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O.S.A.No.313 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2025

DELIVERED ON : 14.03.2025

CORAM :

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE MOHAMMED SHAFFIQ

O.S.A. No.313 of 2019
and C.M.P.No.25586 of 2019

Indo Pacific Software and Entertainment Ltd,
First Floor B, Poonam Chambers,
Byranji Town, Chindwara Road,
Nagpur - 440 013.

.. Appellant

Vs

1.Kone Elevators India Pvt. Ltd.,
rep. by its Company Secretary,
C.V.S.Krishna Kumar,
No.50, Vanagaram Road,
Aynambakkam, Chennai-600 095.

2.Mr.Justice (Retd.) S.Jagadeesan,
Old No.23, New No.53, 3rd Main Road,
Gandhi Nagar, Adyar,
Chennai-600 020.

.. Respondents



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Prayer: Appeal under Order XXXVI, Rule 9 of the Original Side Rules, 1956 read with Clause 15 of the Letters Patent to set aside the order dated 4.9.2019 passed by the learned Single Judge in O.P.No.198 of 2011.

For Appellant : Mr.R.Sankaranarayanan
Senior Counsel
for Mr.Arjun Suresh

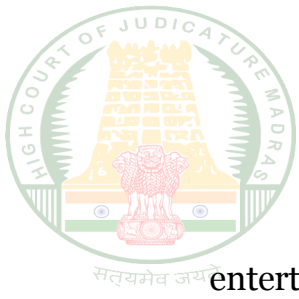
For Respondents : Mr.Murari, Senior Counsel
for Mr.K.K.Muralitharan
for 1st respondent

JUDGMENT

THE CHIEF JUSTICE

Appellant is engaged in the business of engineering and construction and provides comprehensive technical and allied services for infrastructure development. First respondent is engaged in the business of manufacture and supply of elevators and escalators, and maintenance thereon under the collaboration with Kone Corporation, Finland.

2. Appellant was also in the business of constructing and managing



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entertainment complexes. It needed elevators and escalators in two of its projects – one Wardhaman Nagar Project and the other VIP Road Project.

The Wardhaman Nagar Project comprises a commercial multiplex, including Big Bazaar and a multiplex, while the VIP Road Project was another commercial and entertainment complex.

3. Appellant and first respondent had entered into two base agreements – both dated 19.12.2005 – one in respect of supply, erection and installation of one Goods-cum-Passenger Elevator and four Passenger Elevators (totally 5) along with service specifications valued at Rs.70,50,000/- and the other in respect of supply, erection and installation of seven escalators valued at Rs.1.22 Crores. Five elevators and one escalator were to be supplied to Wardhaman Nagar Project and six escalators for the VIP Road Project.

4. The agreements dated 19.12.2005 were executed by the parties as offer letters, which included a payment schedule. As regards supply of escalators, two definitive agreements, both dated 16.2.2006, were entered



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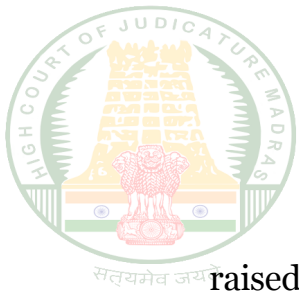
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into. One agreement called Agreement “A” was for design and supply, priced at Rs.68,02,424/- and the other called Agreement “B” was for installation, testing and commissioning priced at Rs.54,92,566/-. Both agreements featured arbitration clauses and other provisions. No such definitive agreement was executed for elevators.

5. Only four elevators and one escalator were supplied and installed. It is appellant's case that VIP Road Project was left incomplete. It is also appellant's case that not even a single escalator was supplied for the Wardhaman Nagar Project. In short, of the total number of five elevators sought, four were supplied and one was not given; and of the total seven escalators required to be supplied, only one was given, six not supplied.

Therefore, disputes arose.

6. Appellant paid a sum of Rs.72,33,490/-, leaving a balance of Rs.15,93,490/-, which first respondent claimed. First respondent also sought Rs.1,09,00,359/- as cancellation charges. In response, appellant



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raised a counter-claim totalling Rs.11,98,44,385/- citing loss of business income, non-supply of equipment, mental agony and loss of goodwill. Appellant relied on termination notices from various commercial tenants, which were marked as evidence to substantiate its claim of damages and loss of business.

7. Thereafter, first respondent filed two separate petitions, O.P.Nos.704 and 711 of 2007 – one regarding elevators and the other relating to escalators under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the Act). Pursuant to a common order dated 19.9.2008, this court was pleased to appoint Mr.Justice S.Jagadeesan (Retired) as the Sole Arbitrator. The arbitrator and arbitral proceedings was common and the award dated 20.10.2010 also was common.

8. In the trial before the Sole Arbitrator, appellant led evidence and an award came to be passed on 20.10.2010. By the said award, the Arbitrator was pleased to grant first respondent's claim of Rs.15,93,490/- towards unpaid dues. The counter-claim of appellant was partially allowed,



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inasmuch as a sum of Rs.1,10,30,700/- was awarded for loss of business income and a sum of Rs.2,50,00,000/- for non-supply of equipment, totalling Rs.3,60,30,700/-. First respondent's claim for cancellation charges was rejected.

9. Assailing the award, first respondent filed a petition under Section 34 of the Act. The learned Single Judge, by an order dated 4.9.2019, was pleased to set aside the award to the extent the award was in favour of appellant. It is that order passed under Section 34 of the Act that is impugned in this appeal filed under Section 37 of the Act.

10. It is settled law that the scope of a challenge under Section 34 of the Act is very narrow and the challenge under Section 37 of the Act is narrower.

11. The law as regards interference with the arbitrator's award is clear. It is only under Section 34(2)(a) or 34(2)(b)(i) (not the case in the matter at hand) or the court finds that the award is in conflict with public



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policy in India under Section 34(2)(b)(ii) of the Act, that merits of the arbitral award are to be looked. It is also settled law that when any of the heads/sub-heads of test of “public policy” is applied to arbitral award, court does not act as court of appeal. Interference is permissible only when findings of arbitrator are arbitrary, capricious or perverse, or when conscience of court is shocked, or when illegality is not trivial, but goes to root of the matter, and not when merely another view is possible. It is also trite law that arbitrator being ultimate master of quantity and quality of evidence while drawing of arbitral award, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held invalid. Once it is found that arbitrator's approach is neither arbitrary nor capricious, no interference is called for [***Associate Builders v. Delhi Development Authority***].

12. Before we proceed further, it will be useful to reproduce the following clauses of the agreement between the parties:

ESCALATORS:

A. BASE AGREEMENT DATED 19.12.2005 – KEI/0035/200512/20:

1 (2015) 3 SCC 49



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“.....

*Terms and conditions of contract
for
Supply, Erection & Installation of Escalators*

REF.No:KEI/0035/200512/20

Date: 19/12/05

“B-1) General Arrangement Drawing (GAD)

This General Arrangement Drawing in triplicate will be forwarded to you in approximately six weeks from the date of receipt of complete site details along with the order and advance payment. The purpose of this drawing to clearly indicate to you pertinent dimensional details of the Elevator shaft, pit, machine room, car and landing entrances, etc. If any modification is required by you in our GAD, it is advisable to hold the construction till the revised GAD is approved by you.

Submission of General Arrangement Drawing:

Within six weeks from the date of receipt of all the site details, the same should be returned to us, duly approved by you. We reserve the rights to charge extra for subsequent GAD revisions, if full site particulars are not made available to us at the time of placing of the order (or) any modification is desired regarding the building structure resulting in revision of GADs.

B-2.) Installation

.....

We shall commence the installation after the materials arrive at the job site and upon intimation from you that the site is ready as per the approved GAD. If the site is not ready for taking up installation when the materials arrive at the job site, we shall depute an installation team on hearing from you that the site is ready in all respects as required by us...

B-3) Completion Period:

On compliance of Payment Terms, we shall deliver the materials for each Elevator by the end of months from the date of receipt of approved GAD provided the elevator shaft, entrance ways,



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machine room including 3 phase power supply are made available as per the agreed terms.

On compliance of the above, we shall complete the installation by the end of months.

In the event of site not made ready as per the contract, we reserve the right to defer the date of despatch of material and subsequent erection. However, the revised schedule of despatch and erection shall be finalised on mutually agreed terms.

...

We cannot accept responsibility for delayed delivery and / or installation of the Elevator in the following cases.

- 1. If the terms of payment are not complied with.*
- 2. If the preparatory building works excluded from our contract and necessary structure, support frame, etc. are not completed by the client in time.*
- 3. If permanent three phase power supply along with double earthing, etc. is not given in time in the machine room.*
- 4. If formalities are delayed due to non-payment of licence fees or if necessary technical details are missing.*

B-6) Guarantee

Unless otherwise specified in our confirmation of order, all machinery and equipment will be of our standard design and manufacture and will be carefully inspected before despatch from our works....

...

All liability from our part ceases at the termination of guarantee period. In the case of goods not of our manufacture, the buyer will be entitled to the benefit of any guarantee held by us in respect thereof. Our liability in respect of any order confirmed by us is limited as specified in these conditions and does not include consequential damages either direct or indirect, nor expenses for repairs or replacement or otherwise paid or incurred without our authority. We accept no liability for defects or depreciation caused by wear and tear, accidents, lightning, dampness, neglect, misuse or other abnormal conditions resulting directly or indirectly due to circumstances beyond our control.

....

Accepted & signed by both parties to make this offer a legal and valid contract binding on both parties.



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....
Hence for 7 nos of escalator the price is
Rs.1,24,25,000/- (In words Rupees One Crore Twenty-Four Lacs
Twenty-Five Thousand only)"

[emphasis supplied]

B. AGREEMENT "A" DATED 16.02.2006:

"Whereas the Owner is desirous of installing the Escalators for the Poonam Mal Opp. Alankar Talkies North Ambazari Road and City Pulse, Wardhaman Nagar, Nagpur and has accepted an offer made by the Contractor for the Design & Supply of Escalators

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The following documents shall be deemed to form and be read and constitute as part of this Agreement, viz. KEI Offer letter – KEI/0035/200512/20.

2. In consideration of the payments to be made by the Owners to the Contractor, as hereinafter mentioned, the Contractor hereby covenants with the Owner to complete the Design & Supply of seven Numbers of Escalators in conformity in all respects with the provisions of the Contract. The technical specification of the Escalators would be as per Annexure I of this Agreement.

3. The Owner hereby covenants to pay to the Contractor in consideration of the Design and Supply of Escalators, an estimated Contract Value of Rs.68,02,424/- by Opening an irrevocable Letter of Credit through a Nationalised Bank....

....
9. This Agreement between the parties revokes and supersedes all previous correspondence, representations, arrangements or agreements between the parties concerning the matters covered herein whether written or oral or implied.

....
14. All disputes and differences of any kind whatever arising out of or in connection with this agreement shall be amicably settled at the first instance mutually by Indo Pacific Software & Entertainment Ltd,



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and Kone. If no such amicable solution at the first instance, then the dispute or differences shall be referred to the arbitration and will be dealt according to the provisions of Arbitration and Conciliation Act, 1996.”

[emphasis supplied]

C. AGREEMENT “B” DATED 16.02.2006:

“1. The following documents shall be deemed to form and be read and constitute as part of this Agreement, viz. KEI Offer letter – KEI/0035/200512/20.

2. In consideration of the payments to be made by the Owner to the Contractor, as hereinafter mentioned, the Constructor hereby covenants with the Owner to complete installation. Testing and Commissioning of 7 nos) Numbers of Escalators in conformity in all respects with the provisions of the Contract.

3. The owner hereby covenants to pay to the Contractor in consideration of the erection, fabrication, installation and commissioning of escalators for an estimated Contract Value of Rs.54,92,566. The owner shall pay 50% of this amount in Advance (As soon as the Escalator arrives at site) and the Balance 50% of this amount at the time of Escalator starting to run.

....

7. This Agreement between the parties revokes and supersedes all previous correspondence, representations, arrangement or agreements between the parties concerning the matters covered herein whether written or oral or implied.

....

12. All disputes and differences of any kind whatever arising out of or in connection with the agreement shall be amicably settled at the first instance mutually by Indo Pacific Software & Entertainment Ltd., and Kone. If no such amicable solution at the first instance, then the dispute or differences shall be referred to the arbitration and will be deal according to the provisions of Arbitration and Conciliation Act, 1996.”

[emphasis supplied]



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13. Though the Arbitrator had framed eleven issues, the issues in general were the following:

- (i) Whether the 19.12.2005 agreement prevails or the 16.2.2006 agreement?
- (ii) Whether any term was fixed under the contract?
- (iii) Whether the appellant was entitled to damages?

14. The Arbitrator passed the award by holding that the agreement dated 16.2.2006 superseded the earlier agreement dated 19.12.2005 for escalators by virtue of Clause 9. The Arbitrator rejected the contention that both agreements should be read together. The Arbitrator also held that payments were made by appellant whenever demanded by first respondent. The completion date was extended to June, 2006, giving first respondent the benefit of delay. Counter-claim for losses by appellant was partially allowed for losses for three months. The losses were computed on the basis that escalators were essential for customer movement and lease agreements were cancelled solely due to non-availability of escalators. It was also noted



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that appellant took reasonable steps to mitigate damages. The Arbitrator also held that first respondent was entitled to the balance amount of Rs.15,93,490/- towards cost of goods supplied.

15. In the petition that was filed under Section 34 of the Act, the learned Single Judge, by the impugned order dated 4.9.2019, was pleased to set aside the counter-claim that was allowed in favour of appellant herein by holding that the agreements dated 19.12.2005 remain dominant, as Agreements A and B incorporated the earlier terms, rather than superseding them. The learned Single Judge held that this court, in the order dated 19.9.2008, while disposing of the petition under Section 11 of the Act, had already determined that the original base agreements dated 19.12.2005 were not superseded – a finding that had attained finality. The learned Single Judge also observed that the contracts did not stipulate a fixed timeline for material supply, rendering the Arbitrator's conclusion of delay unsupported by evidence, ignoring the findings regarding delay and inference of the Arbitrator that the completion date is May, 2006. The learned Single Judge also observed that the Arbitrator rendered



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contradictory findings on payment and delayed supply, inasmuch as the Arbitrator awarded damages for delayed supply, while simultaneously finding that the appellant has not made any payment towards the goods not supplied, but awarded damages for non-supply, leading to inconsistency. It is also held that the agreements dated 19.12.2005, which were held to be dominant agreements, expressly prohibited consequential damages, making the award of such damages beyond the scope of the contract and disagreed with the Arbitrator that the later agreements dated 16.2.2006 superseded the older agreements dated 19.12.2005. It was also held that appellant failed to substantiate the claim for damages, since the evidence was insufficient for the claim of damages, including loss of profit and cancellation of rental agreements. The learned Single Judge, consequently, set aside the Arbitrator's award granting Rs.3,60,30,700/- to appellant.

16. The points for our consideration are:

- (a) Whether the findings rendered by the Arbitrator were contrary to public policy of India?
- (b) Whether there was patent illegality?



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- (c) Whether the view expressed by the Arbitrator was a possible view and, therefore, the learned Single Judge should not have interfered?
- (d) Whether the later agreements dated 16.2.2006 superseded the base agreements dated 19.12.2005? and
- (e) Whether the appellant proved its claim for damages?

In our view, all these points can be disposed of by a common finding.

17. Both the Arbitrator and the learned Single Judge have missed the fact that the two Agreements A and B dated 16.2.2006 were restricted only to supply of escalators. There were no such agreements as A and B for supply of elevators. For supply of elevators there was only one agreement dated 19.12.2005. The Arbitrator has dealt with both escalators and elevators collectively, which he could not have done. Therefore, we will have to deal with both separately.



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18. As regards escalators, parties had initially entered into an agreement called Terms and Conditions of Contract for Supply, Erection & Installation of Escalators – Reference No.KEI/0035/200512/20, dated 19.12.2005. This agreement expressly provided that “... *Our liability in respect of any order confirmed by us is limited ... and does not include consequential damages either direct or indirect ...*”. The said agreement also says “... *Accepted & signed by both parties to make this offer a legal and valid contract binding on both parties.*”

19. Agreement A and B, both dated 16.12.2006, in clause (1) provide that “*The following documents shall be deemed to form and be read and constitute as part of this Agreement, viz. KEI Offer letter – KEI/0035/200512/20*”. Therefore, both agreements expressly provide that the terms and conditions of contract, as evidenced by the agreement dated 19.12.2005, form part of the agreements dated 16.2.2006. To put it differently, the terms and conditions dated 19.12.2005 should be taken to



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have been specifically incorporated and reproduced in the agreements dated 16.2.2006.

20. In view of what we have observed herein, Clause 9 and Clause 7 of Agreements A and B, respectively, being *“This Agreement between the parties revokes and supersedes all previous correspondence, representations, arrangements or agreements between the parties concerning the matters covered herein whether written or oral or implied”*, would mean all such correspondence, representations, arrangements or agreements other than the said agreement bearing Reference No.KEI/0035/200512/20, dated 19.12.2005, have been superseded. Any other interpretation would render Clause 1 otiose.

21. The Arbitrator, in the award, though has reproduced the said Clause 1 in paragraph 10.1 of the award, has not even discussed the effect of the said clause. The relevant paragraph of the award is extracted hereunder:

“10.2 It is clear from the above that the Ex.C-1 dated 19.12.2005 deals with the agreement relating to supply and installation of elevators. Ex.C-2 dated 19.12.2005 relates to the supply and



installation of escalators. These agreements are in respect of the project of the respondent at Wardhaman Nagar comprising of rental chain by name Big Bazaar spread over around 5 floors of around one lakh sq. ft. and multiplex comprising of 3 theatres situated in 3rd and 4th floors as well as of the project VIP road project comprising shopping mall and commercial areas in multistoried building. Though Ex.C-2 deals with the supply and installation of escalators according to the learned counsel for the respondents, the entire form refers only to the elevators perhaps, the claimant did not have any printed form or regular forms for agreements in respect of the escalators and as such the agreement form pertaining to the elevators has been used for the supply of escalators also. But however, the agreement Ex.C4 & C5 dated 16.2.2006 deals with exclusively for the supply and installation of the escalators alone. When once the parties have entered into the agreement afresh incorporating new terms and conditions in respect of the schedule of payment, for the supply of escalators, then there cannot be any dispute that the earlier agreement Ex.C2 entered into between the parties will stand superceded unless it is mentioned that the new terms are in addition or modification to the earlier agreement. The agreements Ex.C4 & C5 dated 16.2.2006 pertaining to the escalators do refer to the supercession of the earlier agreement under Ex.C-2 dated 19.12.2005. Clause 5 of Ex.C4 and Clause 7 of Ex.C-5 therein specifically mention that the agreement dated 16.2.2006 revokes and supercedes all previous correspondence, representations, arrangements and agreements. It has to be held that Ex.C-2 is superceded in view of fresh terms and conditions incorporated in Ex.C-4 and C-5 dated 16.2.2006. Hence, the contention of the learned counsel for the claimant that the Exc.C4 & C5 is only a modified form of Ex.C2 cannot be accepted. Similarly, the contentions of the learned counsel for the respondent that there was no specific agreement for the supply and installation of escalators also cannot be accepted especially in view of Ex.C-4 and C-5 dated 16.12.2006 which undoubtedly relate to the supply and installation of escalators."

[emphasis supplied]

22. It is also settled law, as held by the Apex Court in ***Oil and***



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Natural Gas Corporation Limited v. Western Geco International

Limited, that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. What is important in the context of the case at hand is that, on the facts before the Arbitrator, the Arbitrator ought not to have drawn the conclusion regarding the supersession of the agreement. The inference drawn, therefore, on the face of it is untenable, which, in our view, is resulting in miscarriage of justice. Such adjudication, even when made by the Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards is open to challenge and may be cast away. It would be apposite to reproduce paragraphs 35, 39 and 40 of the said decision hereunder:

“35. What then would constitute the “fundamental policy of Indian law” is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression “fundamental policy of Indian law”, we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other

2 (2014) 9 SCC 263

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authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

.....

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is



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not severable from the rest.”

23. That apart, the question of superseding the said agreement bearing Reference No.KEI/0035/200512/20, dated 19.12.2005, does not arise because it has already been incorporated in these two agreements dated 16.2.2006.

24. Moreover, this court, in its order dated 19.9.2008, while disposing the petition under Section 11(6) of the Act, in paragraphs 16 and 17, has recorded as under:

“16. Now the second question is whether the initial agreement of arbitration stands modified by the subsequent agreement.

17. Insofar as the agreement relating to Elevators is concerned, there is no supplementary agreement. But there are supplementary agreements relating to Escalators. In respect of both the supplementary agreements dated 16.2.2006, it is provided that the said agreements will form part of the original letter dated 19.12.2005. This is provided in Clause-1 of the agreements. That being the dominant position in the supplementary agreements, it cannot be said that the supplementary agreements supersedes the previous agreement. Learned counsel refers to Clause-9 of the first supplemental agreement (page-41 of the typed set) and Clause-7 of the second supplemental agreement (page-49 of the typed set) as superseding the previous agreement. The said clauses 9 & 7 have to be read in their context and not bereft of it. If they are so read and given their ordinary meaning, as would be understood by men of ordinary prudence, it cannot be said that those clauses supersede the dominant part of the agreement namely, clause-1. It is well settled



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that commercial agreements are to be read with a broad common sense approach and in a manner they are understood by ordinary men of the world of trade and commerce. They cannot be read as words of statute. Therefore, this Court holds that the stipulation in the arbitration clause in the original agreement must prevail and govern the relationship between the parties.”

[emphasis supplied]

25. The Court has, therefore, given a finding, while disposing the petition under Section 11 of the Act, that the agreement dated 19.12.2005 forms part of the agreements dated 16.2.2006 and it cannot be said that the agreements dated 16.2.2006 (referred to as “supplementary agreements”) supersede the previous agreement.

26. These findings were not challenged by appellant. On the face of such a finding by court of competent jurisdiction, the learned Arbitrator could not have given a contrary conclusion. The said view is bolstered by the decision of the Apex Court in the case of ***SBP & Co v. Patel Engineering Ltd and another***³, wherein it is held that the finality given to the order of Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral

³ (2005) 8 SCC 618



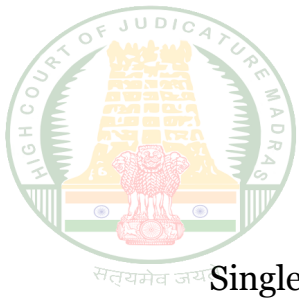
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Tribunal. Paragraph 20 of the said judgment reads as under:

“20. Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In Konkan Rly. [(2002) 2 SCC 388] what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.”

[emphasis supplied]

27. Shri Sankaranarayanan submitted that the opinion of the Arbitrator was different and it was a possible view and, hence, the learned



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Single Judge should not have interfered.
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28. We are afraid, we cannot accept the submission of Shri Sankaranarayanan because the learned Arbitrator, with due respect, has not even considered the effect of Clause (1), namely the incorporation clause, which says that the agreement bearing Reference No.KEI/0035/200512/20 shall be deemed to form and be read and constitute as part of this agreement.

29. Therefore, to this extent, we agree with the learned Single Judge.

30. Shri Sankaranarayanan also submitted that the clause excluding the claim for damages is bad in law. Relying on a judgment of a learned Single Judge of the Delhi High Court in ***Simplex Concrete Piles (India) Ltd v. Union of India***⁴, it was submitted that the clause which deprives appellant from claiming damages or a clause by which appellant is alleged to have contractually waived its right to claim damages will be contrary to

⁴ 2010 (115) DRJ 616



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public policy and public interest elements created by Section 73 of the Contract Act, 1872. It was submitted that such a clause would mean that the contract can be broken at will. It will amount to destroying the very edifice of the Contract Act.

31. We disagree with Shri Sankaranarayanan because in *Simplex Concrete Piles (India) Ltd* (supra), the clause which was under consideration by the Delhi High Court provided “*No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted shall be admitted*”. The Delhi High Court was pleased to observe that such a clause went against the very edifice of the Contract Act because that would otherwise boil down to waiving of rights which were created by Section 73 of the Contract Act, in which there is a public policy or public interest element involved. The Court also went on to hold that by the said clause, the party only stated that it will not entertain a claim for damages. However, such a clause in a contract cannot prevent the award of damages, although the same are otherwise payable in law.



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32. Furthermore, it is well settled that where the contract in clear and unambiguous terms bars or prohibits a particular claim, the award made in violation of the terms of the contract would violate Section 28(3) of the Act and would be considered to be patently illegal and, therefore, liable to be set aside under Section 34(2)(b) of the Act [***J.B.Engineers (P) Ltd v. Union of India⁵***]

33. It was also submitted by Shri Sankaranarayanan that, in any event, the claim was not for a consequential loss, but a direct loss, because first respondent must be aware that the elevators and escalators were to be used in a commercial establishment and appellant was going to earn rental income.

34. Shri Sankaranarayanan submitted that the damages claimed by appellant were something which flowed naturally from the breach, without other intervening clause and independent of any special circumstances. He submitted that indirect or consequential loss does not exclude liability for damages which is a natural result of the breaches complained of. The

⁵ (2011) 5 SCC 758



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claim, according to Shri Sankaranarayanan, makes it clear that it was a claim that may very well directly and naturally arise from the breach based on delay/non-supply. He relied on a judgment of the Royal Courts of Justice, London, in the case of **2 *Entertain Video Limited and two others v. Sony DADC Europe Limited***⁶.

35. We are unable to entertain the submission of Shri Sankaranarayanan because, in fairness, it was informed to us that these pleas were not raised before the Arbitrator or even before the learned Single Judge. The Apex Court in ***MSK Projects (I) (JV) Ltd v. State of Rajasthan***⁷, while considering the scope of interference with the arbitral award under Section 34 or Section 37 of the Act, has emphatically held that a defence or a claim not raised before arbitrator cannot be considered by the Courts.

ELEVATORS:

36. Admittedly, the only agreement which was entered into between the parties is the one dated 19.12.2005. The clauses are identical to that of

⁶ Judgment passed on 24.4.2020 in Case No.HT-2017-000219,

Neutral Citation Number: [2020] EWHC 972 (TCC)

⁷ (2011) 10 SCC 573



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escalators. This agreement also expressly provided that “... *Our liability in respect of any order confirmed by us is limited ... and does not include consequential damages either direct or indirect ...*”. In the case of elevators, parties had not entered into Agreement “A” or “B” as was done in the case of escalators. The Arbitrator has missed the point that there was no question of this agreement dated 19.12.2005 being superseded by any later agreement. The learned Arbitrator, with due respect, has mixed up the whole issue and on that ground alone the award has to be termed as perverse requiring interference to the extent of awarding damages in favour of appellant.

DAMAGES:

37. On the quantum of damages awarded, at the outset, Shri Sankaranarayanan, as an officer of court, was candid to admit that the Arbitrator has made an error on the amount awarded for delay/non-supply of elevators. Shri Sankaranarayanan submitted that the amounts taken itself were incorrect and instead of Rs.1,10,30,700/-, what should have been awarded was only Rs.58,78,635/-.



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38. It was submitted by Shri Sankaranarayanan, relying on a judgment of a Division Bench of the Delhi High Court in ***Chennai-Ennore Port Road Co. Ltd. v. RDS Project Ltd.***⁸, that if it was only a computation error, the court may make the correction.

39. We do not agree with Shri Sankaranarayanan for two reasons: (a) We have already found that the award was otherwise perverse; and (b) Under Sections 34 and 37 of the Act, there is no power vested in a court to modify an award or even for that matter, correct the award.

40. Section 33 of the Act provides that within thirty days from the receipt of the award, unless another period of time has been agreed upon by the parties, a party may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award and the arbitral tribunal may, subject to what the other party has to say, make the correction. Of course, it also empowers the Tribunal to correct any error on its own initiative within thirty days from the date of the arbitral award. Certainly, it does not

⁸ 2016 SCC OnLine Del 1572



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empower this court to make such correction.

41. The aforesaid view is fortified by a recent decision of the Apex Court in **S.V. Samudram v. State of Karnataka**, wherein it has been held as under:

“17. It would be useful to examine the expositions of this Court on the scope to interfere with arbitral awards under Sections 34 and 37 of the A&C Act. The judgment and order of the learned Civil Judge was dated 22-4-2010. The position as to whether an arbitral award can be modified in the proceedings initiated under Sections 34/37 of the A&C Act is no longer res integra. While noting the provisions, more specifically, Section 34(4) of the A&C Act; the decisions rendered by this Court, including the principles of international law enunciated in several decisions recorded in the treatise Redfern and Hunter on International Arbitration, 6th Edn., this Court in NHAI v. M. Hakeem [NHA v. M. Hakeem, (2021) 9 SCC 1 : (2021) 4 SCC (Civ) 437 (two-Judge Bench)], categorically held that any Court under Section 34 would have no jurisdiction to modify the arbitral award, which at best, given the same to be in conflict with the grounds specified under Section 34 would be wholly unsustainable in law. The Court categorically observed that any attempt to “modify an award” under Section 34 would amount to “crossing the Lakshman Rekha”.”

[emphasis supplied]

42. In view of the above finding, we are not getting into the aspect as to whether the evidence led was sufficient for the learned Arbitrator to award any damages.



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43. Though parties filed compilation of various judgments, only the judgments referred to above were cited, besides the decision in *S.V. Samudram* (supra), which is a recent one governing the issue involved qua the power of the courts under Sections 34 and 37 of the Act to modify the award.

For the foregoing reasons, the appeal is dismissed with costs in a sum of Rs.2,00,000/-. Consequently, interim application stands closed.

(K.R.SHRIRAM, C.J.)

(MOHAMMED SHAFFIQ, J.)

14.03.2025

Index : Yes
NC : Yes
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THE HON'BLE CHIEF JUSTICE
AND
MOHAMMED SHAFFIQ, J.

(sasi)

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