by Lrs*, reported in *2000 (2) Supreme 119*; *Food Corporation of India Vs. Chandu Construction and another*, reported in *(2007) 4 SCC 697* and *Satya Jain Vs. Anis Ahmed Rushdie* reported in *(2013) 8 SCC 131* for the propositions regarding interpretation or construction of terms of a contract, scope of arbitration in such matters and permissibility of interference U/s. 34 of the Act.



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25. Learned Senior Counsel for the appellant also relied on the following judgments:

i) *O.N.G.C. Ltd Vs. Garware Shipping Corporation Limited*, reported in (2007) 13 SCC 434,

ii) *Security Printing and Minting Corporation of India Ltd Vs. Gandhi Industrial Corporation*, reported in (2007) 13 SCC 236

iii) *Delhi Development Authority Vs. M/s. R.S.Sharma & Co., New Delhi*, reported in 2008 4 LW 401 (SC), and

iv) *ONGC Vs. Western Geco Internation Ltd*, reported in (2014) 9 SCC 263

for throwing light on scope of Sections 34 and 37 of the Act.

26. Learned Senior counsel finally relied on the judgment of the Hon'ble Supreme Court in *Samee Khan Vs. Bindu Khan*, reported in (1998) 7 SCC 59 for the interpretation of the word “ALSO”.

27. Per contra, the learned Senior counsel for the 1st respondent supported the majority award of the Arbitral Tribunal and contended that no interference was warranted as the majority award of the Arbitral



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Tribunal was reasonable and probable in the circumstances of the case, especially in the light of evidence adduced by the parties before the Arbitral Tribunal. Learned Senior counsel also drew the attention of this Court to Ex.C.16, C55 and C60 and persuaded this Court to see that the negotiations and draft Purchase Order before finalization of the contract, would go to show that the 1st respondent never agreed to bear the difference in Foreign Exchange variation and that despite specific and repeated requests made in that regard by the appellant, the 1st respondent never acceded to the same and even after the draft Purchase Order underwent changes and corrections which were mutually agreed upon, there is no indication in the final contract casting liability on the 1st respondent to absorb the difference in Foreign Exchange rate. The learned Senior counsel also argued that the power of this Court exercising jurisdiction U/s. 37 of the Act was narrower than the powers available U/s. 34 of the Act and therefore in the absence of the order of the learned Single Judge being patently illegal or the findings of the learned Single Judge holding that the award was not opposed to public policy, it could not be called for interference U/s. 37 of the Act. The learned Senior counsel placed reliance on the following judgments:



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1. ***Haryana Tourism Limited Vs. Kandhari Beverages Limited***, reported in (2022) 3 SCC 237, for the proposition that the High Court U/s. 37 of the Act cannot enter into merits of claim and that the same is impermissible in exercise of powers U/s. 37.

2. ***UHL Power Company Ltd Vs. State of Himachal Pradesh***, reported in 2022(4) SCC 116, for the proposition that (i) the jurisdiction of an Appellate Court hearing an appeal U/s. 37 of the Act is even more circumscribed than the scope of the High Court deciding challenge to an award U/s. 34 of the Act, which by itself is already narrow.

(ii) When there are two plausible interpretations of terms and conditions of contract, no fault can be found, if the Arbitral Tribunal accepts one interpretation as against the other and that such course adopted by the Arbitral Tribunal cannot be set aside by the High Court even U/s. 34 of the Act.

(iii) The mandate U/s.34 of the Act is to respect finality of the Arbitral award and if the Courts were to interfere with the Arbitral award in usual course on factual aspects, then the very object and purport behind parties opting for alternate dispute resolution would itself stand frustrated.

3. ***Sutlej Construction Limited Vs. Union Territory of Chandigarh***,



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reported in **2018(1) SCC 718**, for the proposition that the Court should not set aside an award on the ground of being opposed to public policy unless the award shocks the conscience of the Court and it would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the Arbitrator, to do what it considers to be justice.

4. ***Welspun Specialty Solutions Limited Vs. Oil and Natural Gas Corporation Limited***, **2022(2) SCC 382**, for the proposition that Court should not interfere unless illegality of the award goes to the root of the matter and any illegality of a trivial nature could not be held to be opposed to public policy.

5. ***Associate Builders Vs. Delhi Development Authority***, reported in **2015(3) SCC 49**, for the proposition that the High Court cannot interfere when a possible view is taken by the Arbitrator given the facts and circumstances of the case.

6. ***MMTC Limited Vs. Vedanta Limited***, reported in **2019(4) SCC 163**, for the proposition that in the absence of violation of fundamental policy of Indian Law, any patent illegality resulting in contravention of Substantive Law of India, contravention of the Arbitration and Conciliation Act, 1996, and contravention of the terms of contract,



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interference is not permissible U/s. 34 and interference U/s. 37 cannot travel beyond the restrictions laid down U/s. 34 and that the Court of Appeal U/s. 37 should be extremely cautious and slow to disturb concurrent findings.

7. *Mcdermott International Inc Vs. Burn Standard Co. Ltd and others*, reported in **2006(11) SCC 181** for the proposition that the Act only makes the role of Courts supervisory for reviewing Arbitral awards and only for the purpose of ensuring fairness and routine interference by setting aside awards is not permissible.

8. *Project Director, National Highways No.45 E and 220, National Authority of India Vs. M.Hakeem and another*, reported in **2021 (9) SCC 1**, for the proposition that even U/s.34 of the Act awards can be set aside on very limited grounds.

9. *Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited*, reported in **2022 (1) SCC 131**, for the proposition that U/s.34 challenge cannot be on the merits of the award; There is a disturbing tendency of Courts to set aside Arbitral awards after dissecting and reassessing factual aspects of the case to come to a conclusion that the award needs intervention and by dubbing the award to



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be vitiated by perversity or patent illegality and that such an approach would lead to corrosion of the very object of the Act itself.

28. This Court has carefully considered the submissions made by the learned Senior counsel on either side, besides also going through the materials placed before us by way of voluminous typed sets and also the several judgments relied on by the learned Senior counsel on either side to buttress their respective submissions.

(a) In so far as the interpretation of the contract and to determine whether the contract in question was a “firm price” contract the Purchase Order would be the most important and relevant document. We have already extracted the relevant clauses of the Purchase Order. This Court, at the very outset does not have any difficulty in holding that the contract was indeed a “firm price” contract. However, the dispute arises with regard to the monetary value of the contract. It is not in dispute that the parties have fixed the total price at Rs. 17,23,16,160/- which comprises of indigenous equipments as well as imported equipments. It is seen from the table forming part of the contract itself that a sum of Rs.17,23,16,160/- was arrived at taking the value of 1\$ at Indian Rupee 31.61. Tabulation value



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available and forming part of the Purchase Order also sets out the amount in U.S \$ at Rs.24,53,460/- and corresponding value in INR to be at Rs.11,04,16,525/- and costs of indigenous equipments at Rs. 6,18,99,635/-. Adding up the two figures in INR, the amount arrived at is Rs.17,23,16,160/-. The value of 1 \$ equivalent to Rupees 31.61 was taken into account as on the date of the Purchase Order viz., 28.03.1995. The Court has gone through the entire Purchase Order and does not find any specific clause to deal with Foreign Exchange variation and the consequent liability arising therefrom. In this context, some of the exhibits which have been relied on and referred to by both the learned Senior Counsel would assume relevance. Ex.C16 is a letter of acceptance issued by the appellant in favour of the 1st respondent on 24.02.1995. Admittedly, this document was before the final Purchase Order dated 28.03.1995. It is seen from Ex.C16 that there is a mention of prices being FIRM for the entire duration of the contract. It is also mentioned “As agreed by you, no Foreign Exchange variation is allowed in respect of imported items”. However in a subsequent correspondence viz., Ex.C19 the 1st respondent by letter dated 21.03.1995 has clearly declined the offer or condition insisted on by the appellant by mentioning that “Any variation in Exchange rate will be to



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TNEB account”. Though in EX.C16 the appellant has chosen to mention the words “ As agreed by you”, this Court is unable to see any indication or agreement or acceptance of the 1st respondent in this regard. Ex.C.19 referred above clearly establishes the fact that the 1st respondent was not agreeable to the appellant's condition that there would be no variation in the exchange rate during the entire period of contract.

29. Exs.C20 and C21 are germane to note the intention of the parties. In and by a draft Purchase Order the appellant had forwarded to the 1st respondent, making changes by hand. Some of the important changes that this Court notices between the draft Purchase Order and the final Purchase Order are as follows:

- (1) “All inclusive prices” has been replaced with “total price”.
- (2) The words “prices are firm for indigenous equipment and CIF value in US Dollars” has been inserted by way of a hand written inclusion.
- (3) A new clause has been inserted mentioning “The CIF value in U.S. Dollars indicated is to be kept FIRM during the period of contract. The prices of spares are also FIRM during the period of contract.”
- (4) Most importantly, a specific clause 1.4.4 under the heading



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exchange rate which read as follows has been struck off and the same does not find a place in the final purchase order. The said struck off clause 1.4.4 reads thus:

“1.4.4. Exchange Rate:

1 U.S Dollar equal to Rs.31.61 (buying rate) as on date of supplementary price bid (16.05.1994) is the basis of accepted prices. Any variation in exchange rate within the contractual delivery period or any extension thereof will be paid against evidence.”

30. In examining the real intention between the parties, with specific reference to the final Purchase Order, this Court is able to gather from various documentary evidence that prior to the final Purchase Order being accepted and signed, parties were primarily deliberating on one issue viz., the variation in exchange rate in so far as cost of imported items were concerned, in U.S. Dollars and for the purposes of arriving at a cost, the value of 1 \$ as on the date of the Purchase Order was freezed at Rs.31.61. In Ex.C20 draft Purchase Order, despite there being a specific clause 1.4.4, extracted herein above, pertaining to exchange rate, the said clause has been omitted from the final Purchase Order. This fact has been admitted to



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by both parties as well as both the learned Senior counsel appearing for the parties. This Court can draw the inference from the removal or omission of the said clause that only after discussions and deliberations the parties chose to omit the said clause. If this clause was indeed retained in the final Purchase Order, the dispute would have never arisen. The parties had negotiated on this particular aspect not once or twice but across several meetings and exchange of letters, including the corrections to the draft Purchase Order before drawing up the final Purchase Order.

31. It is easy to say that there is no clause in the final purchase order regarding the liability that arises on account of variation in Foreign Exchange rate. However, when the parties had clearly negotiated with their open eyes and did not meet eye to eye on this aspect and finally, consciously omitted to include clause 1.4.4 pertaining to exchange rate in the final draft Purchase Order, this Court finds that the said clause would have been omitted only because of the 1st respondent's persistence with its stand that any variation on account of Foreign Exchange rate would be to the appellant's account. Therefore, this Court is unable to accept the argument advanced by the learned Senior counsel for the appellant in this



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regard that since the Purchase Order does not contain any clause fixing the liability on the appellant, the express words used in the Purchase Order terming the contract as a “firm price” contract should be respected and the amount of Rs.17,23,16,160/- (Rupees Seventeen Crores twenty three lakhs sixteen thousand and one hundred and sixty only) alone would bind the parties.

32. This Court is also unable to accept the argument canvassed by the learned Senior counsel for the appellant that the word “ALSO” appearing after the prices of spares would only indicate that the prices of the equipment, whether indigenous or imported would be FIRM and that otherwise the word “ALSO” would not have been included at such a place in the contract. As already indicated, this Court does not have any difficulty whatsoever in finding that the purchase order dated 28.03.1995 is only a “firm price” contract. However, at the same time it is to be noted that the contract comprises of two parts:

- (1) costs of indigenous equipments and
- (2) costs of imported equipments



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33. In so far as the indigenous equipments are concerned, there can be no difficulty at all. The prices are mentioned in INR value and there is clear mention that the prices are FIRM for indigenous equipments. This is not disputed by the learned Senior counsel for the 1st respondent also. However, it is only the application of the clause that the prices are FIRM to the imported equipment creates confusion. The clause in the final Purchase Order clearly mentions that the prices are FIRM for CIF value in U.S.Dollars. There is also reiteration that CIF value in U.S Dollars indicated is to be kept FIRM during the period of contract. The next sentence mentions that the prices of spares are also FIRM during the period of contract. If the parties had actually deliberated and agreed that value of 1 U.S \$ at INR 31.61 was final and applicable for the entire period of contract, then there would not have been any necessity to mention that the prices are FIRM in so far as CIF value in “ U.S.Dollars”. Merely because the calculation is provided in the table and total cost of Rs. 17,23,16,160/- is arrived at, it does not mean that the parties had agreed on even the Foreign Exchange rate to be INR 31.61 for 1 U.S.\$. The only interpretation that this Court is able to give and arrive at is that the parties had only agreed that the value mentioned in U.S.\$ was FIRM, without



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factoring variation in Foreign Exchange rate. It is also very relevant to fall back to the second page of the Purchase Order under the heading Commercial-Section 1-Acceptances, where the parties never chose to mention the Foreign Exchange rate as 1 \$ = INR 31.61. Even in Table A, CIF value in U.S. Dollars is mentioned specifically wherever applicable, apart from mentioning INR price after conversion of such CIF value.

34. This Court keeping in mind the fact that the entire discussions and negotiations between the parties was only on this specific issue of variation in Foreign Exchange rate and the resultant conduct of the parties viz., agreeing to omit the specific clause 1.4.4 under the exchange rate in the draft Purchase Order, only indicates that the 1st respondent was never agreeable to absorb any variation in Foreign Exchange. If at all the appellant had bargained for “firm price” contract in terms of INR, the appellant would not have agreed for omitting clause 1.4.4 from the draft Purchase Order while finalizing the Purchase Order dated 28.03.1995. This Court also does not find the word 'total' replacing 'at all inclusive price' to be of any consequence in the light of the discussions herein above. In addition to the above, it is also seen from Ex.C60, though after the contract



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period itself i.e., on 29.10.1998, the parties met and concluded by way of a minuted meeting in writing, that the issue regarding Foreign Exchange variation is not resolved by mutual agreement and therefore the parties decided to refer the said dispute for arbitration along with the other issue of payment of interest on unadjusted advance. This also clearly indicates that the parties were also firm in their respective contentions. It is common knowledge that the value of 1 U.S. \$ keeps varying or fluctuating everyday. It is not only in so far as the Indian Rupee is concerned but also with regard to the currencies across the World. The purchasing power of 1 U.S. \$ is based on various economical and financial considerations. It is not as if the parties were ignorant of this. Throughout the pre-negotiation stage, this issue was being raised and sent back and forth without any amicable resolution, not only before the finalization of Purchase Order but even thereafter, post the contract period also.

35. This Court has also gone through the various decided cases relied on by the respective learned Senior counsel and conscious of the ratio laid down by the Hon'ble Apex Court and this Court. From the elaborate discussions made herein above, this Court has already found that though



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the contract can be termed as “ firm price” contract, the “firm price” was only in U.S. \$ value and not in INR. This being the position, the Court has also perused the majority award as well as the minority award of the Arbitral Tribunal. This Court finds that the majority award has taken a very plausible view of the matter, interpreting the contract in the light of the various documents exhibited by the parties. The learned Single Judge of this Court exercising jurisdiction U/s. 34 of the Act has also rejected the challenge to the said majority award.

36. No doubt there are judgments of the Hon'ble Supreme Court as well as this Court regarding relevancy of a minority award. This Court is conscious of the fact that a minority view can also ultimately be the correct view. This Court is not in quarrel with regard to the ratio laid down by the Hon'ble Supreme Court as well as this Court regarding dissenting opinion of a minority Arbitrator also being relevant and the same can be relied upon. However, when the majority award is based on materials placed before the Arbitral Tribunal, proper appreciation of evidence on record and ultimately arriving at a certainly plausible view, then in such circumstances the relevancy of the minority award may be inconsequential. No Court can



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say that the minority award should be accepted and the majority award should be over turned. Infact, the Hon'ble Supreme Court in the case of ***Project Director, National Highways No.45 E and 220, National Authority of India Vs. M.Hakeem and another***, reported in ***2021 (9) SCC 1***, has held that Sec.34 of the Act is modelled on UNCITRAL Model Law on International Commercial Arbitration, 1985 and that there is no power given to the Court to modify an award while hearing a challenge to an award. The Hon'ble Supreme Court has discussed the march of law beginning with the old Act i.e the Arbitration and Conciliation Act, 1940 and factoring the amendments to the Arbitration and Conciliation Act, 1996, held that the power of modification of an award is never available to the Court exercising power U/s. 34 of the Act.

37. In the light of this categorical ratio laid down by the Hon'ble Apex Court, this Court holds that if the minority award is accepted and the majority award is overturned, it would only result in modifying the very award under challenge, which is impermissible. In any event this Court has already found that the conclusion arrived at by the Arbitral Tribunal in and by an majority award is well reasoned and does not call for any



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interference. On the contrary, the reasoning of the third Arbitrator rendering the minority award cannot be sustained since the conclusions arrived at in the minority award are not keeping in mind the letter and spirit of the negotiations between the parties, the intention of the parties throughout the pre-negotiation stage, as well as at the time of finalizing of the Purchase Order which would only lead to the irrefutable conclusion that the 1st respondent never agreed for absorbing the difference in Foreign Exchange value.

38. This Court also does not find any violation of Sec.28(3) of the Act as strongly canvassed by the learned Senior counsel for the appellant. While deciding and making an award the Arbitral Tribunal certainly has to take into account the terms and conditions set out in the contract. However, in cases like these where there are grey areas, it is well open to the Arbitral Tribunal to fall back on the exchange of correspondence between the parties, intention of the parties as expressed therein, all of which culminated in the final contract being drawn. Even on this view of the matter, this Court does not find that the majority award of the Arbitral Tribunal suffers from any infirmity on the ground of violation of the



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Sec.28(3) of the Act.

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39. For all the above reasons, this Court answers Point A against the appellant and in favour of the 1st respondent.

Point B:

40. This Court is conscious of the powers vested in it in terms of Sec. 37 of the Act. Sec, 37 reads as follows:

“ 37. Appealable orders.—

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

(a) accepting the plea referred in sub-section



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(2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

41. A reading of Sec.37 does not expressly curtail the powers of this Court exercising jurisdiction as an Appellate Court. However, there are series of judgments of the Hon'ble Supreme Court as well as this Court regarding the jurisdiction of this Court and powers vested in it while exercising Appellate jurisdiction U/s. 37 of the Act.

42. The Hon'ble Supreme Court and this Court have repeatedly shown restraint in setting aside award on trivial or factual issues. The object of arbitration itself is only a result of mutual consent of two parties who are in conflict, to redress their respective grievances, by opting to avoid the normal recourse to the Courts and instead go in for arbitration,



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which according to them would be quicker and effective. In this view of the matter, this Court takes notice of the settled position of law that even a Court exercising jurisdiction U/s. 34 of the Act cannot set aside an award unless it is a case of fraud or bias by the arbitrators or in the event of the award being opposed to public policy of Indian law or patently illegal. When the power available to the High Court U/s. 34 of the Act is itself very limited and more supervisory in nature, this Court exercising jurisdiction U/s.37 as an Appellate Court is further circumscribed to interfere in the absence of the above set out features or factors that alone would warrant interference. This Court has gone through the order passed by the learned Single Judge and does not find any of the circumstances available, in order to term the same as patently illegal or the award being opposed to public policy going unnoticed by the learned Single Judge.

43. Admittedly, in this case there is no allegation of fraud or bias. Therefore, this Court exercising powers U/s. 37 of the Act does not see or find any reason whatsoever to set aside the order by the learned Single Judge rejecting the challenge to the majority award of the Arbitral Tribunal. In short, this Court does not find the majority award or the order



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of the learned Single Judge to “shock” the conscience of the Court.

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In fine, the Original Side Appeal is dismissed. There shall be no order as to costs.

(S.S.S.R.J) & (P.B.B.J)
24.03.2023

Internet : Yes

Index: Yes/No

Speaking/Non-speaking order

Neutral Citation: Yes/No

To

1.The Sub Assistant Registrar (Original side)
High Court, Madras

2.The Section Officer
VR Section,
High Court, Madras



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S.S.SUNDAR, J.,
and
P.B.BALAJI, J

kpr

Pre-delivery judgment in
O.S.A.No.51 of 2011

24.03.2023