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Arb.O.P.No.86 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.12.2023

PRONOUNCED ON : 29.04.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.86 of 2023

and

A.No.1100 of 2023

M/s.Subaya Constructions Company Limited,
Rep.by its Director S.Chandaragandhimathi

... Petitioner

VS.

M/s.P & C Projects (P) Ltd.,
(Formerly known as M/s.P & C Construction (P)Ltd.,
Rep.by its Authorised Signatory and
DGM Projects
Mr.M.A.Syed Sirajudeen P & C Towers

... Respondent

Prayer: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 27.11.2021 passed by the learned Arbitrators.

For Petitioner : Mr.N.L.Rajah
Senior Counsel
for M/s.B.Natarajan



Arb.O.P.No.86 of 2023

For Respondent : Mr.A.K.Sriram
Senior Counsel
for M/s.Amit Kataria

ORDER

The petitioner is aggrieved by the impugned Award dated 27.11.2021 passed by the Arbitral Tribunal. By the impugned Award, the Arbitral Tribunal has awarded a sum of Rs.1,58,53,090/- to the respondent. The operative portion of the impugned Award reads as under:

THE AWARD:

48 For all the reasons stated above the Award is passed;

- a) Directing the Respondent to pay the Claimant a sum of Rs.1,58,53,090 (Rupees one crore, fifty eight lakhs, fifty three thousand and ninety only) referred to in para 46.8 supra, and it concludes the pre-award interest as well, and*
- b) Further directing the Respondent to pay interest on the said sum of Rs. 1,58,53,090 (Rupees one crore, fifty eight lakhs, fifty three thousand and ninety only) for the post award period at the rate of 9% per annum from date of Award (27.11.2021) till the date of payment.*
- c) The parties are directed to bear their respective costs of this Arbitration.*



Arb.O.P.No.86 of 2023

2. In the aforesaid arbitral proceedings, the respondent was claimant.

The petitioner was the respondent. The petitioner was awarded a contract by the Tamil Nadu Water Supply and Drainage Board (TWAD Board) pursuant to a tender floated by it. In anticipation of the contract being awarded to the petitioner, the petitioner engaged the service of the respondent as a sub-contractor *vide* Ex.R1 Sub-Contractor Agreement dated 15.05.2003. Clause 11 of the said Agreement reads as under:-

CLAUSE – 11 – AGREEMENT:

In the event of I.M/s.Subaya Constructions Company Ltd., having its office at New No.21 (Old No.26), Soundarapandian Street, Ashok Nagar, Chennai - 600 083 emerges as a successful bidder in the said contract a detailed agreement will be entered into between the parties incorporating details of the scope of work, terms and conditions which shall not be in consistent with this agreement.*

(* petitioner herein)

3. Pursuant to Ex.R1 Sub-Contractor Agreement dated 15.05.2003 between the petitioner and the respondent Ex.C1 Sub-Contractor Agreement



Arb.O.P.No.86 of 2023

dated 23.05.2003 was signed between the petitioner and the respondent.

The scope of work under the contract in Ex.C1 Sub-Contractor Agreement

dated 23.05.2003 reads as under:-

SCOPE OF THE WORK FOR SUB CONTRACTOR:

- a) *Supplying, laying, jointing & testing of PSC Pipes in pumping main including earth work excavation in all soils, refilling with excavated earth, disposal of surplus earth, construction of intermediate manhole, valve chambers and covers.*
- b) *Supplying, laying, jointing & testing of C.I. Pipes in pumping main including earth work excavation in all soils, refilling with excavated earth, disposal of surplus earth, construction of intermediate manhole, valve chambers and covers.*
- c) *Supplying, laying, jointing & testing of RCC Pipes in pumping main including earth work excavation in all soils, refilling with excavated earth, disposal of surplus earth, construction of intermediate manhole, valve chambers and covers.*
- d) *The scope of the work of the sub contractor is not be limited to the items included in the Bill of Quantities which may be supplemented/added/deleted by TWAD as per the provisions of the referred contract specifications and conditions”.*

4. The respondent as a Sub-contractor under Ex.C1 – Sub-contract



Arb.O.P.No.86 of 2023

Agreement dated 23.05.2003 was required to give a security deposit at the rate specified in the tender document for the value of respondent's work in the form of a bank guarantee if as accepted by TWAD Board directly to TWAD Board if permissible. Otherwise, the security deposit was to be in the form of Bank Draft or FDR in the name of the petitioner.

5. Tamil Nadu Water Supply and Drainage Board [TWAD] *vide* Ex.C2 Letter (Work Order) dated 14.08.2003 bearing reference No.69/2001/SDO.II awarded contract to the petitioner for a period of 5 years for a sum of **Rs.76,11,02,660/-** (Rupees Seventy Six Crores Eleven Lakhs Two Thousand Six Hundred and Sixty only). Relevant portion from Ex.C2 Letter (Work Order) dated 14.08.2003 reads as under:-

“For and on behalf of the TWAD Board, your tender for the work of Installation and Commissioning of Underground Sewerage System to Trichirappalli corporation in the Unsewered area of Srirangam Golden rock and part of old Tiruchirappalli Town and improving the existing system comprising the Components of Sewer lines pumping stations, pumping mains sewage treatment plan inclusive of Civil, Mechanical and Electrical and all other allied works on turnkey basis including maintenance for a period of five years; the first year of operation and Maintenance being at free of cost under Turn key



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Arb.O.P.No.86 of 2023

*basis is accepted for a total value of **Rs.76,11,02,660/-** (Rupees Seventy Six Crores Eleven Lakhs Two Thousand Six Hundred and Sixty only) subject to the following conditions”.*

6. The petitioner as the main contractor was however required to furnish a security deposit to TWAD Board for a sum of **Rs.1,69,52,000/-**. However, the total value of the contract as per Bill of Quantity was **Rs.84,75,53,074/**. The petitioner as the main contractor was required to complete the work within 36 months. As per Clause 4 of Ex.C2 Letter (Work Order) dated 14.08.2003, the period of completion of work reads as under:-

4. PERIOD OF COMPLETION

“The entire work should be completed within a period of 36 (Thirty six) months. The fifteenth day from the date of issue of the Work order shall be reckoned as the "Start Date" of the contract period. You are informed that any delay in concluding agreement taking over of the site, slow progress, suspension of work etc., will make the TWAD Board to take penal action against you as per tender conditions/TNDSS and as per rules in force and the contract will be terminated at your risk and cost with forfeiture of EMD/SD”.



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Arb.O.P.No.86 of 2023

7. Thereafter, Ex.C3 Main Contract dated 15.09.2003 was signed between the petitioner and the TWAD Board and the petitioner. The relevant clause from Ex.C3 Main Contract dated 15.09.2003 reads as under:-

“Articles of Agreement made this fifteenth Day of September 2003 Between M/s.Subaya Constructions Co Ltd. New No:21/Old No:26/ Soundarapandian Street, Ashok nagar, Chennai-600083(hereinafter referred to as the contractor) which expression shall where the context so admits include his heirs, executors, administrators and legal representatives of the one part and the Tamil Nadu Water Supply and Drainage Board (hereinafter called the Employer) which expression shall where the context so admits include its successors in office and assigns) of the other part. Whereas the contractor delivered to the Employer the bid which was opened on,23th May2003 (technical Bid). whereby the contractor offered and undertook to carry out the works specified under this contract and allied work, i.e. (name of work) Installation and commissioning of Underground Swerage system, to Trichirappalli corporation, in the unsewered area of Srirangam, Golden rock and part of old Tiruchirappalli town and improving the existing system comprising the components of supply laying and jointing of RCC and stoneware, sewerlines, construction of appurtenances



WEB COPY



Arb.O.P.No.86 of 2023

including manholes, Supply of sewer jetting Machines, providing House service connections, construction of pumping stations, Improvements to the Existing sewage pumping stations including supply and erection of pumping machinaries supply laying and jointing of pumping main and construction of sewage treatment plant, including civil-Mechanical and electrical and other allied works on turnkey basis including maintenance for period of five years in the State of Tamil Nadu in India, and provide the works, materials matters and things described or mentioned in these presents at the prices set forth in the schedule annexed to such bid and the contractor also undertook to do all extra and varied works which might be ordered as part of the contract on the terms provided for in the conditions and specifications hereto annexed and the Employer accepted such tender in pursuance where of the parties hereto have entered into this contract.

And whereas the contractor in accordance with the terms of the said Bid has deposited in the Office of Executive Engineer, TWAD, Sewerage Division... Trichirappalli as performance security for the due and faithfully performance by the contractor of this contract, the sum, of Rs 1,69,32,000/. (Rupees One crore sixty nine lakhs fifty two thousand only) in the form of Bank Guarantee No:LG365/2003 Dt.27.08.2003 issued by the Union Bank of India Ashoknagar Chennai duly pledged to the Executive Engineer/TWAD board Sewerage Division Trichirappalli and valid upto 26-09-2006”.

8. The Clause regarding the payment of security deposit in Ex.C1



Arb.O.P.No.86 of 2023

Sub-Contractor Agreement dated 23.05.2003 between the petitioner and the respondent was later modified by Ex.C4 Series Amendments Nos.1, 2 & 3 Series dated 27.08.2003, 12.12.2003 and 20.07.2005. The relevant clause insofar as the security deposit Ex.C1 Sub-Contractor Agreement dated 23.05.2003 was altered as follows in Ex.C4 Series Amendments Nos.1, 2 & 3 Series dated 27.08.2003, 12.12.2003 and 20.07.2005 as follows : -

Amendment No.1 Dated 27.08.2003	Amendment No.2 Dated 12.12.2003	Amendment No.3 Dated 20.07.2005
NOW both the parties mutually agreed that the sub contractor shall pay to the main contractor the sum of Rs.33,00,000/- in the form of Bank deposit receipt towards the Performance security for sub contractor's scope of work in-lieu-of the clause specified under "SECURITY DEPOSIT" in the sub contractor agreement. This bank deposit receipt may be lien to	NOW both the parties mutually agreed that the sub contractor shall pay to the main contractor the sum of Rs.33,00,000/- in the form of Bank deposit receipt towards the Performance security for sub contractor's scope of work in-lieu-of the clause specified under "SECURITY DEPOSIT" in the sub contractor agreement. This bank deposit receipt may be lien to	Instead of as stated in the Amendment No.2 the Sub-Contractor has given a cheque bearing No.371177 of Indian Overseas Bank dated 27.08.2003 2003 drawn in favour of Union Bank of India to enable the Main-Contractor to obtain a FDR for Rs.33,00,000/- in the Name of Main Contractor's lien to Bank Guarantee which was submitted to the



the bank by the main contractor for the Bank guarantee in favour of TWAD towards the performance security of the main contractor. This bank deposit receipt shall be released by the main contractor along with the accumulated interest to the sub contractor duly discharged by main contractor and bankers on receipt of the Performance security of the main contractor from TWAD board.	the bank by the main contractor for the Bank guarantee in favour of TWAD towards the performance security of the main contractor. This bank deposit receipt shall be released by the main contractor along with the accumulated interest to the sub contractor duly discharged by main contractor and their bankers on completion of work to the satisfaction of the TWAD Board and also in stipulated period on completion of the maintenance to the satisfaction of the TWAD Board and on release of the same by TWAD Board.	TWAD Board towards Security Deposit. As agreed earlier in the amendment 2 the Main Contractor agrees to release the FDR No B No 2022806 dated 27.08.2003 drawn in the name of the Main Contractor along with the accumulated interest to the Sub-Contractor duly discharged by main contractor and their bankers on completion of work to the satisfaction of the TWAD Board and also in stipulated period on completion of the maintenance to the satisfaction of the TWAD Board.
All money transactions like cash, cheques, deposit receipts, work bills, material bills, or in any other forms between the parties shall be duly discharged and acknowledged by the parties concerned.	The performance Bank Guarantee for the portion of work of the sub contractor comes to Rs.66 lakhs as per the work order. Instead, for which Rs.33 Lakhs in the shape of FDR has been provided to the	



Arb.O.P.No.86 of 2023

	main-contractor as mutually agreed. However it is the liability of the sub contractor to provide the balance security deposit of Rs.33 Lakhs to the main contractor, otherwise the main contractor will deduct the same from the sub contractor's bills, if the sub contractor breaches "The Sub contractor agreement".	
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9. The scope of work was also altered in Ex.C4 Amendment No.2-B dated 12.12.2003. It reads as follow: -

“Amendment No.2-B

*The following items shall be included in the "**Scope of the work for sub-contractor**" of the sub contractor agreement dated 23.05.2003.*

e) The scope of the work of the sub contractor includes one year free maintenance of their portion as per TWAD Board specifications.



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Arb.O.P.No.86 of 2023

f) The scope of the work of the sub contractor includes the defect liability period as per TWAD Board norms.

This agreement will have to be read in conjunction with the sub contract agreement entered into 23.05.2003 between SCCL and P & C and amendment No. 1 to the agreement entered into on 27.08.2003.*

* Ex.C1 Sub-Contractor Agreement dated 23.05.2003”.

10. The relevant Clauses for the purpose of dispute under consideration are referred to from Ex.C3 Main Contract between the TWAD Board and the petitioner dated 15.09.2003. Clause 49 in Section VII - General Conditions of Contract in Ex.C3 Main Contract between the TWAD Board and the petitioner dated 15.09.2003 reads as under :-

H – Programme Schedule :

39. Penalty for Defective Construction :

39.If any defect is noticed by the Employer in the construction of any portion of work/component, the Employer shall levy penalty upto 10% of te total value of the defective work as assessed by the Engineer in charge in addition to rectification of defective works at his cost.



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Arb.O.P.No.86 of 2023

General Conditions of Contract :-

49.Performance Guarantee:-

The period of guarantee for the entire works shall be 60 months from the date of completion and commissioning of the project to the satisfaction of the Engineer incharge of the work. This will include the maintenance of the entire project by the firm/contractor for a period of 60 months. If defects are noticed during the guarantee period, the firm/contractor shall rectify/replace wherever necessary at its/his own cost within 30 days of such intimation. If the contractor/firm fails to carry out rectification within the stipulated time, the rectification works shall be carried out by the Employer at the risk and cost of the contractor/firm and contractor/firm will become ineligible for the payment of the retention amount for the said purpose. Necessary Indeminty Boand for performance Guarantee of the scheme for five years shall be provided by the contractor.

11. Clause 45 in Section V – Payments and Recovery in Ex.C3 Main Contract between the TWAD Board and the petitioner dated 15.09.2003 reads as under:-

“45. Release of Performance Security & Retention Amount. :-

45.1 In addition to the withheld amount, 40% of the amount of each bill of the contract shall be



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Arb.O.P.No.86 of 2023

deducted and will be retained till the date of receipt of certificate of water tightness from the Executive Engineer, TWAD Board. The whole of the above sum of together with any recovery from the payments already made to the contractor as may be assessed by the Executive Engineer shall be forfeited to the TWAD Board if the liquid retaining develop structural defects or leaks. The above recovery shall be exclusive of the amount deposited towards security deposit. The fact of carrying out water tightness test should be recorded in the M.Book. The last part bill should be passed only after above certificate is issued. However, the contractor shall be permitted to execute an indemnity bond in lieu of the recovery of 40% in each bill in prescribed form in non judicial stamp paper for a value of Rs.100.00 towards water tightness and structural stability of the liquid retaining structure. The period of guarantee required by the contract shall be two years from the date of completion and commissioning (with filling of liquid upto maximum level in the case of liquid retaining structure). If defects are noticed within the stipulated period of 24 months of satisfactory performance, the defects should be rectified by the contractor at his own cost and the performance period again shall be reckoned from the date of completion of the rectification of defects by the contractor. In the case of liquid retaining structures during this period, structure under full working head of liquid should show no sign of leakage. The test for water tightness should be arranged to be carried out and



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Arb.O.P.No.86 of 2023

completed within 30 days from the date of intimation by the Engineer in charge. The testing of the liquid retaining structures should be done by the contractor at his own cost inclusive of all necessary equipment, water etc., complete. The test for water tightness of the structure as well as materials of construction used shall be conducted in conformity with the standard specifications as per 3370 (Part-I) – 1965 as amended from time to time and the other specifications as mentioned in the Bid Document.

- 45.2 The security deposit less any amount due to the Board except 5% of the retention amount made in every running bill shall be released in final bill which shall be prepared after the works are completed in all respects and after completion of maintenance period of one year and 5% of the retention amount will be released only after completion of five years maintenance period.*
- 45.3 In respect of building works, liquid retaining structure and other works where water tightness and soundness are to be watched for more than 6 months notwithstanding above clause, the balance 5% retention amount from final bill in respect of contract for original building works, construction of liquid retaining structures work etc., will be retained by Engineer in charge and paid to the contractor after a period of 60 months of satisfactory performance of entire civil works including maintenance period.”.*



Arb.O.P.No.86 of 2023

12. Clause 46 in Section V – Payments and Recovery in Ex.C3 Main

Contract between the TWAD Board and the petitioner dated 15.09.2003

reads as under:-

46. Recovery of Money Payable to the TWAD Board:-

“46.1 All losses, costs, damages and expenses and other money payable to the Board by the contractor under any stipulation in the contract, may be retained out of any money due or which may subsequently become due from the board to the contractor under any contract or otherwise whatsoever and in case such money then due or to become due to the contractor by the Board shall be insufficient to pay such losses, Costs, Damages, and other money payable to the TWAD Board by the contractor, it shall be lawful for the Engineer in charge without any further consent on the part of the contractor to sell or dispose of any or all the government promissory notes for the securities deposited in the Board by the contractor as aforesaid and with and out of the proceeds of such sale, after payment of all expenses connected therewith or reimburse and pay to the Board all such losses, cost, damages and expenses and other money payable to the contractor, and in case such proceeds of sale of the said Government promissory notes or securities shall be insufficient for such purpose then and in that case it shall be lawful for the Board to recover the residue thereof, if necessary by legal proceedings and or by resorting to revenue recovery act against the contractor”.



Arb.O.P.No.86 of 2023

13. Clauses 39 & 42 in Part H – Programme Schedule in Section IV

in Ex.C3 Main Contract between the TWAD Board and the petitioner dated

15.09.2003 reads as under:-

39.Penalty for Defective Construction	42.Liquidated Damages
<i>39.1 If any defect is noticed by the Employer in the construction of any portion of work/component, the Employer shall levy penalty upto 10% of the total value of the defective work as assessed by the Engineer in charge, in addition to rectification of defective works at his cost.</i>	<i>39.1 If any defect is noticed by the Employer in the construction of any portion of work/component, the Employer shall levy penalty upto 10% of the total value of the defective work as assessed by the Engineer in charge, in addition to rectification of defective works at his cost.</i> <i>42.1 Provided the firm/contractor fails to complete the work as a whole or part thereof within the stipulated period, the firm/contractor shall be liable to pay liquidated damages at 0.10% of the value of the unfinished works per week of delay till the completion of the work in full in all respects and handing over to the department. The amount recoverable towards liquidated damages shall however be restricted to 5% of the total contract value. The imposition of the</i>



Arb.O.P.No.86 of 2023

liquidated damages clause will be without prejudice to the rights of the Employer to terminate the contract as time barred.

42.2 For imposing liquidated damages, detailed show cause notice shall be served on the defaulting firm/contractor either by RPAD or through personal service. The first notice shall be served allowing 15 days time to the firm/contractor for furnishing the reply by them. In case of non receipt of reply on expiry of 15 days time from the date of first notice, the second notice shall be served allowing 7 days of time to the firm/contractor for furnishing the reply by them. Again in case of non receipt of reply on expiry of 7 days time from the date of second notice, the third notice shall be served allowing 3 days of time to the firm/contractor for furnishing the reply by them. On receipt of the reply, it shall be verified by the Engineer in charge and liquidated damages clause shall be invoked by issuing



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Arb.O.P.No.86 of 2023

an explicit speaking order to the firm/ contractor. Similarly, the non receipt of any reply from the firm/ contractor shall attract imposing the liquidated damages clause automatically and in this case also, the liquidated damages shall be imposed by issuing an explicit speaking order to the firm/contractor.

14. The petitioner terminated Ex.C1 Sub Contract dated 23.05.2003 with the respondent *vide* Ex.C10 Letter dated 06.05.2011 in the light of Ex.C7 Letter dated 25.03.2011 and Ex.C8 Letter dated 19.04.2011 issued earlier to the respondent. In Ex.C10 Letter dated 06.05.2011, the petitioner stated as follows:-

“In the sub contract agreement page one, para four, the project was agreed as **“Installation and Commissioning of Under Ground Sewerage Scheme System for Tiruchirappalli City corporation in the unserved areas of**



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Arb.O.P.No.86 of 2023

SriRangam, Golden Rock and Part of Old Trichy Town and improving the Existing system comprising of sewer lines, Construction of new pumping station, Pumping Main house service, connection augmenting the existing sewage treatment plant including Civil, Electrical, Mechanical and all other allied works on turnkey basis including maintenance for a period of five years.”

Again under para one on page five, Responsibility was agreed as **“The sub contractor is responsible for the timely progress and quality of work as per the norms of the TWAD. In case of any delay in progress due to whatsoever the reason not covered under "Force de Mejure", the sub contractor shall make good. If the sub contractor fails to comply even after the show cause notice by TWAD, the sub contract may be terminated as a whole or part by the Main Contractor and the same will be carried out at "Risk and Cost of the Sub Contractor" by the Main Contractor or any other party nominated by the Main Contractor. In the above process if any penalty/incentive imposed by TWAD, the same will be to the account of subcontractor only”**.

The amendments mentioned by you states about free maintenance period and maintaining to the stipulated period to the satisfaction of TWAD Board. Hence the sub contract agreement and amendments did not indicate that maintenance period is only one year. The sub contract



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Arb.O.P.No.86 of 2023

agreement and the amendments, indicate that your portion of work should be maintained to the stipulated period, that is 5 years, to the satisfaction of the TWAD Board. Then only the performance security (S.D) would be released to you on its receipt from the TWAD Board after satisfactory completion of stipulated period of maintenance. Hence the question of 1 year free maintenance alone would not arise. The amendment was given to indicate that the five years maintenance period include 1 year free maintenance and four year paid maintenance totaling to five years stipulated maintenance period.

The Final Notice was already given to you in our letter cited 2nd as per the clause "Responsibility" on page five para one of the sub contract agreement. Hence as per the clause Responsibility of the sub contract agreement, the sub contract agreement is terminated at your risk and cost with immediate effect. You are requested acknowledge this Termination Order”

15. The termination of Ex.C1 Sub Contract dated 23.05.2003 was on account of the failure of the respondent to rectify the work as was required by TWAD.

16. Thus, a dispute arose between the petitioner and the respondent.



Arb.O.P.No.86 of 2023

Earlier, the respondent had approached this Court in A.Nos.721, 1599 & 1600 of 2015. The petitioner also filed A.No.1397 of 2015. These applications were filed for the following reliefs:-

A.No.721/2015 filed by Respondent	A.No.1599/ 2015 filed by Respondent	A.No.1600/2015 filed by Respondent	A.No.1397/2015 filed by Petitioner
<i>To prohibit the 2nd and 3rd Respondent/Garnishees from making payment of a sum of Rs.6,54,96,217/-or any amounts to the 1st Respondent or its agents and restrain the 1st Respondent and its agent or representatives from receiving a sum of Rs.6,54,96,217/- or any amounts from the 2nd and 3rd Respondent/Garnishees and further direct the 2nd and 3rd Respondent/Garnishees to deposit a sum of Rs.6,54,96,217/- or any amounts to the credit of the above Application until disposal of the arbitral proceedings.</i>	<i>To vacate the prohibitory order restraining the second and third respondent from making payment to the first respondent by order dated 06/02/2015 in the above application No.721 of 2015.</i>	<i>To direct the Respondent to pay the admitted sum of Rs.1,80,28,295/-to the applicant or in the alternative direct the respondent to deposit the said amount to the account of pending Arbitration Proceedings.</i>	<i>To direct the 2nd and 3rd Garnishees to produce the entire Bill Abstract pertaining to 'tender notice dated 07.04.2003 for the work of installation and commissioning of underground sewerage scheme for Tiruchirappalli City Corporation in the unserved area of Srirangam, Golden Rock and part of Old Trichy Town and improving existing system comprising of sewer lines and other allied works on Turn key basis including maintenance of the works for a period of five years.</i>



Arb.O.P.No.86 of 2023

17. By a common order dated 27.04.2015, this Court dismissed all the applications filed by the respondent and also directed the petitioner herein to furnish the security to the tune of Rs.1,80,28,295/- to the respondent. Operative portion of the said order dated 27.04.2015 reads as under:-

“44. As settled by various decisions, it is only an interim measure to protect the interest of the applicant pending arbitration proceedings. It is also settled that the provision can be invoked even after an award is passed but before execution. However, the section cannot be treated on par with Order 12 Rule 6 of CPC to direct payment as an interim award, Therefore, the relief sought for in A.No 1600/15 cannot be granted and is dismissed as it is beyond the scope of Section 9 of the Act. Section 9 of the Act empowers the court to grant such other interim measure of protection that may appear to be just.

45. Therefore, considering the facts and circumstances of the case, 06.02.2015 is vacated with the prohibitory order dated a condition that the respondent shall furnish security 1st to the tune of Rs 1,80,28,295/- within four weeks from the date of receipt of a copy of this order”.*

(* the petitioner herein)



Arb.O.P.No.86 of 2023

18. On appeal by the petitioner, the aforesaid order was modified by

the Hon'ble Division Bench of this Court *vide* order dated 18.08.2015 in

O.S.A.No.102 of 2015 with the following observations:-

“9. The admitted portion is that the Arbitral Tribunal has been constituted though the proceedings are stated not to have progressed much as in between, there were endeavours once again to resolve the disputes, but unsuccessfully.

10. The parties have claim against one another. A case for passing decree on admission has not been made out, which is obvious from the rejection of the applications filed by the first respondent. The amount stated to have been withheld by the appellant was to be adjusted against the loss suffered by them. The prayer in the nature of decree under Order 12, Rule 6 of the Code of Civil Procedure amounted to an interim award and has been held to be beyond the scope of Section 9 of the said Act.

11. In the aforesaid situation, there can be no question of the appellant providing security for the amount, more so as there is no case made out that in case of success before the Arbitral Tribunal, the first respondent would be deprived of the fruits of the success on account of the inability of the appellant to meet its liabilities. Furnishing of security, thus, in a way amounts to an order akin to attachment before judgment where there are claims and counterclaims yet to be adjudicated inter se the parties.

12. We are, thus, of the view that the direction to furnish security, cannot be sustained and is



Arb.O.P.No.86 of 2023

accordingly set aside and the appeal is allowed to the aforesaid extent, since that was the only aspect of impugned in this appeal. The parties are left to bear their own costs.

13. We would expect the Arbitral Tribunal to now expeditiously continue with the arbitral proceedings, so that the parties are able to see the result of their respective claims and counter-claims.

14. At the request of the learned counsel for the first respondent, we clarify that we are not in any way precluding the first respondent from making the claim for interim award or for an attachment of the amount, if there is material available requiring such an order subject, of course to the Arbitral Tribunal being inclined to do so.”

19. It is in this background, the respondent as the claimant before the Arbitral Tribunal filed a claim for the following amounts:-

<i>Claim No.</i>	<i>Claim</i>	<i>Amounts</i>
Claim No.1a	To declare the Termination Letter dated 06.05.2011 as illegal, void, non-est and against the provisions of the Agreement dated 23.05.2003.	-
Claim No.1b	To award Damages for	Rs.10,00,000/-



Arb.O.P.No.86 of 2023

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Claim No.2a	To direct the respondent (petitioner herein) to pay the outstanding amount upto 44 th R.A. Bills	Rs.17,85,995/-
Claim No.2b	To direct the respondent (petitioner herein) to pay the withheld monies from R.A. Bills 40 to 44	Rs.14,54,218/-
Claim No.2c	To direct the respondent (petitioner herein) to pay the security deposit	Rs.33,00,000/-
Claim No.2d	To direct the respondent (petitioner herein) to pay the T.D.S. upto 44 th R.A. Bills	Rs.38,47,334/-
Claim No.2e	To direct the respondent (petitioner herein) to pay the outstanding amount under R.A. Bills 45 to 50 th and Final Bill	Rs.5,75,00,894/-
Claim No.3	Interest on the various outstanding as claimed under Claim No.2a, 2b, 2d and 2e	Rs.2,66,57,370/-



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Arb.O.P.No.86 of 2023

	at 12.70% per annum and under Claim No.2c at 9.00 per annum	
Total		Rs.9,55,45,811/-
Claim No.4	Interest on the amount of Rs.9,55,45,811/- for the post award period till payment	-
Claim No.5	Cost towards Arbitration and other litigation expenses	-

20. The petitioner denied the liability and also made a counter claim for the following amounts:-

<i>Counter Claim No.</i>	<i>Claim</i>	<i>Amounts</i>
Counter Claim No.1	Towards expenditure incurred on behalf of claimant for attending to the defects in claimant's scope of work	Rs.2,53,08,841/-
Counter Claim No.2	Towards expenditure incurred on behalf of the claimant for	Rs.10,54,335/-



Arb.O.P.No.86 of 2023

Counter Claim No.	Claim	Amounts
	maintaining the works executed by claimant's scope of work	
Counter Claim No.3	Towards compensation paid to the Accident Victims 47th R.A. Bill - Rs.16,00,000/- 48th R.A. Bill - Rs. 1,16,454/- 50th R.A. Bill & Letter dt. 3.2.15 - Rs.30,00,000/- ----- Total - Rs.47,16,654/- -----	Rs.47,16,654/-
Counter Claim No.4	Towards damages, loss of business reputation and mental agony	Rs.5,00,00,000/-
Counter Claim No.5	Towards Interest for the preference period	Rs.1,97,78,144/-
Counter Claim No.6	Towards cost of arbitration and legal expenses	Rs.7,00,000/-
Counter Claim No.7	Towards interest for the period pendent lite at 18% per annum from 14.09.2017	-
Counter Claim No.8	Towards interest on the Counter Claim Nos.1 to 6 at 18% per annum from the date of award till the date of realization	-



Arb.O.P.No.86 of 2023

Counter Claim No.	Claim	Amounts

21. Before the Tribunal, the respondent marked Exs.C1 to C30 and the petitioner marked Ex.R1 to R51. The parties filed proof affidavits and affidavits of admission and denial of documents filed by the respective parties. After examining the records, the Arbitral Tribunal framed the following issues:-

- i. *Whether the Claimant is entitled to the claims claimed under items 1 (a), 1(b), 2(a) to 2(e), 3 and 4 in the claim statement?*
- ii. *Whether as per the Sub Contract Agreement dated 23.5.2003 and the Amendment No 2 dated 12.12.2003 to the Sub Contract Agreement dated 23.5.2003, the free maintenance period of the Claimant's scope of work is for a period of one year and for the remaining period of four years at what rate, the Claimant is to be paid towards maintenance work?*
- iii. *Whether the Sub Contract Agreement dated 15.5.2003 is valid and binding on both the parties?*
- iv. *Whether the Respondent is entitled to the counter claims claimed as items 1 to 8?*
- v. *Whether the Claimant / Respondent are entitled to interest, if so, for what amount, for what period and at what rate?*
- vi. *Whether the Claimant / Respondent is entitled to the*



Arb.O.P.No.86 of 2023

costs of the Arbitration?
vii. To what reliefs the parties are entitled to?

22. On behalf of the respondent, Mr.V.Dhinakaran was examined as C.W.1. On behalf of the petitioner, the following 6 persons were examined as RW1 to RW6 :-

- i..E.Subaya (RW1)
- ii. Mr.G.Mohana Murugan (RW2)
- iii. Mr.R.Manmathan (RW3)
- iv. Mr.V.Balaji (RW4)
- v. Mr.D.Kandasamy (RW5)
- vi. Mr.V.Kanagamani (RW6)

23. After examining all evidences, statements of witnesses and documents filed by the respective parties, the Arbitral Tribunal has passed the impugned award and awarded amounts to the respondent/claimant. As against the claim and the counter claim of the petitioner, the Tribunal has awarded the following amounts:-

<i>Respondent's claim (Claimant)</i>			
<i>Claim No.</i>	<i>Claim Amount</i>	<i>Award Amount</i>	<i>Result</i>



Arb.O.P.No.86 of 2023

Claim No.1a	-	-	Dismissed
Claim No.1b	Rs.10,00,000/-	-	Dismissed
Claim No.2a	Rs.17,85,995/-	Rs. 17,85,995/-	Allowed
Claim No.2b	Rs.14,54,218/-	Rs. 8,95,035/-	Partly Allowed
Claim No.2c	Rs.33,00,000/-	-	Dismissed
Claim No.2d	Rs.38,47,334/-	Rs 38,47,334/-	Allowed
Claim No.2e	Rs.5,75,00,894/-	Rs.1,13,08,175/-	Partly Allowed
Total		Rs.1,78,36,539/-	

<i>Petitioner's counter claim</i>				
<i>Counter Claim No.</i>		<i>Claim Amounts</i>	<i>Award Amount</i>	<i>Result</i>
Counter Claim No.1		Rs.2,53,08,841/-	Rs.33,00,000/-	Partly Allowed
				Partly Allowed
Counter Claim No.2		Rs.10,54,335/-		
Counter Claim No.3		Rs.47,16,654/-	Rs.17,16,654/-	Partly Allowed
Counter Claim No.4		Rs.5,00,00,000/-	-	Dismissed
Counter Claim No.5		Rs.1,97,78,144/-	-	Dismissed
Counter Claim No.6		Rs.7,00,000/-	-	Dismissed
Total			Rs.50,16,454/-	

24. The Arbitral Tribunal has thus directed the petitioner to pay a sum of Rs.1,58,53,090/- to the respondent based on the following calculation:-



Arb.O.P.No.86 of 2023

Sl. No.	Heads	Amounts	
1	Awarded on the claim	Rs.1,78,36,539/-	Rs.1,28,20,085/-
2	Awarded on the counter claim (-)	Rs. 50,16,454/-	
	Sub Total	Rs.1,28,20,085/-	
3	Pre-award interest on the amount of Rs.1,28,36,539/- at 6% p.a. from 14.09.2017 till 27.11.2021		Rs. 30,33,005/-
Total			Rs.1,58,53,090/-

25. The Arbitral Tribunal has also directed the petitioner to pay the interest at 9% per annum on the amount of **Rs.1,58,53,090/-** for the post-award period from 27.11.2021 till the date of payment.

26. The petitioner has thus challenged the impugned award awarding a sum of **Rs.1,58,53,090/-** [**Rs.1,78,36,539/-** - **Rs.50,16,454/-**] +**Rs.30,33,005/-**] to the respondent and rejecting the petitioner's counter claim.

27. It is submitted that the respondent provided FDR for



Arb.O.P.No.86 of 2023

Rs.33,00,000/- only. The balance Rs.33,00,000/- towards performance guarantee was not provided by the respondent and no recovery was also effected. This fact was accepted by the Tribunal. It is further submitted that 5% of the value of work for every running bill was retained and this is the additional performance security as per clause 45.2 of Ex.C3 Contract dated 15.09.2003 between the petitioner and TWAD Board dated 15.09.2003. The respondent provided bank guarantee for the additional 5% of the performance guarantee in favour of TWAD Board and the withheld amount was also released by the TWAD Board.

28. It is submitted that the petitioner in turn released the amount to the respondent on the strength of bank guarantee provided to the TWAD Board as a gesture of goodwill and to maintain cash flow for the respondent in the interest of work. However, after respondent abandoned the work. The petitioner has however not requested TWAD Board to encash the bank guarantee and remit the proceeds to the account of the petitioner since it would have affected the reputation of the petitioner as a whole. The petitioner thus continued with the rectification work and to maintain their



Arb.O.P.No.86 of 2023

reputation.

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29. It is submitted that the amendment to the Ex.C1 Sub Contract dated 23.05.2003 *vide* Ex.C4 series Amendments dated 27.08.2003, 12.12.2003 and 20.07.2005 was entered only to ensue that out of Rs.66,00,000/- performance guarantee to be provided by the respondent, Rs.33,00,000/- will be in the shape of FDR and balance Rs.33,00,000/- was to be recovered from the bills of the respondent.

30. It is submitted that this amendment did not alter the other liabilities of the respondent. Besides the above, it was also specified that there will be free maintenance for the portion of work executed by the respondent for 1 year *vide* Ex.C4 Amendment No.2 dated 12.12.2003.

31. It is therefore submitted that it was clear that there after the payment for the further period of four years was governed by the payment as per Ex.C3 Contract dated 15.09.2003 and it was not the intention of the parties that the maintenance was restricted only for 1 year. It is also submitted that this was also evident from the fact that the respondent



Arb.O.P.No.86 of 2023

continued to maintain as per the contract beyond the free maintenance period of one year.

32. It is submitted that the respondent executed its portion of works by March 2008 and did one year free maintenance work of their portion of works till March 2009 and continued to do paid maintenance work of their portion of work till 10.03.2011 and thereafter abruptly stopped maintenance due to extraneous reasons and abandoned the work of their scope of maintenance.

33. Besides, there were several defects pointed out by TWAD Boar that were not attended or rectified by the respondent which had to be carried out by the petitioner.

34. It is thus submitted that by Ex.C10 Letter dated 06.05.2011 the petitioner was constrained to terminate Ex.C1 Sub Contract dated 23.05.2003 with the respondent since the respondent failed to perform its contractual obligation of maintenance of the work. Further, it is submitted



Arb.O.P.No.86 of 2023

that the petitioner continued to receive complaints from the TWAD Board due to failure of the respondent to rectify the defects in time as was required by the TWAD Board.

35. It is submitted that the impugned Award dated 27.11.2021 passed by the learned Arbitrators was not in accordance with the principles of equity and natural justice. The impugned Award dated 27.11.2021 passed by the learned Arbitrators if allowed to stand will result in gross miscarriage of justice, since it is suffers from error apparent on the face of record.

36. It is submitted that the learned Arbitrators erred while deciding on counter claims 1 & 2 and the Tribunal went beyond the contract condition agreed by the parties and the findings related hereto and set out below would clearly demonstrate an error apparent on the face of record.

37. It is submitted that the learned Arbitrators failed to consider Clause 39.1 of the Contract between the petitioner and the TWAD Board in Ex.C3 dated 15.09.2003 which has been extracted above in this order. The



Arb.O.P.No.86 of 2023

learned Arbitrators failed to see that as per the said Clause, the petitioner is entitled to recover 10% of the value of defective work in addition to cost of rectification.

38. It is submitted that as per Ex.C1 Sub Contract dated 23.05.2003, respondent as the sub contractor was responsible for timely progress and quality of work as per norms of the TWAD. In case of any delay in progress due to whatsoever the reason not covered under “Force de Mejure”, the sub contractor shall make good. If the sub contractor failed to comply even after the show cause notice by TWAD, the sub contract could be terminated in whole or in part by the Main Contractor at “ Risk and cost of the Sub Contractor” by the Main Contractor or any other third party nominated by the main Contractor. In the above process, if any penalty/incentive imposed by TWAD, the same will be to the account of sub Contractor only.

39. It is submitted that the sub contract is a back to back contract as that of the contract between the Petitioner herein and TWAD Board. Whatever the clauses are applicable to the main contractor were also



Arb.O.P.No.86 of 2023

applicable to the respondent sub-contractor and the respondent was to abide by all the terms and conditions stipulated in the main contract in Ex.C2 dated 14.08.2003 and Ex.C3 dated 15.09.2003. The respondent sub-contractor was bound to do one year free maintenance and 4 years of paid maintenance and was to rectify the defects which were pointed out by the TWAD Board.

40. It is further submitted that the main contract contains clauses towards performance security. The total performance guarantee available for the compensation to the losses for the non performance was 2% plus 5% as per Clause 44.1c of Ex.C3 dated 15.09.2003. In total 7% (security deposit 2% plus retention amount/ additional performance security 5%) is available as a performance security.

41. It is further submitted that the liquidated Damages is a compensation for the losses on account of delay in works. This condition of this clause will not be applicable in this case, since the breach of sub contract agreement is failure to perform its contractual obligation of



Arb.O.P.No.86 of 2023

maintaining the works by the Respondent herein, hence the contract was terminated. Hence, Liquidated Damages was not be applicable.

42. It is submitted that if the contractor firm fails to carry out rectification within stipulated time, the rectification works shall be carried out by the Employer at the Risk and cost of the Contractor firm and the Contractor will become ineligible for the payment of retention amount for the said purpose. The outstanding and defective works of the respondent herein was executed by the petitioner herein and this said contention was also accepted by the Tribunal, but for which cost was not allowed by the Tribunal.

43. It is further submitted that in paragraph 20.18 of the impugned Award, it has been clearly stated that the petitioner herein is entitled by way of compensation for the loss on account of the breach of sub contract agreement. But in paragraph 20.18 of the impugned Award, the Tribunal restricted the amount to Rs.66,00,000/- which was only 2% of the sub contract value against our entitlement of 7% as per the contract Clause 49.



Arb.O.P.No.86 of 2023

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44. It is further submitted that the Tribunal while deciding the issue inadvertently concluded that the Petitioner herein is entitled for 2% (Performance Security) only and awarded accordingly. The Tribunal did not apply its mind and failed to consider that 5% of the retention amount deducted from RA Bills would also form part of Security deposit. As per clause 49, the sub contractor (the respondent herein) is ineligible for the payment of retention amount. Accordingly, the Tribunal ought to have awarded 7% to the Petitioner herein. The award of only 2% to the Petitioner herein, is contrary to the provisions contained in the contract.

45. Finally, it was submitted that the Arbitral Tribunal has not applied its mind and awarded only 2% of the security deposit and not awarded the remaining 5% of the performance guarantee in the form of retention of 5 % in the RA Bills which the subcontractor is bound to forego in view of breach of terms of contract.

46. The learned Senior Counsel for the petitioner relied on the



Arb.O.P.No.86 of 2023

following decisions:-

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- “i. Som Datt Builders Limited Vs. State of Kerala, (2009) 10 SCC 259.**
- ii.I Pay Clearing Services Private Limited Vs. ICICI Bank Limited, (2022) 3 SCC 1.**
- iii.Dyna Technologies Private Limited Vs. Crompton Greaves Limited, 2021 (2) CTC 315;**
- iv.Union of India Vs. Royal Construction, 2001 SCC OnLine Cal 476;**
- v.Government of NCT Delhi Vs. M/s.Garg Builders, 2018 SCC OnLine Del 9900;**
- vi.Indian Oil Corporation Vs. Shree Ganesh Petroleum Rajgurunagar, (2022) 4 SCC 463”.**

47. The learned Senior Counsel for the respondent defends the impugned Award passed by the Arbitral Tribunal and would submit that challenge to the impugned Award is unsustainable and therefore, the present Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 is liable to be dismissed.

48. Summarizing the arguments advanced by the learned Senior Counsel for the petitioner, the learned Senior Counsel for the respondent submits that it is a well-established proposition that that an Award can be set



Arb.O.P.No.86 of 2023

aside only on the ground of Patent Illegality and other extremely narrower grounds/scope as given under Section 34 of the Arbitration and Conciliation Act 1996.

49. It is submitted that 'Patent Illegality' can be invoked only if the award is contrary to the substantial provisions of law or contrary to the terms of the contract or the terms of the agreement or have been considered in such a way that no fair minded or a reasonable person could do so or if the view taken by the Arbitrator was not even a possible view

50. It is further submitted that upon successfully completing its scope of work including the free maintenance for a period of 1 year, the respondent herein was orally requested by the petitioner to *continue maintaining* its scope of work and also assured that as and when it receives payment for the same from its Principal Employer, i.e., TWAD Board, the respondent would be paid for the same. The said arrangement was requested by the petitioner in accordance to its contractual requirements (Clause 49 & 50 of Ex.C3 Main Contract dated 15.09.2003) to maintain the work for a



Arb.O.P.No.86 of 2023

period of 5 years and DLP of 60 months under the Main Contract with TWAD Board.

51. Based on the request and assurance of the petitioner and as a gesture of goodwill, the respondent agreed upon the same and continued to maintain the work beyond its scope of work of maintaining the work only for a period of 1 year. Accordingly, the respondent - claimant *maintained its scope of work for a further period of 2 years from March, 2009 up to March, 2011* and the said maintenance for the further period of 2 years was a non-tendered item of work. However, when the respondent-claimant raised *Bill seeking monies towards paid maintenance*, the petitioner refused to make any payment towards maintenance, alleging that the respondent was to maintain the work free of cost for 5 years rather than 1 year.

52. It is further submitted that as the respondent could not afford to work free of cost out of pocket and was therefore constrained to stop carrying out the maintenance work until payment was made for above stated 2 years. However, the petitioner terminated the Ex.C1 Sub-Contract dated



Arb.O.P.No.86 of 2023

23.05.2003 in an arbitrary manner at the risk & cost of the respondent claimant, when the latter refused to further maintain the work without being paid for the maintenance work beyond one year. The said termination was strongly repudiated by the respondent-claimant but the petitioner reiterated its stand on termination and hence the dispute between the Parties.

53. It is submitted that as per the petitioner, the Arbitral Tribunal failed to consider Clause 39.1, 44.1, 49 of Ex.C3 Main Contract dated 15.09.2003 and Security Deposit Clause as found in Ex.C2 Work Order issued by TWAD dated 14.08.2003 as per which the Performance Security was 7%, i.e., 2% provided at the time of the award of the Contract + 5% retained from all the R.A. Bills, apart from 10% of the total value of defective work as penalty. The Arbitral Tribunal further erred in not taking into consideration of Clause 42 of Ex.C3 Main Contract dated 15.09.2003, which is a Liquidated Damages clause, as per which TWAD Board had the right to impose Liquidated Damages at the rate of 0.1% of the value of unfinished work per week of delay subject to a maximum of 5% of the total



Arb.O.P.No.86 of 2023

Contract Value. The Arbitral Tribunal erred in interpreting Para 2 of the Amendment No.2A of the 2nd Amendment dated 12.12.2003 which is in the nature of Liquidated Damages Clause.

54. It is further submitted that the further case of the petitioner is that the terms of Contract between TWAD and M/s Subaya, i.e., Ex.C2 & C3 is binding the respondent and hence a conjoint reading of Clauses 39.1, 44.1 (c), 49, the petitioner on breach is entitled to recover 10% of the total value of defective work as penalty together with retaining 5% from every Bill along with 2% by way of Performance Guarantee and as per Clause 42, the maximum Liquidated Damages that can be imposed is 5% of the Contract value.

55. It is submitted that the above said ground raised by the petitioner is wrong as the Arbitral Tribunal in a well reasoned and detailed finding has interpreted the clauses of Contract and held that Para 2 of Amendment No.2A of the 2nd Amendment dated 12.12.2003 is in the nature of Liquidated Damages Clause and hence the named sum of Rs.66,00,000/- is



Arb.O.P.No.86 of 2023

the ceiling fixed on the total liability of the respondent for breach of Contract, including breach relating to not maintaining and not rectifying for 5 years and the petitioner failed to prove the cost incurred towards rectification.

56. It is further submitted that the ground of the petitioner that the Arbitral Tribunal erred in dismissing Application under Section 26 for Appointment of a Chartered Accountant to examine and verify the books of accounts of the petitioner pertaining to Counter Claim 1 to 3 is misleading as the Arbitral Tribunal has given a categorical finding at Paragraphs 36.2 and 37.2 that though the petitioner admitted that it is in possession of entire ledger statements, cash books, vouchers, the petitioner did not file such documents before the Tribunal and withheld such documents and thus an adverse inference had to be drawn that if the said documents are produced, they will not support the case of the petitioner in support of its Counter Claims. Further with regard to Counter Claim No.3, the Arbitral Tribunal gave a detailed finding and partly allowed the said claim.



Arb.O.P.No.86 of 2023

57. It is submitted that the ground of the petitioner that the Arbitral Tribunal has wrongly rejected the Counter Claim No.4 towards loss of business reputation is wrong since the Arbitral Tribunal has elaborately dealt with the said claim.

58. It is submitted that the ground of the petitioner that the Arbitral Tribunal has wrongly rejected Counter Claim 5 towards Interest is misplaced as the Arbitral Tribunal has in detail dealt with the same and since the petitioner's Counter Claims were set off against the claims of the respondent, the question of granting Interest does not arise.

59. It is further submitted that the further ground of the petitioner that the Arbitration Tribunal has wrongly rejected Counter Claim 5 towards Cost of Arbitration is also misplaced as the Arbitral Tribunal has in detail dealt with the same.

60. It is submitted that in the present case, the view taken by the Tribunal was perfectly valid one and the Tribunal applied their mind,



Arb.O.P.No.86 of 2023

perused and considered all the relevant clauses of the Agreement, took into account the surrounding circumstances, analyzed the documentary and oral evidence and ultimately passed an Award. In the present Award, which is the subject matter of the present Section 34 proceedings, it is important to note that the Arbitral Tribunal was called upon to interpret/analyze the Contract as it was their duty and primary responsibility to determine the terms of the agreement, which they have done so and rendered their findings. Presently, the petitioner challenging the Award is only attempting to substitute their view and is expecting the Court under Section 34 to do so, which is impermissible.

61. It is further submitted that the Arbitral Tribunal was the ultimate fact-finding authority before whom the entire evidences and documents were available and it has rendered a finding which perfectly possible and plausible. The Tribunal has not rendered a finding which can be termed as ‘not a possible view’ at all. It is submitted that even if the Arbitrators view is a plausible one, then the Courts under Section 34 of the Arbitration and Conciliation Act, 1996 cannot be interfere with the award.



Arb.O.P.No.86 of 2023

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62. It is stated that the most important factor is that only if while interpreting the terms of the contract a view is taken is such that, no reasonable person could have arrived at such decision which would only then mean that the award suffers from irrationality and perversity which will warrant interference. It is therefore prayed for dismissal of the present Arbitration Original Petition.

63. The learned Senior Counsel for the respondent relied on the following decisions:-

- “i. Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49.**
- ii. Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131.**
- iii. Dyna Technologies Private Limited Vs. Crompton Greaves Limited, 2021 (2) CTC 315 : (2019) 20 SCC 1.**
- iv. MMTC Limited Vs. Vedanta Limited, (2019) 4 SCC 163.**
- v. South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) Vs. Oil India Limited, (2020) 5 SCC 164.**
- vi. Patel Engineering Limited Vs. North Eastern Electric Power Corporation Limited, (2020) 7 SCC 167.**



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Arb.O.P.No.86 of 2023

- vii. **Indian Oil Corporation Limited through its Senior Manager Vs. Shree Ganesh Petroleum Rajgurunagar**, (2022) 4 SCC 463.
- viii. **UHL Power Company Limited Vs. State of Himachal Pradesh**, (2022) 4 SCC 116.
- ix. **Larsen Air Conditioning and Refrigeration Company Vs. Union of India and others**, 2023 SCC OnLine SC 982.
- x. **Delhi Development Authority Vs. Durga Construction Company**, 2013 (139) DRJ 133 (DB).
- xi. **N.Sengoda Gounder Vs. R.Manickam and others**, dated 20.10.2010 passed by this Court in C.R.P.(NPD) No.3746 of 2009.
- xii. **The Assistant Manager, Indian Overseas Bank Vs. The Managing Director, M/s.Global Powertech Equipment Pvt. Ltd. and others**, dated 08.12.2017 passed by the Division Bench of this Court in W.P.Nos.31816 & 31817 of 2017”.

64. I have considered the arguments advanced by the learned Senior Counsels for the petitioner and the respondent. I have perused the impugned Award passed by the Arbitral Tribunal and the documents that were marked as Exhibits before the Arbitral Tribunal by the petitioner and the respondent.



Arb.O.P.No.86 of 2023

65. There is no dispute in the facts that had led to the dispute between the petitioner and the respondent. The contract between petitioner and the respondent was entered in the light of the contract being awarded to the petitioner by the TWAD Board *vide* Ex.C3 Main Contract dated 15.09.2003. The value of the contract awarded to the petitioner was Rs.76,11,02,660/- against the bill of quantity value of Rs.84,75,53,074/-.

66. In terms of Clause 1 in Ex.C2 Work Order dated 14.08.2003, the petitioner has provided the performance security for a sum of Rs.1,69,52,000/- to the TWAD Board. Ex.C1 Sub Contract dated 23.05.2003 that was awarded by the petitioner to the respondent was amended. Therefore, the respondent had provided the performance security only for a sum of Rs.66,00,000/- [Rs.33,00,000/- in the shape of FDR and Rs.33,00,000/- to be recovered from the respondent's bills] as per the Amendment No.2 dated 12.12.2003 in Ex.C4 Amendments series.

67. The petitioner terminated the contract *vide* Ex.C10 Termination



Arb.O.P.No.86 of 2023

Letter dated 06.05.2011. This was after 1 year of completion of project and during the last 4 years of the period of contract between the petitioner and the TWAD Board. This was during the paid maintenance period.

68. According to the petitioner, the petitioner was constrained to terminate the contract *vide* Ex.C10 Termination Letter dated 06.05.2011 as the respondent failed to respond to the defects pointed out by the TWAD Board which the respondent was required to rectify when read in conjunction with Ex.C1 to C4 series.

69. On the other hand, it was the contention of the respondent that the respondent was not bound to service beyond the period of 1 year in view of Amendment No.2-B in Amendment No.2 dated 12.12.2003 in Ex.C4 series, as per which, the scope of the work of the sub-contract includes 1 year free maintenance of their portion as per TWAD Board specification and that this scope of work of the respondent merely included the defect liability period as per the TWAD Board norms.



Arb.O.P.No.86 of 2023

70. The Arbitral Tribunal has concluded that the petitioner was justified in terminating the contract vide Ex.C10 Termination Letter dated 06.05.2011. At the same time, the Arbitral Tribunal has concluded that the petitioner was entitled to only Rs.66,00,000/- as compensation payable for breach of Ex.C1 Sub-Contract dated 23.05.2003 as amended by Ex.C4 series Amendments.

71. Specifically, the Arbitral Tribunal has concluded in paragraph 19.14(b) of the impugned Award that on a careful reading of the Amendment No.2A of the 2nd Amendment dated 12.12.2003 (Ex.C4 series), makes it clear that total liability of the respondent to the petitioner, for the breach of the terms of Ex.C1 Sub Contract dated 23.05.2003, which includes the breach of terms of the sub contract regarding the maintenance of the project works for a period of 5 years, as well as the rectification of defect during the defect liability period of 5 years, was named and mutually agreed as a sum of Rs.66,00,000/- and thus a ceiling is fixed on the total liability of the respondent at Rs.66,00,000/-, as compensation payable to the



Arb.O.P.No.86 of 2023

petitioner for the breach of Ex.C1 sub contract dated 23.05.2003.

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72. The Arbitral Tribunal has further concluded in paragraph 20.13 of the impugned Award that the liability for payment of compensation for loss on account of breach of Ex.C1 Sub Contract dated 23.05.2003 was genuine pre-estimate in paragraph 2 of Amendment No.2A of the 2nd Amendment dated 12.12.2003 (Ex.C4 series) in the light of the decision of the Hon'ble Supreme Court in **Sir Chunilal V. Mehta and Sons, Ltd Vs. The Century Spinning and Manufacturing Co. Ltd.**, AIR 1962 SC 1314.

73. Scope of interference under section 34 of the Arbitration and Conciliation Act, 1996 is very limited. This Court can neither sit as a court of appeal or re-appreciate the evidence placed before the Arbitral Tribunal or substitute the finding of the Arbitral Tribunal with its own conclusion on facts or evidence. In this connection, the decision of the Hon'ble Supreme Court in **the Project Director, NHAI Vs. M. Hakim**, (2021) 9 SCC 1 is invited, wherein, it was held that the power to set aside an Arbitral Award under Section 34 of the Arbitration And Conciliation Act, 1996 does not



Arb.O.P.No.86 of 2023

include the authority to modify the award. It further held that an award can be 'set aside' only on limited grounds as specified in Section 34 of the Act and it is not an appellate provision. It further held that an application under Section 34 for setting aside an award does not entail any challenge on merits to an award.

74. The Hon'ble Supreme Court in **Ssangyong Engineering and Construction Co Ltd Vs. National Highway Authority of India**, (2019) 15 SCC 131 has held that an award can be set aside on the ground of patent illegality under section 34 (2-A) of the Arbitration And Conciliation Act, 1996 only where the illegality in the award goes to the root of the matter. It further held that **erroneous application of law by an Arbitral Tribunal** or the re-appreciation of evidence by the court under section 34 (2-A) of the Arbitration and Conciliation Act, 1996 is not available.

75. The Court further held that the above ground is available only where the view taken by the Arbitral Tribunal is an impossible view while



Arb.O.P.No.86 of 2023

construing the contract between the parties or where the award of the tribunal lacks any reasons. The Court further held that an award can be set aside only if an arbitrator/arbitral tribunal decide(s) the question beyond the contract or beyond the terms of reference or if the finding arrived by the Arbitral Tribunal is based on no evidence or ignoring vital evidence or is based on documents taken as evidence without notice to the parties.

76. The Hon'ble Supreme Court in the case of **Ssangyong Engineering** referred to *supra* has observed as follows:-

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.
38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the



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Arb.O.P.No.86 of 2023

ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.
40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).
41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under



“public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, 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. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.

Section 34(2)(a) does not entail a challenge to an arbitral award on merits

43. Sections 34(2)(a)(iii) and (iv) state as under:

“34. Application for setting aside arbitral award.—

(1) * * *

(2) An arbitral award may be set aside by the court only if



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Arb.O.P.No.86 of 2023

—
(a) the party making the application furnishes proof that—

- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;

44. In *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]* , this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India,



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Arb.O.P.No.86 of 2023

the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same”.

77. The Hon’ble Supreme Court has further observed as under:-

“68. A conspectus of the above authorities would show that where an Arbitral Tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the Arbitral Tribunal, as understood in *Praveen Enterprises [State of Goa v. Praveen Enterprises, (2012) 12 SCC 581]*, the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration.

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of



Arb.O.P.No.86 of 2023

submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal”.

78. The challenge to the award on the ground that it is in conflict with the public policy of India and contravention of policy of Indian Law and in conflict of basic notion of morality and justice under Section 34(2)(b)(ii) read with *Explanation I* (ii) & (iii) of the Arbitration and Conciliation Act, 1996. The Hon’ble Supreme Court has explained the position in the case of **Ssangyong Engineering** referred to *supra* as under:-

Most basic notions of justice

70. The expression “most basic notions of ... justice” finds mention in Explanation 1 to sub-clause (iii) of Section 34(2)(b). Here again, what is referred to is, substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court. Thus, in *Parsons [Parsons & Whittemore Overseas Co. Inc.v.Societe Generale de l'Industrie du Papier (RAKTA)]*, 508 F 2d 969 (2nd Cir 1974) , it was held:

“7. Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse



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Arb.O.P.No.86 of 2023

enforcement, on the defendant's motion or *sua sponte*, if 'enforcement of the award would be contrary to the public policy of (the forum) country'. The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to "principles of the law" and awards violative of 'fundamental principles of the law'. In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Contini, "International Commercial Arbitration : The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award" [8 Am J Comp L 283 (1959)] , Am J Comp L at p. 304]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" [70 Yale LJ 1049 (1961)] , Yale LJ at pp. 1070-71].

8. Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points towards a narrow



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Arb.O.P.No.86 of 2023

reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement. [see “Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes” 114-15 (1971); *Digest of Proceedings of International Business Disputes Conference*, 14-4-1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity — considerations given express recognition in the Convention itself — counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice. [*Restatement Second of the Conflict of Laws* 117, comment c, at 340 (1971); *Loucks v. Standard Oil Co.* [*Loucks v. Standard Oil Co.*, 224 NY 99 : 120 NE 198 (1918)] , NY at p. 111].”

71.In *Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH* [*Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH*, 2008 SGHC 67] , the High Court of Singapore held:



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Arb.O.P.No.86 of 2023

“131. In *PT Asuransi Jasa Indonesia (Persero) v.Dexia Bank SA*[*PT Asuransi Jasa Indonesia (Persero) v.Dexia Bank SA*, (2007) 1 SLR (R) 597] [*PT Asuransi Jasa Indonesia (Persero)*], the Court of Appeal explained what would constitute a conflict with public policy (at [57] and [59]):

‘57. ... The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under Section 24 of the Act and Article 34 of the Model Law. ... In the present context, errors of law or fact, *per se*, do not engage the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law when they cannot be set aside under Article 34(2)(a)(iii) of the Model Law.

59. Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a *narrow scope*. In our view, it should only operate in instances where the upholding of an arbitral award would “*shock the conscience*” (see *Downer Connect* [*Downer Connect Ltd.v.Pot Hole People Ltd.*, CIV 2003-409-002878, decided on 19-5-2004 (NZ,



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Arb.O.P.No.86 of 2023

unreported)] , at p. 136, para 58), or is “clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public” (see *Deutsche Schachtbau-und Tiefbohrgesellschaft GmbH v. R'As al-Khaimah National Oil Co.* [Deutsche Schachtbau-und Tiefbohrgesellschaft GmbH v. R'As al-Khaimah National Oil Co., (1990) 1 AC 295 : (1987) 3 WLR 1023 : (1987) 2 Lloyd's Rep 246 (CA)] , Lloyd's Rep at p. 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice : see *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)* [Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F 2d 969 (2nd Cir 1974)] , F 2d at p. 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 [referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration : Legislative History and Commentary* by Howard M. Holtzmann and Joseph E. Neuhaus (Kluwer, 1989) at 914]:

In discussing the term ‘public policy’, it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions*



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Arb.O.P.No.86 of 2023

and principles of justice... It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, *instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.*

(emphasis in original)

132. In *Profilati Italia SRL v.Paine Webber Inc.* [*Profilati Italia SRL v.Paine Webber Inc.*, (2001) 1 Lloyd's Rep 715] (*Profilati*), Moore-Bick, J. made the following observations in relation to the argument that non-disclosure of material documents constituted a breach of public policy in the context of Section 68 of the English Arbitration Act, 1996 (at [17], [19] and [26]):

'17. ... Where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour. Moreover, I do not think that the Court should be quick to interfere under this section [i.e. Section 68(2)(g) of the Arbitration Act, 1996]. In those cases in which Section 68 has so far been considered the Court has emphasised that it is intended to operate only in extreme



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Arb.O.P.No.86 of 2023

cases...

19. Where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the Court may well consider that he procured that award in a manner contrary to public policy. After all, such conduct is not far removed from fraud...

26. Even if there had been a deliberate failure to give disclosure of the two documents in question it would still be necessary for Profilati to satisfy the Court that it had suffered substantial injustice as a result.”

79. The Court in the case of **Ssangyong Engineering** referred to *supra* has further observed as under :-

16. Since the Section 34 petition in the present case is dated 30-7-2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 (the 2015 Amendment Act) with effect from 23-10-2015 — in particular, in the “public policy of India” ground for challenge of arbitral awards. The question which arises is whether the amendments made in Section 34 are applicable to applications filed under Section 34 to set aside arbitral awards made after 23-10-2015.

17. This Court, in *BCCI v. Kochi Cricket (P) Ltd.* [*BCCI v. Kochi Cricket (P) Ltd.*,



Arb.O.P.No.86 of 2023

(2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] (BCCI), has held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after this date. Thus, this Court held : (SCC pp. 335 & 338-39, paras 75 & 78)

“75. Shri Viswanathan then argued, relying upon *R. Rajagopal Reddy v. Padmini Chandrasekharan* [*R. Rajagopal Reddy v. Padmini Chandrasekharan*, (1995) 2 SCC 630] , *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* [*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2001) 6 SCC 356] , *SEDCO Forex International Drill. Inc. v. CIT* [*SEDCO Forex International Drill. Inc. v. CIT*, (2005) 12 SCC 717] and *Bank of Baroda v. Anita Nandrajog* [*Bank of Baroda v. Anita Nandrajog*, (2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689], that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that “for the avoidance of any doubt, it is clarified”, this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to the learned Senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being *Saw Pipes Ltd.* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] and *Western Geco* [*ONGC*



v.Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as has been held in para 18 in *HRD Corpn.v.GAIL (India) Ltd.*[*HRD Corpn.v.GAIL (India) Ltd.*, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] , it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. *It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature.* Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

‘... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the



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Arb.O.P.No.86 of 2023

object of the Act’.

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in *HRD Corpn.v.GAIL (India) Ltd.*[*HRD Corpn.v.GAIL (India) Ltd.*, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] of limiting the grounds of challenge to awards as follows : (SCC p. 493, para 18)

‘18. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC v.Saw Pipes Ltd.* [*ONGC v.Saw Pipes Ltd.*, (2003) 5 SCC 705] has been expressly done away with. So has the judgment in *ONGC v. Western Geco International Ltd.*[*ONGC v.Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Co. Ltd. v.General Electric Co.*[*Renusagar Power Co. Ltd. v.General Electric Co.*, 1994



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Arb.O.P.No.86 of 2023

Supp (1) SCC 644] , where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in *Renusagar [Renusagar Power Co. Ltd. v.General Electric Co., 1994 Supp (1) SCC 644]* . “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the court as understood in *Associate Builders v.DDA[Associate Builders v.DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]* . Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders[Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]* , making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.’]

It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would



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Arb.O.P.No.86 of 2023

otherwise be defeated.”

(emphasis supplied)

18. There is no doubt that the amendments made in Explanations 1 and 2 to Section 34(2)(b)(ii) have been made for the avoidance of any doubt, which language, however, is not found in Section 34(2-A). Apart from the anomalous position which would arise if the section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas sub-section (2-A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively. Thus, in *SEDCO Forex International Drill. Inc.v.CIT* [*SEDCO Forex International Drill. Inc.v.CIT*, (2005) 12 SCC 717] (SEDCO), this Court held : (SCC p. 724, para 17)

“17. As was affirmed by this Court in *Goslino Mario*[*CIT v.Goslino Mario*, (2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also *Reliance Jute and Industries Ltd.v.CIT*[*Reliance Jute and Industries Ltd.v.CIT*,



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Arb.O.P.No.86 of 2023

(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an explanation can add to and widen the scope of the main section (See *Sonia Bhatia v. State of U.P.* [*Sonia Bhatia v. State of U.P.*, (1981) 2 SCC 585 : AIR 1981 SC 1274] , SCC at p. 598, AIR at p. 1282, para 24). If it is in its nature clarificatory then the explanation must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder v. Ram Kumar* [*Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24] , SCC para 44; *Brij Mohan Das Laxman Das v. CIT* [*Brij Mohan Das Laxman Das v. CIT*, (1997) 1 SCC 352] , SCC at p. 354; *CIT v. Podar Cement (P) Ltd.* [*CIT v. Podar Cement (P) Ltd.*, (1997) 5 SCC 482] , SCC at p. 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”.”

19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in *ONGC v. Saw Pipes Ltd.* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] [“*Saw Pipes*”] and *ONGC v. Western Geco International Ltd.* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [“*Western Geco*”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we



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Arb.O.P.No.86 of 2023

declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.”

80. This view has been followed by the Hon’ble Supreme Court in

Dyna Technologies Private Limited Vs. Crompton Greaves Limited,

(2019) 20 SCC 1, wherein, it has been observed as under:-

“29. There is no gainsaying that arbitration proceedings are not per se comparable to judicial proceedings before the Court. A party under Indian Arbitration Law can opt for an arbitration before any person, even those who do not have prior legal experience as well. In this regard, we need to understand that the intention of the legislature to provide for a default rule, should be given rational meaning in light of commercial wisdom inherent in the choice of arbitration.

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

35. When we consider the requirement of a reasoned



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Arb.O.P.No.86 of 2023

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

81. The Hon’ble Supreme Court has reiterated the above position in



Arb.O.P.No.86 of 2023

the case of **MMTC Limited Vs. Vedanta Limited**, (2019) 4 SCC 163,

wherein, it has been held as under:-

“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.

82. In South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) Vs. Oil India Limited, (2020) 5 SCC 164, the Court has reiterated that if the interpretation of contract by Arbitral Tribunal is perverse and is not a possible interpretation, the award passed by it is liable to be set aside.

83. In Patel Engineering Limited Vs. North Eastern Electric



Arb.O.P.No.86 of 2023

Power Corporation Limited, (2020) 7 SCC 167, the Hon'ble Supreme Court has reiterated the position that while interpreting the contract, if the view taken by the Arbitral Tribunal was a possible view, the award is liable to be set aside.

84. In **Indian Oil Corporation Limited through its Senior Manager Vs. Shree Ganesh Petroleum Rajgurunagar**, (2022) 4 SCC 463, it was held as under:-

46. In *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , this Court held that an award ignoring the terms of a contract would not be in public interest. In the instant case, the award in respect of the lease rent and the lease term is in patent disregard of the terms and conditions of the lease agreement and thus against public policy. Furthermore, in *Associate Builders* [*Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] the jurisdiction of the Arbitral Tribunal to adjudicate a dispute itself was not in issue. The Court was dealing with the circumstances in which a court could look into the merits of an award.
47. In this case, as observed above, the impugned award insofar as it pertains to lease rent and lease period is patently beyond the scope of the competence of the arbitrator appointed in terms of the dealership agreement by the Director (Marketing) of the



appellant.

50. In *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust* [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, 2021 SCC OnLine SC 508] this Court referred to and relied upon *Ssangyong Engg. & Construction* [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and held : (*PSA Sical Terminals case* [PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust, 2021 SCC OnLine SC 508] , SCC para 85)

“85. As such, as held by this Court in *Ssangyong Engg. & Construction* [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.”

51. In *PSA Sical Terminals* [PSA Sical Terminals (P)



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Arb.O.P.No.86 of 2023

Ltd. v. V.O. Chidambranar Port Trust, 2021 SCC OnLine SC 508] this Court clearly held that the role of the arbitrator was to arbitrate within the terms of the contract. He had no power apart from what the parties had given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction”.

85. In **UHL Power Company Limited Vs. State of Himachal Pradesh**, (2022) 4 SCC 116, the Hon’ble Supreme Court reiterated the view in the case of **Dyna Technologies Private Limited** referred to *supra* and held as under:-

“18.It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. In ***Dyna Technologies (P) Ltd. v.Crompton Greaves Ltd.*** [***Dyna Technologies (P) Ltd.v.Crompton Greaves Ltd.***, (2019) 20 SCC 1] , the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an



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Arb.O.P.No.86 of 2023

award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

19. In *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.* [*Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552] , advertng to the previous decisions of this Court in *McDermott International Inc.v.Burn Standard Co. Ltd.* [*McDermott International Inc.v.Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [*Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306] , wherein it has been observed that an Arbitral Tribunal must decide in accordance with



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Arb.O.P.No.86 of 2023

the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus : (***Parsa Kente Collieries case [Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552]*** , SCC pp. 244-45, para 9)

“9.1. ...*It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.*

9.2. Similar is the view taken by this Court in ***NHAI v. ITD Cementation India Ltd. [NHAI v. ITD Cementation India Ltd., (2015) 14 SCC 21 : (2016) 2 SCC (Civ)***



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Arb.O.P.No.86 of 2023

716] , SCC para 25 and ***SAIL v.Gupta Brother Steel Tubes Ltd. [SAIL v.Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16]*** , SCC para 29.”

20. In *Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1]* , the view taken above has been reiterated in the following words : (SCC p. 12, para 25)

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. An identical line of reasoning has been adopted in ***South East Asia Marine Engg. & Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd. [South East Asia Marine Engg. & Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., (2020) 5 SCC 164 : (2020) 3 SCC (Civ) 1]*** and it has been held as follows : (SCC p. 172, paras 12-13)

“12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in ***Dyna Technologies (P)***



Arb.O.P.No.86 of 2023

Ltd. v. Crompton Greaves Ltd.[Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] laid down the scope of such interference. This Court observed as follows : (SCC p. 12, para 24)

‘24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. *We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.* Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.’

13. It is also settled law that where two views are possible, the Court cannot interfere in the



Arb.O.P.No.86 of 2023

plausible view taken by the arbitrator supported by reasoning. This Court in ***Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.,*** (2019) 20 SCC 1] observed as under : (SCC p. 12, para 25)

‘25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.’ ”

(emphasis supplied)

22. In the instant case, we are of the view that the interpretation of the relevant clauses of the implementation agreement, as arrived at by the learned sole arbitrator, are both, possible and plausible. Merely because another view could have been taken, can hardly be a ground for the learned Single Judge to have interfered with the arbitral award. In the given facts and circumstances of the case, the appellate court has rightly held that the learned Single Judge exceeded his jurisdiction in interfering with the award by questioning the interpretation given to the relevant clauses of the implementation agreement, as the reasons given are backed by logic”.



Arb.O.P.No.86 of 2023

86. In **Larsen Air Conditioning and Refrigeration Company Vs.**

Union of India and others, 2023 SCC OnLine SC 982, it was held as

under:-

“15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, *sans* the grounds of patent illegality, i.e., that “*illegality must go to the root of the matter and cannot be of a trivial nature*”; and that the tribunal “*must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground*” [ref : *Associate Builders (supra)*]. The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously *omitted* by Parliament, while enacting the Act of 1996. This means that the Parliamentary intent was to exclude power to modify an award, *in any manner*, to the court. This position has been iterated decisively by this court in *Project Director, National Highways No. 45E and 220 National Highways Authority of India v. M. Hakeem*:

“42. *It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc.v.Burn Standard Co. Ltd.,(2006) 11*



Arb.O.P.No.86 of 2023

SCC 181], [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106], [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the “limited remedy” under Section 34 is coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.”

87. In **Som Datt Builders Limited Vs. State of Kerala**, (2009) 10

SCC 259, the Hon’ble Supreme Court has held as under:-

“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. That the present



case is not covered by clauses (a) and (b) is not in dispute. In the circumstances, it was obligatory for the Arbitral Tribunal to state reasons in support of its award in respect of Claims 1 and 4-B. By legislative mandate, it is now essential for the Arbitral Tribunal to give reasons in support of the award. It is pertinent to notice here that the 1996 Act is based on UNCITRAL Model Law which has a provision of stating the reasons upon which the award is based.

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 ***Wool combers 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 quasi judicial 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)

24. Learned Senior Counsel for the contractor referred to a decision of the Delhi High Court in *Delhi Electric Supply Undertaking v. Victor Cable Industries Ltd.* [(2006) 1 Arb LR 297 (Del)] and submitted that where the arbitrator has referred to facts of the case and has noticed some reasoning which in view of the arbitrator was sufficient to arrive at a conclusion for granting relief, award cannot be stated to be unreasoned. He also referred to yet another decision of the Delhi High Court in *Kumar Construction Co. v. DDA* [(1996) 64 DLT 553] wherein it has been observed that the arbitrator is not expected to write an elaborate judgment and where the arbitrator has noticed contentions of the counsel, it cannot be said that the arbitrator failed in stating reasons for the award”.



88. In **I Pay Clearing Services Private Limited Vs. ICICI Bank**

Limited, (2022) 3 SCC 1, it was held as under:-

- “20. The learned Senior Counsel, with the above submissions, requested to set aside the impugned order and to issue directions for remitting the award to Arbitral Tribunal for consideration of the issue, on abrupt and illegal termination of the agreement entered between the parties and to give detailed reasons.
21. On the other hand, Shri K.V. Viswanathan, learned Senior Counsel for the respondent has made the following submissions : the notice of motion moved by the appellant is dismissed by the High Court by assigning valid reasons in the impugned order [*ICICI Bank Ltd. v. I-Pay Clearing Services (P) Ltd.*, 2019 SCC OnLine Bom 13078] and in view of the same, no interference is called for. No grounds are made out in the application filed by the appellant for remitting the matter to the arbitrator, and in fact, the arbitrator has not considered the relevant documentary evidence produced on behalf of the respondent, and passed the award. As the arbitrator has passed the award by ignoring important and relevant evidence on record, it suffers from perversity and patent illegality, which cannot be cured on remittal under Section 34(4) of the Act by the arbitrator. Under guise of adding reasons, the arbitrator cannot take contrary view against the award itself. The arbitrator in resumption proceedings cannot change his award and the same would be contrary to provision under Section 34(4) of the Act and would amount to arbitrator assuming the role of the Court, which alone is empowered to set aside the award.



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Arb.O.P.No.86 of 2023

22. It is submitted by Shri Viswanathan that in spite of sufficient evidence on record to prove that there was “accord and satisfaction” between the parties, without considering such evidence, the arbitrator has proceeded on the premise that there was no “accord and satisfaction” and passed the award in favour of the appellant. The findings recorded on the plea of “accord and satisfaction” in the award without considering the entire evidence on record, constitute patent illegality, as such, same is to be considered only by the Court while considering the application filed under Section 34(1) of the Act. Even assuming that on remittal, the arbitrator wants to consciously hold that there was accord and satisfaction of claims and there was no abrupt and illegal termination of the contract, he would not be able to do so, as he cannot change his own award. The judgments relied on by learned counsel for the appellant are distinguishable on facts and would not render any support to the case of the appellant. Oral submissions made before this Court, run contrary to pleadings on record in the application”.

89. In Union of India Vs. Royal Construction, 2001 SCC OnLine

Cal 476, it was held as under:-

“10. Under the old Arbitration Act, 1940, the law was that the arbitrator was not in general compelled to give reasons. Some 30/40 years ago, in practice, arbitrators hardly, if ever, gave reasons for awards. Experienced arbitrators knew that the giving of



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Arb.O.P.No.86 of 2023

reasons rendered the award liable to attack on various grounds, including error apparent. Even when I joined the bar in 1970, if an award fell for consideration in a case, and the arbitrator had given reasons, it never failed to cause a twitch of the lips or a raising of the eyebrows of learned advocates experienced in the law of arbitration.

11. In those years, cases had not even started to come before the courts, where parties by agreement, were seeking to compel the arbitrators to give reasons. The time upto the decade of the 70's was the time of no reasons in awards.
12. Thereafter things changed a little. In the field of administrative law reasons for orders became compulsory. The administrative waves of demand for reasons hit the arbitral shores. Afterall, the same Judges were sitting on the bench. Parties also started thinking that if they agreed to have a reasoned award then they could compel arbitrators to make a reasoned award.
13. Cases then came before the Court, and the law developed into this, that if the parties expressly agreed that the arbitrator shall give reasons, then a breach of that obligation by the arbitrator might well amount to misconduct and cause the award to be upset.
14. In the stage of the law that we are now in, the situation has changed quite a lot. Under the new Arbitration & Conciliation Act of 1996 it is the law that the arbitrator shall ordinarily give reasons for awards, but it is open to the parties to agree otherwise. Section 31(3) of the new Act might be seen in this regard.



15. In our case, however, we are concerned with the position as under the 1940 Act, but that the arbitrator was here compelled to give reasons is beyond dispute.

17. The authorities on this subject are very helpfully (with respect) set out in an unreported judgment delivered by the Hon'ble Justice Ruma Pal when sitting here and the Hon'ble Justice M.H.S. Ansari in a judgment of the Division Bench dated the 25th of March, 1999 in A.P.O. No. 473 of 1998 (*Union of India v. Singh Verma*).

18. One of the cases referred to therein was also referred to by Mr. Roychowdhury and that is the English case of *Re :Royser* reported at 1963 (1) A.E.R. 612. The other cases are, *inter alia*, M.L. Kapoor, AIR 1974 SC 87, *Municipal Corporation of Delhi*, AIR 1987 SC 2316, *Gurdayal Singh*, AIR 1979 SC 1622.

19. On behalf of the respondents two cases referred to in the above unreported judgment were also specifically placed before us. Those are the cases of *Indian Oil Corporation*, reported at AIR 1988 SC 1340 and of *Gujrat Water Supply*, reported at AIR 1989 SC 973. Both these judgments are of the same Bench consisting the Hon'ble Justice Sabyasachi Mukherjee as his Lordship then was and the Hon'ble Justice S. Ranganathan, as his Lordship then was.

20. The law as it appears from the above authorities and especially the two last ones referred to above is as follows:—

(1) To make a reasoned award the arbitrator has to make his mind known on the basis which he has acted.

(2) Statement of reasons is not the same



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Arb.O.P.No.86 of 2023

thing as the giving of a detailed judgment.

- (3) Reasons are short and intelligible indications of the arbitrator's mind, no more.
- (4) The reasons must have such connection with the conclusions reached by the arbitrator as to show that the arbitrator has not acted irrelevantly, unreasonably or capriciously.
- (5) The reasons should deal with the substantial points raised in the reference”.

90. In **Government of NCT Delhi Vs. M/s.Garg Builders**, 2018

SCC OnLine Del 9900, the Delhi High Court has observed as follows:

- “7. The petitioner in its reply had denied the very maintainability of these claims. Even if the said stand of the petitioner was found to be incorrect, it was for the respondent to have proved the quantification of such claims by way of evidence before the Arbitrator. The respondent cannot rely upon mere non-denial of the figures given in form of a chart by him to sustain such claim. The chart itself cannot be treated as evidence. The award having been passed on basis of no evidence, cannot be sustained.
8. It is indeed surprising that for counter claim no. 2 raised by the petitioner, the Arbitrator has rejected such claim for want of evidence, while the



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Arb.O.P.No.86 of 2023

petitioner had pleaded regarding floating tender for the work and award thereof to M/s Raj Construction Company for an amount of Rs. 5,63,967/-. It is also relevant to note that in the earlier award, the Arbitrator had awarded a sum of Rs. 1 lakh in favour of the petitioner towards counter claim no. 2. This Court in its Judgment dated 09.10.2013 had observed that there was no reason given by the Arbitrator for awarding only Rs. 1 lakh in favour of the petitioner. In the Impugned Award, the Arbitrator has completely rejected the counter claim no. 2 of the petitioner. Such finding of the Arbitrator cannot be sustained”.

91. The Tribunal having come to a conclusion that the petitioner was entitled to terminate the contract *vide* Ex.C10 Letter dated 06.05.2011 and conformed the find relief to Rs.66,00,000/- by incorporating the 2nd Amendment dated 12.12.2003 to Ex.C1 Sub Contract dated 23.05.2003 as if for breach of contract by the respondent, the petitioner was entitled to Rs.66,00,000/- as liquidated damages. Amendment in Ex.C4 substitutes the security deposit clause in Ex.C1 Sub Contract which reads as under:-

SECURITY DEPOSIT

On success of the tender, the sub contractor shall pay Security Deposit at the rates specified in the tender document for the value of work under sub



contractor's scope in the shape of Bank Guarantee or as accepted by the TWAD Board directly to TWAD Board if permissible. Otherwise, Security Deposit in the shape of Bank Draft/FDR in the name of the Main Contractor will be paid to the Main Contractor within two weeks from the date of order issue".

92. Thus, initially, the respondent was to provide security deposit at the rate specified in the Tender Document for the value of work under the respondent's scope of work in the shape of Bank Guarantee or as accepted by the TWAD Board directly to TWAD Board if it was permissible. Otherwise, the security deposit was to be in the shape of Bank Draft/FDR in the name of the petitioner within two weeks from the date of issuance of the order.

93. The performance of contract which was given as above was reduced to Rs.33,00,000/- towards performance security for the respondent's scope of work in view of security deposit as in Ex.C1 Sub Contract dated 23.05.2023.



Arb.O.P.No.86 of 2023

94. Over and above the amount, the Bank Guarantee towards security deposit of Rs.33,00,000/- was also required to be provided as balance security deposit of Rs.33,00,000/- to the petitioner and in absence of such deposit, the petitioner was entitled to recover if the respondent breaches Ex.C1 Sub Contract dated 23.05.2003.

95. The interpretation given by the Arbitral Tribunal is one of the plausible interpretations. It cannot be said that the interpretation by the Arbitral Tribunal was improbable interpretation to conclude that the award suffers from patent illegality.

96. In my view, since scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited, the award does not call for any interference either under Section 34 of the Arbitration and Conciliation Act, 1996 or under Section 34(2)(b)(ii) read with *Explanation I* (ii) & (iii) of the Arbitration and Conciliation Act, 1996.

97. If this Court was sitting as a Court of appeal against the



Arb.O.P.No.86 of 2023

Judgment and Decree passed by the Trial Court, perhaps, this Court could have interfered with such interpretation. Since the scope of interference against Award passed by the Arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 is limited, I am unable to accept the submission of the petitioner.

98. Therefore, the impugned award cannot be interfered with. This Arbitration Original Petition is liable to be dismissed and is accordingly dismissed. Consequently, connected application is closed. No costs.

29.04.2024

Index : Yes/No
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C.SARAVANAN, J.

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Arb.O.P.No.86 of 2023

Pre-delivery Order in
Arb.O.P.(Com.Div.)No.86 of 2023

29.04.2024