



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 10th April, 2023**
Pronounced on: 26th May 2023

+ O.M.P. (COMM) 505/2020 & I.A. 9393/2020 & I.A. 493/2021 &
 I.A. 494/2021

JAIPRAKASH ASSOCIATES LIMITED Petitioner

Through: Mr. Lovkesh Sawhney, Sr.
 Advocate with Mr. R. K. Mishra,
 Mr. Rohit Kumar and Ms. Navita
 Gupta, Advocates

versus

NHPC LIMITED Respondent

Through: Mr. Gauhar Mirza, Mr. Prakhar
 Deep and Ms. Purnima Mathur,
 Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition has been filed on behalf of the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) raising objections to the Award dated 7th October 2019, corrected on 18th December 2019, (hereinafter “the impugned Award”). The petitioner has prayed for the following reliefs:



A) call for the records of the arbitration matter between Jaiprakash Associates Limited v. M/s. NHPC Ltd. before the Ld. Arbitral Tribunal comprising Hon'ble Mr. Justice B.P. Jeevan Reddy, Presiding Arbitrator, Sh. K.K. Madan and Sh. V.K. Tyagi, Co-Arbitrators;

B) set aside/Modify the Ld. Arbitral Award dated 07.10.2019 passed by the Two Arbitrators, comprising Hon'ble Mr. Justice B.P. Jeevan Reddy and Sh. K.K. Madan to the extent sought in this petition i.e. quantification and interest and modify the amount to Rs. 208.50 Crores, as given in the Supporting Award of the Third Arbitrator, which has been based upon established and accepted formulae as well as taking due cognizance of the material and evidence on record with the Ld. Arbitral Tribunal.”

FACTUAL MATRIX

2. The following course of events has led to the controversy and disputes between the parties which are before this Court:

a. The respondent proposed a Hydro Electric Project on river Chenab at Kishtwar, Jammu and Kashmir (hereinafter “the work”). On 10th April 1995, the respondent invited fresh bids for the work, after the same was abandoned by a previous awardee of the work, namely Dumaz-Sogea Borie SAE and was continued by the respondent on its own between 1992 to 1995.

b. In the second phase, the work was divided into two packages, an Upstream Area Work and a Downstream Area Work. The Joint Venture of M/s Jaiprakash Industries Limited and M/s Statkraft Anlegg AS, subsequently amalgamated with M/s Jaypee Cement Limited and came to be known as M/s Jaiprakash Associates Limited, the petitioner herein, also



submitted its bid to the tender floated by the respondent on 19th August 1995 and were awarded the work for the two packages on 3rd March 1997.

c. Accordingly, on 9th April 1997, the parties entered into a Contract, wherein the scope of work awarded was delineated including the time for completion of the work. However, due to certain hindrances, the petitioner was not able to complete the work within the stipulated term of 33 months. Time extensions were also granted to the petitioner to complete the work and hence, the project which was to be completed till the year 2000 was extended till 2007.

d. On 11th May 2007, the certificate of completion was issued to the petitioner. Accordingly, the final bill for the two packages was also furnished by the petitioner.

e. In the said bills produced by the petitioner, there were additional costs which were said to have been incurred by the petitioner due to overstay at the site. The petitioner claimed a total amount of Rs. 360.56 Crores, which was rejected by the respondent vide letter dated 25th January 2010 on the grounds that, first, the extension granted were as per the General Conditions of Contract entered into between the parties, second, the claim was not maintainable since it was put forth by M/s Jaiprakash Association Limited, whereas it was not an entity when the Contract was executed, and third, the petitioner herein had



submitted no claim undertaking as demanded by the respondent. The petitioner objected to the ground taken by the respondent.

f. In the background of the aforesaid discrepancies, the petitioner herein invoked Clause 39.2 of the Contract and invoked dispute resolution mechanism of arbitration to resolve and amicably settle the issues between the parties.

g. Accordingly, an Arbitral Tribunal was constituted comprising of three Arbitrators, including a Presiding Arbitrator, and arbitration proceedings were initiated between the parties.

h. Upon completion of pleadings and conclusion of arguments, the learned Tribunal passed the Minority and Majority Award dated 7th October 2019, which came to be corrected on 18th December 2019.

i. The petitioner, being aggrieved of the quantum aspect of the additional costs granted in its favour by the Majority Award has approached this Court by way of the instant petition.

SUBMISSIONS

3. The learned counsel appearing on behalf of the parties were heard at length on the instant petition. Both the sides have also filed their pleadings, which are on record. A joint consideration of the arguments advanced, the pleadings as well as the written submissions sets out the following objections on behalf of the parties *qua* the dispute in question.



On behalf of the Petitioner

4. The learned senior counsel appearing on behalf of the petitioner submitted that the Majority Award insofar as delineated is grossly erroneous, in conflict with public policy and vitiated by patent illegality, which is *ex-facie* apparent, and thus calls for interference by this Court while exercising its powers under Section 34 of the Act on the grounds as invoked by the petitioner.

5. It is submitted that the impugned Award is unanimous in so far compensation is to be paid to the petitioner herein for the overstay period. The Award given by Majority Tribunal has rendered a positive finding of the Award to the effect that *"Even so, in the light of the undeniable fact that the Claimant had to overstay at the site, together with his equipment etc.- wherever it may be, for a period of more than 80 months beyond the scheduled period, must necessarily have caused additional cost/ expense it, which has to be recompensed..."*. Similarly, the Minority Tribunal vide its separate Supporting Award recorded positive finding in the Supporting Award while dealing with answer to Issue No. 5 and 7. Thus, the Award dated 7th October 2019 is unanimous, though two separate decisions have been given by the Tribunal, holding that petitioner entitled to be compensated for the overstay period.

6. It is submitted that Majority Tribunal claimed to have quantified the compensation on the reasonable and proper estimate basis, to Rs. 60 Crores without apportioning the compensation to the three heads of claims, as done by the petitioner, having regard to all the circumstances



discussed in their decisions including the pleadings, oral and documentary evidence adduced by the parties and merits and demerits of each party's case, though without specifying the reasons for reaching the said figure of compensation. Whereas, the Supporting Award of the Minority Tribunal quantified the compensation to Rs 208.50 crores, apportioning the amount against each of the three heads of claims, namely Time Related Expenses - Rs 82.08 crores; Head Office Expenses - Rs 15.04 crores and Depreciation- Rs 111.38 Crores. The reasons for awarding Rs 208.50 Crores, are specified and discussed in detail in the Supporting Award.

7. It is submitted that the Impugned/Majority Award fell in error when it recorded a finding that *“In the light of the imperfect evidence lead by the Claimant, it is not possible for the Tribunal to indicate the amounts payable to the Claimant separately under each head ...”*. It is mentioned that evidence was led and was available on the records of the case, which fact is also admitted by the Majority Tribunal when they termed the evidence "imperfect". It is well settled in law that a distinction must be drawn between cases of complete absence of evidence, which makes it impossible to fix damages, and cases which present difficulty in assessing the damages, and difficulty in assessing the damages with precision or certainty is no ground for refusing to award substantial damages.

8. It is submitted by the learned senior counsel that it well settled that the reasons are required to be given in support of the findings recorded in the Award. The Majority Tribunal has awarded Rs.60 Crores, without specifying any reason in support of how the sum of Rs.60 Crores is



reasonable and proper compensation to be awarded, and failing to give any reason for reaching the figure of Rs.60 Crores, as reasonable and proper estimate of compensation, is contrary to Section 31(3) of the Act which mandatorily requires the arbitrator to state the reasons upon which the award is based.

9. It is submitted that while on one hand finding of Majority Award, without specifying the reasons, granted Rs. 60 crores, as reasonable and proper on the ground that the evidence is imperfect, on the other hand the Minority Tribunal, on great scrutiny of evidence and material on record, did the proper quantification of the claim and allowed the claim to the extent of Rs 208.50 Crores. Thus, there are two divergent findings, forming part of the Award. One is detailed, dealing with an issue of quantification, which is not discussed in the award of Majority Tribunal, thus it is that finding which is based upon reasons and in consonance with the documents on record and evidence produced, which is required to be followed over the other which is based upon taking cognizance of no evidence and without any reason. This requires modification of the Award and not setting aside of the Award.

10. It is submitted that there is power to modify the Award on the interest component and no evidence or arguments are required on this issue as this issue has been dealt with in the Supporting Award of the Minority Tribunal while the Two Arbitrators have not discussed this issue at all and have given no reasons for parties to bear their respective cost. It is otherwise settled in law that even in claims for damages, there is power to grant interest even for the period prior to quantification of claim. The



Minority Tribunal in the Supporting Award has granted interest from the date of invocation of arbitration rather than date of claim.

11. It is further submitted that the valid part of the award can be separated from the invalid part and given effect to following the doctrine of severability. The findings recorded by the Arbitral Tribunal other than the quantification and interest are separable and valid and ought to be separated from the main Award.

12. To give force to his arguments, the learned senior counsel relied upon the following judgments:

- a. ***Construction & Design Services vs. DDA*, (2015) 14 SCC 263**
- b. ***National Highways Authority of India vs. Hindustan Construction Company*, 2016 SCC OnLine Del 1144**
- c. ***McDermott International Inc. vs. Burn Standard Co. Ltd.*, (2006) 11 SCC 181**
- d. ***Rashtriya Chemicals & Fertilizers Ltd. vs. Chowgule Bros.*, (2010) 8 SCC 563**
- e. ***J.C. Budhraj vs. Chairman, Orissa Mining Corpn. Ltd.*, (2008) 2 SCC 444**
- f. ***Narinder Batra vs. Union of India*, 2009 SCC OnLine Del 480**



13. In view thereof, it is prayed that the Majority Award to the extent of the quantum of the additional costs awarded to the petitioner may be modified and the quantification of the third Arbitrator may be accepted.

On behalf of the Respondent

14. The learned counsel appearing on behalf of the respondent submitted that the operative part of the Majority Award and findings related to dismissal of the Counter-Claims no. 1,2,10,13,14,16 and 17 of the respondent/counter-claimant already stand challenged by the respondent by way of a separate petition under Section 34 of the Act on the ground of it being unreasoned in terms of Section 31. The objections have also been raised on behalf of the respondent on the ground that the impugned Award is passed on the basis of principles of equity, which is expressly barred under Section 28(2) of the Act and therefore, liable to be set aside under Section 34(2A) of the Act.

15. With regards to the Minority Award, it is submitted that the Minority Tribunal has concurred with the findings of the Majority Tribunal on the merits except on the quantum of damages awarded to the petitioner which have also been challenged by the respondent in its petition under Section 34 of the Act bearing OMP (COMM) No. 482/2020.

16. It is submitted that the present petition is not maintainable since the petitioner has wrongly interpreted Section 34 of the Act since it is seeking modification of the award, which is impermissible by the mandate of the provision. Section 34 of the Act does not envisage or extend power of



Courts to modify or vary an arbitral award. Therefore, the prayer sought in the petition is fundamentally flawed.

17. It is submitted that the petitioner by its own admission has challenged the findings and reasoning of the Majority Award and cannot seek to modify the same with that of a minority/dissenting opinion. The petitioner herein is seeking before this Court to uphold the Minority Award, which under law is nothing but merely a dissenting opinion. Therefore, the same is not maintainable.

18. It is a settled law that a Court exercising jurisdiction under Section 34 of the Act has no specific power to allow the claims originally made before the Arbitral Tribunal where it finds the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34(4) of the Arbitration Act, then the Court will be acting no different from an appellate court which would be contrary to the legislative intent behind Section 34 of the Act.

19. It is settled law that the Minority Award is merely a dissenting opinion and cannot be construed as a part of the Majority Award or a Supporting Award. In terms of Section 31 (2) of the Act, the Majority Award is liable to be set aside and cannot be construed as an Award. It is well settled that the minority ruling will not override the majority view nor can it constitute the law. It is the Majority Award that would be challenged by the party aggrieved and not the reasoning given by the minority in its favour. Thus, the finding of the Minority Tribunal does not have any bearing on the present matter and is deemed to be a dissenting



opinion which cannot substantiate any errors of the findings of the Majority Tribunal.

20. It is submitted that the Minority Tribunal travelled beyond its jurisdiction while computing the claims. It is submitted that the petitioner while computing its claims did not rely or refer to the CWC Guidelines. Even the claim for depreciation was computed as per the Income Tax Rules. However, while adjudicating the claims, the Minority Tribunal on its own accord, applied the CWC Guidelines erroneously and awarded all the claims to the petitioner.

21. Therefore, it is prayed that the instant petition be dismissed for being devoid of merit.

22. Heard the learned counsel for the parties at length and perused the record.

FINDINGS AND ANALYSIS

23. The petitioner has invoked Section 34 of the Act for raising objections to the impugned Award. A consideration of the submissions raised on behalf of the parties and contentions raised in the pleadings, the controversy in the instant case is largely narrowed down to findings of the Arbitral Tribunal in the impugned Award regarding additional costs granted to the petitioner towards the overstay at the site of work.

24. A perusal of the aforesaid facts and submissions shows that the petitioner's objections to the Award are two-fold. At the first instance, the petitioner has argued that the instant is a case of no-evidence as the Majority Arbitral Tribunal has made the Award of additional costs of Rs.



60 Crores without any substantiating documents, material or evidence on the basis of equity and reasonability. Secondly, the petitioner has argued that the supporting award has been passed on the basis of material on record, evidence and upon application of judicial mind and hence, the same must be accepted. Based on the said two objections, it is submitted that the Award *qua* quantum of additional costs is liable to be set aside.

25. The Majority Award notes that the claim of the petitioner before the Arbitral Tribunal was limited to the amount which was said to be due on account of overstay at the site due to reasons not attributable to the petitioner. The petitioner has not challenged the Award in its entirety but has only assailed the quantum of Award where the learned Arbitral Tribunal has awarded an amount of Rs. 60 Crores for additional costs to the petitioner for overstay at the site. Therefore, the issues which are before this Court are as follows:

- I. Whether the findings of the Arbitral Tribunal *qua* additional costs are based on *no evidence* or *no reasons*.
- II. Whether the findings of the Majority Award *qua* additional costs is liable to be set aside and the Minority Award is to be accepted.

26. Accordingly, these issues are considered hereinafter for proper adjudication of the objections brought before this Court by the petitioner.

ISSUE NO. I

27. It has been repeatedly stated by the Hon'ble Supreme Court that the scope of interference of a Court in an award passed by an arbitral



tribunal is limited by the mandate of Section 34 of the Act. There are a few grounds which, when invoked and established, allow the Court to interfere with an arbitral award. The Arbitration Act was enacted for providing a mechanism to the public to resolve their disputes in a process less rigorous, technical and formal than that of a litigation. It has proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation. The alternative dispute mechanism is not only advantageous for the people involved in disputes but has also been aiding the effective disposal and release of burden on the Courts of the Country. To fulfil the objective of introducing the Act, it has been deemed necessary by the legislature as well as the Hon'ble Supreme Court to limit interference by the Courts in the process of arbitration, whether before, during or after the conclusion of the proceedings.

28. An arbitral tribunal, which in its wisdom, passes an award, upon conducting the arbitration proceedings with the participation of parties to the dispute, considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, the relevant documents placed on record by the parties, is considered a Court for the purposes of adjudicating the dispute before him. An unfettered intervention in the functioning of the arbitral tribunal would defeat the spirit and purpose of the Act.

29. Therefore, the Hon'ble Supreme Court, by way of various judgments, has laid down the grounds for which an arbitral award may be interfered with by the Court. Keeping in view the principle of limited and



restricted intervention by the Courts, the decisive test for validity of an award is rigorous. The Court is to see whether the party which is aggrieved by an arbitral award is able to show that the award suffers from illegality, which is patent, on the face of the record, and of the nature which shocks the conscience of the Court. The intent is also to see whether the findings given by a tribunal are such that no reasonable person could arrive at that conclusion. Thereafter, the tests become extensive and the Court are to see whether the award against which objections under Section 34 of the Act are brought before Court or the findings of the said award are against the public policy, the fundamental policy of India, are not supported by reasoning unless otherwise agreed between the parties etc. The case of the petitioner before this Court is that the findings and conclusion of the Tribunal of awarding a sum of Rs. 60 Crores towards additional costs in favour of the respondent is patently illegal since it is clear that the same is not supported by material or evidence.

30. The principle of *no evidence* or *no reason* emanates from Section 31 of the Act, which under Sub-section 3 provides as under:

“31. Form and contents of arbitral award.—

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.”



31. Therefore, there is an obligation on the arbitral tribunal to state reasons for its award unless the parties have expressly agreed to the contrary or if the parties have settled their disputes and the arbitration proceedings are terminated as a consequence. It is hence incumbent that the arbitral tribunal concerned passes an award which is supported by reasoning.

32. The Hon'ble Supreme Court in ***State of Rajasthan & Ors. v. Ferro Concrete Construction Pvt. Ltd., (2009) 12 SCC 1***, regarding the validity of an award made without evidence held as under:

“55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.”

33. The Hon'ble Supreme Court in the said judgment held in clear and unequivocal terms, that stating reasons and evidence to support a finding is essential with regard to findings pertaining to quantum of any claim along with the finding on the validity of that claim. A decision on a claim and its rightful quantum must be backed and supported by reasons and must not only be a reiteration of the claims raised by a party.

34. In ***Som Datt Builders Ltd. vs. State of Kerala, (2009) 10 SCC 259***, the Hon'ble Supreme Court was of the following opinion:



“20. Section 31(3) mandates that the arbitral award shall state the reasons upon which it is based, unless—(a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award under Section 30. ...

21. In Union of India v. Mohan Lal Capoor [(1973) 2 SCC 836 : 1974 SCC (L&S) 5] this Court said: (SCC p. 854, para 28)

“28. ... Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.”

22. In Woolcombers of India Ltd. v. Workers' Union [(1974) 3 SCC 318 : 1973 SCC (L&S) 551 : AIR 1973 SC 2758] this Court stated: (SCC pp. 320-21, para 5)

“5. ... The giving of reasons in support of their conclusions by judicial and quasijudicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations.”

23. In S.N. Mukherjee v. Union of India [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445] the Constitution Bench held that recording of reasons

“(i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making.” (SCC p. 612, para 35)

25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the



Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed.”

35. The Hon’ble Supreme Court has held that an award which does not give out any reason is patently illegal. The said observation was passed in ***Associate Builders vs. DDA, (2015) 3 SCC 49*** as under:

“42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality - for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.”

36. The judgment passed in ***Associate Builders (Supra)*** is one of the most comprehensive judgments decoding Section 34 of the Act and settling the law on the objections which may be raised against an arbitral award. With patent illegality being one of the principal grounds for interfering with an arbitral award by a Court, the judgment holds that an award without reasons shall be considered an award patently illegal and hence liable to be set aside. It is, hence, clear that the requirement of stating reasons while passing an award is indispensable, with the only exception being the consensus amongst the parties involved. Any award



passed without the support of reasons is thus considered a legally flawed award and may be interfered with by the Court on the said ground.

37. In the judgment of *PSA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*, 2021 SCC OnLine SC 508, the Hon'ble Supreme Court observed as under:

“43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all



or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. *To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in Associate Builders (supra), which read thus:*

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)

“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.”

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429], it was held : (SCC p. 14, para 10)

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

38. In ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC OnLine SC 1656***, the Hon’ble Supreme Court laid down the following observation:

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

39. A perusal of the aforesaid judgements shows that an award based on no evidence is foundationally patently illegal and may not be sustained by a Court adjudicating objections to the same.

40. Reason is the soul of justice. Any order passed, in the exercise powers vested in an authority, must be speaking. As goes the judicial precedents, an order disposing of an application necessarily requires recording of reasons in support of the conclusions arrived at in the order and failure to give reasons tantamount to denial of justice.

41. While exercising jurisdiction under Section 34 of the Act, so long as the findings of the arbitrator are supported by reasoning, a Court is not to examine the validity of reasons provided by an arbitrator. The only test in this respect remains whether the arbitrator has provided any reasons for



the conclusion reached at and not whether such reasoning is sound. The Hon'ble Supreme Court in the case titled ***Anand Brothers (P) Ltd. vs. Union of India & Ors., (2014) 9 SCC 212***, has settled the position in this regard.

42. The principle shall now be applied to the facts of the instant case and the contents of the Majority Award impugned in the instant petition. The relevant portion of the Award is as under:

“It must be appreciated that what we are concerned with is an estimate of the Additional cost that must have been incurred by the Claimant on account of overstaying for more than 80 months at the site, along with his machinery, equipment, labour and all other incidental items. Precise ascertainment is not possible since the said amount was not claimed during the currency of the contract and was therefore not estimated simultaneously with other expenses incurred from time to time which expenses were audited by the statutory auditor. Had the Claimant so claimed during the implementation of the contract, the amount of additional cost could probably have been ascertained with some level of accuracy. Now, more than two years after the work has been completed, an estimate is sought to be made. For this purpose, while the Claimant bases its claim on the estimates prepared or approved by the Auditors and the certificates said to have been issued by the Auditors, on the basis of accounts of the Claimant for the years 2001 to 2007 (which have not been proved according to law, as pointed put hereinbefore, the Respondent seeks to arrive at the estimate applying CWC guidelines which too have not been properly proved/ explained by the Respondent's witness (RW 1). The difference between the two figures - one by the Claimant and the other by the Respondent - is too vast. There is also no material before us to decide whether the Time related cost claimed by the Claimant is part of Overheads, as asserted by the Respondent or not. According to CWC guidelines



extracted in the Defence Statement, overhead charges do include "office expenses". Probably "Head office expenses" are included within the ambit of office expenses". It is equally relevant to notice that time extensions were granted mainly for HRT work and not for other works. How was the ratio of expenditure between HRT and other works - set out in the Rejoinder filed by the Claimant – was determined is also a relevant aspect, which has remained unexplained. Then, there is the issue of depreciation. The Respondent stated that the machinery/equipment made over to the Claimant, by the Respondent at the Inception of the contract, had already earned depreciation for several (six) years and that the Claimant can claim depredation only for one year, whereas the Claimant says that this machinery/ equipment was "refurbished" by the Claimant and hence he is entitled to claim depreciation. No material has been placed before us in support of 'refurbishing' except oral assertions. Undoubtedly, the Claimant had claimed depreciation on all relevant machinery/ equipment during the years 2001 to 2007. in the respective years and. had availed Now, the claim in effect is for additional depreciation for overstaying on a retrospective basis. Not only depreciation, the Claimant has claimed "escalation" on depredation - the basis of which is not clear. The Respondent further says rightly that the claim for depreciation too, if any, has to be restricted to HRT work only since the extension of time was mainly with regard to HRT only. In short, case put-forward by the Claimant cannot be said to have been properly explained and / or established by it. Even so, in the light of the undeniable fact that the Claimant had to overstay at the site, together with his equipment etc. wherever it may be, for a period of more than 80 months beyond the scheduled period, must necessarily have caused additional cost/expense to it, which has to be recompensed, even though the Respondent was also not responsible for the said overstay - as discussed hereinbefore.

The Claimant has claimed Additional costs under three heads as mentioned above, the Respondent has, however, disputed the said categorization into three heads and says that there



are only two heads of expenses. In the light of the imperfect evidence led by the Claimant, it is not possible for the Tribunal to indicate the amounts payable to the Claimant separately under each head - whether there are three heads or two heads, as the case may be. Be that as it may, having regard to all the aforementioned circumstances including the pleadings, oral and documentary evidence adduced by the parties and merits and demerits of each party's case, we are of the opinion that an amount of Rs. 60,00 Crores (Rupees sixty crores only), (as the additional cost incurred by the Claimant on account of overstay at the site) would be a reasonable and proper estimate."

43. A perusal of the relevant portion of the Award shows that the Majority Tribunal clearly noted that the petitioner failed to produce any material basis which the quantum of the award could be arrived at. In the absence of any material substantiating the claim of the petitioner, which was originally of more than 300 crores, was decided to be fixed at 60 Crores. This amount of compensation has been fixed despite there being a clear contradictory finding that the case put forward by the petitioner herein was not established. At this juncture, this Court refers to the judgment passed by the Calcutta High Court in ***State of West Bengal vs. Tapas Kumar Hazra, AP 1036/2011*** dated 25th August 2022, wherein it was found the arbitral tribunal had given award in contradiction to its findings and hence it was set aside for the same reason.

44. Every judicial authority is required to apply its mind to the case at hand while adjudicating the same, and to furnish the reasons for its findings. An arbitral tribunal is also considered a court for the purposes of adjudication of claims before it and is often subject to the requirement of providing reasons while granting a party any relief, not for the purposes



of adjudicating the validity of an order but for the satisfaction, understanding and notional justice for all the parties involved. In the instant case, providing reasons was imperative especially because the learned Arbitral Tribunal specifically noted that the claimant, i.e. petitioner herein, had not properly established its case and also that the respondent herein was not responsible for the overstay of the petitioner at the site. Without fixing responsibility of payment of compensation, a significant amount of Rs. 60 Crores, without any basis, has been levied upon the respondent.

45. Certainly, there is nothing in the language of the Award which shows that any reasonable considerations to the claim have been given to say that the petitioner was entitled to a sum of Rs. 60 Crores. As per the mandate of law, by the plain reading of the Section 31(3) of the Act and by the reference to judicial pronouncement reproduced above, it is evident that the case of the petitioner falls under the principle of no-evidence. The Arbitral Tribunal has failed to delineate and specify any reason for fixing the amount of Rs. 60 Crores as additional cost in favour of the petitioner and against the respondent.

46. Moreover, in the absence of any substantiating evidence, the Majority Tribunal went on to decide the claim and the quantum thereof *ex aequo et bono*, that is, on the basis of equity and conscience, which is specifically barred under Section 28(2) of the Act when there is no express agreement or authorization on behalf of the parties in favour of the Arbitral Tribunal to act in such manner. The position has been settled by the Hon'ble Supreme Court in ***P. Radhakrishna Murthy v. National***



***Buildings Construction Corp. Ltd.*, (2013) 3 SCC 747**, by this Court in ***DMRC vs. Kone Elevators India (P) Ltd.*, 2021 SCC OnLine Del 5048**, and by the Bombay High Court in ***Board of Control for Cricket in India vs. Deccan Chronicle Holdings Ltd.*, 2021 SCC OnLine Bom 834**.

47. Accordingly, this Court finds force in the argument that the findings of the Majority Tribunal while deciding additional costs and the quantum thereof was based on *no evidence* and *no reason*.

ISSUE NO. II

48. The petitioner has argued that the findings of the Majority Award pertaining to the quantum of the award towards additional costs is liable to be partly set aside and be modified. It is the case of the petitioner that the findings of the Majority Tribunal are correct to the extent that the petitioner is entitled to the additional costs arising out of overstay, however, it is argued on the behalf of the petitioner that quantum of the award may be modified and the quantification of supporting award by the third arbitrator be accepted.

49. The law *qua* a Minority Award and modification of an arbitral award by the Court has been settled.

50. With regard to enforcement and consideration of Minority Award, a Coordinate Bench of this Court in ***Government of India, BSNL v. Acome*, 2007 SCC OnLine Del 226** held as under:

“28. Section 31 (1) of the Act makes it clear, and this is the common case of both the parties, that the law contemplates the passing of only one arbitral award. Reading of Section 31(2) makes it clear that in an arbitral proceedings before a



*Tribunal consisting of more than one arbitrator, the award of the Tribunal would be sufficiently made, if it is signed by the majority of arbitrators, so long as the reason for the omission to sign by other arbitrators who are in minority is so stated in the award itself. It therefore follows, that a document containing the opinion of a minority of arbitrators cannot be called an award within the meaning of Section 31 of the Act. Apart from the decisions cited by the Respondent, I find that a Division Bench of this Court in *Fertilizer Corporation of India Ltd. v. IDI Management (USA) & Others*, AIR 1984 Delhi 333 has held that opinion of a minority of arbitrators cannot be looked at for any purpose. The award with which the law is concerned is the award of the majority. Reasons given by the minority are not reasons of the majority and as such does not form part of the majority. ”*

51. As regards the second consideration and reiterating the position of the first consideration regarding Minority Award, the Hon’ble Supreme Court in the recent judgment passed in ***Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.***, (2021) 7 SCC 657, has reiterated as under:

“Relevance of a dissenting opinion

39. *The dissenting opinion of a minority arbitrator can be relied upon by the party seeking to set aside the award to buttress its submissions in the proceedings under Section 34. At the stage of judicial scrutiny by the court under Section 34, the court is not precluded from considering the findings and conclusions of the dissenting opinion of the minority member of the Tribunal.*

40. *In the commentary of Russel on Arbitration, the relevance of a dissenting opinion was explained as follows:*

“6-058. Dissenting opinions.—Any member of the Tribunal who does not assent to an award need not sign it but may set out his own views of the case, either



within the award document or in a separate “dissenting opinion”. The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award. This is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award.” [David St. John Sutton, Judith Gill and Matthew Gearing QC, Russel on Arbitration, 24th Edn. (Sweet & Maxwell), p. 313.]

(emphasis supplied)

41. Gary B. Born in his commentary on *International Commercial Arbitration* opines that:

*“Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the Tribunal's related obligation to make a reasoned award. Although there are legal systems where dissenting or separate opinions are either not permitted, or not customary, these domestic rules have little application in the context of party-nominated co-arbitrators, and diverse Tribunals. Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his/her adjudicative mandate, particularly in circumstances where a reasoned award is required. Only clear an explicit prohibition should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process, and can provide a valuable check on arbitrary or indefensible decision making.” [Gary Born, *International Commercial Arbitration*, Wolters Kluwer, Edn. 2009, Vol. II, p. 2466.]*



It is further commented that:

“There is nothing objectionable at all about an arbitrator “systematically drawing up a dissenting opinion, and insisting that it be communicated to the parties”. If an arbitrator believes that the Tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he/she may express that view. There is nothing wrong — and on the contrary, much that is right — with such a course as part of the adjudicatory process in which the Tribunal's conclusion is expressed in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a “systematic” discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process, and the requirement of a reasoned award.” [Gary Born, International Commercial Arbitration, Wolters Kluwer, Edn. 2009, Vol. II, p. 2469.]

It is further observed that:

“... the very concept of a reasoned award by a multi-member Tribunal permits a statement of different reasons — if different members of the Tribunal in fact hold different views. This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process.”

44. *In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award. In *McDermott International Inc. v. Burn Standard Co. Ltd.* [McDermott*



International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under : (SCC p. 208, para 52)

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

52. Therefore, both the considerations are clarified by the aforesaid judgment that firstly, that where more than one arbitrator are passing an award and there is a dissenting opinion amongst the set of arbitrators Minority Award, the award passed by the Minority Tribunal shall be considered merely an opinion and not an award *per se*. Secondly, this Court certainly does not have the power to modify an award, whether Majority or Minority. At the most, the dissenting award may be considered a supporting award, however, cannot be prevailed over a Majority Award.

53. Further, there is no doubt to the position that this Court exercising powers under Section 34 of the Act shall not modify an award or any quantum thereof. Hence, this Court does not find merit in the arguments advanced on behalf of the petitioner in this regard.



54. This Court in excess of powers in no manner can interfere with the Award extraneously by travelling beyond the mandate of law as settled by the provisions as well as the interpretations by the Courts of the Country.

55. Therefore, this Court does not agree with the petitioner to the point that the quantum of the award may be modified by this Court. However, in view of the findings in Issue No. I, this Court is of the opinion that the Award may be set aside *qua* the award of additional costs in favour of the petitioner since there has been no substantiating material to support the finding.

CONCLUSION

56. During the course of the arguments, the learned counsel for the parties limited their arguments to the issue of additional costs so decided by the Arbitral Tribunal, both Minority and Majority. Therefore, limiting itself to the questions and objections raised to the grant of additional costs, this Court has only adjudicated upon the issue pressed. Moreover, the law is settled regarding a Minority Award being a mere supporting Award and it has no sanction and is not binding in nature. Hence, the said impugned Award passed by the Minority Tribunal is not entered into to complicate the proceedings, the law regarding which stands absolutely settled.

57. Keeping in view the aforesaid facts, circumstances, contentions raised on behalf of the parties, arguments advanced, law reiterated and



analysis made, this Court is of the considered view that findings of the Tribunal pertaining to the grant of additional cost must not survive.

58. The impugned Award does not set forth the reasons for the grant of award of additional costs of Rs. 60 Crores in favour of the petitioner and against the respondent. At the first instance, there was no material on record to substantiate the quantum of the additional costs claimed and at the second stage, it was not within the scope of the Arbitral Tribunal to grant an award on the basis of estimates made on equity.

59. It is also noted that the respondent has raised objections to finding *qua* the grant of additional costs granted in the favour of the petitioner and has accordingly filed OMP (COMM) No. 482/2020 under Section 34 of the Act. Hence, it is evident that the petitioner is also aggrieved of the findings given by the Tribunal to this effect.

60. Therefore, considering the entirety of the matter and the analysis made in the foregoing paragraphs, this Court is inclined to set aside the Award *qua* additional costs of Rs. 60 Crores granted in favour of the petitioner herein.

61. Accordingly, the instant petition is allowed to the extent that the findings in impugned Award dated 7th October 2019, corrected on 18th December 2019, *qua* additional costs of Rs. 60 Crores granted in favour of the petitioner herein, i.e., Jaiprakash Associates Limited, is set aside.

62. The petition is allowed in the terms as aforesaid and pending applications, if any, stand disposed of.



63. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 26, 2023
gs/ms

