



Arb.O.P. (Com.Div.) No.330 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:
02.11.2023

Pronounced on:
25.03.2024

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.330 of 2023
and
Application No.3710 of 2023

M/s.Lucky Star Computers India Pvt. Ltd.,
represented by its Director,
Mr.Anilkumar Vadakkepattam,
No.1613/1614, 5th Main Road,
E Block, AECS Layout, Kundalahalli,
Brookefields, Bengaluru – 560 037.

.. Petitioner

Vs.

Redington (India) Ltd.,
Represented by its
Deputy General Manager,
Redington House, Centre Point,
Plot No.11 (SP),
Thiru. Vi. Ka. Industrial Estate,
Guindy, Chennai – 600 032.

.. Respondent

Prayer: Original Petition is filed under Section 34(2A) of the Arbitration and Conciliation Act, 1996, praying to set aside the Impugned Arbitral Award dated 23.03.2023 passed by the Arbitral Tribunal and to direct the respondent to pay the costs.



For Petitioner : Mr.Karthik Sundaram

For Respondent : Mr.S.S.Rajesh

ORDER

This petition has been filed under Section 34(2-A) of the Arbitration and Conciliation Act, 1996, to set aside the Impugned Arbitral Award dated 23.03.2023 passed by the Arbitral Tribunal and for a direction to the respondent to pay for the costs.

2. The petitioner has challenged the Impugned Award dated 23.03.2023 passed by the learned Arbitrator allowing the claim of the respondent. The respondent was the claimant before the Arbitral Tribunal.

3. By the Impugned Award dated 23.03.2023, the Arbitral Tribunal has awarded the following amounts to the respondent/claimant:-

“36. In the result, there shall be an award on the following terms:

- (i) The respondent* shall pay to the claimant a sum of Rs.54,32,231/- (Rupees fifty-four lakhs thirty-two thousand two hundred and thirty one only);*
- (ii) The aforesaid sum shall carry*



simple interest at 15% per annum from 25.02.2019 till date i.e., 23.03.2023. The said sum shall be paid within 30 days from today failing which it shall carry further simple interest on the principal sum at 18% per annum till the date of realization.

(iii) That a sum of Rs.1,00,000/- shall be paid to the claimant as costs by the respondent.”

(the petitioner herein)*

4.The Arbitral Tribunal had framed the following six issues on 08.06.2022 before passing the Impugned Award:-

“1.Whether the return of goods vide invoice no.R090957, dated 08.06.2018 & Invoice No.R091484, dated 20.06.2019 are admitted and acknowledged by the respondent?

2. Whether the Distribution Agreement contemplates the return of products to the respondent, post the claimant making full payment for the purchase of products?

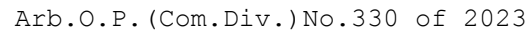
3. Whether the sales returns made by the Claimant are valid under the Distribution Agreement?

4. Whether the Claimant is entitled to recover a sum of Rs.1,18,46,047/- together with interest at 24% per annum on the principal sum of Rs.64,10,032/-?

5. Whether the claimant is entitled to interest, if so, at what rate?

6. To what other reliefs are the parties entitled to?”

5.The Impugned Award dated 23.03.2023 is assailed primarily on



6. The facts in brief are that the petitioner and the respondent entered into Ex.C4 – Distributor Agreement dated 28.09.2017. Pursuant to Ex.C4 – Distributor Agreement dated 28.09.2017, the respondent was appointed as a Distributor for Apple products imported by the petitioner herein. The petitioner had supplied Apple products to the respondent and raised Ex.C5 to Ex.C8 pursuant to Ex.C4 - Distributor Agreement dated 28.09.2017 as detailed below:-

Sl.No.	Date	Ex.No.	Invoice No.	Amount (in Rs.)
1.	02.11.2017	C5	0696	
2.	29.11.2017	C6	0828	42,43,374.00
3.	19.12.2017	C7	0926	7,68,010.00
4.	02.02.2018	C8	1123	20,03,050.00
Total				70,14,434.00

Ex.C5 to Ex.C8 invoices were raised by the petitioner were also settled by the respondent.



7.Ex.C4 / Distribution Agreement dated 28.09.2017 signed

between the parties hereto contemplates the following clauses:-

5.Payment and Discounts	6.Stock Rotation
5.1 The Company* shall raise invoices along with the Products supplied to the Distributor#. 5.2 The Distributor# shall make payments to the Company for the Products sold to the Distributor# within sixty (60) days from the date of invoice after adjusting credit notes issued by the Company* for the Products returned as per Clause 6.1 below.	6.1 The Distributor# shall have the right to return the Products unsold in its inventory for a period of more than 50 days from the date of purchase of the products against which Company* shall issue credit notes at the original price at which the Products were purchased by the Distributor# with applicable GST.

* petitioner's

respondent/claimant

8. The respondent herein returned unsold stocks which remained unsold for a period of more than 50 days from the date of purchase of the product from the petitioner herein.

9. These purchase returns were made by the respondent to the petitioner vide Ex.C9 / invoice dated 08.06.2018 and Ex.C10 / invoice dated 20.06.2018 as detailed below:-



Sl.No.	Date	Ex.No.	Invoice No.	Amount (in Rs.)
1.	08.06.2018	C9	R090957	3,64,804.78
2.	20.06.2018	C10	R091484	60,45,227.14
Total				64,10,031.92

10. After Ex.C9 & Ex.C10 / invoices were sent by the respondent to the petitioner, the petitioner sent e-mails questioning the inclusion of GST components in Ex.C9 & Ex.C10 / invoices raised for these sales returns.

11. In this background, the respondent issued Ex.R1 & Ex.R2 / invoice as credit notes both dated 12.07.2018. Thereafter, the raised Ex.C11 & Ex.C12 / invoices in *lieu* of Ex.C9 & Ex. C10 / invoices.

12. The details of the sales invoices and credit notes raised by the respondent on the petitioner for the sales returns are tabulated below:-



(1)	(2)	(3)
Invoice with GST	Credit Note No.R.s.52,701/- for invoice in Col.I	Invoice Without GST
Ex.C9	Ex.R1	Ex.C11
08.06.2018	12.07.2018	13.07.2018
Rs.3,64,804.78	Rs.3,64,804.78	Rs.3,09,156.60
Invoice with GST	Credit Note No.R.s.52,700/- for invoice in Col.I	Invoice Without GST
Ex.C10	Ex.R2	Ex.C.12
20.06.2018	12.07.2018	12.07.2018
Rs.60,45,227	Rs.60,45,227	Rs.51,23,073.84

13.The challenge to the award passed by the learned Arbitrator is on the following grounds:-

(i)The impugned award is erroneous as it upholds a claim based on two tax invoices Ex.C9 & Ex.C10 which stand cancelled by two credit notes Ex.R1 & Ex.R2 issued by the respondent.

(ii)Under the terms of the agreement, the respondent was the only buyer and petitioner was the seller of the products. The tax invoices Ex.C9 & Ex.C10 issued by the respondent were wrongly issued by them. The tax invoices were unilaterally issued and later cancelled by the respondent.

(iii)The learned Tribunal has erred in holding at paragraph No.24 of the impugned award that the



present Applicant had initially accepted the returns and also admitted Ex.C9 & C10 were purchase returns. The said findings were contrary to the documents on record.

(iv) The learned Tribunal has failed to consider the terms of the clauses 5 & 6 of Ex.C4 – Agreement.

(v) It is an settled position of law that if an Arbitrator travels beyond the contract, the award will be without jurisdiction and would be amenable to be set aside by the Court.

(vi) The learned Arbitrator has erred in not interpreting or applying the specific terms of Ex.C4 / Distribution Agreement, but instead relying upon the principles of estoppel, which is contrary to settled law.

(vii) The Tribunal has erred in not following the well settled law that the true construction of a contract must depend upon import of words used and not upon what the parties choose to say afterwards.

(viii) The findings of the learned Tribunal are perverse



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and either not based on any evidence at all or based on selective reliance on evidence, while disregarding significant evidence filed by the claimant itself.

(ix) It is evident from e-mails dated 04.12.2019 sent by the petitioner that the alleged return of products by the respondent has never been considered as a valid sales return under the Agreement. It is also pertinent to note that the Tribunal has selectively considered the evidence on record and ignored these e-mails, which also form part of Ex.C13.

(x) The learned Arbitrator erred in holding that Ex.C9 & Ex.C10 did not stand cancelled despite the issuance of credit notes Ex.R1 & Ex.R2 being admitted and marked by the claimants themselves. Therefore, the learned Arbitrator erred in granting reliefs in respect of tax invoices Ex.C9 & Ex.C10, which stand cancelled and have no existence in the eyes of law.

14. In support of the case, the learned counsel for the petitioner has

relied on the following cases:-



- i. ***Associate Builders Vs. Delhi Development Authority***, (2015) 3 SCC 49;
- ii. ***Steel Authority of India Limited Vs. Gupta Brother Steel Tubes Limited***, (2009) 10 SCC 63;
- iii. ***Associated Engineering Company Vs. Govt. of A.P.***, [(1991) 4 SCC 93];
- iv. ***Bank of India Vs. K.Mohandas***, [(2009) 5 SCC 313];
- v. ***Amalgamated Investment & Property Co. Ltd., Vs. Texas Commerce International Bank Ltd.***, (1982) QB 84;
- vi. ***Gedela Satchidananda Murthy (Dead) by LRS., Vs. Dy.Commr., Endowments Deptt., A.P., and others***, (2007) 5 SCC 677 and
- vii. ***Narayana Gowda Vs. Girijamma***, [AIR 1977 Kant 58].

15. The learned counsel for the respondent defends the impugned Award dated 23.03.2023 passed by the Arbitral Tribunal. It is submitted that the Impugned Award neither calls for any interference under Section 34(2-A) of the Arbitration and Conciliation Act, 1996 nor can it be said to be in violation of the Fundamental Policy of Indian Law under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

16. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

17. Section 34 of the Arbitration and Conciliation Act, 1996



provides mechanism for an aggrieved party to approach the Court to set aside the award. The grounds for setting aside the award are under Section 34(2) (a) & (b) and Section 4 (2-A) of the Arbitration and Conciliation Act, 1996. It reads as under:-

34. Application for setting aside arbitral award	
34(2) an arbitral award may be set aside by the Court only if-	
(a) the party making the application furnishes proof that— i. a party was under some incapacity, or; ii. (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or; 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; or v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the	(b) the Court finds that— i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or ii. the arbitral award is in conflict with the public policy of India



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agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or	
34(2-A)	
34(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award 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 reappreciation of evidence.	

18. An Arbitral Tribunal while making an award although not strictly governed by the procedure under CPC, 1908 and Indian Evidence Act, 1872, under Section 19 of the Arbitration and Conciliation Act, 1996 is nevertheless while deciding the issues before it while passing the award is required to take into account of the substantive law and the terms of the contract and the trade usage applicable to the transaction as in Section 28(3) of the Arbitration and Conciliation Act, 1996.

19. At the same time, under Sub Section (2) to Section 28, the Arbitral Tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. Sub Section (2) reads as follows:-

“28. Rules applicable to substance of dispute



- (1) ...
(2) *The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.*”

20. The expression *ex aequo et bono or as amiable compositeur* means what according to the Tribunal is justice of the case and fair in the given facts and circumstances.

21. In **Associate Builders Vs. Delhi Development Authority**, (2015) 3 SCC 49, observed what is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in **Renusagar Power Co. Ltd. v. General Electric Co.**, 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. It summarized the position as follows:-

The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or



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- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

22. Relevant portion of the **Associate Builders Vs. Delhi**

Development Authority, (2015) 3 SCC 49 is extracted below:-

“16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.

19. When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to



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adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

- (i) a party was under some incapacity, or*
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
- (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.*

(2) The court may set aside the award:

- (i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,*



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(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;



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(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.”

25. *J.G. Engineers (P) Ltd. v. Union of India [(2011) 5 SCC 758 : (2011) 3 SCC (Civ) 128] held: (SCC p. 775, para 27)*

“27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705 : AIR 2003 SC 2629] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”

27. *Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head*



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*“fundamental policy of Indian law”. It has already been seen from *Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]* judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*

*40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. In *R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw [(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)**

“Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (see Statutes 9 and 10



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Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob [(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712], but is now well established.”

62. The Single Judge is clearly right. We have gone through all the 15 claims supplied to us and we find that none of these claims are in fact overlapping. They are all contained under separate heads. This argument, therefore, must also fail.”

23. The Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)**, (2019) 15 SCC 131 has laid down the guidelines and contours for setting aside the award. The Court has examined the case laws rendered by it earlier in the context of Section 34(2)(b)(ii) as it stood prior to amendment to Section 34 in 2015 and thereafter. It held “Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court”.

Relevant portion from the said decision reads as under:-



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“76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of



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the 1996 Act, as has been noted earlier in this judgment.”

24. In *Konkan Railway Corporation Limited Vs. Chenab Bridge Project Undertaking*, 2023 SCC Online SC 1020, it was held that mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. The Court further held that scope of the jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. Relevant portion of the said decision reads as under:-

“24. Therefore, the scope of jurisdiction under Section 34 and Section 37 of the Act is not akin to normal appellate jurisdiction. [UHL Power Co. Ltd. v. State of H.P., (2022) 4 SCC 116, para 15 : (2022) 2 SCC (Civ) 401. See also : Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 24, 25.] It is well-settled that courts ought not to interfere with the arbitral award in a casual and cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle courts to reverse the findings of the Arbitral Tribunal. [Ibid; Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213; Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., (2019) 7 SCC 236, para 11.1 : (2019) 3 SCC (Civ) 552] In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1], this Court held : (Dyna Technologies case [Dyna Technologies (P) Ltd. v.



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Crompton Greaves Ltd., (2019) 20 SCC 1] , SCC p. 12, paras 24-25)

“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.

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.”



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27. The Single Judge of the High Court affirmed *[Chenab Bridge Project Undertaking v. Konkan Railway Corpn. Ltd., 2019 SCC OnLine Bom 13296]* the findings of the Arbitral Tribunal. The reason for upholding the decision of the Tribunal is not that the Single Judge exercising jurisdiction under Section 34 of the Act is in complete agreement with the interpretation of the contractual clauses by the Arbitral Tribunal. The learned Judge exercising jurisdiction under Section 34 of the Act kept in mind the scope of challenge to an Arbitral Award as elucidated by a number of decisions of this Court. Section 34 jurisdiction will not be exercised merely because an alternative view on facts and interpretation of contract exists. In its own words, the conclusion *[Chenab Bridge Project Undertaking v. Konkan Railway Corpn. Ltd., 2019 SCC OnLine Bom 13296]* of the Single Judge Bench of the High Court is as follows :

“10. The ambiguity does not come from clause 5.1.1, but from the fact that there are other clauses in the contract, such as clauses 7.1.1 and 7.1.2. One way to look at the coexistence of these clauses is to treat clauses 7.1.1 and 7.1.2 merely as an exclusion for working out price variation, since it is specifically provided for in clause 5.1.2. Equally, there is another way of looking at these three clauses, and that is : clauses 7.1.1 and 7.1.2 make it clear that no increase in tax in the case of any component forming part of BoQ rates, which was considered by the contractor for quoting his rates for any particular item, should be allowed to the contractor; it is only when particular taxes were actually to be paid on the deliveries of the contractor, these would be included for reimbursement by the employer under clause 5.1.2. The arbitrator



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adopted the latter view. It cannot be said either that it is an unreasonable view or a view which is either impossible or which no fair and judiciously minded person would have taken. The award on this dispute, thus, does not merit any interference under Section 34 of the Act, having regard to the law stated by the Supreme Court in Associate Builders.”

25. The Arbitral Tribunal has relied on the decision in **Amalgamated Investment & Property Co. Ltd., Vs. Texas Commerce International Bank Ltd., (1982) QB 84**, wherein it was held as under:-

“So I come to this conclusion: When the parties to a contract are both under a common mistake as to the meaning or effect of it – and thereafter embark on a course of dealing on the footing of that mistake – thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them.”

26. In **Steel Authority of India Limited Vs. Gupta Brother Steel**



Tubes Limited, (2009) 10 SCC 63, the Hon'ble Supreme Court held as

under:-

“18.It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

- (i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.*
- (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.*
- (iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.*
- (iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.*
- (v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.*



(vi) *If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.*

(vii) *It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."*

27. In Bank of India and another Vs. K.Mohandas and another,

(2009) 5 SCC 313, the Hon'ble Supreme Court held as under:-

"28. The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties."

28. In Gedela Satchidananda Murthy (Dead) by LRS., Vs.

Dy.Commr., Endowments Deptt., A.P., and others, (2007) 5 SCC 677,

the Hon'ble Supreme Court held as under:-

"30. These admissions on the part of the plaintiffs had rightly been held to be relevant by the High Court for determining the question. The temple, therefore, was not established as a private place of worship by the plaintiffs or their family members but it had been established with the help extended by the



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disciples and members of the public. The factum of issuance of pamphlets or entry tickets, as noticed by the High Court, had not been denied or disputed by Plaintiff 2 in his reply dated 26-12-1978 in response to the notice issued by the Deputy Commissioner. The conduct of the parties in not even denying the said letters containing certain vital admissions on their part would, thus, clearly go to show that the judgment of the High Court does not suffer from any infirmity. Rule of estoppel in a case of this nature would be clearly applicable.”

29. Coming to the facts of the present case, the argument of the learned counsel for the petitioner that the award suffers from vices of patent illegality cannot be countenanced. The scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited as held by the Hon'ble Supreme Court in the above mentioned cases.

30. The arguments that the Arbitral Tribunal / learned Arbitrator erred in awarding amounts claimed under Ex.C9 & Ex.C10 / invoices towards sales returns was wrongly relied upon by the learned Arbitrator in view of the Ex.R2 & Ex.R3 / credit note cannot be countenanced. In any event, Court is not expected to venture into merits.

31. A reading of Ex.R3 e-mail dated 16.01.2018 of Anil, VP of the petitioner to the respondent / claimant indicates in Ex.R1 & Ex.R2 credit



notes were issued only at the behest of the petitioner, as has been pointed out by the learned Arbitrator in the award. The fundamental law as far as sales returns are concerned, the sales returns will also qualify as a supply within the meaning of Section 7 of the respective GST enactments, 2017.

It reads as under:-

“7. Scope of supply.— (1) *For the purposes of this Act, the expression -supply includes—*

- (a) *all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
- (b) *import of services for a consideration whether or not in the course or furtherance of business;*
- (c) *the activities specified in Schedule I, made or agreed to be made without a consideration;*
- (d) *[*****]*

[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

(2) *Notwithstanding anything contained in sub-section*

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) *Subject to the provisions of [sub-sections (1), (1A) and*



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(2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

- (a) a supply of goods and not as a supply of services; or*
- (b) a supply of services and not as a supply of goods.”*

32. Section 34 of the respective GST Act, deals with credit notes and debit notes. It is the petitioner who requested the respondent to issue credit note.

33. Therefore, whether the seller or the buyer, who is effecting the supply albeit, whether the sale or sales return as the case may be is required to raise the invoice as is contemplated under Section 34 of the respective GST Act, 2017 read with GST Rules. Although not covered in the award passed by the learned Arbitrator, the decision is clear. Section 34 of the respective GST enactment is merely a mechanism provided for issuance of credit and debit notes.

34. Under Section 34(1) of the CGST Act, 2017, where invoices have been issued for supply of goods and where the goods supplied are returned by the recipient or whether the goods supplied are found to be deficient, the person who supplied such goods or services, may issue to



the recipient [one or more credit notes for the supplies made in a financial year] containing such particulars as may be prescribed as per sub Section (2) to Section 34 of the CGST Act, 2017. Section 34(2) of the CGST Act, 2017 reads as under:-

“34. Credit and debit notes.—

- (1) Where one or more tax invoices have been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services or both supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient [one or more credit notes for supplies made in a financial year] containing such particulars as may be prescribed.*
- (2) Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than September following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier, and the tax liability shall be adjusted in such manner as may be prescribed:
Provided that no reduction in output tax liability of the supplier shall be permitted, if the incidence of tax and interest on such supply has been passed on to any other person.”*

35. Thus, allusion to Section 34 during the course of hearing was unnecessary as it is for the purpose of internal accountings, once invoices



raised for return of goods and goods are returned along with the invoices, the original seller has to issue a credit note to the buyer, who returned the goods. Therefore, the argument that Ex.C9 & Ex.C10 invoices stood cancelled with the issuance of credit note in Ex.R1 & Ex.R2 by the respondent on the petitioner cannot be countenanced.

36. As mentioned above, an award can be challenged on any of the grounds stipulated in Sub Section (2) & (2A) to Section 34 of the Arbitration and Conciliation Act, 1996. In this case, the impugned award cannot be said to have either violated public policy or can be said to suffer from patent illegality. Even otherwise on facts, it is clear that the petitioner on receiving the goods under Ex.C9 & Ex.C10 / invoices has accepted the sales returns and has later sold the same in the market. The award that has been passed is inconsonance with clause 6.1 of Ex.C4 / Distribution Agreement dated 28.09.2017 as per which a Distributor has a right to return the unsold inventory remaining for a period more than 50 days from the date of purchase.

37. Clause 5.2 as it reads indicates that the Distributor has to make



payment against the supplies within sixty (60) days from the date of invoice after adjusting the credit notes that may be issued by the petitioner to the respondent on the returned goods as per clause 6.1.

38.The argument that Ex.R1 & Ex.R2 / credit notes and Ex.C11 & C12 / tax invoices are primary piece of evidence and that the Court has heard in relying on similar piece of evidence in Ex.R3 e-mail dated 16.01.2018 cannot be countenanced.

39.Each document is a primary piece of evidence. As per Section 62 of the Evidence Act, 1872. It cannot be argued that Ex.C9 & Ex.C10 are secondary piece of evidence and primary has been given to the secondary piece of evidence. Contents under Section 62 of the Indian Evidence Act, 1872, is for a totally different purpose. It reads as under:-

“62. Primary evidence. — *Primary evidence means the document itself produced for the inspection of the Court.*

Explanation 1. —Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. — Where a number of documents are



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all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.”

40. Therefore, neither the impugned award is perverse in violation of the fundamentals of the Indian Contract Act, 1872 or the Indian Evidence Act, 1872 nor is patently illegal.

41. Therefore, the award passed by the learned Arbitrator does not call for any interference and this OP is liable to be dismissed. Accordingly, Arb.O.P.(Com.Div.) No.330 of 2023 stands dismissed. Consequently, the connected Application is also closed. No costs.

25.03.2024

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Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No



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C.SARAVANAN, J.

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