



Arb.O.P.(Comm.Div.) No.69 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 24.01.2025

Pronounced on: 17.02.2025

CORAM

THE HONOURABLE MR.JUSTICE P.B.BALAJI

Arb.O.P.(Comm.Div.) No.69 of 2024
and A. No.717 of 2024 &
E.P. SR. No.104110 of 2023

Ashok Leyland Limited,
Represented by its Authorized Signatory,
Mr.Y.B.Seetharaman,
No.1, Sardar Patel Road, Guindy,
Chennai – 600 032.

... Petitioner

VS.

FIBROPLAST MARINE PRIVATE LIMITED,
Represented by its Director Mr.Harish Narula,
S-130, Greater Kailash-1,
New Delhi – 110 048.

... Respondents

PRAYER: Arbitration Original Petition filed under Sections 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 15.03.2023 in respect of those portions which have been allowed in favour of the respondent.

For Petitioner : Mr.R.Sankaranarayan,



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Senior Counsel for
Mr.Kuberan for
M/s.Rank Associates

For Respondent : Mr.Satish Parasaran,
Senior Counsel for
Mr.Arun Saxena
Ms.Nalini
Mr.Surya Narayanan for
Mr.Rahul Balaji

ORDER

This Arbitration Original Petition (Commercial Division) has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the award dated 15.03.2023. The petitioner herein was the respondent before the Arbitral Tribunal, in a claim preferred by the respondent herein.

2. The factual matrix:

2(i)The parties entered into a Definitive Agreement on 29.06.2010 for the purposes of doing business jointly, in connection with production and marketing of boats. The said Definitive Agreement agreed upon various



terms and conditions for the production and marketing of the boats and also contemplated a Manufacturing Agreement to be executed.

2(ii). According to the claimant, even at the stage of Prototyping and Field trials, the project failed and the parties were not able to move to the next stage of executing the Manufacturing Agreement. However, according to the claimant, drafts of the Manufacturing Agreement were exchanged between the parties. In view of the failure of the project, the respondent made claims before the Arbitral Tribunal seeking reimbursement of Research and Development costs incurred, expenses incurred in setting up a temporary manufacturing unit and also claimed business loss on the basis of the assured business under the draft Manufacturing Agreement, besides also losses arising out of cancellation of the contracts, goodwill, etc.

2(iii) The parties led evidence before the Arbitral Tribunal and ultimately, the Tribunal came to the findings that the project had crossed the Prototyping stage and the petitioner herein had not adhered to the terms



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and conditions/obligations. The Tribunal further found that though the Manufacturing Agreement was not executed, it was treated as to have come into force and on the basis of the projections in the draft Manufacturing Agreement, the Tribunal proceeded to award loss of profit to the claimant.

3. I have heard Mr.R.Sankaranarayan, learned Senior Counsel for Mr.Kuberan for M/s.Rank Associates, learned counsel for the petitioner and Mr.Sathish Parasaran, learned Senior Counsel for Mr.Arun Saxena, Ms.Nalini, Mr.Surya Narayanan for Mr.Rahul Balaji, learned counsel for the respondent/claimant.

4. The learned Senior Counsel, Mr.R.Sankaranarayanan, would first and foremost submit that the Manufacturing Agreement was never signed admittedly and further, the Manufacturing Agreement contained a separate arbitration clause and when the Tribunal had held that the respondent/claimant was entitled to place reliance on the said Manufacturing Agreement in order to make the claim before the Tribunal on the ground that the said



Manufacturing Agreement had come into force, then according to the learned Senior Counsel, the arbitration clause available under the Manufacturing Agreement alone would prevail and the same should have been invoked. However, it was only the arbitration clause under the Definitive Agreement that has been relied upon by the Arbitral Tribunal which is patently illegal. The learned Senior Counsel would also invite my attention to a separate Consortium Agreement which again contained an arbitration clause and the said clause was also not invoked.

5. The sum and substance of the argument of the learned Senior Counsel Mr.R.Sankaranarayan, in this connection is that all the three agreements are independent contracts and cannot be treated as forming part of or flowing only from the Definitive Agreement.

6. The next contention of the learned Senior Counsel is that the Arbitral Tribunal has reimbursed the Research and Development costs as well as pre and post operative expenses solely based on the certificate of the



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Cost Accountant. In this regard, the contention of the learned Senior Counsel Mr.R.Sankaranarayanan is that the Cost Accountant was not examined before the Arbitral Tribunal and even the said certificate was not marked as an Exhibit and it was only during the stage of final arguments, when the learned Arbitrators pointed out that there is no proof adduced by the claimant for the expenditure which is sought to be reimbursed and at that stage, the certificate was produced along with an affidavit. Therefore, according to the learned Senior Counsel, the Tribunal without even giving an opportunity to the respondent to contradict the averments in the said affidavit or the contents of the certificate, has proceeded to rely on the same and award the claims, that too, with interest at the rate of 18% per annum. Therefore, the learned Senior Counsel's contention in this regard is that the parties have not been treated equally and there has been a denial of fair opportunity to the petitioner, warranting the award to be set aside.

7. The learned Senior Counsel would also take me through the Definitive Agreement and contend that the Definitive Agreement was



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nothing more than a skeleton agreement which was to be superseded by another agreement which would have to be in writing and also contain exhausted terms and conditions which were to be drawn up after mutual discussion. In other words, the Definitive Agreement was to lead to an other agreement viz., the Manufacturing Agreement. Admittedly, the parties only circulated draft Manufacturing Agreement via e.mail and the same was never signed or executed between the parties. The learned Senior Counsel, Mr.R.Sankaranarayanan, would therefore contend that when the Manufacturing Agreement was never entered into, it would clearly establish the fact that the parties had not even completed the testing of the sample boats to enable them to move into the commercial production phase. Referring to the findings of the Arbitral Tribunal that, based on emails exchanged between the parties, the Manufacturing Agreement was only a formality and the same not being executed in writing would not militate against the fact that the stage of Prototyping and trial are not over and that there was only one single integrally connected contract, the learned Senior Counsel would submit that the Arbitral Tribunal was bound by the terms ad



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conditions of the contract between the parties. The respondent also having relied on the Definitive Agreement in the claim statement, it was not open to the Arbitral Tribunal to render a finding that the Definitive Agreement did not contemplate a separate Manufacturing Agreement to be entered into between the parties. The learned Senior Counsel therefore submits that the interpretation by the Tribunal is clearly perverse, which no reasonable person would construe in such a manner and consequently, the finding that the respondent had completed the prototyping and trials and was entitled to reimbursement of Rs.12.95 Crores towards expenses incurred in connection with Research and Development was also liable to be set aside.

8. The learned Senior Counsel, Mr.R.Sankaranarayanan, would take me through some of the emails exchanged between the parties regarding the draft Manufacturing Agreement and contend that the Arbitral Tribunal had clearly erred in relying on the non existing Manufacturing Agreement to award the claims in favour of the respondent, being clearly perverse and shocking the conscience of the Court. The learned Senior Counsel would



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also lay emphasis on Ex.C18 and Ex.C33 as late as November 2013, to fortify his argument that the prototyping and trials cannot be said to be completed and that the commercial production had commenced. The attack on the award of the Tribunal in this regard is that the Arbitral Tribunal has ignored material evidence to arrive at erroneous conclusions, thereby rendering the award liable to be set aside.

9. Similarly, the learned Senior Counsel would also invite my attention to the e.mail dated 07.07.2010, which has been marked as Ex.C5, which only disclosed the fact that the parties were only in the pilot phase and in the email dated 11.11.2010 marked as Ex.C6, it has been stated that the petitioner will have to work on giving projections for a specific period as well as firm orders on a monthly basis. Placing reliance on the said e.mail, the learned Senior Counsel submitted that despite such a specific understanding, no projections were given and no firm orders were also placed, which again clearly demonstrated that the parties did not move into the commercial production phase. He would further contend that the



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Arbital Tribunal has erroneously placed reliance on the purchase orders alone, ignoring the evidence that the purchase orders only pertained to test boats and never indicated that the commercial production had commenced.

10. The learned Senior Counsel, Mr.R.Sankaranarayanan, regarding the findings of the Arbitral Tribunal that the trial of the prototype was completed even on 24.03.2011, would invite my attention to the correspondence between the parties in 2012 and 2013 vide Ex.C18 and Ex.C33 regarding issues pertaining to design of the hull and the boat, would submit that when the parties had not even finalised the design and were still working on it in 2012 and 2013, then it could have been impossible for the trial of the prototype itself to be completed in March 2011. He would also rely on Ex.C27, which has been exhibited by the respondent themselves which clearly established the fact that the parties were still in discussions with the Professors from IIT, Madras, even as late as in April 2013 on the technical specifications of the hull and the expert had even suggested modifications. Therefore, the learned Senior Counsel would submit that



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these material evidence which were placed before the Arbitral Tribunal even by the respondent/claimant would be more than sufficient to hold that the prototyping and testing was not complete and therefore, material evidence has been ignored by the Arbitral Tribunal which again warrants the award to be set aside.

11. The learned Senior Counsel would also rely on Ex.C24, again an Exhibit which has been brought on record before the Tribunal by the respondent/claimant itself. Drawing my attention to the contents of Ex.C24, the learned Senior Counsel submits that when the respondent/claimant themselves had admitted that they were at fault for not being able to produce functional and saleable boats, the Arbitral Tribunal has miserably failed to rely on the said admission made by the respondent/claimant themselves and ignoring such vital admission, the Arbitral Tribunal has proceeded to award the claims in favour of the respondent.

12. With regard to the loss of profits awarded by the Arbitral Tribunal,



the learned Senior Counsel would contend that the Arbitral Tribunal has awarded a sum of Rs.23.03 Crores to the claimant, without any evidence brought on record by the respondent/claimant. In this regard, he would take me through the relevant portion of the award, where the Arbitral Tribunal has fixed 10% on the speculative turnover loss claim made by the respondent. The contention of the learned Senior Counsel is that it is a clear case of no evidence presented by the respondent/claimant and in such circumstances, the Arbitral Tribunal ought not to have awarded the claim of loss of profit to the extend of Rs.23.03 Crores. Again, the fact that the award in this regard is without any evidence, rather no evidence, the award of the Arbitral Tribunal is patently illegal and liable to be set aside.

13. On the same issue, the learned Senior Counsel would place reliance on the decision of the Hon'ble Supreme Court in *Bharath Coking Coal Limited Vs. L.K.ARuja*, reported in (2004) 5 SCC 109, where the Hon'ble Supreme Court held that when a plea for loss is raised, then the same should be established and in the absence of any evidence, the claim



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for loss of profits ought not to have been granted. Therefore additionally, according to the learned Senior Counsel, Mr.R.Sankaranarayanan, the Arbitral Tribunal having not followed the binding decision of the Hon'ble Supreme Court, the award itself is in the violation of public policy and therefore, liable to be set aside.

14. The contention of the learned Senior Counsel Mr.R.Sankaranarayanan, with regard to the loss of turnover is that the Arbitral Tribunal has awarded the claim based on projections alone and that itself would not entitle the respondent to claim loss of turnover, as it was clearly speculative. In the absence of concrete evidence being brought on record by the respondent, the learned Senior Counsel would submit that the Arbitral Tribunal ought not to have granted the award under the head, loss of turnover.

15. Insofar as the cancellation of tender by the Ministry of Home Affairs (MHA), it was the case of the claimant that the cancellation was



only because of the fault at the petitioner's end and the said plea has been accepted by the Arbitral Tribunal. In this regard, the learned counsel Mr.R.Sankaranarayanan, would take me through the relevant portion of the award and submit that despite giving a categorical finding that there is no material for the reasons for re-tendering or as to why the a tender was cancelled or re-tendered, then the cancellation cannot be attributable to the petitioner. Despite the said findings, the Arbitral Tribunal awarded Rs.37.73 Crores to the respondent/claimant, which is clearly illegal and also opposed to public policy, based on no evidence and shocking the conscience of the Court.

16. The learned Senior Counsel would also place reliance on the following decisions:

(i) *Vedanta Limited Vs. Emirates Trading Agency*, reported in (2017) 13 SCC 243;

(ii) *Thawardhas Pherumal & Another Vs. Union of India*, reported in AIR 1955 SC 468;

(iii) *Kollipara Sriramulu (Dead) by his Legal Representative Vs. T.Aswatha Narayana (Dead) by his Legal Representative*, reported in AIR 1968 SC 1028 (V 55 C 200);

(iv) *Indian Oil Corporation Limited Vs. Nilofer Siuddiqui and others*,



reported in *MANU/SC/1389/2015*;

(v) *Kailash Nath Associates Vs. Delhi Development Authority*, reported in (2015) 4 SCC 136;

(vi) *Ajay Singh (Sunny) Deol of Mumbai Indian Inhabitant Vs. Suneel Darshan carrying on his sole proprietary business under the name "Shree Krishna International"*, reported in (2015) SCC Online, Bom 1412;

(vii) *Ahluwalia Contracts (India) Limited Vs. Union of India*, reported in (2017) SCC Online Del 8234;

(viii) *Essar Procurement Services Limited Vs. Paramount Constructions*, reported in (2016) SCC Online Bom 9697;

(ix) *Engineer India Limited Vs. Tema India Limited*, reported in (2016) SCC Online Del 86;

(x) *Fateh Chand Vs. Balkishan Dass*, reported in (1964) 1 SCR 515;

(xi) *Maharashtra State Electricity Board Bombay Vs. Sterlite Industries (India) Limited*, reported in 2000 (2) Mh.L.J;

(xii) *Indian Oil Corporation Vs. Lloyds Steel Industries Limited*, reported in (2007) SCC Online Del 1169;

(xiii) *Vishal Engineers & Builders Vs. Indian Oil Corporation Limited*, reported in (2011) SCC Online Del 5124;

(xiv) *Bharat Coking Coal Limited Vs. L.K.Ahuja*, reported in (2004) 5 SCC 109;

(xv) *Unibors Vs. All India Radio*, reported in 2023 SCC Online SC 1366;

(xvi) *Malay Kumar Ganguly Vs. Dr.Sukumar Mukherjee and others*, reported in (2009) 9 SCC 221;

(xvii) *Life Insurance Corporation of India and another Vs. Ram Pal Singh Bisen*, reported in (2010) 4 SCC 491;

(xviii) *Delhi Metro Rail Corporation Vs. Delhi Airport Metro Express P Limited*, reported in (2024) SCC Online SC 522;

(xix) *Bareilly Electricity Supply Company Limited Vs. The Workmen and others*, reported in 1971 (2) SCC 617;

(xx) *M/s.Transtonnelstroy-Afcons (JV) Vs. M/s. Chennai Metro Rail Limited*, reported in *MANU/TN/10713/2023*;

(xxi) *Nabha Power Limited (NPL) Vs. Punjab State Power*



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Corporation Limited (PSPCL) and another, reported in MANU/SC/1291/2017;

(xxii) The High Court of Karnataka in Union of India through Deputy Chief Engineer Vs. Anneppa and others, in Miscellaneous First Appeal No.200021/2024 (LAC) dated 16.02.2023; and

(xxiii) High Court for the State of Telangana at Hyderabad in K.Sambaiah Vs. V.Sampath Kumar in Appeal Suit No.1337 of 2017, dated 11.06.2024.

(xxiv) High Court of Andhra Pradesh in The Apsrtc rep by its Managing Director Vs. Smt.Gousia Begum, dated 30.09.2004

17. The learned Senior Counsel would also take me through the HALSBURY'S LAWS OF ENGLAND Vol-4(I), with regard to the measure of damages and contract, the Author has stated that an innocent party cannot ordinarily recover both expectation loss (such as loss of profit) and reliance loss (such as wasted capital expenditure) and that he had a choice between the two measures but must, in general, opt for one or the other and when the claim for both outlay and gain involving a double counting and granting such a claim would offend the rule for damages for expectation losses assessed as if the contract that had been performed. The learned Senior Counsel therefore prays for the award being set aside.

18. Per contra, the learned Senior Counsel, Mr.Sathish Parasaran,



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appearing for the respondent/claimant would submit at the outset, that the petitioner has not established any of the grounds which fall within the ambit of Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'Act'). The reliance placed on by the learned Senior Counsel, to the evidence before the Tribunal cannot afford a ground for setting aside the award when the Arbitral Tribunal, has in great detail, discussed the factual as well as legal points raised and there can be no re-appreciation of the evidence adduced before the Tribunal. Therefore as a preliminary submission, the learned Senior Counsel, Mr.Sathish Parasaran, would submit that this Original Petition lacks merit and is liable to be dismissed.

19. The learned Senior Counsel would take me through the summary of claims made by the respondent under various heads. He would also refer to the counter claims filed by the petitioner seeking refund of advances paid. With regard to the contention that the Manufacturing Agreement was not executed, the learned Senior Counsel would submit that the Arbitral Tribunal was conscious of the fact that the parties had exchanged drafts of



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the said Manufacturing Agreement and the same exhibited a clear intention of the parties to enter into the said agreement in furtherance of the Definitive Agreement. He would further submit that the draft emanated from the claimant and therefore, as rightly held by the Arbitral Tribunal, the execution of the Manufacturing Agreement was a mere formality. In this regard, he would take me through the portions of the award where the Arbitral Tribunal has discussed the evidence and come to a finding that the terms of the Manufacturing Agreement, though not signed, were duly complied by the parties.

20. As regards, the parties not moving to commercial production stage, the learned Senior Counsel, Mr.Sathish Parasaran, would submit that the petitioner themselves had agreed to have sold boats. Therefore, the findings of the Arbitral Tribunal based on the evidence available before the Tribunal cannot be tinkered with. Further, as regards the trial of boats, he would refer to the findings of the Tribunal that when the boats were given for customer trial, the Boats did not have any fault and further there were



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appreciation mails and letters from the customers which clearly supported the findings of the Tribunal that the commercial production had in fact commenced and therefore, no interference is warranted with such factual findings, based on evidence.

21. As regards, three independent agreements and separate arbitration clauses in all the agreements and two of them not been invoked by the claimant, the learned Senior Counsel would submit that the Tribunal had rightly found that the consortium agreement was only a fall out of the Definitive Agreement and therefore, when the other two agreements were also connected to the Definitive Agreement and disputes were within the ken of the arbitration, no fault can be found with on part of the Tribunal for awarding the claims in favour of the respondent.

22. As regards, the loss of profits, the learned Senior Counsel would submit that it was only based on the indication that was given by the petitioner in the email sent in 2013, regarding order of 3000 boats that the



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Tribunal has arrived at the loss of assured business, at 10% of the value of the boat, on the respondent's claim for 3650 boats which was only on the basis of the projections provided in the Manufacturing Agreement.

23. With regard to the award towards loss of the MHA project worth Rs.426 Crores, the learned Senior Counsel would submit that the Arbitral Tribunal has found that the petitioner had abruptly stopped even communicating with the respondent after opening of the price bid which had resulted in the loss to the consortium. He would also invite my attention to the rejection of respondent's claim to the tune of Rs.20,25,000/- on account of loss of confirmed contracts and contend that the Tribunal has applied its mind and has not merely awarded the claim as prayed for by the claimant. Similarly, the Arbitral Tribunal also rejected the claim on account of loss of goodwill.

24. Meeting the submissions of the learned Senior Counsel for the petitioner that the prototype stage had not been crossed, the learned Senior



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Counsel, Mr.Sathish Parasaran, would submit that the contentions in this regard even before the Arbitral Tribunal were very vague and the same never indicated to which type of boat, the petitioner had consented. As regards the positive assertion of the respondent that, the commercial production had commenced after crossing the prototype stage, the learned Senior Counsel would submit that the various mails that had been referred by the learned Senior Counsel Mr.R.Sankaranarayanan, involving the parties and IIT at Chennai had nothing to do with the carrier boat which was approved even as early as in July 2012. He would further submit that if really the prototype of the first carrier boat had not been completed, it was wholly unnecessary for the petitioner to call upon the respondent to develop different kind of Fishing boats by making modifications to the hull design developed for the Carrier boat.

25. He would further contend that the petitioner has also not stated as to why purchase orders were raised especially carrying the petitioner's brand name, if the prototype stage had not been crossed. He would further submit



that the mere fact that the petitioner sold branded boats to its dealers and customers, deflates the arguments that the boats did not cross the prototype stage and that they were defective. The reference to a letter of the Technical Director, Mr.Charles Clarke of the respondent, according to the learned Senior Counsel for the respondent was misinterpreted conveniently by the petitioner, without advertng to the fact that the respondent had developed three versions of boats for the petitioner and the reference was only to version 2, in the letter of Mr.Charles Clarke and therefore had no significance.

26. As regards the Tribunal awarding loss of profits based on the projections and on the report of the cost accountant, the learned Senior Counsel would submit that the very nature of loss of profit claim can only be based on future projections and therefore, absolutely no error has been committed by the Arbitral Tribunal. With regard to not being given an opportunity to cross examine the Cost Accountant, the learned Senior Counsel would submit that the Arbitral Tribunal has power to summon any



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expert or seek report from an expert and therefore, there is nothing illegal or improper for the Arbitral Tribunal to have considered the report of the Cost Accountant. Mr.Sathish Parasaran, learned Senior Counsel would further contend that in the affidavit of admission and denial filed by the petitioner, the audited balance sheets of the respondent have not been denied by the petitioner and therefore, the Arbitral Tribunal was wholly justified in accepting the report of the expert and proceed to award the claim based on his report.

27. In any event, the learned Senior Counsel would submit that in terms of Section 19(1) of the Act, the Arbitral Tribunal is not bound by the provisions of Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 and the parties are free to agree to the procedure to be followed by the Arbitral Tribunal under Section 19(2) and when there is such a failure, Section 19(3) would come into play, entitling the Tribunal to conduct the proceedings in a manner it considers appropriate.



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28. Inviting my attention to the minutes of proceedings of the Arbitral Tribunal being the second sitting held on 15.04.2017, the learned Senior Counsel would submit that the Tribunal did not require strict compliance of the provisions of the Evidence Act, requiring documents that are not marked as Exhibits to not form part of the Tribunal record. Therefore, in the light of the audited balance sheets of the respondent being admitted by the petitioner in its affidavit of admission and denial, there was no requirement to mark the documents as an Exhibit and the report filed by the expert was only on a reading of the audited balance sheets and nothing more. Therefore, the learned Senior Counsel would submit that it is not open to the petitioner to contend that the balance sheets cannot be relied on and that the procedure adopted by the Arbitral Tribunal is violative of the principles enunciated in the Indian Evidence Act.

29. As regards the double claims, viz., one with respect to reimbursement of Research and Development costs and the other in respect of loss of profits not being possible to be claimed together, the learned



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Senior Counsel would submit that the claim for reimbursement of Research and Development was only arising out of costs incurred under the contract for the purposes of conducting Research and also Development towards creation of boats. However, the claim of loss of profits is merely a claim for damages in respect of failure of the petitioner to provide bulk purchase orders to the respondent, despite projections given and contained in the Manufacturing Agreement and the fact that the respondent has set up a manufacturing unit exclusively at Karwar for manufacturing the boats for compliance of the orders to be placed by the petitioner in terms of the Definitive Agreement. Therefore, Mr.Sathish Parasaran, learned Senior Counsel would submit that the award of claims under two heads was not overlapping and the Arbitral Tribunal had rightly held the claimant to be entitled to awards under both the heads.

30. Finally, the learned Senior Counsel would place reliance on the following decisions viz., (i) *Associate Builders Vs. Delhi development Authority*, reported in (2015) 3 SCC 49; (ii) *Dyna Technologies (P) Limited*,



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Vs. Crompton Greaves Limited, reported in (2019) 20 SCC 1; and *Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited*, reported in (2019) 7 SCC 236, in support of his contentions that the award of the Arbitral Tribunal can be interfered with under Section 34 of the Act only on very narrow and limited grounds and in the present case, the petitioner has miserably failed to make out any of the grounds that permit interference with the award of the Arbitral Tribunal. Taking me through several of the grounds raised in the Section 34 Petition, learned Senior Counsel would submit that the petitioner is merely attacking factual findings arrived at by the Arbitral Tribunal and when there is no scope of re-appreciation of the evidence adduced before the Arbitral Tribunal by this Court, none of the grounds raised can even be sustained as valid grounds under a Section 34 Petition. The learned Senior Counsel would therefore pray for dismissal for the above Arbitration Original Petition.

31. I have carefully considered the submissions advanced by the learned Senior Counsel for the parties. I have also gone through the various typed set of papers filed along with this Original Petition, the impugned



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award of the Tribunal besides also carefully going through the various decisions on which reliance has been placed on by the learned Senior Counsel on either side.

32. The admitted facts are that the petitioner and the respondent entered into a Definitive Agreement on 29.06.2010. The claimant is engaged in the business of boat building and the respondent is engaged in manufacturing of commercial vehicles, automobiles and other equipments. The parties felt a need to do joint venture business for manufacturing fiber reinforced plastic boats and after negotiations, the parties entered into a Definitive Agreement under Ex.C9 dated 29.06.2010. In terms of the said agreement, the petitioner was to place orders for specific boats, like fishing/carrier and the same would be manufactured by the respondent and marketing and sale was agreed to be under the petitioner's brand. One of the clauses in the Definitive Agreement is that upon completion of the prototyping and trials, the respondent would commence commercial productions, that is manufacturing of boats for sale by the petitioner.



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33.The disputes arose because, according to the respondent/claimant, satisfactory trials were shown and the prototype was also made in terms of the specifications required by the petitioner and even certification was also obtained from experts in the field, but however, the petitioner failed to place orders as indicated in the draft Manufacturing Agreement exchanged between the parties, resulting in huge financial losses to the respondent. Therefore, the respondent has made claims under various heads totalling in all 8600.41 Crores under claims 1 and 2; under claim 3, the respondent sought for award of 489.96 lakhs towards loss of goodwill; under Claim 4, the respondent sought for interest at 18% per annum on claim 1 & 2 payable from the date of investment till the date of realisation, and claim 5 related to costs of the arbitration. The petitioner, apart from denying the above claims made by the respondent, made 6 counter claims towards return of advance paid on account of 14 boats lying unsold, together with interest; return of mobilization amounts together with interest; value of missing materials; value of unused material procured on the basis of specific orders by the



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respondent together with interest; value of expenses incurred for arranging trials together with interest; loss of goodwill and costs of arbitration. The Arbitral Tribunal, after framing as many as 14 composite issues, rejected all the counter claims made by the petitioner and passed an award in respect of claims 1 & 2 made by the respondent, totalling in all to an extent of Rs.73,84,93,303.50, together with interest at 18% per annum from the date of award till the date of payment.

34. It is this award which is under challenge in the above petition under Section 34. With regard to the issue of Definitive Agreement alone being executed and the Manufacturing Agreement not being executed in writing as contemplated under the Definitive Agreement and the Arbitral Tribunal having committed a patent error in referring to the Manufacturing Agreement which never came into existence and proceeding to award claims in favour of the respondent, there is no dispute with regard to the fact that the parties did not enter into a Manufacturing Agreement as contemplated under the Definitive Agreement. However, it is admitted on



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both sides, even before the Tribunal that drafts of the Manufacturing Agreement, had been exchanged between the parties.

35. The Arbitral Tribunal found from the emails exchanged between the parties that the petitioner had exhibited a clear intention to enter into the Manufacturing Agreement and also took note of the further acts of the parties, in furtherance of the terms of the Manufacturing Agreement. The Arbitral Tribunal, on facts has found that the parties, despite not entering into a Manufacturing Agreement had substantially complied with the terms of the Manufacturing Agreement, and therefore, the fact that the Manufacturing Agreement had not been entered into would be of no consequence as, by the conduct of the parties, the execution of Manufacturing Agreement was rendered to a mere formality.

36. Such findings of the Arbitral Tribunal are clearly based on materials available on record and therefore, it is not open to this Court sitting under Section 34 of the Act to re-appreciate the evidence and come to a



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different conclusion, especially when the Arbitral Tribunal has found that the terms and conditions of the Definitive Agreement, Manufacturing Agreement, though at the draft stage, as well as the Consortium Agreement were all interconnected and everything had flown only from the Definitive Agreement. Such a finding arrived at by the Tribunal is certainly a plausible finding and therefore, I do not see any scope for interference with such findings, exercising jurisdiction under Section 34 of the Act.

37. Insofar as the contention of the petitioner that the prototype stage had not been crossed and the boats were only at the stage of testing and several defects had been pointed out and there has been back and forth correspondence in this regard, the Arbitral Tribunal has clearly held that the petitioner has not led any evidence to show that the boat failed to achieve intermittently and all the claims of under performance of the boat had occasioned only after delivery taken by the petitioner which was on account of the users, fault and cannot be categorised as a manufacturing or design defect. In fact the Arbitral Tribunal categorically found that at the time of



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customer trial, the boats manufactured by the respondent were not found to have any faults whatsoever. The Arbitral Tribunal in this regard has also referred to the correspondence brought on record with regard to the performance of the boats being appreciated by the customers.

38. Much was argued about the letter of the Technical Director of the respondent, Mr.Charles Clarke. It was also argued that the said Director was not even examined before the Arbitral Tribunal and it was clearly to withhold evidence that may go against the respondent/claimant. However, the Arbitral Tribunal has considered the said letter of Mr.Charles Clarke by finding the said letter was only at the time when Version 2 of the boat was being developed by the claimant and that only after Version 2 was successful, Version 3 boat was required by the petitioner and therefore, it was incorrect on the part of the petitioner to contend that the prototype stage had not been crossed. The Arbitral Tribunal, in my considered opinion, has rightly appreciated the evidence and held that IIT Madras had vide its report in April 2013, had approved and validated even Version 3, after



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having given its report in July 2012 in respect of the Carrier boat alone.

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39. It is contended by the petitioner that the boats purchased were only for field trials and only in that connection purchase orders had been placed and invoices have also been raised. However, the Arbitral Tribunal has considered all these objections and found that the petitioner has not been able to establish that the manufacturing process did not cross the stage of prototype and in the light of the admission of the petitioner's witness and also in view of the fact that the petitioner did not raise any objections then and there with regard to the prototypes/trials and the further fact that the modifications suggested to the initial specification, were carried out to even to change the Carrier boats into different types of Fishing boats. The Arbitral Tribunal has relied on the purchase order dated 03.11.2011, which was after the parties had freezed the technical specifications and has also found that safety and sea worthiness of the boats had been certified by the Government Surveyors as well as experts from IIT Madras. The Arbitral Tribunal has



also found that subsequent to the first purchase order, further orders had been placed by the petitioner which emboldened the respondent to set up a manufacturing unit at Karwar exclusively for production of boats for the respondent.

40. Further, the Arbitral Tribunal has also found that the parties never contemplated in further testing of the prototype and were instead discussing orders and supply to be made to the petitioner. These findings of the Arbitral Tribunal are based only on available materials, including oral and documentary evidence brought on record by the parties. Therefore, this Court not sitting in Appeal over the award is not entitled to re-appreciate the evidence and come to a different conclusion, especially when the findings arrived at by the Tribunal are plausible findings and not perverse findings which no person of reasonable intelligence would arrive at in the given facts and circumstances of the case.

41. With regard to the non examination of the Cost Accountant and



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non marking of his report being opposed to settle principles of law of evidence and there being a deprivation of fair opportunity to the petitioner to contradict the report of the Cost Accountant by way of cross examination, though the Arbitral Tribunal has accepted the report of the Cost Accountant at the stage of arguments and proceeded to award the claims in favour of the respondent, without summoning the Cost Accountant to appear before the Arbitral Tribunal and give evidence and also the report not being marked as exhibit, in terms of Section 19 of the Arbitration and Conciliation Act, 1996, it is open to the parties to agree upon a particular mode to conduct proceedings before the Arbitral Tribunal. Section 19(1) also clarifies that the Arbitral Tribunal is neither bound by provisions the Code of Civil Procedure, nor the Indian Evidence Act.

42. As rightly pointed out by the learned Senior Counsel, Mr.Sathish Parasaran, the proceedings held on 15.04.2017 vide procedural order No.1 at point 5, the Tribunal has clearly stated that the pleadings shall necessarily be accompanied by the documents which the parties rely on. I do not find



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that the Arbitral Tribunal has made the provisions of the Indian Evidence Act applicable to the evidence to be adduced by the parties. Therefore, mere non marking of the report of the Cost Accountant cannot be said to be improper or illegal. No doubt, the Arbitral Tribunal has relied on the said report of the Cost Accountant. The Cost Accountant has only read the audited balance sheets and rendered his findings based upon the said audited balance sheets. The said balance sheets were already filed on behalf of the respondent/claimant and despite the petitioner having an opportunity to deny the said audited balance sheets of the respondent while filing his affidavit of admission and denial, the petitioner has not denied the said audited balance sheets. In other words, it is implied that the petitioner has accepted the truth and genuineness of the said audited balance sheets of the respondent.

43. No doubt, as contended by the learned Senior Counsel Mr.R.Sankaranarayanan, the Arbitral Tribunal had found that there is no evidence to establish loss from the part of the claimant and it was only at that stage that the affidavit of the Cost Accountant came on record. I find



that the report of the Cost Accountant is only based on the audited balance sheets of the respondent and it is merely an interpretation of the balance sheets of the respondent as an expert.

44. The Arbitral Tribunal is well within its right to seek expert opinion at any stage of the proceedings, and in fact Section 26 of the Act empowers the Arbitral Tribunal to require a party to appoint one or more experts to report it on one or more specific issues to be determined by the Arbitral Tribunal and also require a party to give the expert any relevant information relating to any documents for inspection. Sub Section 2 of Section 26, specifically empowers the Tribunal to permit the expert who has given a written or oral report to participate in an oral hearing.

45. Thus, the Tribunal has in its discretion sought for expert opinion with regard to the claim of loss of profit and when the expert Cost Accountant has only given a report interpreting the various audited balance sheets available before the Arbitral Tribunal, I am unable to find fault with



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the Arbitral Tribunal for adopting such a procedure. In fact, when the petitioner had not denied the audited balance sheets of the respondent, despite an opportunity given to file an affidavit of admission and denials, no serious prejudice was caused to the petitioner by non examining the said Cost Accountant who has only spoken about the technical aspects of the audited balance sheets, in order to make available the information before the Arbitral Tribunal regarding computation of losses suffered by the claimant. Therefore, even on this ground, I am unable to be persuaded by the attractive submissions of learned Senior Counsel, Mr.R.Sankaranarayanan that there has been gross deprivation of fair opportunity of contradicting the expert's report and that the award suffers for reason of the Arbitral Tribunal having been unfair to the petitioner. I do not find that the said ground can be countenanced and in my considered opinion and in the facts and circumstances of the case and the findings rendered by the Arbitral Tribunal in this regard, there is no violation of the mandate of Section 18 of the Act.

46. Coming to the actual assessment of loss of profits and the other



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monetary claims, I am in entire agreement with the argument of Mr.Sathish Parasaran, learned Senior Counsel appearing for the respondent. Loss of profit is a claim which is made only based on future events. Therefore, the argument of Mr.R.Sankaranarayanan, learned Senior Counsel appearing for the petitioner that the petitioner has not let in any evidence whatsoever and despite there being no evidence, the Arbitral Tribunal has proceeded to award claims in favour of the petitioner, I am unable to accept the said contention for the simple reason that the claim towards loss of future profits can only be proved by projections. Here admittedly, the parties had arrived at certain projections contemplating a particular number of boats being purchased and sold. Therefore in order to assess the claim of future losses suffered by the respondent, the Arbitral Tribunal has fallen back on the projections given and agreed upon between the parties themselves. Such findings cannot said to be perverse or illegal and therefore, I do not see any requirement of interfering with the said award of claim of future loss and damages.



47. With regard to other claims being awarded viz., reimbursement of

Research and Development and argument that the claims cannot be made under both heads, I do not find the argument advanced by the learned Senior Counsel for the petitioner acceptable and applying to the facts of the present case. Clearly, the petitioner has made claim for reimbursement of expenses already incurred and in respect of damages, the claim is based on the loss of future which are totally independent claims and not overlapping as contended by the petitioner. As far as the reliance placed on the passage in HALSBURY'S LAWS OF ENGLAND, that the claimant cannot recover both expectations loss like loss of profits and reliance loss such as wasted capital expenditure, in the case on hand, the respondent has only made totally independent claims, one towards reimbursement of Research and Development costs/expenses already incurred another towards loss of future profits based on the expectations of the claimant on the strength of projections given by the petitioner. Therefore, I do not see the claims being overlapping or amounting to double claims. These aspects are also been rightly gone into and addressed by the Arbitral Tribunal and therefore, I do



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not see any grounds to interfere with the findings of the Arbitral Tribunal.

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48. Though the learned Senior Counsel for the petitioner would bring to my notice certain contradictions in the award itself, in such matters of commercial transactions and an award running to 100s of pages, there is bound to be some discrepancies that creep in. The award has to be read in its entirety and isolated portions cannot be magnified and projected as being contradicting to other portions of the award. I find that the Arbitral Tribunal has given reasons for all the findings and such reasons are based on the available oral and documentary evidence. There has been proper appreciation of evidence adduced by the parties and hearing a Section 34 Petition, this Court certainly cannot re-appreciate the evidence and come to a different conclusions.

49. All the points that have been urged by the learned Senior Counsel for the petitioner towards evidence being ignored or there being findings and no evidence etc., are all not substantiated, since the award has dealt



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with all the issues in a comprehensive manner and the Arbitral Tribunal has also discussed the oral and documentary evidence relevant to the contentions raised by the parties and further, the Arbitral Tribunal has also rejected certain claims made by the respondent/claimant, while allowing claims 1 and 2 in favour of the respondent. It is not a case of non application of mind or ignoring of vital evidence leading to a patently illegal award on an award which is opposed to public policy. In fact, though the Hon'ble Supreme Court in *Barath Coking Coal Ltd.*, 's case (referred herein supra) has held that claim for loss of profits should be established, in the present case, the respondent/claimant has only relied on the admitted correspondence between the parties with regard to the projection of number of boats to be manufactured and the best possible evidence has been made available and same has been rightly appreciated by the Tribunal in awarding claim for loss of profits.

50. Lastly, with regard to the award of compensation to the tune of Rs.37.73 Crores, towards cancellation of tender by the Ministry of Home



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Affairs, the claim has been made by the respondent under Serial No.C of Claim No.2. The case of the claimant is that the petitioner was responsible for the contract awarded by the MHA being terminated and therefore, the petitioner was liable to compensate the respondent for the said losses running to Rs.37.73 Crores. The Arbitral Tribunal found that the claimant did not substantiate that the petitioner was the reason for cancellation of the award of work.

51. This issue has been specifically dealt with by the Arbitral Tribunal at paragraph No.122 of the Award and also reiterated in Paragraph No.202 of the award, where the learned Arbitral Tribunal categorically found that there is no material to suggest the reasons for the Ministry of Home Affairs going for re-tender. Thus the Arbitral Tribunal had consistently held that the petitioner was not at fault and there is nothing to substantiate the allegation of the respondent/claimant. However, the Tribunal went on the hold that the mere fact that there was a delay in supplying of Engine, the claimant was entitled to loss of cancellation of the contract which cannot be denied to the



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claimant. This belies logic and reasoning. Having specifically found that there is no evidence on the side of the claimant that the petitioner was at fault, the award of Rs.37.73 Crores to the respondent is clearly hit by “no evidence”. The claim being severable and specifically dealt with separately by the Arbitral Tribunal, I do not see that upsetting the said award on this claim would amount to modification of the award itself which I am conscious is impermissible under Section 34 of the Act, in line with the ratio laid down by the Hon'ble Supreme Court in *Project Director NHIA Vs. M.Hakeem (batch of Appeals)* reported in 2021 SCC Online SC 473, even though, the Hon'ble Supreme Court is already in the process of constituting a special larger Bench to review the said proposition and test whether the High Court exercising power under Section 34 is entitled to modify the award or not. In the light of the above discussions, I am unable to sustain the award of Rs.37.73 crores to the respondent which is not only based on no evidence but also contrary to the findings arrived at by the Arbitral Tribunal itself in this regard.



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52. Though several decisions have been cited by the learned Senior Counsel on either side, relating to the propositions that unsigned contracts cannot be relied upon; the loss of profits would have to be established; unmarked documents cannot be relied upon; ignoring the vital evidence on record amounting to adverse and patently illegal award; Balance Sheets cannot be received as evidence without the Chartered Accountant being examined; the Court exercising powers under Section 34 cannot re-appreciate evidence; a Section 34 Court has to lay of its hands of when the Arbitral Tribunal has published the award based on sufficient quantity of evidence and also quality of evidence and when a possible view on facts has been taken by the Arbitral Tribunal then, it has to necessarily pass muster because the Arbitrator is the ultimate Master of not only quantity but also quality of evidence all these principles are by now fairly well settled. Even with regard to interest, the Arbitral Tribunal has awarded interest only from the date of the award and therefore, I find that the Arbitral Tribunal has exercised its discretion judiciously and there is no unjust interest slapped on the petitioner.



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53. I have already applied my mind and discussed the various grounds that have been agitated before me, challenging the award and at the relevant places, I have also indicated as to whether the award requires interference or not. Therefore, I am not proceeding to elaborately discussed the several case laws that have been relied on by the learned Senior Counsel on either side. It is suffice to state that the reasons given by me herein above are only keeping in mind the well enshrined principles enunciated by the Hon'ble Supreme Court and various other High Courts with regard to the scope of a Section 34 Petition under the Arbitration and Conciliation Act, 1996.

54. For all the above reasons, the Original Petition is partly allowed, setting aside the award of Rs.37.73 Crores in respect of Ministry of Home Affairs Project alone, which confirming all the other heads of the award dated 15.03.2023. No costs. Consequently, connected Application is closed.

17.02.2025



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P.B.BALAJI, J.,
rkp

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