



Arb.O.P.(Com.Div.) No.236 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:
08.11.2023

Pronounced on:
04.06.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.236 of 2023

and

A.No.2880 of 2023

M/s.Ravindranath GE Medical Associates Private Limited,
Represented by its Corporate Legal Advisor,
Gleneagles Global Health City,
No.439, Cheran Nagar,
Medavakkam Road, Perumbakkam,
Chennai – 600 100,
Tamil Nadu.

.. Petitioner

Vs.

M/s.Dusters Total Solutions Service Private Limited,
Represented by its Managing Director,
No.332/1, Corporate Miller Road,
3rd Floor, Thimmaiah Road,
Vasanth Nagar,
Bangalore – 560 052.

.. Respondent

Prayer: Original Petition is filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, praying to set aside the Arbitral Award dated 20.02.2023 bearing No.01/2021 passed by the Sole Arbitrator in its entirety and for a direction to the respondent to pay the costs.



For Petitioner : Mr.N.L.Rajah
Senior Counsel
for Mr.E.Jayasankar

For Respondent : Mr.Adeesh Anto

ORDER

The petitioner is aggrieved by the impugned Award dated 20.02.2023 bearing Arb.No.01 of 2021 passed by the Sole Arbitrator appointed by this Court by its Order dated 26.03.2021 in O.P.No.175 of 2021.

2. By the impugned Award dated 20.02.2023, the Arbitral Tribunal has rejected the claim of the petitioner and has allowed the counter-claim of the respondent. Operative portion of the impugned Award reads as under:-

Issue No.1: whether the Respondent is in breach of the “Housekeeping Services Agreement” dt 10.11.2017 with regard to their obligations under the agreement Ex.C1 series?

Issue No.2: Whether the Respondent is liable to indemnify the Claimant under Para 5 of “House Keeping Services Agreement” dt 10.11.2017 Ex.C1 for losses suffered by the Claimant due to actions of the Respondent?

Issue No.6: Whether the Claimant is eligible for compensation and damages for breach of Housekeeping Services Agreement dated 10.11.2017 Ex.C1 by the Respondent?

Issue Nos.1, 2 and 6 are answered as follows:



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(A) *As regards issue no.1, the Claimant did not place crucial materials to show that the Respondent had committed breach of the Housekeeping agreement dt.10.11.2017 Ex.C1 series with reference to their obligations under the Agreement. The issue is answered against the Claimant.*

(B) *Under the Housekeeping Agreement (Ex.C1 series) dt. 10.11.2017, the Respondent is liable to indemnify the Claimant in terms of para 5 for the losses suffered. But the said claim will have to be proved by materials which are believable by the Tribunal and it had not been done so. The issue no 2 is answered against the Claimant.*

(C) *The Claimant had not proved that they are eligible for compensation, damages for the breach of Housekeeping Agreement (Ex.C1 series) dt 10.11.2017 by the Respondent by any acceptable evidence. **The issue no.6 is answered against the Claimant.***

Issue No.3: *Whether the Claimant had proved that they had actually appointed an external independent agency to conduct an unvestigation into the allegations of statutory violations and excess billing by the Respondent, and further, if so, whether such agency has adopted a reasonable methodology to quantify the purported loss suffered by the Claimant of Rs.4,13,27,181/-*

Therefore, it cannot be said that the external independent agency had conducted a proper investigation into the allegations of statutory violations and excess billing by the Respondent and that in doing so, they have not adopted a reasonable methodology to quantify the purported loss suffered by the Claimant. The issue no.3 is held against the Claimant.

Issue No.4: *Whether the Claimant is entitled for compensation/indemnification for a sum of Rs.2,72,78,917/- along with interest at the rate of 18% prayed for in the Claim Statement?*

Issue No.5: *Whether the Claimant has proved that*



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they are entitled to, and whether the Respondent is liable to pay to the Claimant, interest on the amount of Rs. 2,72,78,917/- at the rate of 18% per annum from the date of issuance of the demand notice dated 27.11.2020 (Ex.C6) till date of realisation and further interest at the rate of 18% per annum from the date of the award till realisation?

*With reference to the interest payment claimed at the rate of 18% on the amount of Rs.2,72,78,917/- is concerned since all the claims made by the Claimant have been negated, the question of interest payment does not arise. **Hence, issue no 4 and 5 are answered against the Claimant.***

Issue No.7: *Whether the Respondent is entitled for the counter claim of Rs.3,32,97,811.08/-?*

Issue No.8: *Whether the Respondent has proved that the Claimant was liable to pay a sum of Rs, 2,56,03,540.70 towards unpaid invoices?*

Issue No.9: *Whether the respondent is entitled to interest of Rs.76,94,270.38/- at the rate of 18% on the unpaid invoices from the date of expiry of the credit period under the invoices, till the date of the counterclaim, and future interest at the rate of 18% per annum from the date counter claim till the date of full realisation of the award amount from the Claimant? (As corrected)*

*The Claimant is not only bound to refund the amounts deducted from the due payable to the Respondent but also to pay for the subsequent unpaid invoices raised by them. Further, the agreement itself provides for interest at the rate of 18%. Therefore, the Respondent is entitled for the counter claim of Rs.3,32,97,811.08 including the interest at the rate of 18% from the date of counter claim till the date of Award and further entitled for future interest at the rate of 12% p.a. from the date of the Award till the date of its realisation. **The issues no.7,8 and 9 are decided in favour of the Respondent.***

Cost :

Parties are allowed to bear their own costs."



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3. The petitioner was the claimant before the Arbitral Tribunal, who claimed that the respondent had done excess billing for the service provided to the petitioner/claimant between January 2018 to July 2020 for a sum of Rs.2,72,78,917/-. The claim of the petitioner/claimant before the Arbitral Tribunal was based on Ex.C3 Draft Report dated 19.09.2020 and Final Report dated 08.12.2020 in Ex.C22 Series of FTI Consulting, an external agency was employed by the petitioner/claimant to investigate whether the respondent had done excess billing on the petitioner/claimant.

4. Before the Arbitral Tribunal, the respondent herein had made a counter-claim of Rs.3,32,97,811/-. As on the date of the counter-claim, a sum of Rs.2,56,03,540.70/- was allegedly due and together with an interest of Rs.76,94,270/- at 18% per annum.

5. Along with the counter-claim filed on 21.10.2021, the respondent had also filed I.A.No.01 of 2021 before the Arbitral Tribunal for a direction to direct the petitioner/claimant to deposit a sum of Rs.1,90,99,554/- or in the alternative furnish a Bank Guarantee for an



equivalent sum.

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6. The above application was dismissed by the Arbitral Tribunal with the observation that the respondent, the applicant therein had not shown any *prima facie* case to succeed except by stating certain amounts were admittedly due to them, which was disputed by the petitioner/claimant.

7. The dispute before the Arbitral Tribunal arose on account of the arrangement between the petitioner/claimant and the respondent under Ex.C1 House Keeping Services Agreement dated 10.11.2017 (hereinafter referred to Agreement dated 10.11.2017) along with the extension letters dated 17.01.2020 and 02.07.2020 to the aforesaid agreement.

8. Under Ex.C1 Agreement dated 10.11.2017, the respondent was appointed as a service provider for supply of manpower and for management of the Hospital run by the petitioner/claimant in their Perungudi Hospital. The Agreement was to be in force for a period of two years and was deemed to have commenced from 01.01.2018. The last date as per Clause 6 of Ex.C1 Agreement was before 31.12.2019.



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9. Though Ex.C1 series Agreement dated 10.11.2017 came to an end on 31.12.2019, the petitioner/claimant extended the arrangement vide Extension Letter (Ex.C1 series) dated 17.01.2020 for the period between 01.01.2020 and 31.03.2020. Extension Letter (Ex.C1 series) dated 17.01.2020 states the extension of arrangement for House Keeping Service at GGHC, Chennai i.e., the petitioner/claimant was subject to the following terms and conditions as under:-

“As you are aware that the above referred agreement dated 10.11.2017 entered into between us was expired on 31.12.2019. In this regard, the management authorities of our company upon deliberations have decided to extend your services for another 3 months period.

Consequently, you are hereby notified that the above referred agreement dated is being extended from 01.01.2020 till 31.03.2020, subject to the following terms and conditions:

- 1. You shall be required to provide efficient services during this extended period at the same rates (consideration) as agreed to be provided under the above referred agreement dated 10.11.2017 and there shall be no revision of rates under any circumstances.*
- 2. You shall not indulge in any act that may cause prejudice to the rights and interest of our company.*
- 3. This extension letter has been issued by us only based on the administrative requirement and in order to facilitate the agreement closure process without any inconvenience. Hence, it shall not be construed as an intent for renewal of your services whatsoever.*



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4. *It is herewith made clear that upon expiry of this extended period, there shall be no further requirement for serving any notice period and the said agreement dated w.e.f 31.03.2020.*
5. *You shall continue to provide Housekeeping services at GGHC and comply with your statutory & other obligations in strict accordance with the terms & conditions stipulated under the above referred contract dated 10.11.2017 until 31.03.2020.*
6. *Notwithstanding anything contained herein, the management of our company at its discretion shall extend the agreement for further periods as it feels necessary.*
7. *Upon expiry on this extended agreement period, you shall carry out the necessary final formalities as required by us.*
8. *You shall also be required to furnish the proof of payment of wages made to the concerned employees for the period from inception (10.11.2017) till date.”*

10. Thus, Clause 5 of Extension Letter (Ex.C1 series) dated 17.01.2020 renewed the statutory obligation of the respondent in strict accordance with the terms and conditions under Ex.C1 series Agreement dated 10.11.2017.

11. By the Second Extension Letter (Ex.C1 Series) dated 02.07.2020, the petitioner/claimant extended the service of the respondent for a further period of three months till 31.07.2020.



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12. Clauses 1 to 5 of the Extension Letter (Ex.C1 series) dated 17.01.2020 extracted above was reiterated. In view of the discrepancies, the contract of the respondent service provider for further period was not extended vide Notice dated 25.07.2020.

13. By the Notice dated 25.07.2020, the petitioner/claimant has flagged certain issues which were in the background. It has been stated that despite repeated request, the respondent had failed to remit the salaries to the concerned staff/workers for the month of May and June 2020 and hence, the petitioner/claimant was directly remitting the salaries to the concerned staff/workers for the said period as communicated to the respondent vide Ex.C16/R12 E-mail dated 02.07.2020 and Ex.R12 series dated 07.07.2020 and therefore, the total amount incurred towards remittance of the salary for the employees during the two months will be deducted and paid from the outstanding dues of the petitioner to the respondent.

14. In the Notice dated 25.07.2020, the petitioner/claimant further stated that default in payment of statutory dues (PF + ESI, etc.,) for any of the contracted employees would be construed as a material breach in



terms of Ex.C1 Agreement dated 10.11.2017 and will warrant indemnification from the respondent.

15. In the said Notice dated 25.07.2020, it was further stated that in the event of any unwarranted liability to the petitioner/claimant on account of any breach of Agreement/statutory violation committed by the respondent, indemnification clause will be invoked and contingent liability will be deducted from the outstanding amounts payable by the petitioner/claimant to the respondent.

16. The petitioner/claimant filed the Claim Statement before the Arbitral Tribunal pursuant to the Order dated 26.03.2021 of this Court in O.P.No.175 of 2021 appointing the Learned Arbitrator. The claim petition is dated 30.06.2021. At the time of filing of the claim petition on 30.06.2021, the petitioner/claimant had filed a total of 12 documents and had made a claim on the respondent for a sum of Rs.2,72,78,917/- together with interest from 27.11.2020 being the date of Ex.C6 Notice dated 27.11.2020 till the date of realisation.

17. The claim of the petitioner/claimant was purely based on the alleged excess billing by the respondent on the petitioner/claimant in their



monthly invoices during the period between January 2018 till July 2020 and for the statutory violation allegedly committed by the respondent M/s.Dusters Total Solutions Service Private Limited India and its sub-contractor namely M/s.Carpet India, Bangalore and further interest.

18. In the course of the proceeding before the Arbitral Tribunal, the petitioner has filed a total of 42 exhibits as detailed below:-

Sl. No.	Date	Description	Ex.No.
1.	10.11.2017	Housekeeping agreement entered between the Claimant and the Respondent	C1
2.	01.01.2018	Agreement entered between the Respondent and M/s.Carpet India (Sub Contracting agreement)	C2
3.		Draft Report given by the independent agency (FTI Consulting)	C3
4.	---	Computation of loss incurred by the Claimant during March 2020 till July 2020	C4
5.	19.10.2020	Minutes of the meeting held between the Claimant and Respondent	C5
6.	27.11.2020	Claimant's counsel's notice to the Respondent to pay the outstanding claim.	C6
7.	10.12.2020	Claimant's counsel's notice to the Respondent invoking arbitration clause	C7
8.	07.01.2021	Respondent's counsel's interim reply to the Claimant's counsel	C8
9.	25.01.2021	Petition filed in O.P.No.175/2021, High Court: Madras	C9
10.	05.02.2021	Respondent's counsel's reply to the Claimant's counsel	C10
11.	26.03.2021	Order passed by the High Court in Arb.OP No.175/2021	C11
12.	01.11.2017	Extract of the Board Resolution of the Claimant's company	C12
13.	19.01.2018	Emails sent by the representatives of Claimant to the	C13



Sl. No.	Date	Description	Ex.No.
	to 30.07.2020	Respondent	series
14.	20.01.2018	Respondent's email to the Claimant informing the engagement of sub-contractor	C14
15.	07.05.2018	Email sent by the Claimant to the respondent seeking documents as per checklist for statutory compliance audit	C15
16.	02.07.2020	Email sent by the Claimant to the respondent reminding them about not paying the wages of the contract staff.	C16
17.	---	Statement showing the details of payment made by the Claimant to the Respondent from January 2018 to July 2020	C17
18.	07.04.2020 to 22.05.2020	Emails sent by the Claimant to the respondent seeking the relevant documents of the concerned contract workers towards Internal Audit/External Investigation	C18 series
19.	10.04.2020	Emails sent by the Claimant to the respondent pointing out the discrepancies in the invoice/ documents submitted by it.	C19 series
20.	11.08.2020	Email sent by the Claimant to the respondent with the status report on pending documents for Internal Audit / External Investigation with enclosure	C20
21.	22.05.2020	Email sent by the Claimant to the respondent seeking related documents of the concerned contract workers towards Internal Audit / External Investigation.	C21
22.	13.07.2020 & 08.12.2020	Engagement letter (13.7.2020) issued by the Claimant to FTI Consulting and the Final Investigation report (8.12.2020) & working sheets	C22 series
23.	25.02.2020	Email sent by the Claimant to the Respondent requesting for furnishing of documents relating to the sub-contractor	C23
24.	20.03.2020	Respondent's reply to the Claimant informing the termination of the sub-contract.	C24
25.	30.06.2020	Email regarding internal evaluation conducted by the claimant	C25
26.	13.06.2019	Govt. of India's notification on revision of ESI (Employer & Employee) contribution w.e.f. 01.07.2019	C26
27.	31.07.2020	Notice of the Claimant seeking remittance of the terminal benefits of the contract workers deployed by	C27



Sl. No.	Date	Description	Ex.No.
		the Claimant after the termination of the contract	
28.	22.05.2020	Email sent by the respondent to the Claimant proposing to cover the employees under the ESI Scheme	C28
29.	---	Audited Financial Accounts statement and P&L of the Claimant for the years 2018-19 and 2019-20	C29 series
30.	24.09.1998	Certificate of Incorporation of the Claimant Company (issued by the ROC)	C30
31.	---	Working Sheet on the derivation of final balance loss amount to be compensated by the respondent along with relevant details.	C31
32.	---	Rule 78 of the Contract Labour (Regulation & Abolition) Central Rules, 1971	C32
33.	---	Working Sheets supporting the report given by the external agency (FTI Consulting)	C33 series
34.	03.12.2021	Authorisation Letter filed by CW1	C33A
		Marked during Cross-examination of CW1	
35.	---	Attendance sheet for January 2018	C34 series
		Document filed along with affidavit of CW1	
36.	06.02.2022	Minutes of the purchase committee Meeting along with e-mail exchange between parties	C35
37.	11.03.2017	Request For proposal before awarding the contract. (RFP)	C36
38.	25.02.2022	Authorisation Letter in favour of CW2 to depose in the enquiry	C37
39.	---	Authorisation Letter in favour of CW3 to depose in the enquiry	C38
40.	16.10.2020	Invoice No.134001079 submitted by the FTI consulting to the Claimant towards professional services fees	C39(1)
41.	16.10.2020	Invoice No. 134001107 submitted by the FTI to the Claimant towards professional services fees	C39(2)
42.		Annual report of the claimant company	C40
43.	April 2018 to June 2018	Documents filed along with Affidavit of Ameya Gopal Lahoti (CW2) dt. 12.4.2022 enclosing attendance sheets relating to the DTSS staff (substituting the earlier	C41



Sl. No.	Date	Description	Ex.No.
		document fair copy filed after retrieving the same with the covering e-mail date 30.06.2020 recorded in the minutes dated 30.07.2020	
44.	03.05.2016	Letter sent by ESIC -Regional Office (Tamilnadu) to the claimant	C42

19. On behalf of the respondent, the respondent had marked Ex.R1 to R30 as detailed below:-

Sl. No.	Date	Description	Ex.No.
1.	19.08.2021	Certified Copy of the Board Resolution authorizing Mr.Sanjeev Kumar (RW1) to act as the authorized signatory	R1
2.	09.09.2017 to 27.10.2017	Emails between the Respondent and Claimant	R2 series
3.	18.10.2017	Housekeeping services agreement	R3
4.	19.01.2018 to 22.01.2018	Emails evidencing request and approval of the sub-contractor namely Carpet India	R4 series
5.	23.07.2021	Transition closure report dt.27.2.2018 shared with the Claimant by the respondent	R5
6.	24.08.2019 & 19.09.2019	Client Feedback Forms, also referred to as C-SAT or customer satisfaction reports shared by the Respondent along with the accompanying emails	R6 series
7.	24.02.2020 to 04.06.2020	Emails exchanged between the Claimant and the Respondent regarding payment of the outstanding invoices	R7 series
8.	05.06.2020 to 11.06.2020	Emails exchanged between the Respondent and the Claimant	R8 series
9.	12.06.2020 to 22.06.2020	Emails between the Respondent and the Claimant evidencing the continuous follow up by the Respondent with the Claimant regarding its outstandings	R9 series



Sl. No.	Date	Description	Ex.No.
10.	24.06.2020	Emails evidencing acceptance by Mr. Pratap as regards the payment of 30% of their pending monthly salaries by the Respondent	R10 series
11.	30.06.2020	Email evidencing Mr. Reddy seeking the details of the payment as well as statutory payment, along with other emails	R11 series
12.	02.07.2020 to 07.07.2020	Email by Mr. Anjaneya Reddy alleging breach of trust and contractual obligations by the Respondent	R12 series
13.	09.07.2020	Demand Notice issued by Respondent to the Claimant	R13
14.	22.07.2020 to 31.08.2020	Email correspondence between the parties	R14 series
15.	07.08.2020	Letter by the Respondent to Claimant's letter dt. 31.7.2020 (Ex.C27)	R15
16.	03.06.2020	Email along with a request for proposal by the Claimant to the Respondent	R16
17.	03.11.2020	email attachment thereto clarifying the summarized workings pursuant to the meeting dated 19.10.2020 held (Ex.C5 between claimant and the respondent)	R17 series
18.	08.12.2020	Email from the Respondent acknowledging the meeting held on 04.12.2020 and request for the minutes to be supplied.	R18
19.	18.11.2019	Email along with the e-invoices issued by the Respondent to the Claimant for the billing months from October 2019 till June 2020	R19 series
20.	15.06.2020	Emails along with the e-invoice for the month of June 2020 with supporting documents	R20
21.	January 2018	Attendance register maintained by the Respondent	R21
22.	---	Statement / calculation of ESI deductions along with premium paid towards GPA and MI;	R22
23.	---	Premium receipts towards the GPA and MI	R23
24.	January 2020	E-attendance register	R24
25.	---	Invoices raised by the Respondent on the Claimant along with a table dealing the outstanding amount and	R25



Sl. No.	Date	Description	Ex.No.
		adjustments	
26.	---	Statement setting out the outstanding amounts and the interest computation	R26
27.	03.05.2016	Letter from ESI to the Claimant	R27
28.	01.07.2017	Letter from the Claimant to ESI to allot the ESI Number for Chennai branch	R28
29.	16.04.2018 to 15.04.2019	Group Personal Accident Policy	R29
30.	09.09.2017 to 23.07.2017	Email exchange reference ESI exemption	R30

20. The petitioner/claimant had engaged the services of an External Investigating Agency namely FTI Consulting on 13.07.2020 who had given Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.12.2020. This was purportedly after Ex.C18 Series E-mails of the petitioner/claimant to the respondent between 07.04.2020 and 25.04.2020 asking for relevant documents of the concerned contract staff/workers towards the payments of amount by the petitioner/claimant to the respondent was not responded by the respondent.

21. Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final



Report dated 08.12.2020 were marked through CW-2, an employee of FIT Consulting. These reports concluded that the respondent had over invoiced the petitioner/claimant under Ex.C1 Series Agreement dated 10.11.2017 between January 2018 and February 2020. It was canvassed before the Arbitral Tribunal that the invoices raised by the respondent on the petitioner/claimant were merely based on attendance sheet without corresponding declaration before the authorities under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and that there were no records to show that the respondent had deployed the staff/workers as was claimed in the invoice which was settled earlier.

22. A reference was also made to the Minutes of the Meeting held on 19.10.2020 regarding the discrepancy found in the invoices raised by the respondent on the petitioner/claimant during the audit conducted by the petitioner/claimant and for an explanation/clarification from the respondent.

23. It is the case of the petitioner/claimant that the impugned



Award passed by the Arbitral Tribunal is liable to be set aside as there is patent illegality.

24. The Learned Senior Counsel for the petitioner/claimant submit that the entire demand in the claim statement for the aforesaid amount is on the strength of the indemnification clause (Clause 5) in Ex.C1 Series Agreement dated 10.11.2017.

25. It is the specific case of the petitioner/claimant that the Arbitral Tribunal not only erred in rejecting the claim of the petitioner for the aforesaid sum of Rs.2,72,78,917/- but also erred in awarding the counter-claim of the respondent for a sum of Rs.3,32,97,811/- [Total amount with regard to the unpaid invoices for Rs.2,56,03,540/- + Interest of Rs.76,94,270/-] for the services rendered and invoices raised on the petitioner for the services provided from 01.01.2020 till 30.06.2020.

26. It is submitted that the failure to recover/consider the relevant evidence in the form of Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.12.2020 of the expert (Forensic Report of FTI Consulting) and consideration of irrelevant materials shows perversity and therefore, the impugned Award suffers from patent



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illegality and the impugned Award is liable to be set aside.

27. In this connection, the Learned Senior Counsel for the petitioner/claimant has drawn attention to Clauses 1.4 and 2.9 of Ex.C1 Agreement dated 10.11.2017, which reads as under:-

“1.4 The monthly consideration payable by Company to DTS for the services shall as per Annexure A. The monthly consideration aforesaid will be paid by Company to DTSS, against monthly invoices raised by DTSS after deducting tax at source and applicable Goods and Services Tax (GST), if any. All payment shall be made within 30 (thirty) days of receipt of the concerned invoices. All such invoices must be supported by attested copies of receipted challans for deposit of provident Fund, E.S.I., and other dues of its outsourced personnel. If any changes are made in the Services or personnel, by mutual consent of the parties, the consideration payable by Company to DTSS shall be varied proportionately. All late payments by the Company will attract interest at the rate of 18% (eighteen percent) per annum.

2.9 DTSS shall comply with all local labour and laws regarding the deployment of staff at Company's Premises.”

28. The Learned Senior Counsel for the petitioner/claimant has relied on the following decisions:-

“1.Statesman Ltd and another Vs. Eighth Industrial Tribunal West Bengal and others, 2004 (4) LLN 986;

2.Sahayadri Earthmovers Vs. L and T Finance



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Ltd and others, 2011 (4) Mh L J;

3.Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49;

4.SSANGYONG Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131;

5.Patel Engineering Limited Vs. North East Electric Power Corporation Limited, (2020) SCC 167;

6.The Principal General Manager, BSNL Vs. The Administrator, ISHA Foundation in Arb.O.P.(Comm Div.) No.20 of 2022;

7.M/s. Sun Edison Solar Power India Pvt. Ltd., Vs. Kumar Pramendra in Arb.O.P.(Comm. Div.) No.1 of 2021;

8.Suzlon Energy Limited Vs. Indowind Energy Limited, MANU/TN/9852/2019;

9.Mohana Rao Dandamudi Vs. The Government of Tamil Nadu and Ors., MANU/TN/3275/2021;

10.PSA SICAL TERMINALS PVT. LTD., Vs. THE BOARD OF TRUSTEES OF V.O.CHIDAMBRANAR PORT TRUST in Civil Appeal Nos.3699-3700 of 2018;

11.Saravana Selvarathinam Dairy Division Vs. Nivjer Infrastructure and Ors., MANU/TN/8386/2021;

12.Navin Housing & Properties Pvt Ltd., Vs. Hemalatha and Ors., MANU/TN/0522/2022;

13.Alice Blue Financial Services Private Limited Vs. Jeeva Ratnam Vangari, MANU/TN/8575/2022;



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14.Chandradhar Goswami & Others Vs. Gauhati Bank Ltd., AIR 1967 SC 1058;

15.Central Bureau of Investigation Vs. V.C.Shukla and others, (1998) 3 SCC 410 and

16.M/s.Superior Crafts & Ors., Vs. Sudhir Gupta, 2013 SCC OnLine Del 4067.”

29. It is submitted that CW2 who prepared Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.12.2020 was examined and cross-examined. The documents to support this claim was filed as Ex.C33 Working Sheet supporting Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series containing Final Report, Attendance Registers/Records and Ex.C41 Attendance Sheet relating to DTSS). Therefore, it is submitted that the petitioner has proved the claim, which was ignored by the learned Arbitrator.

30. It is submitted that the fundamental error apparent on the face of the record which goes to the root of the matter and thus vitiates the impugned Award as completely as the Arbitral Tribunal has passed the whole impugned Award based on the above findings only.

31. It is submitted that no application has been filed supporting the present case which deals with a wrong finding of fact. Secondly and most



importantly, the Arbitral Tribunal wrongly holds that the terms of Ex.C1 Series Agreement dated 10.11.2017 have not been incorporated in the subsequent Extension Letters dated 17.01.2020 and 02.07.2020 in the C1 series. This, as has been demonstrated earlier was wrong. It is submitted that assuming that the Arbitrator's view was right, then the question follows which contract the Arbitral Tribunal applied to allow the counter-claim of the respondent since the extension periods are the periods to which the counter-claims relate to. The impugned Award does not even state which contract the Arbitrator applied to the counter-claim.

32. It is submitted that the Arbitral Tribunal conveniently overlooks the fact that the statutory records were in the custody of the respondent. The respondent was duty bound to produce the same, which it failed to discharge. Therefore, adverse inference ought to have been drawn against the respondent. It is submitted that the Arbitral Tribunal on the other hand has cast an obligation on both parties and proceeds as if there is a lapse on the part of the petitioner/claimant too, which is obviously erroneous. Both, to support the claim of the respondent and to counter the claim of the petitioner/claimant, these statutory records in the custody of the respondent are the bedrock.



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33. It is submitted that the respondent failed to produce the same and therefore must face the legal consequences. It is submitted that the Arbitral Tribunal failed to take note of the same, and grievously erred in holding that “none of the parties have produced the statutory registers”.

34. It was further submitted that a meeting was held on 19.10.2020 which was also recorded in the petitioner/claimant CCTV video footage which was marked as Ex.E.E.1. The Minutes of the Meeting signed by the parties has also been produced. It is submitted that the Arbitral Tribunal has rendered a finding completely contradictory to the evidence before the Arbitral Tribunal and therefore, the Award is erroneous.

35. It is submitted that there is no contractual or legal requirement under any law to share the FTI Report with the respondent prior to initiation of arbitral proceedings. The FTI Report is only proof of the allegations made by the petitioner/claimant against the respondent for the Arbitral Tribunal to consider. They are required only to be filed before Arbitral Tribunal in support of their claim. The Arbitral Tribunal erred grievously in discounting the FTI Report on the basis that it was not shared with the respondent and this also is an error apparent on the face of the record. It is submitted that the Arbitral Tribunal has ignored Ex.C3



Draft Report dated 19.09.2020 and Ex.C22 Series of Final Report dated 08.12.2020 as not scientific.

36. It was submitted that the Arbitral Tribunal has not stated what is “scientific basis” that was expected. The FTI Report very clearly shows that invoices and attendances sheets do not match and therefore, nothing more was required to be established. The Arbitral Tribunal failed to note that the Attendance Register/Attendance Records themselves were submitted by the respondent to the petitioner/claimant which in turn was handed over to FTI Consulting. The Arbitral Tribunal in the impugned Award erred in proceeding on the basis that the FTI Report was prepared on the basis of Attendance Register/Attendance Records maintained by the petitioner/claimant which is not the case. Thus, this finding is also a grave error.

37. It was submitted that the Arbitral Tribunal in Para 116 of the impugned Award has failed to appreciate the fact that the meeting was not sought to be proved only through recording. The Minutes of the Meeting signed by the parties has also been produced. It is stated that the Arbitral Tribunal has failed to appreciate the fact that there is both a video and audio recording of the meeting which has been marked as



(Ex.EE1 & Ex.C5). The video recording, audio recording and the minutes of the meeting taken together clearly show that the respondent has at least partly admitted their guilt. This has been completely ignored by the Arbitral Tribunal and that it is an established rule that if an impugned Award ignores vital and relevant evidence, it is liable to be set aside.

38. It was submitted that the Arbitral Tribunal in Para 123 of the Award has failed to appreciate the fact that there is no contractual or legal requirement under any law to share the FTI Report with the respondent. The FTI Report is only proof of the allegations made by the petitioner/claimant against the respondent for the Arbitral Tribunal to consider. They are required only to be filed before the Arbitral Tribunal in support of their claim. The Arbitral Tribunal erred grievously in discounting the FTI Report on the basis that it was not shared with the respondent and this also an error apparent on the face of the record, as it goes against the terms of the agreement between the parties.

39. It was therefore submitted that the Arbitral Tribunal failed to see that the Attendance Registers/Wage Register-cum-Muster Roll for contract labour are to be maintained in Forms XVI and XVII and be submitted to the statutory authorities under the provisions of the Contract



Labour (Regulation & Arbitration) Rules, 1971. In this entire dispute, all that the respondent had to do was to produce the duly authenticated forms, they had submitted to the statutory authorities in support of their assertions if the same were true. The Arbitral Tribunal fails to see that the failure of the respondent to produce these records entitles the petitioner's/claimant's claim to be allowed and the respondent's counter-claim to be dismissed.

40. It is submitted that the Arbitral Tribunal in Para 173 of the Award has failed to note that the Attendance Registers/Attendance Records (not the Statutory Registers but the ones claimed to be maintained by the respondent) themselves were submitted by the respondent to the petitioner/claimant which in turn was handed over to FTI Consulting. The Arbitral Tribunal in the impugned Award erred in proceeding on the basis that the FTI Report was prepared on the basis of Attendance Register/Attendance Record maintained by the petitioner/claimant which is not the case. Thus, this finding is also a patent error on the face of the record.

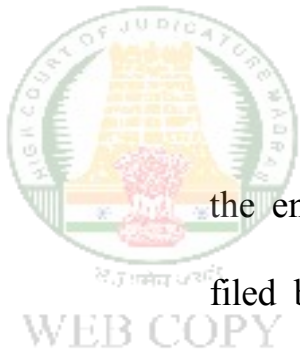
41. It was further submitted that the Arbitral Tribunal has failed to take note of the fact that the respondent has committed clear breach of



Clause 1.4 of Agreement and therefore, is not eligible for any counter-claim or interest as ordered above, especially in light of the fact that they have not produced any documents in support of their invoice.

42. It is submitted that the Arbitral Tribunal has failed to appreciate the fact that none of the monthly invoices raised by the respondent during the contract period has tallied with the respective attendance registers/attendance records maintained and submitted by the respondent till date which was also borne out by the FTI Reports and that the said attendance registers/records are the very basis of the billing of the invoices, towards which the respondent has not been able to produce any valid justification till date. It is also stated that the respondent has not provided the attested copies of receipted challans for deposit of Provident Fund, E.S.I., and other dues of its outsourced personnel for clearance of full invoice amount. Therefore, the petitioner/claimant was right in invoking the indemnity clause and raising the claim for losses incurred by the petitioner/claimant.

43. It was further submitted that the Arbitral Tribunal has allowed



the entire counter-claim despite the fact that there were no documents filed by the respondent in support of their invoices raised during the contract period. (January 2018 till July 2020) which clearly amounts to breach of terms and conditions of the Agreement. Hence, the impugned Award is patently illegal on the face of it and is liable to be set aside.

44. It is therefore submitted that the Arbitral Tribunal has not considered the FTI Report filed by the petitioner/claimant on completely unsustainable grounds stating that the finding of the said FTI Report was not on scientific basis as no forensic audit was done. The Arbitral Tribunal having not found any flaw in the evidentiary value of the FTI Report erred gravely in not considering the same.

45. It is submitted that the Arbitral Tribunal has deliberately ignored the Minutes of the Meeting and video recording which are authenticated and ignored the material evidence, without any valid reasons.

46. It is submitted that the Arbitral Tribunal while awarding the counter-claim has failed to appreciate the fact that the wages paid by the petitioner/claimant directly to the contract staff/workers deployed by the respondent and its sub-contractor for the period between May 2020 till



July 2020 were not adjusted by the respondent in the respective monthly invoices.

47. It was therefore submitted that as per the Order passed by the Arbitral Tribunal in I.A.No.1 of 2021, it was clearly held that the respondent had not made out any *prima facie* case except by stating certain amounts were admittedly due to them, which counter-claim has been disputed by the petitioner/claimant.

48. On the other hand, the learned counsel for the respondent would submit that an impugned Award can be sought to be set aside under Section 34 of the Arbitration and Conciliation Act, 1996, only on limited grounds, *inter-alia*, where the Court finds that the impugned Award is in conflict with the public policy of India and is vitiated by patent illegality appearing on the face of the Award, provided that an Award shall not be set aside merely on the ground of an erroneous application of the law or by the appreciation of evidence.

49. It was submitted that it is well-settled law that the ground of an Arbitral Award being in conflict with the public policy of India can only



be raised under certain circumstances and such ground cannot be used to challenge every Arbitral Award that has gone against a party. The phrase “public policy” does not indicate “a catch-all provision” to challenge Awards before an Appellate Forum on infinite grounds as per the decision of the Hon'ble Supreme Court in **Welspun Speciality Solutions Ltd Vs. Oil and Natural Gas Corporation Limited**, (2022) 2 SCC 382. Illegality must go to the root of the matter, and if the illegalities are of trivial in nature, it cannot be held that the Award is against public policy. As per the decision of the Hon'ble Supreme Court in **ONGC Vs. Western Geco**, (2014) 9 SCC 363, the Award can be set aside only if it is so unfair and unreasonable that it shocks the conscience of the Court.

50. It was further submitted that while applying the public policy test to an Arbitration Award, 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 necessary 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. Once it is found that the Arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.



51. It was further submitted that the grounds raised by the petitioner/claimant in its petition seeking setting aside are based on the Arbitrator's appreciation of the evidence on record and the testimony of the witnesses. The said grounds not available to the petitioner/claimant under Section 34 of the Arbitration and Conciliation Act, for the reason that the examination of the facts of the case and the admissions and depositions of the witnesses is entirely within the jurisdiction of the Arbitrator and the same cannot be re-assessed or re-examined by this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

52. It is submitted that the Arbitral Tribunal has, on the basis of the documents available on record and on the appreciation of evidence on record, come to a reasoned observation and finding as to whether the respondent has breached its obligations under the Agreement and whether the claimant has proved the same. In view of the reasonableness in the finding of the Arbitrator, such Award cannot be assailed under Section 34 of the Arbitration and Conciliation Act, 1996.

53. It is settled law that the Arbitral Tribunal is the ultimate fact finding authority of the quality and quantity of the evidence. Once it is



held that the Arbitrator's approach is not arbitrary or capricious, then he is the last word on facts, as held in the **Associate Builders Vs. Delhi Development Authority**, (2015) 3 SCC 49;

54. It was submitted that the Arbitral Tribunal has rightly observed that the difference of opinion of the parties regarding the said meeting. The respondent has unequivocally disputed the minutes of the said meeting as recorded by the petitioner/claimant and has detailed the background of the meeting. It was on account of this dispute raised by the respondent that the petitioner/claimant was necessitated to produce the purported recordings of the said meeting. The Arbitral Tribunal has rightly observed that there was no proof of the warning of the installation of the CCTV camera in the room or that the meeting was recorded, except an assertion made by CW3.

55. It is therefore submitted that the Arbitral Tribunal has observed that (a) the video does not picture the warning notice, (b) CW-3 admits a gap in the video between 15.43 hours and 16.24 hours of 41 minutes, (c) that no clarification has been provided by CW3 who requested for the footage and who gave approval for sharing the footage and (d) the



minutes of the meeting marked as Ex.C5 also does not mention the video recording of the meeting. Therefore for the stated reasons, the Arbitral Tribunal has chosen not to rely upon the said minutes. This cannot be said to be erroneous, perverse or a patent illegality going to the root of the matter or illegal and rendering the Award unsustainable, as alleged by the petitioner/claimant.

56. It is submitted that the Arbitral Tribunal also observes that the reason why Phase II of the investigation was given up was also not explained. The Arbitral Tribunal further goes on to observe that the petitioner herein did not go to the Police for the alleged falsification of accounts and over claim, and also did not order for a forensic audit for preparing an independent Report.

57. It was therefore submitted that the Arbitral Tribunal observes that the author of the Report had come to know that there were several other records which could have spoken about the attendance of workmen and some of the entries were falsified as per the information received



during discreet enquiries, they ought to have questioned the respondent.

The Arbitral Tribunal further observes that CW2 has admitted that the entire exercise was not an investigation but only a fact finding review. In light of all of the above observations and several others made across the Award, the learned Arbitrator observes that Ex.C22 Series containing Final Report calculating the loss suffered by the petitioner/claimant herein is purely based upon the Attendance Registers/Attendance Records furnished by the petitioner/claimant as well as other records, and that there is no scientific basis for arriving at such a figure.

58. It was further submitted that the Arbitral Tribunal concluded that it cannot be said that the external independent agency had conducted a proper investigation into the allegations of statutory violations and excess billing by the respondent. The Arbitral Tribunal further observes that, in doing so, they have not adopted a reasonable methodology to quantify the purported loss suffered by the petitioner herein, and it was on this ground that the issue was held against the petitioner herein.

59. It is therefore submitted the observations of the Arbitral Tribunal against Ex.C22 Series containing the Final Report were not based on trivial considerations such as non-sharing of the Report, but



were on substantial deficiencies/defects in the entire purported exercise.

The Arbitral Tribunal has shown “*fidelity to judicial approach*” and has acted *bona fide* and has dealt with the subject in a fair, reasonable and objective manner, as mandated in the **Associate Builders case** (cited *supra*).

60. It was therefore submitted that the impugned Award also does not suffer from any perversity or irrationality such that no reasonable person would have arrived at the same, as observed in the **Associate Builders case** (cited *supra*).

61. It is submitted that the petitioner/claimant fails to address the fact that the issue relating to proving a claim for damages against the respondent placed a burden on the petitioner/claimant to prove the existence of facts necessary to prove the claim for damages. The Arbitral Tribunal has negated the petitioner’s/claimant’s claim on the ground that the petitioner/claimant has been unable to prove its claim for damages. Resultantly, fault cannot be found with the conclusions arrived at by the Arbitral Tribunal, and more importantly, the Award does not deserve to be set aside on such flimsy and trivial grounds.



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62. It is submitted that the Arbitral Tribunal has observed that the petitioner/claimant had admitted in its notices at Ex.C6 and Ex.C7 withholding the invoice amounts against the total claim and the outstanding workout to Rs.1,90,99,554/-, which is the same amount demanded by the respondent in its Demand Notice Ex.R13, and on this ground that the liabilities have been admitted by the petitioner/claimant, the Arbitral Tribunal has awarded the counter-claim of the respondent.

63. It was submitted that the respondent's entitlement is based on the issuance of the invoices forming the subject matter of the counter-claim made by the respondent to the petitioner/claimant which has never been disputed by the petitioner/claimant. As a matter of fact, as detailed in the paragraphs above and as evidenced in the e-mails at Ex.R7, the petitioner/claimant kept seeking time to make payments of the said invoices and cited financial hardship and difficulty to make payment. The invoices as such were never disputed.

64. It was submitted that the Arbitral Tribunal has also observed that the petitioner/claimant has not gone to the Police regarding the alleged falsification of accounts and over claim, despite such allegations



constituting offences under various enactments. It was on this basis and for these reasons that the Arbitral Tribunal has negated all the claims made by the petitioner/claimant.

65. It is therefore submitted that the Arbitral Tribunal further observes that the counter-claim made by the respondent was yet to be adjudicated in the main dispute. It is in view of the said observations that the Arbitral Tribunal concluded as follows, insofar as I.A.No.01/2021 is concerned:-

“By a careful perusal of the documents produced and the consideration of the pleadings, I am of the view that the Applicant has not made out any prima facie case for invoking the power under Sec.17 (1) (e) of the A&C Act and hence the application is deserved to be dismissed and accordingly dismissed. However, there will be no order as to costs.”

66. The said conclusion itself clearly demonstrates that the order passed by the Arbitral Tribunal on 22.11.2021 was limited only to disposing I.A.No.1/2021 and had no further repercussions. The purport of the said order cannot extend to the Final Award impugned herein, as, while the order on the interlocutory application was passed at a very preliminary stage of the arbitral proceedings before the detailed trial.



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67. It is submitted that the precedents hold that Section 34 of the Arbitration and Conciliation Act, 1996, not being as Appeal nor a full pledged Review, in a challenge procedure, the reasonableness of the reason stated by the Arbitral Tribunal cannot be gone into as the challenge procedure is summary in nature. The rulings have further held that the Arbitration Tribunal is the sole and final Judge of the quantity and quality of Evidence before it. This Hodgkinson Principle has been referred to and explained by the Hon'ble Supreme Court in **Associate Builders case** (cited supra). Consequently, the sequitur that follows is that the Award of the Arbitration Tribunal has to be tested within the contours and confines of Section 34 read with Section 35 and 5 of the Arbitration and Conciliation Act, 1996. As the Act itself contemplates minimum judicial intervention in testing the impugned Award, the Rulings of the Courts have held that a detailed discussions touching upon Exhibits would tantamount to travelling beyond the scope of the aforesaid Sections.

68. In support of his contention, the learned counsel for the respondent relied on the following decisions:-



“1.State of Gujarat and others Vs. Utility Users Welfare Association and others, (2018) 6 SCC 21;

2.Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131;

3.Welspun Speciality Solutions Limited Vs. Oil and Natural Gas Corporation Limited, (2022) 2 SCC 382;

4.Delhi Airport Metro Express Pvt. Ltd., Vs. Delhi Metro Rail Corporation Ltd., in Civil Appeal No.5627 of 2021;

5.Dyna Technologies Private Limited Vs. Crompton Greaves Limited, (2019) 20 SCC 1 and

6.Indian Oil Corporation Limited through its Senior Manager Vs. Shree Ganesh Petroleum Rajgurunagar through its Proprietor Laxman Dagdu Thite, (2022) 4 SCC 463.”

69. I have considered the arguments advanced by the Learned Senior Counsel for the petitioner and the learned counsel for the respondent. I have perused the impugned Award dated 20.02.2023 including the documents filed before the Arbitral Tribunal. I have also perused the decisions cited by the counsels for the petitioner/claimant and the respondent.

70. On 20.02.2023, the Arbitral Tribunal has framed the following issues:-

“1.Whether the Respondent is in breach of the "Housekeeping Services Agreement" dt.



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10.11.2017 with regard to their obligations under the agreement Ex.C1?

2. Whether the Respondent is liable to indemnify the Claimant under Para 5 of "Housekeeping Services Agreement" dt.10.11.2017 (Ex.C1) for losses suffered by the Claimant due to actions of the Respondent?

3. Whether the Claimant had proved that they had actually appointed an external independent agency to conduct an investigation into the allegations of statutory violations and excess billing by the Respondent, and further, if so, whether such agency has adopted a reasonable methodology to quantify the purported loss suffered by the Claimant of Rs.4,13,27,181/-?

4. Whether the Claimant is entitled for compensation / indemnification for a sum of Rs.2,72,78,917/- along with interest at the rate of 18% as prayed for in the Claim Statement?

5. Whether the Claimant has proved that they are entitled to, and whether the Respondent is liable to pay, to the Claimant, interest on the amount of Rs.2,72,78,917/- at the rate of 18% per annum from the date of issuance of the demand notice dated 27.11.2020 (Ex.C6) till date of realization, and further interest at the rate of 18% per annum from the date of the award till realization?

6. Whether the Claimant is eligible for compensation and damages for breach of Housekeeping Services Agreement dated 10.11.2017 (Ex.C1) by the Respondent?

7. Whether the Respondent is entitled for the counter claim of Rs.3,32,97,811.08/-? (as corrected)

8. Whether the Respondent has proved that the Claimant was liable to pay a sum of Rs. 2,56,03,540.70 towards unpaid invoices?

9. Whether the Respondent is entitled to interest of Rs.76,94,270.38 at the rate of 18% on the unpaid invoices from the date of expiry of the credit period under the invoices, till the date of the



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counter-claim, and future interest at the rate of 18% per annum from the date of counter claim till the date of full realization of the award amount from the Claimant? (as corrected)”

71. The scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited. The challenge to the impugned Award is confined to the grounds stated in Section 34 of the Arbitration and Conciliation Act, 1996. While disposing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, this Court is not sitting as an Appellate Court. This Court is also not expected to re-appreciate the evidence to come to a different conclusion by substituting its decision on merits.

72. This Court can neither sit as a Court of Appeal nor 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 as held by the Hon'ble Supreme Court in “**The Project Director, National Highways Authority of India Vs. M.Hakeem and another**”, (2021) 9 SCC 1.

73. The Hon'ble Supreme Court further held that the power to set aside an Arbitral Award under Section 34 of the Arbitration And



Conciliation Act, 1996 does not 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 Arbitration and Conciliation Act, 1996 and it is not an appellate provision. It is further held that an application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an Award does not entail any challenge on merits.

74. A similar view was taken by the Hon'ble Supreme Court in **“Sutlej Construction Limited Vs. Union Territory of Chandigarh”**, (2018) 1 SCC 718, wherein it was held that when the Award is a reasoned one and the view taken is plausible, re-appreciation of evidence is not allowed while dealing with the challenge to an Award under Section 34 of the Arbitration And Conciliation Act, 1996. It is further held that the proceedings challenging the Award cannot be treated as a First Appellate Court against the decree passed by the Trial Court. Similar view is also been taken by the Hon'ble Supreme Court in **“Ssangyong Engineering and Construction Co. Ltd. Vs. National Highway Authority of India”**, (2019) 15 SCC 131.

75. The Hon'ble Supreme Court further held that the above ground is available only where the view taken by the Arbitral Tribunal is



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plausible while construing the Contract between the parties or where the Award of the Tribunal lacks justifiable reasons. The Hon'ble Supreme Court further held that an Award can be set aside only if an Arbitrator/Arbitral Tribunal decides 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 other side.

76. The Hon'ble Supreme Court in “**Patel Engineering Limited Vs. North Eastern Electric Power Corporation Limited**”, (2020) 7 SCC 167 held that patent illegality as one of the grounds for setting aside an Award and is available only if the decision of the Arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at or the construction of the Contract is such that no reasonable person would take or that the view of the Arbitrator is not even a plausible view then the Award is liable to be set aside.

77. It was held by the Hon'ble Supreme Court in “**McDermott International Inc. Vs. Burn Standard Co. Ltd**”, (2006) 11 SCC 181, held that while interpreting the terms of a Contract, the conduct of the parties and correspondences exchanged between them would also be



relevant factors and it is well within the Arbitrator's jurisdiction to deal with the same.

78. The Hon'ble Supreme Court in “**Sheladia Associates Inc. Vs. Tamil Nadu Road Sector Project II, Represented by its Project Director**”, 2019 SCC Online Mad 17883, reminded itself of the Hodgkinson's principle which has been explained by the Hon'ble Supreme Court in the oft-quoted and celebrated Associate Builders Case being **Associate Builders V. Delhi Development Authority**, (2015) 3 SCC 49. It has held that Hodgkinson's principle in simple terms means that the Arbitral Tribunal is the best Judge with regard to quality and quantity of evidence before it. It further held that if there is no infraction of Section 28(3) of the Arbitration And Conciliation Act, 1996, the question of challenge on the grounds of public policy does not arise.

79. This view has been followed by the Hon'ble Supreme Court in “**Dyna Technologies Private Limited Vs. Crompton Greaves Limited**”, (2019) 20 SCC 1 and has reiterated the above position in the case of “**MMTC Limited Vs. Vedanta Limited**”, (2019) 4 SCC 163 and in **UHL Power Company Limited Vs. State of Himachal Pradesh**”, (2022) 4 SCC 116 as well. In Dyna Technologies Private Limited, 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 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”.

80. In “**South East Asia Marine Engineering and Constructions Limited (SEAMEC Limited) Vs. Oil India Limited**”, (2020) 5 SCC 164, the Hon'ble Supreme Court has reiterated that if the interpretation of Contract by Arbitral Tribunal is perverse and is not a possible interpretation, the Award passed by the Arbitral Tribunal, is liable to be set aside.

81. The Hon'ble Supreme Court in **Associate Builders case** (cited supra) held that an Award ignoring the terms of a Contract would not be



in public interest. The Hon'ble Supreme Court further held that the jurisdiction of the Arbitral Tribunal is to adjudicate a dispute referred to it and that the Court could look into the merits of an Award as observed in **“Indian Oil Corporation Limited through its Senior Manager Vs. Shree Ganesh Petroleum Rajgurunagar”**, (2022) 4 SCC 463.

82. In **PSA Sical Terminals Pvt. Ltd. Vs. V.O.Chidambaranar Port Trust**, 2021 SCC Online SC 508, following **Ssangyong Engineering and Construction Company Limited's case** (cited supra), it was held that the fundamental principle of justice is breached due to unilateral addition or alteration of a Contract foisted upon an unwilling party. The Hon'ble Supreme Court further held that if a party to the Agreement cannot be made liable to perform something for which it had entered into and therefore, re-writing of a Contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such would be one which shocks the conscience of the Court and as such would fall in the exceptional category. This was also reiterated by the Hon'ble Supreme Court in **Indian Oil Corporation Limited's case** (cited supra).

83. In **PSA Sical Terminals case** (cited supra), the Hon'ble



Supreme Court further held that the role of the Arbitrator was to arbitrate within the terms of the Contract and had no power apart from what the parties had given him under the Contract and that the Arbitrator would be acting without jurisdiction only when the Arbitral Tribunal travels beyond the Contract.

84. In “**Larsen Air Conditioning and Refrigeration Company Vs. Union of India and others**”, 2023 SCC Online SC 982, it has been observed 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,



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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 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



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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.”

85. 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.”



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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.”

86. If the Award suffers from any of the vices which would attract Section 34 of the Arbitration and Conciliation Act, 1996, the Award has to be set aside leaving the parties to work out their remedy if any afresh, if cause of action still survives.



87. The Hon'ble Supreme Court in “**J.G.Engineers Private Limited Vs. Union of India and Another**”, (2011) 5 SCC 758, held as

under:-

“25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9.”

88. Thus, the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is narrow and limited. The case of the petitioner/claimant before the Arbitral Tribunal is based on Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.12.2020 of FTI Consulting and the deposition of Ex.CW1, Ex.CW2 and Ex.CW3.

89. Ex.CW1 is an employee of the petitioner/claimant while Ex.CW3 is the Manager of Income Tax Department of the



petitioner/claimant.

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90. Ex.CW2 Mr.Ameya Gopal Lahoti is the author of Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.12.2020 of FTI Consulting. The FTI Consultant was appointed by the petitioner/claimant vide Ex.C22 Series Engagement Letter dated 13.07.2020 after the initial period of contract under Ex.C1 Agreement dated 10.11.2017 come to an end on 31.12.2019.

91. After Ex.C1 Agreement dated 10.11.2017 was signed, the respondent was unable to deploy the required number of manpower for the house keeping services in the petitioner's hospital. Therefore, the respondent engaged the services of M/s.Carpet India, Bangalore, a sub-contractor and entered into Ex.C2 Sub-Contract Agreement dated 01.01.2018 with the said sub-contractor.

92. Pursuant to Ex.C1 Agreement dated 10.11.2017 and Ex.C2 Sub-Contract Agreement dated 01.01.2018 with M/s.Carpet India, Bangalore, the respondent provided services and appears to have raised invoices periodically for the services rendered by it and its sub-contractor namely M/s.Carpet India.



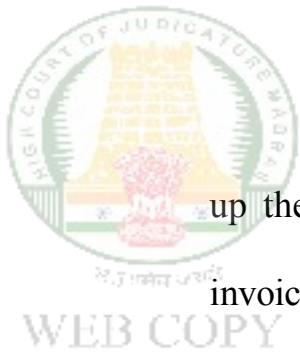
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93. After the initial period of contract under Ex.C1 Agreement dated 10.11.2017 expired on 31.12.2019, there were extensions vide Ex.C1 Series dated 17.01.2020 upto 30.03.2020; 30.03.2020 upto 30.06.2020 and 02.07.2020 upto 31.07.2020.

94. According to the respondent, as on 24.02.2020, the petitioner owed a sum of Rs.1,40,00,000/- and therefore, vide Ex.R7 Series E-mail starting from 24.02.2020, reminders were sent pursuant to which, the petitioner/claimant made few payments for a total sum of Rs.74,00,000/- as detailed below:-

<i>Sl.No.</i>	<i>Date</i>	<i>Amount paid</i>
1.	29.02.2020	Rs. 5,00,000/-
2.	02.03.2020	Rs. 15,00,000/-
3.	04.04.2020	Rs. 15,00,000/-
4.	08.05.2020	Rs. 25,00,000/-
		Total Rs. 60,00,000/-

95. After adjusting a sum of Rs.60,00,000/-, according to the respondent, the petitioner/claimant still owed to the respondent a sum of Rs.1,72,00,000/- as of 15.05.2020 for the services rendered subsequently by the respondent to the petitioner/claimant pursuant to the extensions of contract. It is at that stage, on a suspicion, the petitioner/claimant raked



up the issue relating to the alleged over invoicing in the billings in the invoices raised by the respondent on the petitioner/claimant for the services provided.

96. The petitioner/claimant however wanted the respondent to continue to provide services till 31.07.2020. Thus, the petitioner/claimant paid a further token sum of Rs.14,00,000/- on 23.06.2020 to the respondent. At the time of issuance of Extension Letter dated 02.07.2020 extending contract upto 31.07.2020, the respondent claimed that the petitioner/claimant still owed the respondent a sum of Rs.1,90,99,554/- on various invoices that had remained unpaid/part paid. At this stage, the petitioner/claimant decided to pay the salaries to the staff/workers directly employed by the respondent through sub-contractor namely M/s.Carpet India.

97. It is in this background, the petitioner/claimant engaged the services of FTI Consulting the external independent agency on 13.07.2020 to investigate and give a report regards alleged excess billing for the services. The respondent ceased to provide services with effect from 31.07.2020. Thus, FTI Consulting the external independent agency



gave Ex.C3 Draft Report dated 19.09.2020 and vide Ex.C22 Series Final Report dated 08.12.2020 for the period from January 2018 to February 2020.

98. A meeting is said to have taken place between the representative of the petitioner/claimant and the respondent on 16.10.2020. The discussion was also reduced in Ex.C5 Minutes of the Meeting dated 19.10.2020. The petitioner/claimant had also videographed the meeting held on 16.10.2020 and produced it as an Electronic Evidence and marked it as Ex.EE1 dated 19.10.2020. The Arbitral Tribunal has rejected Ex.EE1 with the following observations:-

“120. During the proceedings, the video footage was also allowed to be run in these proceedings and was witnessed by all. Except for assemblage of several persons in a room, nothing turned out from the footage. Since the Respondent has admitted his presence as well as his signature in the minutes (Ex.C5), no useful purpose will be served in referring to the video footage marked as Ex.E.E.1.”

99. That apart, as far as the rejection of Ex.E.E.1 Electronic Evidence is concerned, the Arbitral Tribunal has also given a categorical finding regarding Ex.E.E.1 electronic evidence was edited and footage for 41 minutes was missing in Ex.E.E.1 based on the statement of CW3, the



petitioner/claimant's witness. There is no scope for re-appreciation of evidence. Thus, this is finding of fact, which cannot be reversed or re-looked.

100. The Arbitral Tribunal has categorically rejected the case of the petitioner/claimant insofar as Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.12.2020 with the following observations:-

“133. On the basis of these records as to how the Claimant fixed the responsibility on the Respondent for payment of the excess amount claimed, they heavily relied upon the so-called investigation report given by FTI Consulting (Ex.C22 series). In the proof affidavit of CW1, in paragraph no.10 the following assertions were made:-

“10. Consequently, an external agency was appointed for conducting an investigation and reporting in the matter. Pursuant to the said appointment, the external agency had also submitted a comprehensive report dated 19.09.2020 (Ex.C3) which clearly pointed out that the Respondent agency and its sub-contractor have been indulging in several malpractices such as excess billing, statutory violations pertaining to the non-remittance of statutory dues etc., due to which the Claimant has incurred huge losses amounting to several crores.”

134. From the above materials placed, it can be



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seen that the Claimant had passed every invoice countersigned by the officials of the Claimant Company, no protest whatsoever were raised on the overbilling. On the contrary, persons were allowed to sign the attendance register with the connivance of the officers on both sides, the Claimant not having moved any police authorities with criminal complaint against their own officers and not having raised a dispute during the pendency of the initial agreement (Ex.C1 series) and not verifying the falsified records with the support of other contemporary documents lying with the claimant and not placing those materials before the FTI consulting and solely relying upon the report of FTI Consulting (Ex.C22 series) for making a claim is clearly impermissible and cannot be justified.

135. Yet another alternate argument was advanced to contend that if the investigation Report (Ex.C22 series) was found to be faulty and not acceptable as evidence the attendance register and other exchange of mails are before the Tribunal and it can render findings on the basis of these records and hold it against the Respondent. Such a course of action is not possible in view of the existence of other records not being made available to corroborate the evidence and also that no action was initiated against their own officers for their culpability in the overdemand. Therefore, the argument was though attractive such a course of action this Tribunal is not willing to explore.”

101. The above finding of fact arrived by the learned Arbitrator cannot be assailed. The entire case of the petitioner/claimant is based on Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report



dated 08.12.2020 and Ex.EE1 Electronic Evidence dated 19.10.2020 and Ex.C5 Minutes of Meeting dated 19.10.2020 which stand discredited.

102. There is no scope for re-appreciation of evidence. It is impermissible under law. Unless, the Arbitral Tribunal had strayed beyond the scope of reference or has relied on material not marked as evidence before it or has ignored the vital evidence, the question of setting aside the Award under Section 34 of the Arbitration and Conciliation Act, 1996 is impermissible.

103. If the conclusion arrived by the Arbitral Tribunal is also an impossible conclusion based on the facts and circumstances of the case, the Award can be set aside on the ground of patent illegality as held by the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited's case** (cited supra). However, on a reading of the impugned Award, it cannot be held that the impugned Award passed by the Arbitral Tribunal suffers from patent illegality or there was a failure to consider the vital evidence before it.

104. Therefore, the rejection of the claim of the petitioner/claimant solely based on the evidence of petitioner/claimant side witnesses CW1



and CW2 and Ex.C4 Internal Assessment Audit Report (for the month of March 2020 till July 2020) cannot be interfered.

105. That apart, the report of an external independent agency in Ex.C3 and Ex.C22 at best is an useful data to arrive at a preliminary conclusion that possibly there was excess billing by the respondent for the services provided and therefore, the respondent was liable to pay the excess amount paid to the petitioner/claimant for initiating proceeding. This would have required a proper tabulation and demonstration of excess billing by producing the primary evidence. This was not done by the petitioner/claimant.

106. Instead, the petitioner/claimant has relied on Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 series containing the Final Report dated 08.10.2020. At best, Ex.C3 Draft Report dated 19.09.2020 and Ex.C22 Series Final Report dated 08.10.2020 could corroborate the case of the petitioner/claimant, if the petitioner/claimant had produced the primary evidence of excess billing before the Arbitral Tribunal.

107. That apart, reliance on Clause 5 of Ex.C1 Agreement dated 10.11.2017 cannot be the basis of a claim of the petitioner/claimant from



the respondent. Clause 5 in Ex.C1 Agreement dated 10.11.2017 will apply only if the petitioner/claimant was exposed to any liability. Clause 5 in Ex.C1 Agreement dated 10.11.2017 reads as under:-

“5. INDEMNITY:

5.1 DTSS hereby indemnifies and agrees to keep indemnified and hold harmless the Company, from and against all claims and all direct losses, liabilities, obligations, damages, expenses and costs (including without limitation reasonable legal fees) brought against or suffered by the other or any of its respective officers, directors, employees or agents, resulting from, arising out of or relating to:

5.1.1 A breach or non-performance by the indemnifying party i.e, DTSS of any of its representations, warranties, covenants and/or assurances contained herein;

5.1.2 Failure by the indemnifying party i.e., DTSS to perform any of its obligations contained herein;

5.1.3 A breach or non-performance by the indemnifying party i.e., DTSS of any law, rule, regulation, notification or other statutory or legal provisions or requirements; or 5.1.4 Any wilful misconduct or negligent acts by the indemnifying party i.e., DTSS or any of its officers, directors, employees or agents.”

108. Therefore, the conclusion arrived in the impugned Award cannot be challenged in an proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, as Clause 5 of Ex.C1 Agreement



dated 10.11.2017 for indemnity will get triggered only if the petitioner/claimant was exposed to any liability on account of the alleged failure on the part of the respondent to comply with the statutory obligations prescribed under the Employees' Provident Funds Act, 1952 (19 of 1952) and the Employees' State Insurance Act, 1948, or under any other labour law or other social welfare legislations.

109. In this case, there are no records to show that the petitioner/claimant has been proceeded by any of the statutory authorities to warrant invocation of Clause 5 of Ex.C1 Agreement dated 10.11.2017 against the respondent. Therefore, the impugned Award does not call for any interference.

110. Therefore, challenge to the impugned Award dated 20.02.2023 on the ground stated in the petition filed in support of the present original petition rejecting the claim of the petitioner/claimant is unsustainable.

111. As far as awarding of the counter-claim of the respondent for a sum of Rs.3,32,97,811/- (Unpaid Invoice – Rs.2,56,03,540/- + Interest – Rs.76,94,270/-) is concerned, the Arbitral Tribunal has proceeded to award the amounts due to payable on the invoices raised by the respondent for services rendered on the petitioner. Operative portion of



the impugned Award is been extracted in Para 2 of this Order.

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112. Hence, I do not find any perversity in the reasoning adopted by the Arbitral Tribunal while Awarding the counter-claim of the respondent.

113. Therefore, the impugned Award passed by the Arbitral Tribunal does not call for any interference in the hands of this Court under Section 34 of the Arbitration and Conciliation Act, 1996. This Arbitration Original Petition is liable to be dismissed. Accordingly, it is dismissed. No costs. Connected Application is closed.

04.06.2024

Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

krk/arb

C.SARAVANAN, J.

krk/arb



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Arb.O.P.(Com.Div.) No.236 of 2023
and
A.No.2880 of 2023

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