# IN THE HIGH COURT OF JUDICATURE AT MADRAS

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| Reserved On | 22.02.2024 |
| Pronounced On | 30.10.2024 |

CORAM :

**THE HONOURABLE MR.JUSTICE C.SARAVANAN**

Arb.O.P.(Com.Div.) No.18 of 2022
and
A.Nos.3489 of 2021, 4537 of 2023
and
Arb.Appln.No.443 of 2023
and
E.P.SR.No.48537 of 2021

1.The Commissioner of Police,
Poonamallee High Road (EVR Salai),
Kilpauk, Chennai – 600 010.

2.The Additional Commissioner of Police,
(Traffic) Chennai,
Poonamallee High Road (EVR Salai),
Kilpauk, Chennai – 600 010. ... Petitioners

Vs.

M/s.Purple Infotech Limited.
Plot No.166, Second Floor,
First Block, 6th Avenue,
Anna Nagar, Chennai – 600 040. ... Respondent

Prayer: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Impugned Award dated 14.09.2020 passed by the Arbitral Tribunal and direct the Registry to number the same for passing further order.

For Petitioners : Mr.J.Ravindran
Additional Advocate General
Assisted by Mr.P.Harish
Government Advocate

For Respondent : Mr.S.R.Raghunathan

**ORDER**

By this Order, Arb.O.P.(Com.Div.) No.18 of 2022, the above applications and E.P.SR.No.48537 of 2021 are being disposed of. They arise out of the **Impugned Award** dated **14.09.2020** passed by the Arbitral Tribunal.

2. Since both the parties to the arbitral proceedings are before this Court in the capacity of the petitioners in the original petition and the respondents in E.P.SR.No.48537 of 2021 respectively, the petitioners in Arb.O.P.(Com.Div.) No.18 of 2021 shall be referred to as the Award Debtor 1, Award Debtor 2 or Award Debtors and the respondent in Arb.O.P.(Com.Div.) No.18 of 2021 who is the petitioner in E.P.SR.No.48537 of 2021 shall be referred as the Award Holder.

3. Details of the applications filed are as under:-

| Appln./ Arb.Appln.Nos. | Applicant | Relief |
|---|---|---|
| 4537 of 2023 | Award Holder - M/s.Purple Infotech | To pass an order payment out of a sum of |

| | | |
|---|---|---|
| | Ltd., | Rs.19,56,00,000/- (Rupees Nineteen Crores and fifty six lakhs only) along with at the rate of 6.8% per annum calculated till the date of disposal of the present application in favour of applicant deposited by the respondents to the credit of A.No.163 of 2022 in Arb.O.P.(Com.Div.) No.18 of 2022. |
| 3489 of 2021 | Award Holder - M/s.Purple Infotech Ltd., | To direct the respondent to disclose the particulars assets including movable/immovable for satisfying the Award/decree. |
| Arb.Appln. No.443 of 2023 | Award Debtor - The Commissioner of Police, Poonamallee High Road (EVR Salai) and another | To appoint a common receiver to accept and receive the materials and equipments said to be purchased by the respondent and hand over the same. |

4. E.P.SR.No.48537 of 2021 has been filed by the successful claimant, the Award Holder to enforce the **Impugned Award** dated **14.09.2020** passed by the Arbitral Tribunal, the Award Debtors have filed Arb.O.P.(Com.Div.) No.18 of 2022 to set aside the **Impugned Award** dated **14.09.2020** passed by the Arbitral Tribunal.

5. By the Impugned Award dated **14.09.2020**, the Arbitral Tribunal has awarded an amount of **Rs.53,20,13,308/-** to the claimant. The Award Holder has not challenged the Award insofar as part of the claim has been rejected. Details of the claims and amounts awarded are as under:-

| S.No. | Claim | Award |
|---|---|---|
| i) | Claim A | Rs. 24,58,97,980/- |
| ii) | Claim C | Rs. 3,70,25,071/- |
| iii) | Claim G | Rs. 8,87,07,695/- |
| iv) | Claim I, interest is awarded at 8% P.A from 18.01.2016 till date of realisation. | Rs. 15,75,32,562/- |
| v) | Claims B, D, F & H are dismissed ; | Rejected |
| vi) | Claim E, claimant conceded, as infructuous; | Rejected |
| vii) | Reimbursement amount awarded to the claimant | Rs. 12,00,000/- |
| viii) | Claim J, costs, partly Awarded to the claimant | Rs. 16,50,000/- |
| | Total | Rs. 53,20,13,308/- |

6. Along with Arb.O.P(Com.Div.) No.18 of 2022, following applications have been filed by the Award Debtors. They were disposed on the following dates:-

| S. No. | Appln.No. | Prayer | Allowed/ Dismissed | Date of Disposal |
|---|---|---|---|---|
| 1. | 640 of 2022 | To recall the warrant to produce the Judgment Debtor dated 17.12.2021 | Allowed | 25.02.2022 |
| 2. | 28 of 2022 | To condone the delay of 5 days in representing in O.P.Diary No.91072/2020 | Allowed | 05.01.2022 |
| 3. | 3044 of 2022 | To grant further extension of time for a period of Eight Weeks to comply with the order passed in A.No.163 of 2022 in Arb.O.P.(Com.Div.)No.18 of 2022 dated 29.06.2022 | Closed | 25.08.2022 |
| 4. | 163 of 2022 | To grant an order of stay of the operation of Arbitral Award dated 14.09.2020 passed by the Arbitral Tribunal | Made absolute | 25.08.2022 |

7. The Award Holder had earlier made a claim under the following heads before the Arbitral Tribunal:-

| Claim | Head of Claim | Amount |
|---|---|---|
| A | Amounts incurred for procuring materials, equipment and services for the implementation of ITMS Project | Rs. 24,58,97,980/- |

| | | |
|---|---|---|
| B | Value of Claimant's Proprietary Software specifically developed for ITMS Project | Rs. 4,95,64,344/- |
| C | Administrative/Overhead Charges | Rs. 3,70,25,071/- |
| D | Costs, Processing Fee/Charges/Interest Paid to Bank for borrowal of funds, vendor payments etc. | Rs. 5,57,75,757/- |
| E | Return of Performance Bank Guarantee - 5% of Contract Value | Rs. 5,85,00,000/- |
| F | Interest on Phase-I Revenue @ 18% p.a. on 10% of Total Contract Value | Rs. 5,47,56,000/- |
| G | Loss of Profit/Damages/ Business Loss @15% of Contract Value | Rs. 17,55,00,000/- |
| H | Loss of Goodwill, Loss of Reputation and Loss of expected profits from future other contracts | Rs. 5,00,00,000/- |
| I | Interest | 18% per annum from date of Statement of Claim till date of realization |
| J | Costs | To be determined by the Tribunal |
| | Total | Rs. 72,70,19,152/- |

8. The Impugned Award dated **14.09.2020** passed by the Arbitral Tribunal is challenged by the Award Debtors/the Commissioner of Police, Kilpauk, Chennai and the Additional Commissioner of Police, Kilpauk,

Chennai primarily on the ground that the **Impugned Award** dated **14.09.2020** is "in conflict with Public Policy of India" and is therefore liable to be set aside as per Section 34(2)(b)(ii) read with Clause (2) to Explanation-1 to Section 34 of the Arbitration and Conciliation Act, 1996. It is also the case of the Award Debtors that the **Impugned Award** dated **14.09.2020** is patently illegal and is therefore liable to be set aside in view of Section 34(2)(a) of the Arbitration and Conciliation Act, 1996.

9. The Award Debtors (petitioners in **Arb.O.P. (Com.Div.) No.18 of 2022**) were directed to deposit a sum of **Rs.20,00,00,000/-** within a period of four weeks on or before **27.07.2022**.

10. To enable the Award Debtors, to deposit the aforesaid amount, the time was extended vide order dated **29.06.2022** in **A.No.163 of 2022**. In compliance of the aforesaid Order, the Award Debtors deposited **Rs.20,00,00,000/-** in favour of the Registrar General, High Court, Madras vide **D.D.No.926160** dated **22.08.2022** drawn at State Bank of India, Treasury Branch. The amount was directed to be deposited in an Interest Bearing Account in accordance with the prevailing procedure by an Order dated

**29.06.2023.**

11. The brief facts of the case are that the Government of Tamil Nadu issued **G.O.Ms.No.176** dated **28.02.2012** for implementing the **Integrated Traffic Management System (ITMS).** The Award Holder-Claimant had participated in the Tender following the tender advertisement and was declared as the successful bidder.

12. Pursuant to the above, a **Concessionaire Agreement** dated **12.07.2012** was signed between the Award Holder-Claimant and the First Award Debtor. On behalf of the First Award Debtor, the aforesaid **Concessionaire Agreement** dated **12.07.2012** was signed by the Second Award Debtor.

13. Under the aforesaid **Concessionaire Agreement** dated **12.07.2012**, about 98 (10+88) Traffic Junctions were selected for implementation of **Integrated Traffic Management System (ITMS)** which included the main infrastructure at the **Integrated Command and Control Centre (ICCC), Vepery, Chennai** the Office of the Award Debtor 1/the Commissioner of Police

to monitor the **Integrated Traffic Management System (ITMS)** in selected 98 Traffic Junctions in Chennai.

14. The project was to be implemented over for a period of six months from **12.07.2012**. Thereafter, the Award Holder was required to maintain it for a period of 66 months (i.e., 5½ years). The installation of the necessary infrastructure for the **Integrated Traffic Management System (ITMS)** was to be completed in two phases.

15. In **Phase-I**, the work was to be completed in 10 Traffic Junctions. The balance was to be completed in **Phase-II** within the period of three months thereafter. The entire project was to be completed within the period of six months from **12.07.2012** i.e., on **11.01.2013**.

16. For implementing the above project, no advance was paid by the Award Debtors to the Award Holder-Claimant. The total value of contract was **Rs.117,00,00,000/-**. The milestones for payment under the **Concessionaire Agreement** dated **12.07.2012** are as under:-

| S.No. | Milestone | Timeline as per REP* | % Payment |
|---|---|---|---|
| 1. | T + 10 junctions with requisite infrastructure as per the REP | T + Months | 10% of Total Contract Value (TCV) |
| 2. | Acceptance of total project completion and Go-live | T + 6 Months | 10% of Total Contract Value (TCV) |
| 3. | Completion of total project period and satisfactory hand holding exercise | T + 66 Months | 10% of Total Contract Value (TCV) |
| 4. | Operations and maintenance | 5 years post Go-live | Remaining 70% as equated quarterly installment for 20 quarters after Project Go-live. |

(*Respondent for proposal)

17. Thus, all the electronic items viz., hardware and software items and other related civil contract works were required to be procured by the Award Holder-Claimant as its cost. Similarly, all the expenses in connection with procurement, installation of the electronic and hardware were also to be borne by the Award Holder-Claimant.

18. **Phase-I** was to be completed in first 3 months from the date of the

**Concessionaire Agreement** dated **12.07.2012 i.e.,** on **11.10.2012. Phase-I** included the Office of the Commissioner of Police, Vepery, i.e., the Office of the Award Debtor 1 as the **Integrated Command and Control Centre (ICCC)**.

19. There was however a delay in handing over of the 7th floor of the aforesaid Building in Vepery. The 7th floor of the building was ultimately handed over to the Award Holder-Claimant only on **31.10.2012.** Thus, there was also a delay on the part of the Award Holder-Claimant in handing over the 7th floor of the Vepery Office for the purpose of **Integrated Traffic Management System (ITMS)** as part of **Phase-I**.

20. The Award Debtors however, terminated the contract on **15.03.2013,** pursuant to a Show Cause Notice dated **06.02.2013** issued by the 2nd Award Debtor.

21. It is in this background, the Award Holder-Claimant invoked the Arbitration Clause. Thus, the Arbitral Tribunal came to be constituted which has now passed the **Impugned Award** dated **14.09.2020,** which is sought to be

implemented by the Award Holder-Claimant and challenged by the Award Debtors.

22. Before dealing with the challenge to the **Impugned Award** dated **14.09.2020** at the behest of the Award Debtors, it will be useful to note that the **Show Cause Notice** was issued on **06.02.2013** by the Award Debtor 2 to Award Holder on account of the alleged failure on the part of the Award Holder-Claimant to complete **Phase-I** in time.

23. After the issuance of **Show Cause Notice** on **06.02.2013,** the Award Holder-Claimant had sent further communication to the Award Debtor 2 on **25.02.2023** for implementation of **Phase-I**.

24. By a letter dated **01.03.2013,** the Award Holder-Claimant requested that power supply be restored immediately and so thus the Award Holder-Claimant could resume the operation at **Integrated Command and Control Centre (ICCC)**, **Vepery, Chennai** of the Award Debtor 1.

25. Further, communications were also exchanged between the Award Holder-Claimant and the Office of the Award Debtor 2/the Additional Commissioner of Police (Traffic), Chennai, which included a reply dated **05.03.2013** of the Award Holder-Claimant.

26. The Award Holder-Claimant had given an undertaking that the entire project will be completed before **30.04.2013**. However, the Award Debtor 2 proceeded to terminate the **Concessionaire Agreement** dated **12.07.2012** by issuing **Termination Notice** dated **15.03.2013** citing letter dated **18.10.2012** and letter dated **08.01.2013** which has now culminated in the **Impugned Award** dated **14.09.2020**.

27. The Award Holder-Claimant has thus sought to enforce the **Impugned Award** dated **14.09.2020** in E.P.SR.No.48537 of 2021 which the Award Debtor 1 the Commissioner of Police and the Award Debtor 2 the Additional Commissioner of Police have to assail in the Arb.O.P.(Com.Div.) No.18 of 2022.

28. Mr.J.Ravindran, learned Additional Advocate General for the petitioners submits that none of equipments were supplied or installed by the Award Holder-Claimant pursuant to the **Concessionaire Agreement** dated **12.07.2012**. It is submitted that the Arbitral Tribunal failed to note that the Award Holder-Claimant has filed fictious and fabricated invoices for **Phase-I**. It is submitted that the Arbitral Tribunal has however awarded the amounts as mentioned above.

29. It is submitted that fraud vitiates everything and therefore the **Impugned Award** dated **14.09.2020** was liable to be set aside. The learned Additional Advocate General submits that many of the invoices that have been marked and allowed to be marked before the Arbitral Tribunal are dated after the termination of the contract and therefore the Award passed by the Arbitral Tribunal is liable to be set aside.

30. The learned Additional Advocate General for the petitioners would submit that the Arbitral Tribunal has erred in ignoring Clause 5.3 of Article 4 of the **Concessionaire Agreement** dated **12.07.2012** which provides that it will be the responsibility of the concessionaire to obtain all necessary regulatory approvals for project implementation and the Award Holder-Claimant cannot be

held responsible for the delay, which clearly indicates that time was the essence of the contract.

31. It is submitted that the Arbitral Tribunal erred in observing that there has been no delay on the part of the Award Holder-Claimant and consequently no breach of the contract, ignoring the timeline for completion of various milestones of the project as was contemplated in Clause 7.1 of Article 6 of the **Concessionaire Agreement** dated **12.07.2012**.

32. The learned Additional Advocate General for the petitioners further submits that the Arbitral Tribunal has erred in awarding interest to the Award Holder-Claimant wholly ignoring the fact that the contract stood frustrated only on account of the admitted delay caused by the Award Holder-Claimant. Therefore, it is submitted that Impugned Award, awarding interest to the defaulting party is without any basis whatsoever and therefore the **Impugned Award** dated **14.09.2020** deserves to be set aside.

33. Specifically, a reference was made to proviso to Section 34(2)(a) of the Arbitration and Conciliation Act, 1996. It is submitted that even if there is an erroneous balance of law, re-appreciation of evidence cannot be the ground

for setting aside the Impugned Award.

34. The learned counsel for the Award Holder would submit that the Award Holder should have completed the **Phase-I** of the project within 3 months from the date of signing the **Concessionaire Agreement** dated **12.07.2012** after getting clearances from all governmental agencies. Hence, the Award Holder was requested to furnish their Progress Report in respect of the implementation of the **Integrated Traffic Management System (ITMS)** by the 2nd Award Debtor vide letter Rc.No.Tr.Imp.1/12937/2012, dated 18.10.2012, soon after the expiry of the stipulated time of 3 months for the completion of **Phase-I** of **Integrated Traffic Management System (ITMS)**, but no response was received from the Award Debtor.

35. By then, the space for the **Integrated Command and Control Centre (ICCC), Vepery, Chennai** was taken over by the Award Holder. In fact, the Award Holder failed to respond to the queries of the 2nd Award Debtor regarding setting up of the **Integrated Command and Control Centre (ICCC), Vepery, Chennai**. Thereafter, a letter No.PIL/AR/12937/2012, dated 08.01.2013 was received from the Award Holder on 10.01.2013 and permission

was granted vide Chennai Traffic Police letter Rc.No.Tr.Imp.1/12937/2012 dated 18.01.2013 after due process. Since the Award Holder failed to submit any Progress Report even after repeated reminders, a **Show Cause notice** dated **06.02.2013** was issued to the respondent by the 2nd Petitioner in Rc.No.Tr.Imp.1/12937/2012, for not complying with the contractual obligations of completing the **Phase-I** of the ITMS project within 3 months from the date of **Concessionaire Agreement** i.e., **12.07.2012**.

36. It is further submitted that the Award Holder was fully aware of the enormity of the project and should have prepared themselves financially, technically and from the manpower point of view, so that they could comply with the most important provision of completing the initial phase of the project within 3 months and entire project within the stipulated period of 6 months. However, the Award Holder miserably failed in this regard and the 2nd Award Debtor was compelled to issue the Show Cause Notice. As an afterthought, the Award Holder had sent a letter on 05.03.2013 with a request of taking over of the **Integrated Command and Control Centre (ICCC), Vepery, Chennai** with 10 Traffic Junctions after the Show Cause Notice was issued almost after a delay of 4½ months beyond the stipulated time of 3 months. As the reply furnished by the Award Holder Company to the Show Cause Notice was not

found to be satisfactory, as detailed above, the same was not accepted and the contract was terminated vide Termination Notice No.Tr.Imp.1/12937/2012, dated **15.03.2013** invoking Article 8 Clause 9(1)(A) of the **Concessionaire Agreement** dated **12.07.2012**.

37. Defending the **Impugned Award** dated **14.09.2020**, the learned counsel for the Award Holder (respondent in Arb.O.P.(Com.Div.) No.18 of 2022/petitioner in E.P.SR.No.48537 of 2021) submits the scope for interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited. It is therefore submitted that unless the Award Holder-Claimant is able to establish patent illegality, question of setting aside the Impugned Award does not arise.

38. It is submitted that re-appreciation of evidence is not permissible as the scope of Section 34 of the Arbitration and Conciliation Act, 1996 does not permit the Court under Section 34(2) of the Arbitration and Conciliation Act, 1996, to re-appreciate the evidence or sit in appeal.

39. Learned counsel for the Award Holder would submit that the Arbitral Tribunal has erred in observing that there has been no delay on the part of the respondents and consequently no breach of the contract, ignoring the timeline

for completion of various milestones of the project, as contemplated in Article 6, Clause 7.1 of the **Concessionaire Agreement** dated **12.07.2012**. The Arbitral Tribunal has wholly ignored the delay caused by the respondents and has erred in holding that the Termination Notice dated 15.03.2013 is illegal and wrongful without any reasonable basis whatsoever. The Arbitral Tribunal has ignored the factum of delay caused by the respondents and has cursorily held the Termination Notice to be erroneous for want of complying with the contractual procedure prescribed for termination. The Arbitral Tribunal has erred in allowing claims A and C arbitrarily without any basis whatsoever. The Arbitral Tribunal has observed thus, vide Paragraph 21(i) (b) as follows:

> "As a matter of fact for the 10% of TCV, on account of completion of Phase I, an invoice has also raised and it remained unpaid. Apparently, as observed supra, instead of pursuing the said claim and rather giving up such claim, based on the invoice, the claimant has chosen to come up with a different methodology of claims to recoup themselves of the money ploughed into the frustrated project and suffered thereby, on account of the wrongful and unlawful termination of contract by the 2nd Respondent. Consequently, in our view, the claimant is entitled to reimbursement of the money spent by them for acquiring the materials necessary for executing the project as well as, the expenses incurred for labour, services and maintenance of labour etc., as claimed in claim C. The claims A and C are, consequently allowed, as prayed for."

40. Thus, by the above findings, the Tribunal has arbitrarily allowed the

Claims A and C, ignoring the absence of any basis for the same. The Arbitral Tribunal has awarded the amounts in relation to Claim A and C ignoring various material clauses in the contract which run contrary to the findings of the Arbitral Tribunal. The Arbitral Tribunal while awarding the amounts for the Claim A and C pertaining to amounts purportedly incurred for procuring materials, equipment and services for the implementation of the project and a purported administrative/overhead charges, has ignored the Express Agreement between the parties, morefully captured vide Clause 3.1 of Article 2 which reads thus:

> "Subject to and in accordance with the terms and conditions set forth in this Agreement, CTP hereby grants and authorizes the concessionaire to design, procure, finance, commission, operate and maintain the project/project facilities..."

41. Therefore, there was never an understanding between the parties as to the payment for expenses purportedly under the heads sought for in Claims A and C. Therefore, the Arbitral Tribunal has clearly awarded the amounts travelling beyond the terms of the contract.

42. Learned counsel for the Award Debtors further submits that the Arbitral Tribunal while allowing Claims A and C has not accorded any reasons whatsoever other than a mere consolatory reference that instead of pursuing the said claim and rather giving up such claim, based on the invoice, the Award Holder-Claimant has chosen to come up with a different methodology of claims to recoup themselves of the money ploughed. Other than the above reason, no reasoning or contractual basis whatsoever has been accorded to justify awarding of the said claims, and it is for this reason alone, the **Impugned Award** dated **14.09.2020** deserves to be set aside. The Arbitral Tribunal while recording that respondent herein abandoned the claim against contractual payments towards purported completion of **Phase-I**, has failed to take note that such abandonment by itself is indicative of the non-performance of the obligations of the respondent herein of the contractual terms.

43. The Arbitral Tribunal has erred in awarding a sum of **Rs.8,87,07,695/-** towards Claim G being loss of profit, on a wholly arbitrary basis. While the Arbitral Tribunal has erred in ignoring the delay caused by the respondent, the award of loss of profit is also contrary to the settled principle as held by the Hon'ble Supreme Court in **Bharat Coking Coal Limited** Vs.

**L.K.Ahuja,** (2004) 5 SCC 109 that in the absence of any material evidence produced in support of a claim for loss of profit, the same could not have been awarded. In the present case, the award of loss of profit is wholly arbitrary and is in conflict with the fundamental policy of India. The Impugned Award dated **14.09.2020** being passed ignoring a number of material terms of the contract suffers from being in conflict with Public Policy of India and thus deserves to be set aside.

44. The learned counsel for the Award Holder has placed reliance on the following decisions:-

i) **Dirk India Private Limited** Vs. **Maharashtra State Electricity Generation Company Limited,** 2013 SCC Online Bom 481.
ii) **Hindustan Construction Company Limited and another** Vs. **Union of India,** (2020) 17 SCC 324.
iii) **Pam Developments (P) Ltd.,** Vs. **State of West Bengal,** (2019) 8 SCC 112.
iv) **Ssangyong Engg. & Construction Co., Ltd.,** Vs. **NHAI,** (2019) 15 SCC 131.
v) **PSA SICAL Terminals Pvt.Ltd.,** Vs. **Board of Trustees of V.O.Chidambranar Port Trust Tuticorin,** (2021) SCC Online SC 508.
vi) **Delhi Airport Metro Express (P) Ltd** Vs. **DMRC,** (2022) 1 SCC 131.

45. I have considered the arguments advanced by the learned Additional Advocate General for the Award Debtors and the learned counsel for the Award Holder. I have also perused the **Impugned Award** dated **14.09.2020** passed by the Arbitral Tribunal and the documents that were filed before the Arbitral Tribunal.

46. The Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited** Vs. **National Highways Authority of India (NHAI)**, (2019) 15 SCC 131, in Paragraph No.76, held as under:-

> "***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 the 1996 Act, as has been noted earlier in this judgment."***

47. Under no circumstances, any Court can interfere with the Arbitral Award on the ground that justice had not been done in the opinion of the Court as it would be an entry into the merits of the dispute and would be contrary to the ethos of Section 34 of the Arbitration and Conciliation Act, 1996.

48. Thus, the aggrieved party will be entitled to an order setting aside the Award impugned before the Court if only under very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice.

49. The Award Debtor had awarded the contract to the Award Holder for a sum of **Rs.117,00,00,000/-** under the **Concessionaire Agreement** dated **12.07.2012.** Before the Arbitral Tribunal, the Award Holder claimed a sum of **Rs.72,10,19,151/-**.

50. As per the said **Concessionaire Agreement** dated **12.07.2012**, the work was to be completed by the respondent-claimant Award Holder in two phases. The first phase was to be completed within a period of three months from the date of signing of the **Concessionaire Agreement** dated **12.07.2012**.

51. The first phase was confined to the **Integrated Command and Control Centre (ICCC), Vepery, Chennai** of the petitioners office and 10 Traffic Junctions in the city of Chennai. However, the work in the first phase was completed by the Award Holder only on 25.02.2013.

52. The petitioner Award Debtor issued **Show Cause Notice** dated **06.02.2013** to the Award Holder to show cause as to why contract awarded on the Award Holder should not be cancelled as the Award Holder had failed to fulfill any of its contractual obligations entrusted under the aforesaid **Concessionaire Agreement** dated **12.07.2012** by drawing reference to Article 2 Sub-Clause 3.2 and Article 8 Sub-Clause 9.1 of the aforesaid **Concessionaire Agreement** dated **12.07.2012.**

53. The **Show Cause Notice** dated **06.02.2013** also proposed to forfeit the performance security offered by the Award Holder at the time of submitting the bid documents with the Award Debtors.

54. It is at this stage, the proceeding commenced before the Arbitral Proceeding pursuant to a reference to the Arbitral Tribunal. The Arbitral Tribunal has awarded to the Award Holder a total sum of **Rs.53,20,13,306/-** against the claim of **Rs.72,10,19,151/-** of the respondent-claimant before the Arbitral Tribunal.

55. Major chunk of the amount awarded to the Award Holder is for a sum of **Rs.37,44,80,746/-** [Rs.24,58,97,980/- + Rs.3,70,25,071/- + Rs.8,87,07,695/-] towards Claim A, C and G and Rs.15,74,32,562/- towards Claim-I as interest for 8% per annum. Balance award amounts pertain to cost and reimbursement of expenses. The details of the claims and the award amounts are as follows:-

| **Claims (Heads)** | **Description** | **Amount Claimed (In Rs.)** | **Amount Awarded by the Arbitral Tribunal (in Rs.)** | **Remarks** |
|---|---|---|---|---|
| A | Expenses incurred for procuring raw materials for the ITMS project | **Rs. 24,58,97,980/-** | Rs. 24,58,97,980/- | Fully Awarded |
| C | Administrative and Overhead Charges | **Rs. 3,70,25,071/-** | Rs. 3,70,25,071/- | -do- |
| G | Loss of Profit/Damages/ Business Loss @ 15% of CV | **Rs. 7,55,00,000/-** | Rs. 8,87,07,695/- | Partly Awarded |
| I | Interest at 18% per annum from the date of statement of claim till the date of realisation | | Rs. 15,74,32,562/- | Partly Awarded 8% per annum from 18.01.2016 till the date of realisation. |
| J | Costs | To be determined by the Tribunal | Rs. 16,50,000/- | |
| | Reimbursement of Amount | | Rs. 12,00,000/- | |

56. The **Concessionaire Agreement** dated **12.07.2012** contemplates termination of the contract under specified circumstances i.e., "Force Majeure Event" coupled with:-

i) political event; or
ii) non-political event; or
iii) other event, such event viz.,

- *earthquake, flood, inundation, landslide;*
- *storm, tempest, hurricane, cyclone, lightning, thunder or other extreme atmospheric disturbances;*
- *fire caused by reasons not attributable to the Concessionaire of the Contractor or any of the employees or agents of the Concessionaire or the Contractor;*
- *acts of terrorism;*
- *strikes, boycotts, labor disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Concessionaire or the Contractor;*
- *any failure or delay of a Contractor caused by any of the aforementioned Non-Political Events, for which no offsetting compensation is payable to the Concessionaire by or on behalf of the Contractor.*

57. The expression "**Force Majeure Event**" has been defined in the **Concessionaire Agreement** dated **12.07.2012** as follows:-

**8.3.** ***Force Majeure Events:***

*As used in this Agreement, Force Majeure Events means any of the* ***Non-Political Events, the Political Events or the Other Events*** *set out in Articles 7 sub-clauses 8.4, 8.5 and 8.6 respectively including the impact/consequence thereof which:*

- *is beyond the control of the Party claiming to be affected thereby (the "Affected Party"),*
- *prevents the Affected Party from performing or discharging its obligations under this Agreement and the Affected Party has been unable to overcome or prevent despite exercise of due care and diligence.*

58. The expressions, "**Non-Political Events**", "**Political Events"** and **"Other Events"** have been defined in Clauses 8.3 to 8.6 of the **Concessionaire Agreement** dated **12.07.2012**. They read as under:-

| **8.4. Non-Political Events** | **8.5. Political Events** | **8.6. Other Events** |
|---|---|---|
| Any of the following events which prevents the Affected Party from performing any of its obligations for a continuous period of not less than 7 days from the date of its occurrence, shall constitute a Non-Political Event:<br>• *earthquake, flood, inundation, landslide;*<br>• *storm, tempest, hurricane, cyclone, lightning, thunder or other extreme atmospheric disturbances;* | Any of the following events shall constitute Political Event:<br>• Change in Law for which no relief is provided, resulting in Material Adverse Effect.<br>• Early determination of this Agreement by CTP for reasons of national emergency, national security or the public interest. | Any of the following events which prevents the Affected Party from performing any of its obligations for a continuous period of not less than 7 days from the date of its occurrence, shall constitute the Other Event:<br>• war, hostilities (whether war be declared or not);<br>• invasion, act of foreign enemy, rebellion, riots, weapon conflict |

| **8.4. Non-Political Events** | **8.5. Political Events** | **8.6. Other Events** |
|---|---|---|
| • *fire caused by reasons not attributable to the Concessionaire of the Contractor or any of the employees or agents of the Concessionaire or the Contractor;*<br>• *acts of terrorism;*<br>• *strikes, boycotts, labor disruptions or any other industrial disturbances not arising on account of the acts or omissions of the Concessionaire or the Contractor;*<br>• *any failure or delay of a Contractor caused by any of the aforementioned Non-Political Events, for which no offsetting compensation is payable to the Concessionaire by or on behalf of the Contractor.* | | or military actions, civil war;<br>• ionizing radiation, contamination by radio activity from nuclear fuel, any nuclear waste, radioactive toxic explosion;<br>• volcanic eruptions;<br>• any failure or delay of a Contractor caused by any of the aforementioned Other Events, for which no offsetting compensation is payable to the Commissionaire by or on behalf of the Contractor. |

59. The party wanting to terminate the contract under the three

specified circumstances, has to issue a Termination Notice to the other party. The expression, "**Termination Notice**" has been defined in Clause 8.8B of the **Concessionaire Agreement** dated **12.07.2012** as under:-

**B.** ***Termination Notice***

*If either Party having become entitled to do so decided to terminate this Agreement pursuant to the proceedinAwardHoldeg sub article (a), it shall issue Termination Notice setting out;*

- *in sufficient detail the underlying Force Majeure Event;*
- *the Termination Date which shall be a date occuring not earlier than 60 days from the date of Termination Notice;*
- *the estimated Termination Payment including the details of computation thereof and;*

*any other relevant information.*

60. Such a **"Termination Notice**", in this case is the **Show Cause Notice** dated **06.02.2013**. It could have been issued by the Award Debtors only under any of the above three circumstances specified in the **Concessionaire Agreement** dated **12.07.2012**.

61. The **Concessionaire Agreement** dated **12.07.2012** treats the "**Force Majeure Event**" coupled with "**Non-Political Event**" and "**Force Majeure Event"** coupled with **"Other Event**" similarly. "**Force Majeure Event**" coupled with "**Political Event"** is treated separately under the **Concessionaire**

**Agreement** dated **12.07.2012**.

62. The expression "Termination" has been defined in Clause 8.8A of the **Concessionaire Agreement** dated **12.07.2012** can be dissected and understood as follows:-

"**Clause 8.8A**. **Termination**:

> *If a Force Majeure Event which is* ***Non-Political Event or Other Event*** *continues or is in the reasonable judgment of the parties likely to continue beyond a period of 120 days, the Parties may mutually decide to terminate this Agreement or continue this Agreement on mutually agreed revised terms.*
>
> *If the parties are unable to reach an Agreement in this regard, the Affected Party shall after the expiry of the said period of 120 days, be entitled to terminate the Agreement*
>
> *Notwithstanding anything inconsistent contained in the Agreement, if a* ***Force Majeure Event*** *is a* ***political event*** *and the same subsists for a period exceeding 365 days either Party shall be entitled to terminate this Agreement.*
>
> *Provided that CTP may its sole discretion have the option to terminate this Agreement any time after the occurrence of the Political Event."*

63. Under the **Concessionaire Agreement** dated **12.07.2012**, the parties can mutually decide to terminate the Agreement or continue with the

Agreement on mutually agreed the revised terms. This is confined to only **Non-Political Event or Other Event** which continues or is in the reasonable judgment of the parties likely to continue beyond a period of 120 days.

64. Thus, only under the specified circumstances, if the parties are unable to reach the Agreement in this regard, the affected party could after the expiry of $120^{th}$ day to terminate the contract under the **Concessionaire Agreement** dated **12.07.2012**.

65. The Agreement also contemplates "**Termination payment**" for the period prior to Commercial Operations Date (COD). Relevant clause relating to termination of contract in the **Concessionaire Agreement** dated **12.07.2012** reads as under:-

D. **Termination Payment:**

| *Upon Termination of this Agreement after the Commencement Date or the Financial Close whichever is later, due to a Force Majeure Event, Termination Payment shall he made to the Concessionaire by CTP in accordance with the following:* | |
|---|---|
| ***Prior to COD*** | ***After COD*** |
| *If Termination is due to a Force Majeure Event which is a Non Political Event, no Termination Payment shall be made by CTP to* | *If Termination is due to a Force Majeure Event which is a Non Political Event, no Termination Payment shall be made by CTP to* |

<table>
<tr><td colspan="2">Upon Termination of this Agreement after the Commencement Date or the Financial Close whichever is later, due to a Force Majeure Event, Termination Payment shall he made to the Concessionaire by CTP in accordance with the following:</td></tr>
<tr><td>the Concessionaire but, the Concessionaire shall be entitled to receive and appropriate the proceeds of any insurance obtained by it.</td><td>the Concessionaire but, the Concessionaire shall be entitled to receive and appropriate the proceeds of any insurance obtained by it.</td></tr>
<tr><td>If Termination is due to a Force Majeure Event which is a Political Event, CTP shall pay to the Concessionaire Termination Payment equal to the Book Value as on the Date of Termination Notice.</td><td>If Termination is due to a Force Majeure Event which is a Political Event, CTP shall pay to the Concessionaire Termination Payment equal to the Book Value of the Termination Notice.</td></tr>
<tr><td>If Termination is due to a Force Majeure Event which is the Other Event, CTP shall pay to the Concessionaire, Termination Payment equal to the Book Value as on the date of Termination Notice.</td><td>If Termination is due to a Force Majeure Event which is the Other Event, CTP shall pay to the Concessionaire, Termination Payment equal to 90% of the Book Value as on the termination date.</td></tr>
</table>

66. The Agreement does not contemplate the termination of contract under any other circumstances other than the one stipulated above. None of the circumstances specified above were available for the Award Debtors to terminate the contract under the **Concessionaire Agreement** dated **12.07.2012** with the Award Holder. Therefore, the termination of contract pursuant to **Concessionaire Agreement** dated **12.07.2012** during the pendency of the arbitral proceeding was contrary to the express terms under condition of the

**Concessionaire Agreement** dated **12.07.2012**.

67. Therefore, the conclusion in the Impugned Award of the Arbitral Tribunal that the termination of the contract by the Award Debtor was illegal cannot be found fault with. In my view, the conclusion arrived by the Arbitral Tribunal therefore does not warrant any interference.

68. Therefore, the challenge to the Impugned Award that the termination of the contract by the petitioner as wrongful and illegal has to be rejected. Thus, the Award Holder was entitled for damages for pre-mature termination of the contract by the Award Debtor and such other amounts towards restitution of the amount spent for executing the contract under the **Concessionaire Agreement** dated **12.07.2012**.

69. In **General Manager, Northern Railway and another** Vs. **Sarvesh Chopra, (2002) 4 SCC 45**, the Hon'ble Supreme Court in Paragraph 15 held as under:-

> *"**15.** In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of*

*material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015) states*

> *"a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')".*

*If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations:*

> *(i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,*
>
> *(ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible,*

*(iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."*

70. The Hon'ble Supreme Court in **General Manager, Northern Railway and another** Vs. **Sarvesh Chopra, (2002) 4 SCC 45**, referring to the American jurisprudence in Hudson's Building and Engineering Contracts and literature / Indian jurisprudence in Chitty on Contracts and with reference to Section 55 and Section 56 of the Indian Contract Act, 1872, observed that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations:

i. if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act,
ii. the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible,
iii. if the contractor makes it clear that escalation or rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the

employer on terms.

71. This ought to have been examined by the Arbitral Tribunal from the prism of Section 73 of the Indian Contract Act, 1872 by the Arbitral Tribunal.

72. For awarding compensation under Section 73 of the Indian Contract Act, 1872, the Arbitral Tribunal ought to have given full effect to Explanation to Section 73 of the Indian Contract Act, 1872. As per Explanation to Section 73 of the Indian Contract Act, 1872, in estimating the loss or damage arising from a breach of contract, the means which existed for remedying the inconvenience caused by the non-performance of the contract should have be taken into account by the Arbitral Tribunal.

73. Section 73 of the Indian Contract Act, 1872 reads as under:-

> "73. ***Compensation for loss or damage caused by breach of contract***.-
> *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote*

*and indirect loss or damage sustained by reason of the breach.*

***Compensation for failure to discharge obligation resembling those created by contract****.-*

*When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

***Explanation****.- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."*

74. In **M/s.A.T.Brij Paul Singh and others** Vs. **State of Gujarat**, (1984) 4 SCC 59, in Paragraphs 8 and 11, the Hon'ble Supreme Court rendered its decision on 25.07.1984, held as under:-

"***8. Once it is held that the respondent was guilty of breach of works contract, part of which was already performed and for performing which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in Saurashtra, certainly he would be entitled to damages. One of the heads of damages under which claim is made is "loss of expected profit in the work". The claim under this head as canvassed before the High Court was in the amount of Rs.4,30,314/-.***

***9. .....***

***10. .....***

***11. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified,***

***and the plaintiff contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured.***"

75. The Hon'ble Supreme Court in **Dwaraka Das** Vs. **State of Madhya Pradesh and another**, (1999) 3 SCC 500 in its decision followed the above views and observed as under:-

> *"**9. The claim of the petitioner for payment of Rs 20,000 as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard, the appellate court observed:***
>
> > "***It is not his case that for due compliance of the contract he had advanced money to the labourers or that he had purchased materials or that he had incurred any obligations and on account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts.***"

***Such a finding of the appellate court appears to be based on wrong assumptions. The appellant had never claimed Rs.20,000/- on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs.2 lakhs which was the value of the contract. <u>This Court in A.T. Brij Paul Singh v. State of Gujarat [(1984) 4 SCC 59] while interpreting the provisions of Section 73 of the Contract Act, 1872 has held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed: (SCC pp. 64-65, paras 10-11)</u>***

> ***"<u>What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of</u>***

> ***work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.***
>
> ***
>
> ***Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured."***

***To the same effect is the judgment in Mohd. Salamatullah v. Govt. of A.P. [(1977) 3 SCC 590 : AIR 1977 SC 1481] After approving the grant of damages in case of breach of contract, the Court further held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding***

> ***<u>breach of contract by specifically holding that "we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract". It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement</u>. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs.20,000/- on account of damages as expected profit out of the contract which was found to have been illegally rescinded.***"

76. In **J.G.Engineers Private Limited** Vs. **Union of India and another**, (2011) 5 SCC 758, the Hon'ble Supreme Court held as under in Paragraph 32:-

> "***32. <u>Once the arbitrator recorded the finding on consideration of the evidence/material, that the contractor was not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of the respondents claiming any of the following from the contractor does not arise</u>:-***
> ***(i) Extra expenditure incurred in getting the balance of work completed through another contractor under Clause (3) of the agreement (Counterclaim 1 for Rs.1,46,69,277/-).***
> ***(ii) Levy of liquidated damages under Clause (2) of the agreement at 10% of the estimated cost of work for the delay between 10-1-1995 to 14-3-1996 (Counterclaim 2 for Rs.56,84,998/-).***
> ***(iii) Claim on account of expected demand for***

> ***escalation in rates payable to the alternative contractor in getting the work completed, in addition to the extra expenditure claimed under Counterclaim 1 (Counterclaim 3 for tentative sum of Rs.75 lakhs to be ascertained after the work was actually completed and the bill of the new agency is settled).***
>
> ***(iv) Claim for cost of arbitration (Counterclaim 4 for Rs.1,00,000/-).***"

77. Thus, consequences arising out of termination of the contract has to be decided in the light of the provisions of the Indian Contract Act, 1872.

78. A reading of the Clauses under the **Concessionaire Agreement** dated **12.07.2012** indicates that the contract with the Award Holder / respondent-claimant can be terminated under limited circumstances namely Force Majeure Events as defined in Clause 8.3 of the **Concessionaire Agreement** dated **12.07.2012** coupled with any of the Non-Political Events or Political Events or Other Events as defined in Clauses 8.4 to 8.6 of the **Concessionaire Agreement** dated **12.07.2012**.

79. The contract was to be completed within a period of 5 years without any financial commitment by the Award Debtors for procurement. A sum of **Rs.117,00,00,000/-** was to be paid in stages as per Clauses 8.3 to 8.6 of the

**Concessionaire Agreement** dated **12.07.2012**.

80. The termination by the Award Debtors was indeed in breach of contract under the **Concessionaire Agreement** dated **12.07.2012** as none of the circumstances in Clause 8.3 read with Clause 8.4 or Clause 8.5 or Clause 8.6 of the **Concessionaire Agreement** dated **12.07.2012** were attracted. Therefore, the rights of the parties *inter se* should have been / ought to have been examined for the perspective of Section 55 of the Indian Contract Act, 1872 read with Sections 64 and 75 of the Indian Contract Act, 1872 and Section 76 of the Indian Contract Act, 1872, depending upon the claims and counterclaims of the parties.

81. This is a case of breach of contract by issuance of Termination Notice dated 15.03.2013. The Award Holder was thus entitled for amount incurred towards the labor skill and the materials utilized up to the completion of Phase-I and other direct consequence arising out of termination of the contract. As far as the supply of materials which were to be deployed for Phase-II are concerned, the Award Holder would not have been entitled to fasten the liability on the petitioners without satisfying the requirements of Explanation to Section 73 of the Indian Contract Act, 1872.

82. A sum of **Rs.24,58,97,980/-** has been awarded towards **Claim A** for the alleged **“Expenses Incurred for Procuring Raw materials for the ITMS Project”**. A sum of **Rs.3,79,25,071/-** has been awarded towards **Claim C** for the alleged **“Administrative and Overhead Charges”** incurred by the Award Holder and a sum of **Rs.8,87,07,695/-** towards **Claim G** for the alleged **“Loss of Profit/Damages/Business”** at 10% .

83. As mentioned elsewhere, this Court is neither expected to sit as Court of Appeal nor reappraise the evidence in substituting its reasoning of the Arbitral Tribunal. If the decision of the Arbitral Tribunal bears sufficient reasoning based on relevant and material evidence, the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996, either on account of patent illegality or Arbitral Award is in conflict with Public Policy of India as in **Section 34(2)(b)(ii)** read with **Explanation 2** to **Section 34** of the Arbitration and Conciliation Act, 1996 cannot be justified.

84. **Explanation 2** to **Section 34(2)** of the Arbitration and Conciliation Act, 1996 starts with the expression **“for avoidance of doubt”**. It makes it

clear, the test as to whether there is a contravention with the Fundamental Policy of Indian Law shall not entail a review on the merits of the dispute.

85. As noted in the above Table, the bulk of Award amount are under the heads **Claim A, Claim C ,Claim G and Claim I.** The rest of the Claims are on account of the interest and cost. **Claim G** is on account of cancellation / termination of the contract vide **Termination Notice** dated **15.03.2013** which led to initiation of the Arbitration Proceedings before the Arbitral Tribunal.

86. **Claim A** relates for a sum of **Rs.24,58,97,980/-** which has been allowed *in toto* relates to procurements / services of various service providers and goods from various vendors. Claim A indicates that the total amount purportedly paid by the respondent-claimant to various vendors of goods and services is Rs.24,58,97,980/-. According to the Award Holder, the Award Holder has paid a sum of **Rs.22,98,95,936/-** leaving the balance of **Rs.3,65,02,044/-**. In all, there are 42 vendors. Certain payments are running to few crores, certain payments are in many lakhs to few lakhs and certain payments are in few thousands.

87. The payments in crores, lakhs and thousands are divided into, segregated and bunched together in the following tables:-

Table A – Payments in Crores

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount allegedly paid said to have been paid to the vendor | Balance that was allegedly payable to vendors | Total |
|---|---|---|---|---|---|
| 1. | **Sharpedge Interior Design and Project Management Private Limited** | Rs.1,66,86,183.94/- | Rs.2,20,00,000/- | --- | Rs.2,20,00,000/- |
| 2. | **BaeganSebuccio Consulting** | Euro 2,70,000 | Rs.75,76,519/- | Rs.1,41,17,423/- | Rs.2,16,93,942/- |
| 3. | **Raj Cabletronics** | Rs. 1,30,92,600/- | Rs.1,30,92,600/- | --- | Rs.1,30,92,600/- |
| 4. | **Infonet Solutions** | Rs. 5,12,80,408/- | Rs.4,45,00,000/- | Rs. 69,57,165/- | Rs.5,14,57,165/- |
| 5. | **Barco Electronic Systems (P) Limited** | Rs. 1,46,22,545/- & Rs.5,61,800/- | Rs.1,80,49,525/- | --- | Rs.1,80,49,525/- |
| 6. | **Analog and Digital Labs** | Rs. 2,19,00,000/- | Rs.1,50,00,000/- | Rs. 69,00,000/- | Rs.2,19,00,000/- |
| 7. | **Arya Communications and Electronics Private Limited** | Rs. 3,84,63,277/- | Rs.1,99,95,230/- | --- | Rs.1,99,95,230/- |
| 8. | Anixter India Private Limited | Rs. 6,40,85,672/- | Rs.2,12,73,108/- | --- | Rs.2,12,73,108/- |
| | | | **Total** | Rs.2,79,74,588/- | **Rs.33,76,54,802/-** |

Table B – Payments in Lakhs

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount Paid | Balance payable to vendors | Total Cost |
|---|---|---|---|---|---|
| 1. | Ping Infrastructure | Rs. 80,54,915/- | Rs. 84,36,123/- | Rs. 13,93,372/- | Rs. 98,29,495/- |

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount Paid | Balance payable to vendors | Total Cost |
|---|---|---|---|---|---|
| | Management System Private Limited | & Rs. 14,95,285/- | | | |
| 2. | Globe Engineering | Rs. 3,15,00,000/- | Rs. 79,00,000/- | --- | Rs. 79,00,000/- |
| 3. | Avika Data Software Private Limited | Rs. 45,00,000/- | Rs. 45,00,000/- | --- | Rs. 45,00,000/- |
| 4. | Solaris Computer Private Limited | Rs. 23,63,800/- & Rs. 14,77,000/- | Rs. 37,74,577/- | --- | Rs. 37,74,577/- |
| 5. | Eazee Tech | Rs. 4,23,40,000/- | Rs. 53,00,000/- | --- | Rs. 53,00,000/- |
| 6. | Aricel Cellular Limited | --- | Rs. 2,94,705/- | --- | Rs. 2,94,705/- |
| 7. | Airtel | --- | Rs. 2,93,634/- | --- | Rs. 2,93,634/- |
| 8. | M.R.S. Genetech Private Limited | --- | Rs. 3,05,000/- | Rs. 1,56,360/- | Rs. 4,61,360/- |
| 9. | Zen Exim Private Limited | Rs. 41,15,330/- | Rs. 5,00,000/- | --- | Rs. 5,00,000/- |
| 10. | Sai Media Productions | Rs. 16,00,000/- | Rs. 16,00,000/- | --- | Rs. 16,00,000/- |
| 11. | Trinity Mobility Private Limited | Rs. 35,70,000/- | Rs. 25,00,000/- | Rs. 10,70,000/- | Rs. 35,70,000/- |
| 12. | CommNet Systems and Solutions | Rs. 10,00,000/- | Rs. 2,75,000/- | --- | Rs. 2,75,000/- |
| 13. | Microcrafts | Rs. 2,61,06,000/- | Rs. 5,00,000/- | --- | Rs. 5,00,000/- |
| 14. | RVS Fabs | Rs. 31,00,000/- & Rs. 2,50,200/- | Rs. 33,50,000/- | --- | Rs. 33,50,000/- |
| 15. | Infonet Solutions | --- | Rs. 5,00,000/- | Rs. 20,266/- | Rs. 5,20,266/- |
| 16. | Genetec | 1,05,919.95 USD | Rs.5,73,579/- | Rs. 58,87,457/- | Rs. 64,61,036/- |
| 17. | Fusion Software & Systems Private Limited | Rs. 4,71,600/- | Rs. 4,71,600/- | --- | Rs. 4,71,600/- |
| 18. | Unex Power Point Private Limited | Rs. 11,63,500/- | Rs. 1,40,000/- | --- | Rs. 1,40,000/- |
| 19. | SRM Enterprises | Rs. 1,48,000/- | Rs. 1,50,000/- | --- | Rs. 1,50,000/- |
| 20. | RSP Technologies | Rs. 50,00,000/- | Rs. 5,00,000/- | --- | Rs. 5,00,000/- |
| 21. | India Network Technology | Rs. 40,50,000/- | Rs. 40,50,000/- | --- | Rs. 40,50,000/- |
| | | | **Total** | Rs.85,27,455/- | **Rs.5,44,41,673/-** |

Table C – Payments in thousands

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount Paid | Balance payable to vendors | Total Cost |
|---|---|---|---|---|---|
| 1. | Dishnet Wireless Limited | Rs. 1,35,000/- | Rs. 61,563/- | --- | Rs. 61,563/- |
| 2. | Selvam Enterprises | --- | Rs. 16,750/- | --- | Rs. 16,750/- |
| 3. | Srimath Consultance | --- | Rs. 83,110/- | --- | Rs. 83,110/- |
| 4. | Delton Cable Company | Rs. 16,800/- | Rs. 18,242/- | --- | Rs. 18,242/- |
| 5. | R.D.Plumbing | --- | Rs. 6,900/- | --- | Rs. 6,900/- |
| 6. | VRN Power Control Systems | --- | Rs. 91,171/- | --- | Rs. 91,171/- |
| 7. | Kumaran | --- | Rs. 48,000/- | --- | Rs. 48,000/- |
| 8. | Log-US Business Systems India Private Limited | --- | Rs. 51,000/- | --- | Rs. 51,000/- |
| 9. | Sign D Sign | Rs. 12,000/- | Rs. 10,000/- | --- | Rs. 10,000/- |
| 10. | Santosh Stores | --- | Rs. 39,000/- | --- | Rs. 39,000/- |
| 11. | Harihara Cleaning Solutions | --- | Rs. 24,000/- | --- | Rs. 24,000/- |
| 12. | Amal Enterprises | --- | Rs. 45,000/- | --- | Rs. 45,000/- |
| | | | **Total** | --- | **Rs. 4,94,736/-** |

Table – A + B + C – Payments in crores, lakhs and thousands

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount Paid | Balance payable to vendors | Total Cost |
|---|---|---|---|---|---|
| 1. | Sharpedge Interior Design and Project Management Private Limited | Rs.1,66,86,183.94/- | Rs.2,20,00,000/- | --- | Rs.2,20,00,000/- |
| 2. | BaeganSebuccio Consulting | Euro 2,70,000 | Rs. 75,76,519/- | Rs.1,41,17,423/- | Rs.2,16,93,942/- |
| 3. | Raj Cabletronics | Rs. 1,30,92,600/- | Rs.1,30,92,600/- | --- | Rs.1,30,92,600/- |
| 4. | Infonet Solutions | Rs. 5,12,80,408/- | Rs.4,45,00,000/- | Rs. 69,57,165/- | Rs.5,14,57,165/- |

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount Paid | Balance payable to vendors | Total Cost |
|---|---|---|---|---|---|
| 5. | Barco Electronic Systems (P) Limited | Rs. 1,46,22,545/-& Rs.5,61,800/- | Rs.1,80,49,525/- | --- | Rs.1,80,49,525/- |
| 6. | Analog and Digital Labs | Rs. 2,19,00,000/- | Rs.1,50,00,000/- | Rs. 69,00,000/- | Rs.2,19,00,000/- |
| 7. | Arya Communications and Electronics Private Limited | Rs. 3,84,63,277/- | Rs.1,99,95,230/- | --- | Rs.1,99,95,230/- |
| 8. | Anixter India Private Limited | Rs. 6,40,85,672/- | Rs.2,12,73,108/- | --- | Rs.2,12,73,108/- |
| 9. | Ping Infrastructure Management System Private Limited | Rs. 80,54,915/- & Rs. 14,95,285/- | Rs. 84,36,123/- | Rs. 13,93,372/- | Rs. 98,29,495/- |
| 10. | Globe Engineering | Rs. 3,15,00,000/- | Rs. 79,00,000/- | --- | Rs. 79,00,000/- |
| 11. | Avika Data Software Private Limited | Rs. 45,00,000/- | Rs. 45,00,000/- | --- | Rs. 45,00,000/- |
| 12. | Solaris Computer Private Limited | Rs. 23,63,800/- & Rs. 14,77,000/- | Rs. 37,74,577/- | --- | Rs. 37,74,577/- |
| 13. | Eazee Tech | Rs. 4,23,40,000/- | Rs. 53,00,000/- | --- | Rs. 53,00,000/- |
| 14. | Aricel Cellular Limited | --- | Rs. 2,94,705/- | --- | Rs. 2,94,705/- |
| 15. | Airtel | --- | Rs. 2,93,634/- | --- | Rs. 2,93,634/- |
| 16. | M.R.S. Genetech Private Limited | --- | Rs. 3,05,000/- | Rs. 1,56,360/- | Rs. 4,61,360/- |
| 17. | Zen Exim Private Limited | Rs. 41,15,330/- | Rs. 5,00,000/- | --- | Rs. 5,00,000/- |
| 18. | Sai Media Productions | Rs. 16,00,000/- | Rs. 16,00,000/- | --- | Rs. 16,00,000/- |
| 19. | Trinity Mobility Private Limited | Rs. 35,70,000/- | Rs. 25,00,000/- | Rs. 10,70,000/- | Rs. 35,70,000/- |
| 20. | CommNet Systems and Solutions | Rs. 10,00,000/- | Rs. 2,75,000/- | --- | Rs. 2,75,000/- |
| 21. | Microcrafts | Rs. 2,61,06,000/- | Rs. 5,00,000/- | --- | Rs. 5,00,000/- |
| 22. | RVS Fabs | Rs. 31,00,000/- & Rs. 2,50,200/- | Rs. 33,50,000/- | --- | Rs. 33,50,000/- |

| Sl. No. | Name of the Vendor | Purchase Order Value | Total Amount Paid | Balance payable to vendors | Total Cost |
|---|---|---|---|---|---|
| 23. | Infonet Solutions | --- | Rs. 5,00,000/- | Rs. 20,266/- | Rs. 5,20,266/- |
| 24. | Genetec | 1,05,919.95 USD | Rs.5,73,579/- | Rs. 58,87,457/- | Rs. 64,61,036/- |
| 25. | Fusion Software & Systems Private Limited | Rs. 4,71,600/- | Rs. 4,71,600/- | --- | Rs. 4,71,600/- |
| 26. | Unex Power Point Private Limited | Rs. 11,63,500/- | Rs. 1,40,000/- | --- | Rs. 1,40,000/- |
| 27. | SRM Enterprises | Rs. 1,48,000/- | Rs. 1,50,000/- | --- | Rs. 1,50,000/- |
| 28. | RSP Technologies | Rs. 50,00,000/- | Rs. 5,00,000/- | --- | Rs. 5,00,000/- |
| 29. | India Network Technology | Rs. 40,50,000/- | Rs. 40,50,000/- | --- | Rs. 40,50,000/- |
| 30. | Dishnet Wireless Limited | Rs. 1,35,000/- | Rs. 61,563/- | --- | Rs. 61,563/- |
| 31. | Selvam Enterprises | --- | Rs. 16,750/- | --- | Rs. 16,750/- |
| 32. | Srimath Consultance | --- | Rs. 83,110/- | --- | Rs. 83,110/- |
| 33. | Delton Cable Company | Rs. 16,800/- | Rs. 18,242/- | --- | Rs. 18,242/- |
| 34. | R.D.Plumbing | --- | Rs. 6,900/- | --- | Rs. 6,900/- |
| 35. | VRN Power Control Systems | --- | Rs. 91,171/- | --- | Rs. 91,171/- |
| 36. | Kumaran | --- | Rs. 48,000/- | --- | Rs. 48,000/- |
| 37. | Log-US Business Systems India Private Limited | --- | Rs. 51,000/- | --- | Rs. 51,000/- |
| 38. | Sign D Sign | Rs. 12,000/- | Rs. 10,000/- | --- | Rs. 10,000/- |
| 39. | Santosh Stores | --- | Rs. 39,000/- | --- | Rs. 39,000/- |
| 40. | Harihara Cleaning Solutions | --- | Rs. 24,000/- | --- | Rs. 24,000/- |
| 41. | Amal Enterprises | --- | Rs. 45,000/- | --- | Rs. 45,000/- |
| | | Total | **Rs.22,98,95,936/-** | **Rs.3,65,02,043/-** | **Rs.39,25,91,211/-** |

88. As Mentioned in the above Table, Claim A is for a sum of **Rs.24,58,97,980/-.** It pertains to procurement of raw material for the work awarded / contracted to the respondent-claimant. The work in the **Integrated Command and Control Centre (ICCC) at Vepery, Chennai**, is Part of **Phase-I** which was completed admittedly on **25.02.2013** i.e., long after **12.10.2012**. Therefore, the claim for a sum of **Rs.24,58,97,980/-** awarded by the Arbitral Tribunal can be contested if the Arbitral Tribunal has committed either patent illegality or has passed the Award in violation of fundamental policy of Indian Law as in Explanation 1 to Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996.

89. The Award Holder has produced invoices of the service provider namely M/s.Sharpedge Interior Design and Project Management Private Limited, Ambattur, Chennai and the consequential payments made by the petitioners in the form of Bank Statement. The total value of the invoices of M/s.Sharpedge Interior Design and Project Management Private Limited, Ambattur, Chennai alone was **Rs.1,66,86,183.94/-**.

90. Out of the aforesaid amount of **Rs.1,66,86,183.94/-**, a sum of **Rs.2,20,00,000/-** has been awarded for the supply effected by M/s.Sharpedge Interior Design and Project Management Private Limited, Ambattur, Chennai. The said M/s.Sharpedge Interior Design and Project Management Private Limited, Ambattur, Chennai has raised few invoices dated **31.03.2013** only after completion of the **Phase-I** on **25.02.2013.**

91. As far as the other major expenses purportedly incurred by the respondent-claimant from and out of the aforesaid amount of **Rs.24,58,97,980/-** pertains to implementation of video processing algorithms. The Arbitral Tribunal has not discussed how these invoices were payable. It is evident from the invoices raised by M/s.Baegan Sebuccio Consulting UG on the respondent-claimant was only for **36,000 Euros (Rs.25,14,582/-)**. Out of the aforesaid amount, 5852.46 Euros (Rs.5,18,004/-) was deducted towards income tax. Thus, only a sum of Rs.19,96,578/- has been paid to the said M/s.Baegan Sebuccio Consulting UG by the respondent-claimant.

92. The Concessionaire Agreement Certificates also confirm the position in Form No.15CB or under Rule 37BB of the Income Tax Rules, 1962 for the purpose of Income Tax Act, 1961. There is no explanation in the Impugned Award as to how the Arbitral Tribunal has accepted the claim of the respondent-claimant for **Rs.2,16,93,942/-**. The Bank Statement that has been filed along with the documents by the respondent-claimant merely discloses payment of **Rs.30,00,000/-** to M/s.Baegan Sebuccio Consulting UG whereas, the invoices raised by M/s.Baegan Sebuccio Consulting UG was for **2,70,000 Euro**.

93. These aspects ought to have been examined by the Arbitral Tribunal before awarding the aforesaid sum of **Rs.2,16,93,942/-** out of a sum of **Rs.24,58,97,980/-** forming part of the Claim A.

94. Similarly, Purchase Order on M/s.Raj Cabletronics is for a sum of **Rs.1,30,92,600/-** dated **05.12.2012.** It is for supply of data and power cables and for operation and maintenance for five years. The invoices that have been filed before the Arbitral Tribunal are for the following amounts:-

| Sl. No. | Date | Amount |
|---|---|---|
| 1. | 07.02.2013 | Rs. 23,012.00/- |
| 2. | 20.02.2013 | Rs. 34,573.00/- |
| 3. | 12.02.2013 | Rs. 7,49,868.00/- |
| 4. | 09.05.2013 | Rs. 3,64,969.00/- |
| | | Total : Rs. 11,72,422.00/- |

95. Though the invoices for only the aforesaid amount, yet the Arbitral Tribunal has awarded **Rs.1,30,92,600/-**. There is also no clear discussion in the Impugned Award as to how the Arbitral Tribunal has entertained the aforesaid claim of the respondent-claimant for **Rs.1,30,92,600/-** out of total claim of **Rs.24,58,97,980/-** forming part of the Claim A and awarded the aforesaid sum.

96. That apart, some of the invoices are after the termination of the contract on 15.03.2013. This aspect ought to have been considered by the Arbitral Tribunal. Similarly, the Purchase Orders on M/s.Ping Infrastructure Management System Private Limited were dated **05.12.2012** and **23.01.2013** for a sum of **Rs.80,54,915.00/-** and **Rs.14,95,285.00/-**, for a total sum of **Rs.98,29,495.00/-**. The supplies have been made under the following invoices:-

| Sl. No. | Date | Amount |
|---|---|---|
| 1. | 01.09.2013 | Rs. 32,86,770.00/- |
| 2. | 01.09.2013 | Rs. 4,22,665.00/- |
| 3. | 04.09.2013 | Rs. 1,40,490.00/- |
| 4. | 04.10.2013 | Rs. 1,38,705.00/- |
| | | Total: Rs. 39,88,630.00/- |

97. These supplies are long after termination of the contract vide **Termination Notice** dated **15.03.2013** although the Purchase Orders are before termination of the contract vide **Termination Notice** dated **15.03.2013**. All the above mentioned supplies are after termination of the contract as noted above. The respondent-claimant appears to have only filed a receipt of **Rs.35,00,000/-** for ITMS project against the Purchase Order No.PO/PIL/1213/055. The details of the Purchase Orders are as under:-

| Sl. No. | Purchase Order No. | Date | Amount |
|---|---|---|---|
| 1. | PO/PIL/1213/055 | 05.12.2012 | Rs. 80,54,915.00/- |
| 2. | PIL/PO/1213/074 | 23.01.2013 | Rs. 14,95,285.00/- |
| | | | Rs. 95,50,200.00/- |

98. The respondent-claimant has not produced any receipt for the

second mentioned Purchase Order i.e., Purchase Order No.PIL/PO/1213/074 and the supplies made against the first Purchase Order by M/s.Ping Infrastructure Management System Private Limited. This aspect ought to have been examined by the Arbitral Tribunal.

99. The Award Holder has raised three Purchase Orders all dated 27.09.2012 on M/s.Barco Electronics Systems Private Limited for a total value of **Rs.1,80,49,525/-.** The supplies against these Purchase Orders are under invoices dated **17.01.2013** and **12.04.2013.** This is after the work in **Phase-I** was purportedly completed on **25.02.2013** and after the termination was granted for starting the work for **Phase-II**.

100. The Arbitral Tribunal ought to have examined what entertained the supplies on the dates mentioned above were utilized for the project for **Phase-II** as admittedly the work was stalled.

101. Most of the invoices which have been filed before the Arbitral

Tribunal indicates that the supplies are purportedly in response to various orders placed by the Award Holder before the issuance of **Show Cause Notice** dated **06.02.2013** and supplies were made after the aforesaid notice was issued and after the Award Holder was stalled from implementing the **Phase-II** of the Project.

102. Since several supplies were purportedly made by various vendors of services and goods after the work was stalled, it was for the Award Holder to establish that the items were purchased for the project. They had to be audited and accounted establishing that they were not utilized for any other purpose and that account of the same, the Award Holder was entitled to recover the cost for the Award Debtors.

103. That apart, the Arbitral Tribunal has not particularized the payments for each of the invoices. Thus, it has to be concluded that the Impugned Award suffers from patent illegality and is liable to be set aside leaving open for the Award Holder to establish its rights to recover the direct loss suffered on account of purchases made pursuant to various Purchase Orders raised on various vendors of services and goods intended for the implementation of the **Integrated Traffic Management System (ITMS)** for

the petitioners-Award Debtors.

104. That apart, the calculation of damages / awarding of Claim C for **Rs.3,70,25,071/-** towards administrative and overhead charges for the work purportedly carried out between **12.07.2012** (being the date of the Concessionaire Agreement) and **06.02.2013** the date of Show Cause Notice could not have been awarded separately over and above purported damages for a sum of **Rs.8,87,07,695/-**. It clearly indicates that there is an unjust enrichment as at best the respondent-claimant would have been entitled to recover for direct loss arising from the breach of the contract in terms of Section 73 of the Indian Contract Act, 1872.

105. The calculation of the damages based on the alleged expenses incurred in procuring services and goods for the **Integrated Traffic Management System (ITMS)** project for the Award Debtor is for **Rs.24,58,97,980/-**. Claim C Award has been restricted to **Rs.8,87,07,695/-** as against a claim amount of **Rs.17,55,00,000/-** of the Award Holder. The amount of **Rs.8,87,07,695/-** has been arrived by the Arbitral Tribunal by subtracting the amount already awarded towards Claim A and towards Claim C for a sum of

**Rs.28,29,23,051/-** (Rs.24,58,97,980/- + Rs.3,70,25,071/-) and on the same, 10% has been awarded i.e., **Rs.88,70,76,949/-** (Rs.117,00,00,000/- - Rs.28,29,23,051/-).

106. In this case, the compensation has been awarded purportedly under Section 73 of the Indian Contract Act, 1872. The calculation has been arrived by the Arbitral Tribunal by subtracting Claim A (**Rs.24,58,97,980/-**) and Claim C (**Rs.3,70,25,071/-**) equivalent to **Rs.28,29,23,051/-**. Thus, the amount has been subtracted from the contract value of **Rs.117,00,00,000/-** to arrive at the figure of **Rs.88,70,76,949/-** (**Rs.117,00,00,000/-** - **Rs.28,29,23,051/-**). On the aforesaid sum of **Rs.88,70,76,949/-**, the Arbitral Tribunal has awarded a sum of **Rs.8,87,07,695/-**.

107. The Arbitral Tribunal having come to a conclusion that the Award Debtors had breached the contract. The Arbitral Tribunal was certainly required to Award compensation to the Award Holder if the conclusion was correct. However, while awarding the aforesaid compensation, it has also included the administrative overhead charges purportedly incurred by the respondent-claimant.

108. While awarding the aforesaid sum of **Rs.8,87,07,695/-,** the Arbitral Tribunal has not considered the explanation which is vital as a result of which, the Award Holder has been awarded the aforesaid sum of **Rs.8,87,07,695/-**. The awarding of **Rs.3,70,25,071/-** also is in the nature of damages suffered by the respondent-claimant on account of the premature termination of the contract which was otherwise to be in force for a period of 5 years from the Commercial Operation Date (COD) as defined in the aforesaid **Concessionaire Agreement** dated **12.07.2012**.

109. Thus, this Court is of the view that awarding of Claim C (**Rs.3,70,25,071/-**) and Claim G (**Rs.8,87,07,695/-**) not only results in twin benefit to the Award Holder but also without due consideration of the mandatory requirements of explanation to Section 73 of the Indian Contract Act, 1872.

110. That apart, the Administrative and Overhead Charges are the

expenses, which the Award Holder was in any event bound to pay to its employees and therefore it was incumbent on the part of the respondent-claimant to have particularized the amount payable and allocated for the staff deployed for implementing **Phase-I** as admittedly the work as far as **Phase-II** had not proceeded after the issuance of **Termination Notice** dated **15.03.2013**.

111. Perusal of the documents filed before the Arbitral Tribunal which have been filed before this Court indicates that there is no clear discussion as to how the respondent-claimant has substantiated the claims before the Arbitral Tribunal barring marking of invoices and few bank statements.

112. Thus, there is scope for interference under Section 34 of the Arbitration and Conciliation Act, 1996 for limited purpose as the Court is not expected to re-appreciate the evidence. However, to verify whether there is patent illegality, the Court has to necessarily see whether the Arbitral Tribunal had applied its mind to the evidence placed before it and the law on the subject.

113. The documents that have been filed before this Court indicates that most of the claims are not substantiated by the respondent-claimant before the

Arbitral Tribunal. The Arbitral Tribunal has also not given a clear finding as to how the Award Holder / respondent-claimant was entitled to the entire amount of **Rs.24,58,97,980**/-.

114. Perusal of the documents and the reasoning in the Impugned Award indicates that the Arbitral Tribunal has not examined the invoices *qua* the respective Purchase Orders raised by the Award Holder on various vendors on the supplies made after the notices were issued for terminating the contract on **06.02.2013**.

115. Admittedly, the Award Holder / respondent-claimant was not allowed to execute **Phase-II** although permission was granted earlier on **18.01.2013** to proceed with **Phase-II**. The Award Holder has not clearly explained how it was entitled for payments for the purported supplies made by the service provider / vendors of material after the work in **Phase-I** was completed on **31.10.2012.** Since there is no clear discussion on this vital aspect, it has to be held that the Impugned Award suffers from Patent Illegality.

116. The **Show Cause Notice** was issued on **06.02.2013.** However,

supplies are said to have made by the vendors of the Award Holder after the **Show Cause Notice** dated **06.02.2013** was issued during **2nd, 3rd** week of **February 2013** and during **March** on **30.03.2013.** The Arbitral Tribunal has not discussed as to how the Award Holder was entitled to recover the amount on the supplies made after the Award Debtors decided to terminate the contract under the **Concessionaire Agreement** dated **12.07.2012** vide a **Show Cause Notice** dated **06.02.2013.**

117. Various delivery notices which have been enclosed along with the typed set of papers in **Form-JJ** indicate that the supplies are directly made to the Award Holder's Office at Anna Nagar, Chennai. This aspect ought to have been examined by the Arbitral Tribunal. Therefore, the **Impugned Award** dated **14.09.2020** does indeed suffer from “patent illegality” in terms of the decision of the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited** Vs. **National Highways Authority of India (NHAI),** (2019) 15 SCC 131.

118. The Arbitral Tribunal also ought to have examined the claim of Award Holder with proper evidence and the steps which the Award Holder had

taken to mitigate the loss. Mere marking of invoices allegedly raised on the Award Holder by its vendors without proof of receipt of the goods and / or services by the Award Holder is not sufficient.

119. Similarly, without proof of steps taken to mitigate the inconvenience caused due to the threat in the Show Cause Notice issued to terminate the contract, would not have *ipso facto* entitled to Award Holder's compensation.

120. Therefore, to that extent, the Arbitral Tribunal has awarded amounts to the Award Holder is susceptible to a valid challenge as the Aribitral Tribunal has committed Patent illegality in allowing the claim to without proper examination of evidence and without examining the case from the perspective of Section 73 of the Indian Contract Act, 1872.

121. Therefore, the **Impugned Award** dated **14.09.2020** is susceptible to a valid challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

122. In the result, the conclusion of the Arbitral Tribunal that the contract

was wrongly terminated with the issuance of the **Termination Notice** dated **15.03.2013** does not merit any interference. However, awarding of **Claims A, G & I** without proper documents and without any discussion regarding the steps taken by the Award Holder in mitigating the loss or damage due to breach of contract is liable to be set aside. Further, awarding **Claim C** for a sum of **Rs.3,70,25,071/-** for the period between **12.07.2012** and **06.02.2013** (9 months) towards Administrative and Overhead Charges also ought to have explained and justified. The Arbitral Tribunal has not discussed the same. Since the **Impugned Award** dated **14.09.2020** does not bear proper discussion, it is liable to be set aside.

123. Therefore, the **Impugned Award** dated **14.09.2020** is set aside leaving open for the Award Holder to establish its case afresh if the Award Holder so desires to press for the reliefs. Since the evidence has been recorded and exhibits have been already marked, the parties are at liberty for the reconstitution of the same Arbitral Tribunal or any other Arbitral Tribunal.

124. Therefore, the time taken from the date of Impugned Award till

passing of this Order and its receipt shall stand excluded for the purpose of computation of limitation under Section 43 of the Arbitration and Conciliation Act, 1996.

125. This Arbitration Original Petition stands allowed with the above observations. No costs. Connected A.Nos.3489 of 2021 and 4537 of 2023 and Arb.Appln.No.443 of 2023 are closed. E.P.SR.No.48537 of 2021 is also closed.

**30.10.2024**

Neutral Citation : Yes / No
kkd/nst/arb

**C.SARAVANAN, J.**

kkd/nst/arb

Pre-Delivery Order in
Arb.O.P.(Com.Div) No.18 of 2022
and
A.Nos.3489 of 2021, 4537 of 2023
and
Arb.Appln.No.443 of 2023
and
E.P.SR.No.48537 of 2021

30.10.2024