2021/KER/52252

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 13TH DAY OF DECEMBER 2021 / 22ND AGRAHAYANA, 1943

ARB.A NO. 38 OF 2020

AGAINST THE ORDER DATED 30.11.2019 IN OP(ARB) 664/2012 OF ADDITIONAL DISTRICT COURT-V, EKM

APPELLANT/RESPONDENT:

M/S.NAVAYUGA ENGINEERING COMPANY LTD
REGISTERED OFFICE, 48-917, DWARAKA NAGAR,
VISHAKHAPATTANAM 530-016,
REPRESENTED BY ITS AUTHORISED SIGNATORY

BY ADVS.SANTHOSH MATHEW
SRI.ARUN THOMAS
SRI.JENNIS STEPHEN
SRI.VIJAY V. PAUL
SMT.KARTHIKA MARIA
SMT.VEENA RAVEENDRAN
SRI.ANIL SEBASTIAN PULICKEL
SMT.DIVYA SARA GEORGE
SMT.JAISY ELZA JOE
SHRI.ABI BENNY AREECKAL
SMT.LEAH RACHEL NINAN
SMT.SHARAN PREM

RESPONDENT/PETITIONER:

UNION OF INDIA
REPRESENTED BY THE CHIEF ENGINEER (NW),
NAVAL BASE P.O.,KOCHI-682 004.

BY ADV SRI.K.SHRI HARI RAO, CGC

THIS ARBITRATION APPEAL HAVING COME UP FOR ADMISSION ON 30.11.2021, THE COURT ON 13.12.2021 DELIVERED THE FOLLOWING:

"C.R."

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Arbitration Appeal No.38 of 2020

Dated this the 13th day of December, 2021

JUDGMENT

C.S.Sudha, J.

The Hon'ble Supreme Court in **Project Director, National Highways Authority of India v. M. Hakeem, (2021 SCC Online 473)** held that Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) does not contemplate modification of an award by a court in a proceeding under the said Section. Now the question is what constitutes modification of an award? If the Arbitrator has awarded separate amounts on various independent claims, would setting aside some of the claims, which are separable and independent of the remaining claims, constitute a modification of the award? This is one

major issue apart from the justifiability of interference made by the court below and the arbitrability of certain disputes decided by the Arbitrator, that calls for an adjudication in this case.

2. First, a brief reference to the facts of the case-

The appellant and the respondent herein entered into a contract for the provision of Parade Ground, PT Complex, Athletic Track, Swimming Pool, Covered PT and Drill Shed etc. at Ezhimala. The work was completed on 31/10/2007. Disputes arose between the parties and hence the matter was referred for arbitration. Sri.N.D.Bhagatkar, Chief Engineer (QS&C), C/o. Commander Works Engineer, Pune was appointed as the sole Arbitrator. 31 claims were raised before the Arbitrator by the claimant for a total amount of Rs.16,04,07,582/- with interest. Claims 1 to 5, 7, 8, 10, 11, 14, 15,16 to 20, 27, 30 and 31 were allowed and the remaining claims were rejected. The Arbitrator by award dated 21.5.2012 granted an amount of Rs.3,93,24,065/- with interest at the rate of 9% per annum w.e.f. 13/09/2009 to the date of

award to be paid within 90 days from the date of award, failing which interest was to be paid @ 11% from the date of award till payment. The claim of the respondent for Rs.11 lakhs (Rs.5 lakhs for cost of arbitration and Rs.8,38,032/- for repair of roof) was rejected by the Arbitrator.

3. The respondent/Union of India (UoI) preferred O.P. Arb. Appeal No.664/2012 before the District Court, Ernakulam challenging the award. The Court confirmed the award under claim no.2, 3,10,11,14,15,20 and 27 and set aside the award under claim no.1,4,5,7,8,16, and 19. The award under claim no.31 was modified. The award of Rs.3,93,24,065/- was thus reduced to Rs.22,36,380/- plus cost of Rs.28,402/-. Aggrieved, the appellant/claimant is before us.

4. Heard Sri. Anil Sebastian Pulickel, the learned counsel for the appellant and Sri.K.Shri Hari Rao, the learned Central Government Counsel for the respondent.

5. According to the learned counsel for the appellant, the

court below went wrong in partly setting aside the award, which in effect, is a modification of the award. This is not permissible under Section 34 of the Act. It was pointed out that in a proceeding under Section 34, the court can only set aside an award on any of the grounds mentioned in S. 34(2) or 34 (2-A) and in no case, can the court modify an award or set aside an award partially except in the contingency provided under the proviso to S.34 (2)(a) (iv). If at all the court finds that a portion or part of the award is bad, the remedy lies in S. 34 (4), goes the argument. Reference was made to **Hakeem's** (*supra*) case in support of the argument that the court has no power to modify an award. The learned counsel, in all fairness, has also brought to our notice, decisions which have held that the doctrine of severability can be applied to awards which are severable. **Raghul Construction Engineers and Contractors v. N.T.P.C. [(2005) SCC Online Kerala 389]; R.S. Jiwani Mumbai v. Ircon International Ltd. Mumbai (2010 (1) Mh.L.J 547); Anugraha Engineers & Contractors v. Union of**

India (2014-1-L.W.132); Saptarishi Hotels Pvt. Ltd. v. National Institute of Tourism and Hospitality Management (2019 SCC Online TS 1765) are the decisions referred to by the learned counsel. Therefore, the argument advanced is that the present appeal is liable to be allowed and the order of the court below can be set aside on this preliminary point itself, without this Court going into the merits of the case. On the other hand, it was submitted on behalf of the respondent that there is no infirmity or illegality in the impugned order as canvassed by the appellant.

6. In **Raghul Construction** (*supra*) a Division Bench of this Court held that if some portions of the award are without jurisdiction, such part alone can be set aside if it will not affect the award in respect of disputes which are arbitrable. The whole award need not be set aside. However, this decision is rendered on the basis of the Arbitration and Conciliation Act, 1940, which contained a specific provision for modification of the award, that is, Section 15. In the present Act, no such provision for

modification of the award has been made. Therefore, the principle laid down in **Raghul Construction** (*supra*) cannot be applied to the facts of the present case as it is the 1996 Act that is applicable here.

7. In **R.S. Jiwani**'s (*supra*), the questions of law that arose for consideration before a Full Bench of the Bombay High Court were - (i) whether the doctrine of severability could be applied to an award in a proceeding under Section 34 of the Act; and (ii) the scope of the proviso to Section 34(2)(iv) and whether its application is restricted to clause (iv) alone or whether it applies to the whole of Section 34(2) of the Act. It was held that the doctrine of severability an established concept, has been applied to the law of contract since time immemorial. The intention of the Legislature in enacting the 1996 Act is to free the Arbitral Tribunal from the rigours of strict rules of procedure and permit least interference by the court. An arbitral award is final and binding on the parties and even on persons claiming under them in terms of Section 35 of the

Act. Therefore, it would be unjust and unfair to deny the statutory rights accrued to the parties by not applying the doctrine of severability if some part of the award is unsustainable and where other part of the award is found to be good and enforceable in law by the court in exercise of its powers under Section 34 of the Act. However, the case would be different where it is not possible or permissible to sever the award. If the bad part of the award is intermingled and interdependent upon the good part of the award, then it is not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. There is no bar in law in applying the doctrine of severability to awards which are severable. If the principle of severability can be applied to a contract and even to a statute, then there is no reason why it cannot be applied to a judgment or an award containing resolution of disputes between parties and providing them such relief as they may be entitled to in the facts of the case. When partial challenge to an award is

permissible, then certainly partial setting aside of an award is also possible. Regarding the proviso to Section 34(2) (a) (iv), it was held that it has to be read *ejusdem generis* to the main Section, as in cases falling in that category, there is an absolute duty on the court to invoke the doctrine of severability where the matter submitted for arbitration is clearly separable from matters not referred for arbitration.

8. **Anugraha Engineers** *(supra)* was a case in which the court under Section 34 of the Act set aside the award in part in respect of claims 1, 2 and 6 and upheld the award in respect of the remaining claims (there were about a total of 15 claims). The Madras High Court held that the remedy lies in sub-section (4) of Section 34 of the Act and that the court while dealing with an application under Section 34 can either set aside the award in its entirety or dismiss the application, but it cannot set aside the award in part. In other words, the court dealing with an application under Section 34, cannot assume the power of an appellate forum and

modify the award. Hence, the order of the court below was held to be infirm and defective and therefore liable to be set aside.

9. **Hakeem** *(supra)* was a case in which land was acquired under the National Highways Act, 1956. The Competent Authority under the said Act awarded very low amounts as compensation, that is, amounts ranging from Rs.46.55/- to Rs.83.15/- per sq. meter. No infirmity was found in this, by the District Collector who made the arbitral award. However, in the proceedings under Section 34, the District Court enhanced the amount of compensation to Rs.645/- per sq.meter, thereby modifying the award of the District Collector. In appeal, a Division Bench of the Madras High Court upheld the modification made. The respondent therein, namely, the National Highways Authority of India took up the matter before the Hon'ble Supreme Court. The Apex Court, after examining various other decisions held that in a proceeding under Section 34, the court does not have the power to modify an award. The Apex Court disagreed with the findings of the High

Court which held that merely because the words 'modify' or 'vary' is not indicated in Section 34, it would not take away the jurisdiction of the court exercising its jurisdiction under Section 34 to interfere with the award passed by the Arbitrator partially; that if such a power is not vested with the court, it would lead to multiplicity of proceedings which was never intended by the legislature while framing Section 34; that a reasonable interpretation to Section 34 would only lead to the irresistible conclusion that the court can modify or vary the award of the Arbitrator if it is contrary to the material evidence adduced by the parties; that even otherwise, as contemplated under Section 34 (2) (v)(b)(ii) of the Act, when the award passed by the Arbitrator is in conflict with the public policy of our country, reversal or modification of such award passed by the Arbitrator is well within the provisions contained under Section 34 of the Act. The Apex Court noticed that the question has been settled finally in **McDermott International Inc. v. Burn Standard Ltd [(2006)**

11 SCC 181], Kinnari Mullick vs Ghanshyam Das Damani and Dekshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies Pvt. Ltd. (2021 SCC Online SC 157). Further, to state that the judicial trend appears to favour an interpretation that would read into Section 34, a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985, which makes it clear that even the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the 'limited remedy' under Section 34 is co-terminus with the 'limited right', namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Act. It further held, if one were to include the power to modify an award in Section 34, one would be crossing the *lakshman rekha* and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a

Judge must put himself in the shoes of the Parliament and then ask whether Parliament intended this result. The Parliament very clearly intended that no power of modification of an award exists in Section 34. It is only for the Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Act and to bring it in line with other legislations the world over. Holding so, the decision of the Madras High Court was overruled. The Apex Court also noted that decisions of the Supreme Court modifying awards were in exercise of its powers under Article 142 of the Constitution of India, which power cannot be exercised by other courts.

10. In **Saptarishi Hotels** case (*supra*), the Telangana High Court held that by applying the doctrine of severability, an award can be set aside in part.

11. By referring to **Hakeem**'s case (*supra*), it was submitted on behalf of the appellant that the Hon'ble supreme Court has in quite unambiguous terms held that modification of an award under

Section 34 is impermissible. That being the law of the land, the court below went wrong in interfering with the award and setting aside some of the claims, which is nothing but modification of the award and hence impermissible.

12. According to us the dictum in **Hakeem**'s case (*supra*) can be distinguished on facts. As stated earlier, the District Court in the proceedings under Section 34 found that the amount of compensation granted to the land owners under the National Highway Act by the authorities under the Act was abysmally low and therefore enhanced the compensation to Rs.645/- per sq.mtr. in the place of Rs.46.55/- to Rs.83.15/- per sq.mtr. This is the modification that has been interdicted by the Apex Court. However, the situation in the case on hand is different. A total of 31 claims amounting to Rs.16,04,07,582/- was made by the appellant/claimant before the Arbitrator. An award of Rs.3,93,24,065/- with interest was granted by the Arbitrator. The court below in the proceeding under Section 34 initiated by the

respondent/UoI, confirmed the award on some claims and set aside the award on certain other claims. The claims are independent and separate. This is not a case in which the award of compensation under any particular head was revised/changed or altered, but a case in which the portion of the award relating to certain independent claims were set aside.

13. In this context, we refer to the decision of the Hon'ble Supreme Court reported in **2011 KHC (Online) 4418) (M/s.J.G.Engineers Pvt. Ltd. vs. UoI)**. The claimant in the said case was awarded the work of extension of terminal building at the Guwahati Airport. Disputes arose between the parties and the matter was referred for arbitration. The claimant filed a statement of claims before the Arbitrator. Claims 1 to 11 were for Rs.2,38,86,198.31/- which was subsequently reduced to Rs.2,06,70,495/-. Claim 12 was for interest @18% p.a. and claim 13 was towards cost of arbitration. The Arbitrator awarded a sum of Rs.1,04,58,298/- with interest and cost. The proceedings under

Section 34 initiated by the UoI was dismissed. This order was reversed by the Guwahati High Court in the appeal filed by the UoI and the award was fully set aside. The Apex Court did not agree with the judgment of the High Court setting aside the entire award. In paragraph 18 it was held thus -

> "*18. The arbitrator had considered and dealt with claims (1), (2, 4 and 5), (6), (7 and 8), (9) and (11) separately and distinctly. The High Court found that the award in regard to items 1, 3, 5 and 11 were liable to be set aside. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event of counter claims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside. It is now well- settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.*"
> (Emphasis supplied)

14. As in the aforesaid decision, in the case on hand also, the award has dealt with and decided several claims separately and distinctly. Therefore, if the court finds the award with regard to some claims to be bad, the court can segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. If such an interpretation is not given, it would result in gross injustice and absurd results because the court would have to set aside that portion of the award also which suffers from no infirmity. This certainly cannot be what was contemplated by the Legislature. No reference has been made to **J.G. Engineers Pvt. Ltd.** (*supra*) in **Hakeem**'s case nor has it been distinguished or overruled. The decision in **J.G. Engineers Pvt. Ltd.** is apparently not under Article 142 of the Constitution also. That being the position, we find that the doctrine of severability can be applied to proceedings under Section 34 also because as held in **R.S. Jiwani** *(supra)*, if a person can challenge an award in part, certainly the court can also set aside an award in part. That being the position,

we negative the argument advanced on behalf of the appellant that the impugned order is liable to be set aside on the said preliminary ground alone.

15. Having negatived the challenge on the preliminary point, we proceed to consider whether the court below was justified in setting aside the award in respect of some of the claims. We will refer to the claims in the order in which arguments were advanced challenging the findings of the court below. Reference was first made to claim no.19. The said claim is relating to 'additional payment for excavation of hard rock by chiseling'. Under this head/claim, an amount of Rs.34,38,452.87/- was claimed. The award of Rs.34,38,453/- granted by the Arbitrator has been set aside by the court below. It was pointed out on behalf of the appellant that the fact that excavation of hard rock was done, is not in dispute. The dispute is only with regard to the mode of excavation, that is, was it done by way of blasting or was it by chiseling. The contract of agreement does not specify the method

to be used for excavation. However, it has been stipulated in the contract that if the appellant/claimant resorts to blasting, he must get necessary permission/sanction from the authorities concerned. Further, if excavation is done by chiseling, the claimant is entitled to a higher rate and if it is done by blasting, he would be entitled only to a lower rate. The Arbitrator after analyzing the evidence adduced before him found that the excavation of hard rock had been done by chiseling and hence awarded the aforesaid amount. According to the appellant/claimant, the finding of the court below that the Arbitrator never considered this aspect is wrong. On the other hand, a detailed discussion regarding this aspect is very much available in the award. The court went wrong in interfering with the factual findings of the Arbitrator. Reference was made to **Madnani Construction Corporation Pvt. Ltd. vs. UoI [(2010)1 SCC 549]** to substantiate the argument on this aspect.

16. The respondent/UoI, disputed the claim of excavation by chiseling and contended that it was the responsibility of the

claimant to have obtained the necessary permit/sanction from the District Collector. The claimant had commenced the work on 05.05.2003, but applied for permission only on 03.09.2004, i.e., after a lapse of sixteen months. Excavation of hard rock was done by blasting only. The fact that blasting alone was done, is evident from the works' diary maintained at the work site which also contains the signature of the appellant/claimant. Further, this amount was never claimed by the claimant during the currency of the work through Running Account Receipts (RARs). Further, the appellant/claimant had during the currency of the contract, requested for extension of time due to delay in getting permission from the authorities concerned for blasting of rock. The Accepting Officer by Deviation Order (DO), granted extension with no financial effect. After that, several RARs were paid to the claimant. The claimant then never claimed any amount for chiseling. Therefore, this would show that the claim now made under this head is only an after-thought. The claimant countered the

contentions of the respondent/UoI by filing a rejoinder, in which he reiterated his claim and contended that he could not obtain permission for blasting. The work diary, namely, Ext.GP-46 relied on by the respondent is a fabricated document created subsequently to suit the case of the respondent.

17. The Arbitrator in paragraph 74.9 of the award considered the rival contentions of the parties and found that excavation had been done by way of chiseling. The Arbitrator noticed that the Station Commander had imposed certain restrictions relating to the execution of the contract. The Arbitrator also took note of the differences seen in the handwriting, ink and pen in the entries seen in Ext.GP-46 works diary produced and relied on by the respondent and so concluded that the argument advanced by the claimant against the works diary is justified. It was also found that there was no dispute regarding the calculated quantities, but the only objection was that the amounts were never claimed in any of the RARs. The Arbitrator found that when the

work had admittedly been done by the claimant, the same cannot be expected to have been done gratuitously ; that the claimant expected a DO to be issued by the respondent/UoI, but the latter took considerable time in issuing various DOs and that some had been issued even after the completion of the work and hence in such circumstances, the argument of the respondent that the claimant ought to have claimed the amounts under this head in the RARs is not justifiable and so accepted the claim and awarded Rs.34,38,453/-.

18. The court below deals with this claim in paragraph 29 of the impugned order which reads thus -

> "*29. Claim No.19 relates to additional payments for excavation by chiseling of hard rocks. As per CA claim 26.5 in Sl. Page 223 controlled blasting contractually agreed with written permission of GE and District Authorities. As per G.P.46 work diary it also noted the blasting work done in field and signed by petitioner and respondent. Without considering the admission and evidence the arbitrator concluded that the respondent carried out the work by chiseling and granted the amount as claimed by the respondent which is patently illegal, unfair and unreasonable that it shocks the conscience of the court and liable to be interfered and do so.*"

19. The finding that admission made by the claimant had

not been taken note of by the Arbitrator, is factually incorrect. The claimant never admitted the entries in the works diary, on the other hand he disputed the authenticity/genuineness of Ext.GP-46 works diary, which contention was found to be probable from the facts, circumstances and evidence on record by the Arbitrator. This factual finding of the Arbitrator ought not to have been interfered with by the court below. It is settled law that the Arbitrator is the master of facts. Finding on facts by the Arbitrator, cannot be easily interfered with unless and until they are found to be perverse or patently illegal. Here, in the instant case, the Arbitrator has given clear and cogent reasons which can in no way be termed as perverse, unfair or one shocking the conscience of the court as held by the court below. The court below has committed a patent mistake by interfering with the award of the Arbitrator under claim no.19 and hence, we set aside the finding of the court below under claim no.19.

20. Now, to claim no.5 which is described as 'provision of

links 1, 2 and 3 around cafeteria', an amount of Rs.13,06,196.51/- claimed was allowed by the Arbitrator. The same has been set aside. It is submitted on behalf of the appellant that the dispute here was, whether this work is covered by the Contract Agreement (CA) or whether it is extra works. If it is included in the CA, the claimant is not entitled to the amount claimed, but on the other hand, if it is extra works, he is entitled to the said amount. According to the claimant, the work done under claim no.5 is extra works and hence he is entitled to the amount claimed. Claim no.5 is dealt with by the Arbitrator in paragraph 16 of the award. The contract entered into between the parties is admittedly a lump sum contract. The claimant before the Arbitrator contended that links 1 to 3 constructed as instructed by the Garrison Engineer (GE), was not part of lump sum contract for the construction of the cafeteria building. These works were completed as directed by the GE as early as in September/October, 2008. However, when the claimant realised that no payments were made for the said links in the

RARs, he brought it to the notice of the GE by way of Ext.C5/S-2 letter. He reminded the authority concerned of the matter by various subsequent correspondences also. However, no action was taken by the respondent/UoI. Hence, by way of Ext.C5/S-5 letter dated 30.1.2009, he informed the GE of his intention to claim these works as extra works with interest through arbitration. The respondent/UoI contended that the claim is not admissible as the work forms part of the lump sum contract and that they are not extra works. The Arbitrator, after hearing both sides and examining the documentary evidence adduced by both sides, concluded that the links were not included in the CA or in the drawings and therefore in the absence of details in the CA, it cannot be considered that the links had been included in the lump sum and not payable unless it had been so specifically mentioned in the contract. The Arbitrator found that as the drawings did not indicate the two ends of the links and also did not indicate which link forms part of which building, it cannot be held to be part of the CA and

hence found the claim to be sustainable and awarded the aforesaid sum. The court below in paragraph 24 of the impugned order deals with claim no.5 which reads thus -

> "*24. Claim No.5 relating to construction of links 1, 2 and 3 around that cafeteria. The respondent as well as well as arbitrator clearly admitted that there is no stipulation in the contract to do the said work, but according to arbitrator there is 'no end' in the drawing and therefore the respondent is entitled to get the amount since they conducted the work, link 1, 2 and 3 around that cafeteria. It is evident from page 23(R) of CA that L1,2 & 3 are excluded. There is no compulsion to the respondent to do the work if he is in a dilemma or if the contract not specified with regard to the work. He could have avoid the same then and there and proceed further after getting clear a written consent from the petitioner. Here the respondent allegedly conducted the work according to their own interpretation, unilaterally and claiming the amount. The same is against the contract and the Arbitrator cannot go beyond the contract and found that the award regarding claim No.5 is contra to the contract and liable to be interfered. Therefore as per the contract the petitioner is not liable to pay the said amount and the findings of the arbitrator is in conflict with the contract and set aside awarding of claim No.5.*"

21. The learned counsel for the appellant submitted that the court below has taken up a stand which neither party had and also that a pure finding of fact which cannot and ought not to have been interfered with, has been interfered with, which finding of the court below cannot be sustained. Reference was made to **M/s.Enkay Construction Company vs. Delhi Development**

Authority [ILR (2006)(II) Delhi 249] in which it was held that based on Section 70 of the Contract Act, which embodies the equitable principle of restitution and prevention of unjust enrichment, any extra works done, which work is not expressly or impliedly included in the original contract, the beneficiary is obliged to pay for the benefit he receives and that a Government is also not outside the purview of Section 70 of the Contract Act.

22. As rightly pointed out by the learned counsel for the appellant, the finding of the court below is apparently incorrect. The respondent/UoI had no case that the work had been done by the claimant, unilaterally and according to his "own interpretation". On the other hand, their specific case is that the works done are not "extra works" but part of the CA and hence the claimant is not entitled to any further sum. They do not dispute the claim that the works had been carried out as instructed by the GE. The finding of the Arbitrator regarding this claim was also purely a factual one, based on the materials placed before him and which

finding is supported by cogent reasons. No interference was called for and there is no justification for the interference also. Hence, the finding of the court below on claim no.5 is liable to be set aside.

23. Claim no.8 is relating to “extension of link (1) between substation and flotilla office, PT shed 2 to link 10”. An amount of Rs.2,81,516.70/- claimed was allowed by the Arbitrator. This was set aside by the court below. According to the learned counsel, the dispute involved here also, was whether this work was part of the CA or was it extra works. Paragraph 26 of the impugned order by which award relating to claim no.8 was set aside, is nothing but a verbatim reproduction of the contentions of the respondent/UoI in the claim petition, which is not supported by any reason(s) whatsoever and hence is also liable to be set aside.

24. Paragraph 63 of the award deals with claim no.8. The claimant contended that this work is not part of the CA, but it was extra work and hence he has to be reimbursed for the same. The respondent/UoI contended that the claim was inadmissible as they

form part of the CA. Paragraph 63.6 of the award deals with the finding of the Arbitrator regarding this claim. The Arbitrator after hearing both sides and considering the documentary evidence produced by either side, found that the CA and drawings were not clear on this aspect. The contract did not mention that the links are included in the lump sum and that the respondent/UoI had failed to establish their contention that the work had been executed by another contractor and hence found the claim to be justifiable and so awarded Rs.2,81,516/- to the claimant.

25. Paragraph 26 of the impugned order deals with claim no.8 which reads thus -

> "*26. Claim No.8: relating to extension of link 1 between Sub station and Flotilla office and PT shed 2 to link 10. It forming part of lump sum as per the drawing number 3TZH-Links -WDAP IS3 (serial No.143.3.TZH links space WADP 2 S3 (serial No.144 and 3TZH – links – WDAP. Space 3 SP(serial No.145). As per schedule 'A' note No.6.1.2 in serial page No.18 (R)the all drawing shall be deemed to be included in respective cost of building unless specifically excluded. Hence it is clear and unambiguous what are included and what are excluded in lump sum. As per the contractual conditions link No.10 is part and parcel of quoted lump sum and the arbitrator ignored these two vital contract conditions and arbitrarily awarded the full amount as claimed by the respondent. According to the arbitrator in the absence of specific stipulation, supported the*

> *view of respondent and allowed the claim. The said conclusion is in conflict with the contractual terms of 6.1.2 and liable to be interfered and do so."*

26. It is apparent that no reasons have been given for setting aside the specific findings of the Arbitrator. The court below does not say any or for what reasons the Arbitrator was wrong in concluding so. Hence, the factual findings supported by reasons, set aside for no apparent reasons, is liable to be set aside.

27. Claim no.16 is relating to 'certain additional works carried out in link 5 at the canopy'. An amount of Rs.39,783.12/- claimed was granted by the Arbitrator. According to the claimant, when the construction of link 5, roof and canopy was at the final stage, the GE vide Ext.C16/S-1 letter dated 24.8.2005 demanded extension of the link inside the canopy-roof reinforcement. The claimant by letter dated 25.8.2005 brought it to the notice of the GE that this was a delayed request on their part. However, he carried out the work as directed by the GE and requested for a DO. He also informed the GE that such changes entail some additional

works beyond the terms of the contract and hence he needed to be reimbursed and a proper DO issued. However, no action was taken by the GE for 19 months. Hence, as per Ext.C16/S-5 letter dated 28.11.2008, he sent a draft DO for the additional works done and requested the GE to issue a DO. Again, no action was taken by the GE. According to the claimant, the extension of link 5 was ordered on 24.8.2005 by the introduction of two revised drawings. These are not missing details and as changes have been brought in as directed by the GE, he is entitled to be reimbursed. On the other hand, the respondent/UoI contended that the changes made in the drawings relating to this work were changes falling under missing details and so the claim is liable to be rejected.

28. The Arbitrator in paragraph 71.7 of the award has given his findings on this claim. It was found that the CA has failed to demarcate the scope of work under lump sum and that the respondent had added supplemental details at a later stage. It was also found that the respondent through their consultant continued

to give details after the commencement of the work and then claimed them as missing details. It was found that such details could not be determined or foreseen at the tender stage itself and therefore in the interest of justice and equity, the claim needs to be upheld.

29. Claim no.16 dealt with in paragraph 28 of the impugned order reads thus -

> "*28. Claim No.16 relates to additional works carried out in link 5 at the canopy and the arbitrator allowed the claim on the conclusion that the contract failed to demarcate scope of work under lump sum. There is clear stipulation in condition 6 B in GCC IAWF 2249 that lump sum contract based on pre priced schedule 'A' and the rates as inserted in MES. Therefore contract terms are clear and the arbitrator cannot take a decision in conflict with the contract. Hence the conclusion of arbitrator in claim No.16 is liable to be interfered and do so.*"

30. It is pointed out that here-again, the finding of the court below is *sans* any reason; that there is no clause as 6B in the GCC as mentioned in the impugned order and this finding of the court below is also a reproduction of the allegations of the respondent herein in the claim petition. To substantiate the argument that the court below is bound to give reasons, the learned counsel relied on a decision of the Delhi High Court namely, **Jai Singh vs. DDA**

(MANU/DE/1254/2008), in which it has been held that merely saying that claim is not in terms of the agreement or that the claim has not been established, is not sufficient and they do not constitute reasons for the conclusion. Therefore, in such circumstances the court would be compelled to peruse the records to find out whether the Arbitrator's conclusions are in accordance with law or not. However, that is not the scope of enquiry while entertaining a challenge to arbitration awards.

31. As pointed out by the appellant, here again the court below does not say in what way the finding of the Arbitrator is against the contractual provision. The court has not addressed the rival claims of the parties as to whether the work done is extra works/new elements or whether it is missing details of the existing details/elements. We went through the General Conditions of Contracts I.A.F.W.-2249 (GCC), but were not able to locate condition 6B as referred to in the impugned order. We find only conditions 6A, 6(A)(A) with sub clauses (a) to (f), 6(A)(B), 6(A)

(C), 6(A)(D) and 6(A)(E). Probably it is condition 6(A)(B) that has been referred to by the court below. Even if that be so, the court below has not stated the reasons for concluding so. On the other hand, the Arbitrator has given reasons for his conclusion and a finding based on facts ought not to have been interfered with. As the court below went wrong, the finding relating to claim no.16 is also liable to be set aside.

32. Claim no.7 is relating to 'provision of local granite stone cladding *in lieu of* Sadarhally stone cladding'. An amount of Rs.49,68,150.61/- claimed was allowed by the Arbitrator. This again has been set aside by the court below. According to the appellant/claimant, as per CA it was 50 mm. Sadarhally stone cladding that was to be provided on the walls of the various building to be constructed. The respondent/UoI after the commencement of the work wanted a change of cladding from Sadarhally stone to 150 mm. thick local granite stone. This was a deviation to item no.60 of part IX of schedule A. Though rates

were to be calculated as per condition 62(A)(a) of the GCC, the respondent prepared a star rate/revised rate for only Sadarhally stone 50 mm. thick, which according to the claimant is contrary to the contractual condition contained in 62(A)(a) of the GCC. The respondent contended that pricing of any deviation to the CA is governed by condition 62 of the GCC and as per 62(B)(a), deviation is to be priced at applicable rate in the relevant part of schedule (A) in which the deviation is involved. Therefore, the question is whether the rate of this item which is pre-priced in schedule (A) part IX under item 60 can be made applicable to schedule A part I in pricing deviation. Condition 62(B)(a) of the GCC says that the rate to be applied in such cases is the rate mentioned in the relevant portion of the schedule in which the deviation is involved. Here the deviation made is in schedule (A) part I, whereas the pre-priced rate inserted by the respondent is in schedule (A) part XI. Therefore, the respondent contended that the rates applicable to schedule (A) part XI cannot be made applicable

to the works or deviations made in the other schedules, which in this case is schedule (A) part I. It was pointed out on behalf of the appellant that the fact that the deviation sought by the respondent/UOI for cladding with local granite stone with 150 mm. thickness, has been done by the claimant is not in dispute. The only dispute is whether the rates are to be given as provided in condition 62(A)(a) or 62(B)(a) of the GCC.

33. The finding of the Arbitrator on this claim is available at paragraph 62.11 of the award. The Arbitrator after hearing the parties and examining the records, accepted the case of the claimant that, it is the rate as provided under condition 62(A)(a) of the GCC that is to be awarded and proceeded to do so. The finding of the court below on this claim is found at paragraph 25 which reads thus -

> "*25. Claim No.7 relates to use of local granite stone cladding in lieu of Sadarahally stone cladding. The said change was effected as per Deviation Order No.65. It is clear that the deviation order was signed and admitted by respondent, so the applicable rate in D.O.No.65 applicable to both and condition 62 of GCC IAFW 2249 also covered this point. Therefore the granting of the said claim by the arbitrator is in conflict with the terms of the respective contract which is liable to be interfered and do so.*"

34. According to the appellant, the court below has taken up a case which neither side has; that the finding is also a reproduction of the contentions of the respondent relating to claim no.7 in their application under Section 34; that the finding is without actually understanding the issue involved and without expressing any opinion on the actual issue involved and that no reason(s) is discernible from the conclusion of the court below which prompted it to set aside the award. This argument advanced is also justified as it appears that the court below has not comprehended the actual issue involved between the parties relating to this claim. As noticed earlier, the actual dispute is whether the rates provided under condition 62(A)(a) is applicable or whether it is the rates provided under condition 62(B)(a) that is applicable. This has not been addressed by the court below. On the other hand, this point has been squarely dealt with by the Arbitrator. In setting aside the award under this claim, not only has the court not dealt with the actual dispute involved but has also set

aside the award on the said claim on totally irrelevant grounds, which both sides did not canvass. Hence, the finding of the court below on claim no.7 is also not sustainable.

35. Now, coming to claim no.1 which is described as 'additional cost of anchor fasteners towards difference in cost of supply of M/s. CANCO make anchor fasteners in lieu of M/s.HILTI'. An amount of Rs.4,03,550/- claimed and awarded by the Arbitrator has been set aside by the court below. According to the claimant, the CA provides for fixing of jalli with Rawal plugs or fasteners. But when the works started, the GE insisted on using HILTI heavy duty fasteners in the place of Rawal plugs. On enquiry with M/s.HILTI the claimant was told that HILTI anchor bolts are no longer being manufactured and that it would take about 6 to 7 weeks for the manufacturer to make an alternate model. Therefore, after proper enquiries and as CANCO make stainless steel anchor bolts as fasteners are equivalent to HILTI, the same was submitted for the approval of the GE. The GE

approved the same also. CANCO anchors are in no way inferior to HILTI and they also satisfied the GE's technical requirements. But the rates were revised by the GE for the CANCO fasteners used and a lower rate awarded. As per the amendment drawing, it was provided that anchor fasteners of HILTI or its equivalent shall be used for fixing of stone jallis and therefore the respondent could not have revised the rates and granted a lower rate against the terms of the agreement. The respondent/UoI contended that initially the claimant had submitted a sample anchor bolt. The same was not approved as it was not as per the contract provisions. Therefore, he was asked to submit a sample as per the CA. Thereafter, without getting the approval of the GE, the claimant started using an anchor, to which the respondent objected. The claimant then informed that HILTI anchor fasteners have become obsolete and hence he suggested CANCO fasteners. As per condition 7 of the GCC, any change from the original contract specifications is a deviation and therefore when approval of

CANCO fasteners was given by the GE, it was made clear that it will be subject to the contract conditions. It was also contended that though CANCO bolts are inferior to HILTI bolts, they serve the purpose of holding the cladding in place and hence it was approved subject to the contract conditions. The revised rate for deviations is based on quotations obtained and hence it was contended that the claimant is not entitled to the amount claimed by him.

36. The Arbitrator after hearing both sides, examining the records and after visiting the site, proceeded to give his findings which are at paragraph 56.5 of the award. The Arbitrator also examined the sample of fastener submitted by the claimant during the hearing. The Arbitrator found that no technical appraisal had been provided by the Consultant of the respondent and that there were misrepresentations and incomplete details in the contract. The contract, according to the Arbitrator, should have been precise and based on availability of the product in the market. Further, the

respondent also failed to technically differentiate HILTI made fasteners from CANCO in order to justify their revision of rates by granting lower rates for CANCO. Therefore, the Arbitrator concluded that CANCO cannot be said to be not equivalent to HILTI and awarded the amount claimed by the claimant.

37. The court below set aside the award under claim no.1 by holding thus –

> "*20. In P.R.Shah, Shanu and Stock Brocker (P) Ltd. v. M/s.B.H.H. Securities (P) Ltd. reported in AIR 2012 SC 1866 the apex court held that An arbitral tribunal cannot of course make use of their personal knowledge of the facts of the dispute, which is not a part of the record, to decide the dispute. There is no details of his visit or notice to the petitioner or entered it into any record by the Arbitrator herein. Therefore the findings based on subjective satisfaction of facts or personal knowledge shall not be form part of conclusion of the award. Of course there is price difference in HILTI and CANCO product and that should be settled as per the rates of MES schedule stipulated under conditions No.62 of GCC-IAWF 2249. In condition 62 it clearly provides under clause (G) that an alteration of work or additions have been covered by the contractor the rates shall be decided by GE, if it is not satisfied refer the matter to CWE within 7 days of receipt of decision of GE decision of CWE shall be final and binding. It further provides if additional work done by the contractor, the Engineer-in-charge shall appraise the value there of and if any dispute then the decision of GE thereon shall be final and binding. Therefore the claim is limited by condition No.62 and the award of the amount, against the condition No.62 of GCC IAFW 2249, rate of MES schedule, is against the terms of contract and against fundamental policy of Indian Law, in conflict with the contract between parties and against morality of justice and the said claim is liable to be set aside u/s 34 of the Act and do so.*"

It was pointed out on behalf of the claimant that the conclusion of the court below that the Arbitrator had used his personal

knowledge in arriving at his finding on the claim is a totally incorrect statement and a ground which neither party had raised. The respondent never raised any grievance/objection regarding the site visit by the Arbitrator either at the time of his visit or during the course of arguments before the court below. The Arbitrator is a technical expert with experience in this field and hence the reason why the parties chose him so that he can properly assess the factual issues by relying on his expertise and experience. It is settled that it is permissible for technically qualified Arbitrators to use their expertise, technical or general knowledge about a trade to decide a matter and that the same can never be termed as personal knowledge of the Arbitrator. According to the claimant this has been clarified by the Apex court in **P.R. Shah Shares and Stock Brokers Pvt. Ltd. v. B.H.H. Securities Pvt.Ltd. (2012) 1 SCC 594**, the very same decision relied on by the court below. Further a reading of the award would show that the conclusions are not based on the site visit. Moreover, the site visit was not made for

gathering evidence but for appreciating the evidence led by the parties, which is perfectly in order, goes the argument.

38. We think that the arguments advanced are justified. The Arbitrator has not based his finding on claim no.1 on the basis of the information collected/gathered from his visit to the site. We have already referred to the grounds on which the Arbitrator arrived at his conclusion and it is apparent and obvious that the same is not based on his visit to the site. Moreover, there is nothing wrong in the Arbitrator making site visits. It is only that his personal knowledge cannot be used to decide the dispute. Here, no personal knowledge is seen used by the Arbitrator to arrive at his conclusions regarding claim no.1. The Arbitrator admittedly an expert in this field, based on the materials placed before him found that CANCO fasteners could in no way be termed inferior to HILTI fasteners, a decision apparently taken after analyzing the technical aspects, which ought not to have been disturbed by the court below as it has obviously no technical

knowhow on the matter. Hence, the finding of the court below on this count is also liable to be set aside.

39. Claim no.4 is described as 'cost for provision of retaining walls (RCC) in front of PT shed'. An amount of Rs.9,84,075.23/- claimed and allowed by the Arbitrator has been set aside by the court below. As per the original drawing forming part of the CA, the roof of some of the buildings to be constructed were to be pyramidal shape over space frame. But later it was changed to hipped roofs. As per the stipulation in the CA, the pipe grid system connected with Nodes is space frame system and the pipe grid system connected with welding is not space frame system. According to the claimant, this was not part of the lump sum contract. However, the respondent in spite of his objection termed the same as part of the lump sum contract. The claimant did not agree to the same and hence signed the DO under protest. The respondent/UoI contended that the lump sum cost of building does not include the cost of space frame items listed under schedule (A)

part XII. These items related to space frame are to be measured and paid under schedule (A) part XII. The pipe systems connected with Nodes are space frame system and those connected with welding are not part of the space frame system and hence the works done by the claimant shall not be measured and paid under schedule (A) part XII.

40. The Arbitrator after considering the oral and documentary evidence and also inspecting the work site, gave his finding which is at paragraph 59.17 of the award. The Arbitrator found that the respondent had not mentioned or indicated clearly the details of the roofing and the structure in the CA or in the drawings. He found that the structure pertaining to the roof was joined at the Nodes. He held the claim to be sustainable as he found that there was no clear stipulation or mention of members or that the roofing was intended to be included in the lump sum of the building by the respondent. The contract also did not stipulate which part of the roof had been included in the lump sum. Hence,

he allowed the claim. This was also set aside by the court below by finding thus -

> "*23. Claim No.4 relates to provision of hipped roof in lieu of Pyramidal roof in its space frame building. As per note 18 serial Page No.20(R) of CA item No.1 to 4 schedule A Part-I the lump sum cost of building do not include the cost of 'space frame' items listed under schedule A. part of XII. According to the arbitrator the petitioner never indicated the details of roofing in the contract and the contract do not stipulate which part of the roof is including in Lump sum and the arbitrator granted claim No.4 in toto. As per Note 18 (Para 20 of CA) all items shown on drawing shall be deemed to be included in respective cost of building unless specifically excluded. In note 18(Page 20(R)) it clearly states that those items which are related to space frame only are to be measured and paid under schedule 'A' part XII. The pipe grid system connected with NODES are 'space frame system.' The pipe system connected with welding etc are not part of 'space frame system' and under no circumstances quantities of these items shall be measured and paid under schedule A part XII. The arbitrator also gathered information at the time of his visit to the site without maintaining any record. Therefore the conclusion that absence of exact mention of members and roofing intended to be included in lump sum of building is against the terms of contract and liable to be set aside under section 34 of the Act and do so.*"

41. According to the appellant, the findings of the Arbitrator are based on technical details which ought not to have been disturbed by the court below, who is not an expert in this area. Here again, we find that the court below has erred in concluding that the Arbitrator has based his finding on personal knowledge which is obviously not the case. Hence this finding is also liable to be set aside.

42. Now coming to claim no.17 which is described as

'additional amount due for pricing of works at quoted rates than rates fixed in amendment no.1 and for not considering certain items of payment'. An amount of Rs.88,17,476/- claimed was allowed by the Arbitrator. According to the respondent/UoI, this is an excepted matter because as per condition 65 of the GCC, the final bills shall be submitted within three months of physical completion of the works to the satisfaction of the Engineer-in-charge. It also says that no further claims shall be made by the contractor after the submission of final bills and that the said claims shall be deemed to have been waived and extinguished. Amendment no.1 to the CA, according to the respondent, was signed by both parties and therefore the contract stood amended. No claim was made before submission of the final bill and therefore all such claims must be deemed to have been extinguished and waived. According to the claimant, the final bill was signed under protest; that the respondent did not act in accordance with condition 66 of GCC by failing to make payment

of the admitted amounts of the final bill within the period of six months stipulated in the condition and that there was undue influence and coercion due to which he was forced to sign amendment no.1. The fact that the claimant had objection to amendment no.1 was also conveyed at the earliest to the respondent.

43. The Arbitrator after a detailed discussion found the case of undue influence and coercion in execution of amendment no.1 put forward by the claimant to be probable and true. About 14 instances have been cited by the Arbitrator, which would show or indicate or justify the allegation of undue influence, and one among them shows the failure of the respondent to release even admitted amounts due to the claimant. It was also found that the claimant was all along objecting to the amendment made and that the amendment made was not on mutual consent. The Arbitrator found there was no justification or reasonable contractual necessity for the respondent to have amended the contract by way of

amendment no.1. After perusal of the facts and circumstances in the case, the Arbitrator was convinced that the respondent had erred in mentioning the correct quantities of earth work involved in schedule (A) part IX and when they noticed the error, they made all efforts to cover it up by various methods. When they realised their mistake, some part of the work had already been executed and therefore the attempt of the respondent was to cover up the same by way of amendment in the contract. The Arbitrator found that there was absence of any communication between the parties so as to conclude that the amendment had been made through mutual consent. There was no offer or acceptance for concluding the new contract in supplement to the main contract. The intention and act on the part of the GE and the respondent in delaying and not paying a huge amount of about Rs.1 Crore, according to the Arbitrator, was certainly indicative of the undue influence exercised by the respondent, a stronger party in the contract. The Arbitrator noticed that the respondent was finding flimsy reasons

for not honoring the bills on time. In paragraph 72.11, as stated earlier, about 14 instances have been cited by the Arbitrator which would substantiate the claim of undue influence and coercion on the part of the respondent. In item no.2 in the table given in the said paragraph, the Arbitrator has noticed that one of the RARs was held up and returned for want of signature of the claimant, though the representatives of the claimant were readily available at the site. It was also found that there was no rhyme or reason for the claimant to voluntarily agree to reduce the rates drastically from the quoted rates through any amendment when the contract provided for variation as deviation. The error/mistake committed by the respondent to assess the correct and sufficient quantities in the contract cannot be foisted upon the claimant by the respondent being a stronger party in the contract. It was found that the claimant was able to establish that though he had protested to the amendment as soon as it was made, the same had been foisted on him. On examination of the disputed amendment no.1, the

Arbitrator found that it was apparent that not even variations admissible in the contract at contract rates were given its due importance and that the respondent had framed an amendment with varying quantities and applying rates on quantities unilaterally decided by them. It was also found that if the claimant had not agreed to the terms unilaterally put forward by the respondent, there was also the possibility of the respondent getting huge quantity of earth work done through other agencies at lesser rates. The rate fixed in the amendment was not based on any realistic analysis of the rates except that it was the rate quoted by the second lowest tender, which rates the Arbitrator found did not have any bearing or any connection with the contract. The amendment thus was found to be made in the absence of free consent which was one of the essential factors for entering into a contract. The Arbitrator concluded that the variation though allowable in the contract was ignored in the amendment; that there was no offer and acceptance; that huge payments were delayed thus putting the

claimant under pressure and undue influence; the basis for arriving at the rates for the works done as per the amendment was not in any way justifiable; that the respondent had not taken any action to revise the amendment when it was objected to by the claimant except contending that the same was signed voluntarily by the claimant and that there was no record to show that the claimant was heard before the amendment was finalized indicating the arbitrary and unreasonable procedure adopted by the respondent. Hence, the Arbitrator concluded that these aspects clearly showed arbitrariness and undue influence exercised by the respondent, the stronger party in the contract. Hence, an amount Rs.88,17,476/- was awarded to the claimant.

44. The court below set aside this finding of the Arbitrator. The finding is at paragraphs 9 to 13 of the impugned order. We are not quoting the entire portion as it is a comparatively long discussion in the order. The sum and substance of the finding of the court below is that there was no undue influence exercised by

the respondent as the relationship was purely contractual and not fiduciary in nature; that several amendments and deviations had been affected, all of which are admitted by the claimant except amendment no.1 and so the same shocks the conscience of the court; the fact that the claimant put his signature in amendment no.1 implies offer and acceptance; that the burden of proving undue influence has not been discharged as per the provisions of the Evidence Act ; that the claim of undue influence has been accepted by the Arbitrator without any evidence; that the claimant signed the amendment with the oblique motive of filing a claim petition and that there was no pressure on the claimant in executing the work as it was an agreement mutually agreed to between the parties. According to the court below, the conclusion of the Arbitrator that the delay caused by the respondent in honoring huge admitted payments was indicative of the undue influence, is against morality and justice because the claimant is entitled to get his payments if any, with interest if there was any delay illegally

caused by the respondent. The court below further held that there was no pressure on the claimant in doing the work except the contractual obligation which had been mutually agreed to. Therefore, according to the court below the conclusion of the Arbitrator that one amendment alone was executed under undue influence is not in conformity with morality and justice and hence it shocked the conscience of the court. The court below expressed its concern and anguish in public money going into the hands of undeserved persons. Hence the court below proceeded to conclude that in the absence of claim no.17 in the final bill, the dispute is not arbitrable as condition no.65 of the GCC has not been satisfied.

45. This finding again will have to go as the Arbitrator on facts found that the claimant had raised this issue before the final bill had been submitted and so the dispute is arbitrable and not an excepted matter as contended by the respondent. He also found that the claimant had to agree to the amendment due to undue influence and coercion and has given a detailed description

supported by cogent reasons for arriving at this conclusion. Now, even if the opinion and conclusion of the Arbitrator is wrong or a different opinion/view is possible, that alone is not a ground for the court to interfere in its jurisdiction under Section 34 as it is not sitting in appeal. Merely because the claimant had affixed his signature to the amendment, would not bar him from raising the plea of undue influence or coercion if he had raised it at the earliest possible opportunity and is able to bring in factors or circumstances establishing the same. The finding of the court below relating to undue influence seems to have been made without understanding the ground realities. If the RARs or part bills are not cleared in time, it would certainly be putting pressure on the claimant. These bills have to be honored in time so as to enable the claimant to maintain his liquidity. Otherwise, he would inevitably find it difficult to carry out the works as the expenditure involved ran into crores of rupees. Further, Section 19(1) of the Act says that the Arbitral Tribunal is not bound by the

Code of Civil Procedure or the Indian Evidence Act. Therefore, the court below clearly erred in holding that the claimant had failed to establish undue influence or coercion as per the provisions of the Evidence Act and hence the said finding is also liable to be set aside.

46. Now, coming to claim no.18 which is described as 'additional cost towards space frame under schedule A part XII'. An amount of Rs.1,52,64,424.33/- claimed was awarded by the Arbitrator. This has also been set aside by the court below. According to the claimant, the design of the space frame was altered on four occasions and the last alteration brought about was from pyramidal roof to hipped roof. However, the Quality Assurance Plan (QAP) for the space frame work was not approved for quite some time. It was approved only on 13.10.2006 and the sample of materials involved in the space frame work approved on 4.12.2008. The claimant anticipating difficulties in getting a DO prepared, star rates/revised rates made and the DO finalized, opted

a path of least resistance so that the RAR payments would not be delayed, informed the Chief Engineer (CE) that if the condition of cost of solid Nodes and hollow Nodes are kept at par, the same would be acceptable to him. However, the claimant was not agreeable to the rates fixed by the GE which had been fixed without taking into account the condition put forward by him, i.e., he was ready to carry out the work provided the cost of solid grade Nodes and hollow Nodes are kept at par. Therefore, he signed the DO on protest and also informed the GE that he is reserving his right to go in for an adjudication of the dispute. The respondent contended that based on the consent of the claimant, Amendment no.3 to CA had been issued. According to the respondent the unit of measurement mentioned in the CA is kilograms and therefore hollow Nodes is also liable to be measured in terms of its weight and accordingly the same was so weighed and payment made. The respondent also took up a contention that the dispute regarding this matter is an excepted one and hence not arbitrable. This contention

of the respondent was countered by the claimant by filing a rejoinder in which he contended that the hollow Nodes and solid Nodes are entirely different in their specifications. The claimant had agreed to rate per piece i.e., the same cost for one piece of hollow Nodes as well as solid Nodes. The manufacture of hollow Nodes involves different materials and highly sophisticated machining process and so the cost of manufacture of hollow Nodes is much higher than solid Nodes. Hollow Nodes weigh much lesser than the solid Nodes but the expenses involved in its manufacture is high. That is the reason why he had agreed for the deviation provided the same rate was given for both Nodes. The claimant also pointed out that the contention of the respondent that the issue is not arbitrable is incorrect as he had raised the issue much before the submission of the final bill as contemplated under condition 65 of the GCC.

47. The Arbitrator after considering all the materials before him, found that the dispute has come up because of lack of clear

and sufficient clarity regarding Amendment no.3. The claimant had clearly informed the GE of his condition relating to the rates of the Nodes. However, this was not incorporated in the amendment. The amendment ought to have contained a clear clause regarding the basis on which the rates would be awarded, i.e., whether it would be rate per piece / per Node or based on their weight in kilograms. Without specifying the same, it is unjust for the respondent to contend that rates would be given based on kilograms because hollow Nodes would be much lighter than solid Nodes. The cost of manufacture of hollow Nods is higher and so if rates are given on the basis of their weight in kilograms and not per piece as agreed to by the claimant, the same would result in great loss to the claimant. It was also found that the dispute had been raised by the claimant before the finalization of the final bill and hence the dispute is not an excepted matter as contended by the respondent and so found the dispute to be arbitrable and proceeded to award a sum of Rs.1,52,64,424/-.

48. The court below set aside the award under claim no.18, the finding of which reads thus -

> "*14. Claim No.18 also challenged by the petitioner at the preliminary stage since it covered as per amendment No.3, dated 30.12.2006. The said amendment was admitted by the respondent and arbitrator but according to the arbitrator it was incomplete since the rate not specified therein. The said work is related to part – XII – space frame and claim of additional towards space frame an amount of Rs.1,52,64,424.33/-. The respondent has agreed to change materials of nodes and props at par with the costs existing in CA. In the amendment it clearly stated as third clause that, the above changes had taken place to suit they decide parameters of the designee provided by specialists agencies as per C.A., as projected by the contractor and approved by the competent authority. It concluded to facilitate the execution space from work by the specialist firm engaged by the contractor (respondent). The amendments was based on mutual agreement and the arbitrator overlook that aspect and granted an amount for the entire roofs including Pipe grid based on that the amendment was incomplete. The said act of the arbitrator is not in accordance with the agreement of parties since the said matter concluded in amendment No.3 and the same is not arbitrable and it ought to have been included in the final bill as per condition 65of IAFW 2249.*"
>
> "*15. The respondent has not even denied the execution of this amendment No.3, through which change of design effected. But the arbitrator has noted that after the amendment the respondent has signed it under protest. There is no need of executing amendment or contract with protest. If the respondent not agreeing with the amendment he could have avoid it. As per the original contract the solid nodes included and as per amendment it changed into hollow nodes and fixed rates based Kilogram. The arbitrator granted the claim of respondent based on same price or solid nodes since the difference of rate is not mentioned in Amendment No.3. As per amendment No.3 third clause it clearly stated that the amount should be as per with the approval of the Competent Authority though the design supplied by the specialized agency through the contractor. According to the arbitrator since the rate of hollow nodes not mentioned in amendment No.3, the amendment is to be considered as incomplete. As per condition No.62 Valuation of Deviation mentioned in detail based on rate applicable in the MES schedule and it should be adopted if there any difference in price. Without considering the contractual rate, as mentioned in condition 62 of GCCIAFW 2249 the arbitrator allowed the entire claim put forward by the respondent. Ofcourse hollow nodes value is less than solid nodes always. Therefore*

> *granting of price equal to solid nodes is unreasonable that shocks the conscience of court and patently illegal. In the amendment No.3 itself in first and second clause it clearly mentioned that amended accordingly without any extra cost to the department (petitioner). That itself shows that it shall not cause any extra cost than the real cost and not higher than fixed earlier. The granting of said claim No.18 is also against the terms of the respective contract and patently illegal. The said claim ought to have been incorporated in the final bill but not included and it waived or terminated under condition No.65 of GCC IAFW 2249 and not arbitrable. Therefore the said claim, claim No.18 is not arbitrable and will not come under the purview of arbitration."*

49. It was argued on behalf of the appellant that the finding of the court below is an unreasoned departure from the view of the Arbitrator. Here again, the court has interfered in a matter in which it has no expertise or knowhow, whereas the Arbitrator an expert in this field is in a much better position to adjudicate the same. This argument advanced on behalf of the appellant is also justified. The court below is seen to have observed in its discussion - "*.... Of course, hollow nodes value is less than solid nodes always. …*" The basis on which this finding has been made is not known and is unclear. Probably as pointed out on behalf of the appellant, a commonsensical approach has been taken by the court below to conclude so. Here is a case where the claimant has specifically

contended that the cost of manufacture of hollow Nodes is more compared to solid nodes. This has not been disputed by the respondent and the said claim has not been rejected by the Arbitrator also. This point is not seen addressed and the court below without properly comprehending the situation seems to have arrived at its conclusion based on a common man's understanding of the same, which appears to be apparently incorrect. The findings of the Arbitrator supported by cogent reasons ought not to have been interfered with by the court below. Further, it was after examining the communications between the parties and other materials, the Arbitrator had concluded that the dispute had been raised by the claimant before the finalization of the final bill as contemplated under condition 65 of the GCC. These materials have also not been referred to and without referring to the same, the court below concluded that the claim is not arbitrable. The findings of the Arbitrator based on facts and supported by reasons is not liable to be interfered with hence this finding of the court below is

also liable to be set aside.

50. Finally, coming to claim no.31 which deals with 'arbitration cost'. An amount of Rs.3 Crores was claimed. The Arbitrator awarded Rs.5 lakhs. The court below reduced it to Rs.28,402/-. Paragraph 32 of the impugned order reads thus -

> "*32. Claim No.31 relating to cost of arbitration, awarded an amount of ₹5 lakhs out of claim of ₹30,00,000/-. The contention is that without any basis it granted. Since the respondent preferred arbitration he has to bear the expense and the amount of cost is tenable. As per award the arbitrator awarded total amount of ₹3,93,24,065/- to the respondent and cost of ₹5,00,000/- awarded by rejecting the claim of ₹30,00,000/- which comes 1.27% of total award amount. Arbitrator exercised his discretion and there is no ground to interfere in it. Therefore the respondent is entitled to get 1.27% of the amount fixed by this court, ₹22,36,380/- (Total of claim Nos.2,3,10, 11, 14, 15, 20 and 27) which comes ₹28,402/- and this claim found accordingly.*"

51. The finding of the Arbitrator regarding costs and the rate has not been disturbed. The reduction came about only because the aforesaid claims have been set aside. This finding will also have to necessarily go in the light of our above made conclusions.

52. Before concluding, we place on record our appreciation for the assistance given by Adv.Anil Sebastian Pulickel, the learned counsel for the appellant who was meticulous in his arguments and

had painstakingly taken us through all the relevant portions of the award as well as the corresponding portions in the impugned order.

For the aforesaid reasons, the appellant succeeds. The appeal is allowed and the award of the Arbitrator is restored.

All pending interlocutory applications, if any, shall stand disposed of.

Sd/-

P.B.SURESH KUMAR, JUDGE

Sd/-

C.S.SUDHA, JUDGE

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