R.R.Donnelley Publishing India ... vs M/S.Canara Traders And Printers

Author: V.Ramasubramanian

Bench: V.Ramasubramanian

In the High Court of Judicature at Madras

Reserved on 25.7.2014 & Delivered on : 09.12.2014

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

Original Petition Nos.717 of 2011 and 433 of 2012
and A.No.3752 of 2012

R.R.Donnelley Publishing India Private
Limited rep.by its Director and Finance
Controller Mr.G.Madhan Kumar ...Petitioner in
O.P.No.717/2011
in O.P.No.433/20
R1 in A.No.3752

Vs

1.M/s.Canara Traders and Printers
Private Limited Thiruvanmiyur,
Chennai-41. ... Petitioner i
O.P.No.717/2011
applicant in A.N

2.Hon'ble Mr.Justice B.P.Jeevan Reddy
Hyderabad - 500 033.

3.Hon'ble Mr.Justice K.A.Swami,
Bangalore - 560 080.

4.Hon'ble Mr.Justice K.P.Sivasubramaniam
Chennai - 600 030. ...Respondents 2 to 4 in
2012 & A.No.3752

PETITIONS under Section 34 of the Arbitration and Conciliation Act, 1996 seeking (i) to

Application to direct the first respondent to deposit the following amounts awar

For Petitioner in O.P.No.717 of 2011 &
R1 in O.P.No.433 of 2012 &
R1 in A.No.3752 of 2012 : Mr.Arvind P.Datar, SC
for M/s.King & Patri

For R1 in O.P.No.717/2011 & Petitioner
in O.P.No.433 of 2012
& Applicant in A.No.3752/12 :Mr.G.Masilamani, SC
for Mr.Mani Sundarago

COMMON ORDER

These petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging an award passed by the Arbitral Tribunal comprising of a retired Judge of the Supreme Court, a retired Chief Justice of this Court and a retired Judge of this Court. While the first petition is by the respondent before the Arbitrators, against whom, an award has been passed, the second petition is by the claimant, who is aggrieved by the refusal of the Tribunal to grant interest for the pre-reference and pendente lite period.

2. I have heard Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioner in the first original petition, who suffered the award and Mr.G.Masilamani, learned Senior Counsel appearing for the petitioner in the second original petition, who was the claimant before the Tribunal. For the sake of convenience, I shall refer to the parties, only by their status before the Arbitral tribunal.

3. The brief facts leading to the reference of the dispute between the parties to arbitration are as follows :

(a) M/s.Canara Traders and Printers Private Limited, whom I shall refer to hereinafter as the claimant for the purpose of convenience, is engaged in the business of printing;

(b) M/s.R.R.Donnelley Publishing India Private Limited, which is the respondent before the Arbitral Tribunal and which suffered an arbitration award, is a group company of M/s.R.R.Donnelley Inc. registered in the United States of America and having its operations in several countries such as China, Poland, etc. I shall refer to the said company as the respondent hereinafter;

(c) According to the claimant, the respondent entrusted with the claimant, under an agreement dated 20.5.2006, the task of printing user guide manuals on a regular basis, for the ultimate end user namely NOKIA. This agreement was preceded by an inspection of the factory premises of the claimant by one Colin J. Fletcher, the Project Manager of the respondent and a series of correspondence in the form of e-mails;

(d) In pursuance of the said agreement, the claimant appears to have purchased a few machines and enhanced the facilities available in its factory. The claimant also placed an order on 3.5.2006 on a company by name Indo European Machine Company for the purchase of a Kolbus patent binding line. This was purportedly for increasing the production capacity. An advance of Rs.20 lakhs was paid for the purchase of the machine. However, the respondent indicated subsequently that they may not be able to provide enough business to support Kolbus line and they wanted the claimant to cancel the order. When it was pointed out that the cancellation of the order would result in forfeiture of a part of the advance amount already paid, the respondent agreed to refund the said amount;

(e) According to the claimant, they also invested in a huge property adjoining their existing unit and put up a construction to the extent of about 18,000 sq.ft., by availing loans from banks for the purpose of segregating the unit that would exclusively serve the respondent;

(f) The claimant also purchased additional machinery such as SM 74 Heidelberg, SM 102 Heidelberg, Three Way Knief Trimmer etc., for the exclusive purpose of serving the respondent;

(g) It appears that NOKIA, for the benefit of which, the user guide manuals are to be printed, proposed to conduct an audit on 19.7.2006. According to the claimant, the respondent was obliged to place orders for the printing of 3 Million user guides per month. But, they did not. Therefore, when the overheads started mounting on the claimant, the first signs of friction appeared;

(h) Therefore, claiming that the huge investments made by them in expanding their capacity have actually started crushing them under its very weight, the claimant invoked the arbitration clause. While the claimant nominated the Hon'ble Mr.Justice K.P.Sivasubramaniam, a retired Judge of this Court, the respondent nominated the Hon'ble Mr.Justice K.A.Swami, a retired Chief Justice of this Court. Both of them nominated the Hon'ble Mr.Justice B.P.Jeevan Reddy, a retired Judge of the Supreme Court as the Presiding Officer and the Arbitral Tribunal commenced proceedings on 22.6.2008.

4. Before the Arbitral Tribunal, the claimant filed a statement seeking various reliefs, which are as follows :

"A. Directing the Respondent to pay the amounts detailed below towards the actual loss suffered by the Claimant on account of repaying loans, interest on loans, meeting administrative expenses, other wages and salaries (cost of production), insurance premiums, AMC charges, preferential dividend, tax on dividend, all together referred to as loss on account of commitment expenditure and interest at the rate of 18% p.a. on the same.

DETAILS:

(i) To pay a sum of Rs.53,75,791/- (Rupees Fifty three Lakhs seventy five thousand seven hundred and ninety one only) towards the loss on account of commitment expenditure for the period from June 2006 to May 2007, as per Exhibit C38.

(ii) To pay a sum of Rs.4,69,52,240/- (Rupees Four Crores Sixty nine Lakhs fifty-two thousand two hundred and forty only) towards the loss on account of commitment expenditure for the period from June 2007 to May 2008, as per Exhibit C38.

(iii) To pay a sum of Rs.2,72,54,385/- (Rupees Two Crores seventy-two Lakhs fifty-four thousand three hundred and eighty-five only) towards the loss on account of commitment expenditure for the period from June 2008 to May 2009, as per Exhibit C38.

(iv) To pay interest of Rs.9,67,642/- (Rupees Nine Lakhs sixty seven thousand six hundred and forty two only) calculated at 18% p.a on Rs.53,75,791/- for the period June 2007 to May 2008.

(v) To pay interest at 18% p.a. on Rs.5,32,95,673/- (Rs.53,75,791/- + Rs.4,69,50,240/- + Rs.9,67,642/-) for the period May 2008 till the date of realization.

(vi) To pay interest at 18% p.a. on Rs.2,72,54,385/- for the period May 2009 till date of realization.

B. (i) Directing the Respondent to pay a sum of Rs.2,37,58,524/- (Rupees Two Crores Thirty seven lakhs fifty eight thousand five hundred and twenty four only) towards actual loss suffered on account of making margin money contribution as per Exhibit C38 and

(ii) To pay interest at the rate of 18% p.a. on Rs.2,37,58,524/- for the period from June 2007 to till the date of realization.

C. (i) Directing the Respondent to pay of Rs.6,43,95,000/- (Rupees Six Crores Forty three lakhs ninety five thousand only) towards actual loss on account of loss of net profits for the period from June 2006 to May 2007, as per Exhibit C38.

(ii) To pay a sum of Rs.15,45,48,000/- (Rupees Fifteen Crores forty-five Lakhs forty-eight thousand only) towards the loss on account of loss of net profit for the period from June 2007 to May 2008, as per Exhibit C38.

(iii) To pay a sum of Rs.15,45,48,000/- (Rupees Fifteen Crores forty-five Lakhs forty-eight thousand only) towards the loss on account of loss of net profit for the

period from June 2008 to May 2009, as per Exhibit C38.

(iv) To pay interest of Rs.1,15,91,100/- (Rupees One Crore Fifteen Lakhs ninety-one thousand one hundred only) calculated at 18% p.a. on Rs.6,43,95,000/- for the period June 2007 to May 2008.

(v) To pay interest at 18% p.a. on Rs.23,05,34,100/- (Rs.6,43,95,000/- + Rs.15,45,48,000/- + 1,15,91,100/- for the period May 2008 till the date of realization.

(vi) To pay interest at 18% p.a. on Rs.15,45,48,000/- for the period May 2009 till date of realization.

D. Directing the Respondent to pay a sum of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs only) towards mental agony, hardship, inconvenience and irreparable loss caused to the Claimant.

E. Directing the respondent to pay the cost of the Arbitration."

5. The respondent filed a detailed defence statement along with a claim for set off. Though the caption given by the respondent to the statement of defence read as 'Defence Statement and Claim to Set Off filed by the Respondent', the prayer appeared to be actually one of counter claim. This can be well appreciated only if the relevant paragraph in the defence statement namely paragraph 99 is extracted in full. Therefore, paragraph 99 of the defence statement filed by the respondent before the Arbitral Tribunal is extracted as follows :

"The Respondent has also filed a typed set of documents a list whereof is placed at Annexure-B to this defence statement. The Respondent craves the leave of this Hon'ble Tribunal to treat the Annexure-A and the documents referred in Annexure-B as part and parcel of the defence statement and claim to set-off. The Respondent also craves the leave of this Hon'ble Tribunal to file any additional documents if the circumstances so warrant.

A. In the circumstances it is humbly prayed that this Hon'ble Tribunal may be pleased to dismiss the claims of the Claimant in these proceedings in the entirety and levy exemplary costs upon the Claimant for setting up the claims.

B. In the circumstances it is humbly prayed that this Hon'ble Tribunal may be pleased to award to the Respondent the cost of these proceedings and pass such further or other orders and thus render justice.

C. In the circumstances it is also prayed in the alternative:-

(i) to direct the Claimant to pay to the Respondent the sum of Rs.13,49,52,458.22 (Rupees Thirteen Crore Forty Nine Lakh Fifty two thousand four hundred and fifty eight and paise twenty two only) deemed to have been paid by the Respondent

towards the cost of machinery and land and building up to March 2008 along with profit and interest thereon upto 18.04.2008 according to Annexure-A and to allow set off of the amount represented by the claim or any part thereof as found due against the amount due to the Respondent.

(ii) to direct the Claimant to pay interest at the rate of 18% p.a. on the sum of Rs.13,49,52,458.22 ((Rupees Thirteen Crore Forty Nine Lakh Fifty two thousand four hundred and fifty eight and paise twenty two only) from 19.04.2008 until the date of realisation and to allow set off of the amount represented by the claim or any part thereof as found due against the amount due to the Respondent by way of such interest;

(iii) to direct the Claimant to pay to the Respondent the sum of Rs.3,09,37,523.12 (Rupees three Crore nine Lakh thirty seven thousand five hundred and twenty three and paise twelve only) deemed to have been paid by the Respondent towards the cost of machinery and land and building from April 2008 to May 2009 along with profit thereon according to Annexure-A to allow set off of the amount represented by the claim or any part thereof as found due against the amount due to the Respondent;

(iv) to direct the Claimant to pay interest severally at the rate of 18% p.a. from the date of each demand payment for the machinery and the land and building in April, May, June, July, August, September, October, November and December (all 2008) and in January, February, March, April and May (all 2009) until the date of realization and to allow set off of the amount represented by the claim or any part thereof as found due against the amount due to the Respondent by way of such interest;

(v) to direct the Claimant to pay the profits for the year 2008-09 and to allow set off of the amount represented by the claim or any part thereof as found due against the amount due to the Respondent towards the said profit;

(vi) to direct the Claimant to pay interest at the rate of 18% p.a. on the Claimant's profits for the year 2008-09 from 01.04.2009 until the date of realization;

D. Pass such further or other orders as this Hon'ble Tribunal may deem fit and thus render justice."

6. On the basis of the pleadings, the Arbitral Tribunal framed the following issues on 18.4.2009:

"1. Whether the agreement dated 20.5.2006 is liable to be impounded and dealt with in accordance with the Stamp Act, 1899 ?

2. Whether all the disputes raised by the claimant are subject matter and arise from the agreement dated 20.5.2006 ?

3. (a) Whether the claimant and the respondent had discussions and correspondence regarding printing of user guides by the claimant to be supplied to the respondent during the months February 2006 to May 2006 ?

(b) If 3(a) is answered in the affirmative, whether in such discussions and in the correspondence exchanged, the respondent had indicated that the claimant should purchase additional/new machinery and improve their infrastructure for establishing business relationship between the claimant and the respondent for printing and supply of user guides by the claimant to the respondent?

(c) Whether the claimant and the respondent had entered into a written agreement dated 20.5.2006 pursuant to the discussions, wherein the respondent, according to the claimant, had committed to place orders for specific quantity of user guides as mentioned in Appendix 4 of the agreement ?

(d) Whether the correspondence, communications, arrangements and agreements of the parties prior to the agreement dated (i.e. 20.5.2006) cannot be considered by the Tribunal in view of the provisions of Clause 27 of the agreement?

4. (a) Whether the respondent had informed the claimant prior to the agreement dated 20.5.2006 that the said agreement was subject to approval by NOKIA in their audit ?

(b) Whether the working and enforceability of the agreement dated 20.5.2006 was subject to the claimant's facilities being approved by NOKIA in their audit as claimed by the respondent ?

(c) Whether the claimant was ever rejected by NOKIA and whether the alleged rejection was informed to the claimant as claimed by the respondent ?

(d) Whether the claimant's facility was not approved by NOKIA for printing of user guides ?

5. (a) Whether the agreements to supply user guides had become otiose as claimed by the respondent in paragraph 5(a) of their defence statement ?

(b) Whether the agreement dated 20.5.2006 continues to be in force till May 2009 and is binding on the parties ?

(c) Whether Appendix 4 to the agreement dated 20.5.2006 became otiose and non functional and the claimant acquiesced thereto ?

6. Whether the respondent had terminated the agreement at that point in time when allegedly the claimant was rejected by NOKIA in their audit ?

7. Whether the respondent had continued to place orders for user guides and accepted supply of the same from the claimant even after the alleged rejection of the claimant by NOKIA ?

8. Whether the respondent is not guilty of committing fraud, cheating and deceit in the event of the agreement being otiose pursuant to the alleged rejection of the claimant by NOKIA ?

9. (a) Whether the claimant proves that the respondent had failed to place orders to the entire quantity as per commitments in Appendix 4 during the months when partial orders were placed and thereby committed a breach of contract ?

(b) Whether the respondent had breached the contract by not placing orders in contravention of the commitment in Appendix 4 as alleged by the claimant ?

(c) Assuming Appendix 4 subsists, whether the claimant breached the conditions in the said Appendix?

10. (a) Whether the respondent was satisfied with production and process capabilities of the claimant and if so, whether the respondent not placing orders is for reasons other than this ?

(b) Whether the claimant had the 'process capability' to print 3 Million user guides per month ?

11. (a) Whether the quality issues raised by the respondent were only occasional feed-backs for correctional exercise, in the normal course of this business and huge volume of work executed ?

(b) Whether the claimant failed to supply products according to the quality and quantitative requirements of the respondent ?

12. (a) Whether the respondent has willfully breached the terms of the contract dated 20.5.2006 ?

(b) Whether the claimant had suffered loss of income/revenue because of the respondent breaching the terms of the contract and not placing orders ?

(c) Whether the claimant is entitled to recover the cost of machinery and other incidental expenses incurred for performing its obligation under the agreement from its revenue/income to be generated by doing business with respondent as per the agreement ?

(d) Whether the claimant is entitled to the profits that it has earned and it would have earned if the respondent had not willfully breached the contract and continued to place orders as per Appendix 4 of the agreement ?

(e) Whether the claimant is entitled to the reliefs/ prayer sought for in the claim statement ?

(f) Whether the claimant is entitled to claim (i) for loss of profits and opportunities; (ii) compensation; and (iii) interest under the agreement dated 20.5.2006 ?

13. Whether the agreement dated 20.5.2006 prescribes any conditional obligation on the claimant to obtain loans or purchase of machinery, immovable property, etc. ?

14. Whether the respondent is entitled to set off ?

15. Whether the respondent is entitled to interest on the set off ? and

16. To what other reliefs ?

7. The claimant examined its Managing Director by name Manjunath V.Shanbhag as their first witness - C.W.1. They also examined one B.Chandramouli, who was the Finance Manager as C.W.2 and Mr.M.Krishnasamy, who was the Cost Accountant as C.W.3. The Deputy General Manager of the respondent company by name Sanjeev K.Sharma was examined as R.W.1. on the side of the respondent. A total of about 149 documents were filed on the side of the claimant. The respondent produced about 80 documents. Thereafter, the Hon'ble Mr.Justice B.P.Jeevan Reddy and the Hon'ble Mr.Justice K.P.Sivasubramaniam, by a majority award passed on 19.9.2011, directed the respondent (i) to pay damages to the claimant to the tune of Rs.16.5 Crores; (ii) to pay interest at 12% per annum from the date of the award till the date of payment; and (iii) to pay Rs.88,76,390/- towards costs.

8. But, by a separate award dated 19.9.2011, the Hon'ble Mr.Justice K.A. Swami assessed the quantum of damages payable by the respondent to the claimant at Rs.9,43,33,320/-. However, even the minority award directed payment of interest at 12% per annum from the date of the award and assessed costs of Rs.88,76,390/-.

9. Aggrieved by the award in entirety, the respondent has come up with the petition in O.P.No.717 of 2011. The claimant has come up with O.P.No.433 of 2012 on the ground that the Tribunal was wrong in not awarding interest for the period upto the date of the award.

10. As seen from paragraph 19 of the majority award, the majority took up the following issues first for consideration :-

"i. Whether the agreement between the parties Ex.C.17 was subject to approval by NOKIA ?

ii. Whether the claimant failed to pass the NOKIA Audit ?

iii. Whether on account thereof, Appendix 4 to the agreement or for that matter an agreement itself in so far as it related to supply of UGs became otiose and non functional ?

iv. Whether this fact was duly intimated by the respondent to the claimant ? and v. Further, whether the claimant had acquiesced in the said situation ?"

11. Towards the end of paragraph 19, the majority of the Arbitral Tribunal indicated that the above issues taken up first for consideration are covered by issues 3(a), (b), (c), (d), 4(a), (b), (c), (d), 5(a), (b), (c) and 6 and 7. The discussion on all the above issues is found in paragraphs 19 to 37 of the majority award.

12. In paragraph 38, the majority considered issue No.3 in entirety. In paragraph 39 of the award, the majority dealt with issues 10 and 11. From paragraph 43 onwards, the majority discussed issue 12(a). Thereafter, the majority proceeded to deal with the quantum of damages, the claim for interest and costs.

13. The minority award is also equally elaborate running to about 100 pages. It appears that the learned Arbitrator had the benefit of the majority award before pronouncing his minority award. On issue No.8, which related to the question as to whether the respondent was guilty of committing fraud, cheating and deceit, the minority had something to say specifically. In paragraphs 59 to 61 and 63 of his separate minority view, the learned Arbitrator held as follows :

"59.Hence, I am of the view that there was no willful misconduct or dishonest intention or any hidden agenda of the respondent in entering into agreement Ex.C.17 with the claimant. Failure to place orders by the respondent would only amount to gross negligence as pointed out earlier.

60. On these grounds only, I agree with the findings recorded by our esteemed Third & Presiding Arbitrator Hon'ble Mr.Justice Jeevan Reddy that there was breach of the agreement committed by the respondent by gross negligence.

61. This conclusion of mine would also be sufficient to answer Issue No.8 by holding that the respondent was not guilty of committing fraud, cheating and deceit in entering into an agreement Ex.C.17. The mere fact of failure to inform the claimant about its rejection by Nokia would not amount to either fraud or cheating or deceit but it is only gross negligence. Further, as it was pointed out earlier Nokia Audit of the Claimant Facility was not a condition precedent for continuing the agreement.

.....

> 63. Mere fact that the respondent informed the claimant that it was establishing in-house facility for binding Nokia User Guides, if at all the claimant was serious and sincere to conform to the terms of the agreement and claim damages on the basis that 30 lakhs Nokia User Guides; it was required of the claimant to possess process capabilities as required by Appendix 4, and maintain quality control as required by Appendix 3. To this extent, the claimant cannot also be held to have complied with the terms of the agreement so as to claim as of right, damages on the basis of 30 lakh Nokia User Guides. This aspect also belies the contention of the claimant that there was willful misconduct or malicious intention or fraudulent conduct, cheating and deceit on the part of the respondent. Therefore, Issue No.8 has to be held against the claimant. Accordingly, it is, answered that the respondent is not guilty of committing fraud, cheating and deceit."

14. After so holding, the learned Arbitrator, who constituted the minority, proceeded to give a finding in respect of some of the issues, which can be tabulated for easy appreciation as follows :

> Issue No. Issue Finding of Minority 3(b)
>
> (b) If 3(a) is answered in the affirmative, whether in such discussions and in the correspondence exchanged, the respondent had indicated that the claimant should purchase additional/new machinery and improve their infrastructure for establishing business relationship between the claimant and the respondent for printing and supply of user guides by the claimant to the respondent?

The claimant had to purchase additional/new machineries to comply with the undertaking and to meet the conditions of the agreement for which the respondent cannot be held responsible nor it can be held that it was the respondent who insisted upon the claimant to purchase additional /new machineries. All that the claimant did was to comply with the undertaking in Ex.C10 and the terms and conditions of agreement Ex.C17.

4(c) and 4(d)

(c) Whether the claimant was ever rejected by NOKIA and whether the alleged rejection was informed to the claimant as claimed by the respondent ?

(d) Whether the claimant's facility was not approved by NOKIA for printing of user guides ?

The respondent had not informed the claimant prior to or after the agreement that approval by Nokia Audit was necessary for the enforceability of the agreement, but it is proved that the Nokia has rejected the claimant's Facility for Nokia User Guides. However, this fact was not informed to the claimant. It was not a condition precedent for enforceability of the agreement.

5(b) Whether the agreement dated 20.5.2006 continues to be in force till May 2009 and is binding on the parties ?

In the facts and circumstances of the case and in the absence of termination of the agreement by the respondent, the agreement was in operation till the end of the period mentioned therein. The issue No.5(b) is answered accordingly. Accordingly, the second part of period of damages would be from May 2007 to 20th May 2009 which comes to 24 months and 20 days.

Whether the respondent had continued to place orders for user guides and accepted supply of the same from the claimant even after the alleged rejection of the claimant by NOKIA ?

Though, the claimant did not execute any agreement pursuant to Ex.C19, however, orders came to be placed by the respondent for Nokia UGs on ad-hoc basis as stated in Ex.C19. Thereafter the respondent appears to have stopped placing orders due to QC problems in processing the product and the lack of process capability of the claimant.

9(c)

(c) Assuming Appendix 4 subsists, whether the claimant breached the conditions in the said Appendix?

As such, claimant committed breach of Appendix 4 and Appendix 3 and also warranty clause as contained Section 16 of the agreement. The respondent also committee breach of Appendix 4 as it failed to place orders as per Appendix 4. Thus, in this way, both the parties committed breach of the terms of the agreement. Issue No.9(c) is answered accordingly.

10(a) & 10(b)

10. (a) Whether the respondent was satisfied with production and process capabilities of the claimant and if so, whether the respondent not placing orders is for reasons other than this ?

(b) Whether the claimant had the 'process capability' to print 3 Million user guides per month ?

There was no other reason for the respondent except those mentioned above i.e., absence of quality control and lack of processing capability, for not placing orders as per Appendix 4.

11(a) and 11(b)

11. (a) Whether the quality issues raised by the respondent were only occasional feed-backs for correctional exercise, in the normal course of this business and huge volume of work executed ?

(b) Whether the claimant failed to supply products according to the quality and quantitative requirements of the respondent ?

Admittedly, the claimant did not possess the required processing capability as peer Appendix 4. Consequently, it follows that the claimant failed to supply products according to the required quality and quantity of the respondent as per the terms of the agreement Ex.C17. Thus, issue No.11(a) and

11(b) are answered accordingly and against the claimant.

12(a)

(a) Whether the respondent has willfully breached the terms of the contract dated 20.5.2006 ?

Accordingly it is held that there was no willful breach of the terms of the agreement by the respondent, it was only due to gross negligence. Issue No.12(a) is answered in the negative.

12(b) to 12(f)

(b) Whether the claimant had suffered loss of income/revenue because of the respondent breaching the terms of the contract and not placing orders ?

(c) Whether the claimant is entitled to recover the cost of machinery and other incidental expenses incurred for performing its obligation under the agreement from its revenue/income to be generated by doing business with respondent as per the agreement ?(d) Whether the claimant is entitled to the profits that it has earned and it would have earned if the respondent had not willfully breached the contract and continued to place orders as per Appendix 4 of the agreement ?

(e) Whether the claimant is entitled to the reliefs/ prayer sought for in the claim statement ?

(f) Whether the claimant is entitled to claim (i) for loss of profits and opportunities; (ii) compensation; and (iii) interest under the agreement dated 20.5.2006 ?

Accordingly these issues will be taken up under the heading "Damages".

Whether the agreement dated 20.5.2006 prescribes any conditional obligation on the claimant to obtain loans or purchase of machinery, immovable property, etc. ?

It cannot be said that the agreement placed any conditional obligation on the claimant to obtain loans for purchase of machinery/immovable property etc. If, in fulfilling these conditional obligations the claimant had raised loans, purchased machineries/immovable properties, it cannot be interpreted that the agreement imposed such conditional obligations. Accordingly, Issue No.13 is answered in the negative and against the claimant.

Whether the respondent is entitled to set off ?

For the reasons stated in the award and the damages awarded to the claimant, the respondent is not entitled to set off as claimed by it. Issue No.14 is answered in the negative.

15. It is on the basis of the above findings that the minority Arbitrator awarded a lesser amount of compensation than what was awarded by the majority. However, there were substantial differences in the findings between the majority and the minority. While the majority found that the respondent

was guilty of fraud, the minority rejected the allegation of fraud. While the majority held that there were willful misconduct and gross negligence on the part of the respondent within the meaning of Section 24 of the agreement entitling the claimant to seek damages, the minority held that there was only gross negligence.

16. Keeping the above factual matrix in mind, I shall now consider the grounds of challenge of the respondent to the award.

GROUNDS OF CHALLENGE OF THE RESPONDENT :

17. Mr.Arvind P.Datar, learned Senior Counsel appearing for the respondent, assailed the award of the Arbitral Tribunal primarily on the following grounds :

> (i) the Arbitral Tribunal failed to answer several issues such as issue Nos.1, 2, 9(a), 9(b), 9(c), 10(a), 10(b), 11(b), 12(b), 12(c), 12(d), 13, 14 and 15. The Tribunal did not also consider the counter claim. Therefore, the award is not a considered and complete award, as pointed out by the Supreme Court in K.V.George Vs. Secretary to Government, Water and Power Department [1989 (4) SCC 595];
>
> (ii) The agreement Ex.C.17 dated 20.5.2006 was not duly stamped and despite the same being pointed out, the Tribunal proceeded to hear the matter and passed an award without the deficiency being removed;
>
> (iii) The award goes beyond the terms and conditions of the contract and hence, it is vitiated;
>
> (iv) When it is established by evidence and also accepted by the minority Arbitrator that the claimant did not even have the capacity to manufacture the volume allegedly promised under Appendix 4 to the agreement, the award of the majority proceeding on the basis that a minimum quantity was assured and that the failure to place orders for the supply of minimum quantity would result in the award of damages, is not correct; and
>
> (v) The basis for the award of damages was completely contrary to law and the public policy.

18. However, Mr.G.Masilamani, learned Senior Counsel appearing for the claimant contended -

(i) that all the issues have been answered by the Arbitral Tribunal in the course of discussion;

(ii) that even if a party to an arbitration feels that any of the claims presented in the proceedings has been omitted to be considered, he must have taken recourse to the procedure prescribed by Section 33(4) of the Act, without which, a challenge cannot be made under Section 34;

(iii) that in so far as the issue of stamp duty is concerned, the same should be taken to have been given up, in view of the fact that the respondent also filed the copy of the agreement as Ex.R.9 on their side;

(iv) that the majority recorded a clear finding of gross negligence and wilful misconduct on the basis of the pleadings and evidence on record and hence, the award was strictly in terms of the contract between the parties;

(v) that the majority rightly found that a minimum quantity was assured and that the respondent failed to honour the commitment; and

(vi) that the principles of damages adopted by the Arbitral Tribunal were in tune with the law.

19. I have carefully considered the rival submissions. I shall now take up the contentions one after another.

CONTENTION NO.1 :

20. The first contention of Mr.Arvind P.Datar, learned Senior Counsel appearing for the respondent is that the Arbitral Tribunal did not even answer many of the issues such as 1, 2, 4(d), 9(a) to (c), 10(a), 10(b), 11(b), 12(b) to (d), 13, 14 and 15. There was a counter claim by the respondent and the same was also not considered. Therefore, Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioner contended that the whole award is vitiated as held by the Supreme Court in K.V.George.

21. But in response, Mr.G.Masilamani, learned Senior Counsel appearing for the claimant presented a tabulation containing the issues and the paragraphs of arbitral award where they were specifically dealt with.

22. In other words, the contention of the learned Senior Counsel appearing for the respondent is seriously challenged even on facts by the learned Senior Counsel appearing for the claimant.

23. I do not think it is necessary to tabulate each of the issues and the findings recorded in relation thereto. To the extent that is sufficient, I have indicated in my discussion supra, the paragraphs, in which, both the majority and the minority had recorded findings in relation to many of the issues.

24. There can be no quarrel about the proposition that the procedure prescribed by the Civil Procedure Code is not applicable to the proceedings before an Arbitral Tribunal. Under the Civil Procedure Code, a civil court is obliged to frame issues under Order XIV Rule 1. Order XIV Rule 2, CPC mandates that a court shall, subject to the provisions of Sub-Rule (2) of Rule 2, pronounce judgment on all issues. Even an appellate court is obliged under Order XLI Rule 31 to state the points for consideration, the decision thereon and the reasons for the decision. These mandatory requirements that are applicable to civil courts are not applicable to arbitral proceedings. Therefore, the fact that each of the issues is not separately tabulated and a finding separately recorded against

each one of them, is not a ground to conclude that the award is vitiated.

25. The decision of the Supreme Court in K.V.George, cannot be applied to the facts of the case. The said case arose out of the Arbitration Act, 1940. It was a case where the arbitrator passed an award in the first instance, allowing the main claim of the claimant but keeping in reserve the counter claim Nos. 1 and 2 to be dealt with and considered separately. The claimant filed an application under Section 14 of the 1940 Act, for making the award, a rule of the Court. When the respondent objected on the ground that the counter claims had not been considered, the Court remitted the Reference back to the Arbitrator for a fresh consideration. In the meantime, a second arbitration was initiated with regard to the termination of the contract. A separate award was passed, leading to the filing of a fresh petition before the Court for making the second award also a rule of Court. The matter ultimately landed up before the Supreme Court raising very serious issues such as res judicata as well as principles behind Order II Rule 2 of the Code of Civil Procedure, 1908. It is in that context that the Supreme Court considered in para 12, the validity of the order of the trial Court allowing an application for Review by which the earlier order of remand was recalled and a decree in terms of the award passed. Therefore, the principles on the basis of which the Supreme Court rendered its decision in K.V.George, cannot be invoked in the present case. Hence, the first contention of the learned Senior Counsel for the Respondent is liable to be rejected.

26. In so far as the counter claim made by the respondent is concerned, the respondent themselves committed a mistake. In the defence statement, the respondent claimed that they were actually seeking a set off. I have already extracted a portion of the written statement of defence filed by the respondent before the Arbitral Tribunal. It can be found from the same that what the respondent sought was not set off, but only a counter claim.

27. When the whole claim of the claimant was for the award of damages, the question of seeking set off would not arise. But unfortunately, the respondent themselves proceeded to brand their claim as set off.

28. The Tribunal framed issue Nos. 14 and 15 in relation to the counter claim made by the respondent. Though the Majority Award was not very specific in its finding with regard to issue Nos. 14 and 15, paragraph 60 of the Majority Award contains an indication which reads as follows:-

> "he also spoke to the plea of set off put forward by the respondent. From his cross-examination, no particular portions are brought to our notice as being relevant on the issue".

29. However, the Minority was categorical in its finding. In paragraph 92 of his independent award, the Minority Arbitrator specifically rejected the claim for set off. Therefore, this is not a case where no finding was recorded with respect to set off or counter claim. In Santa Sila Devi v. Dhirendra Nath Sen [AIR 1963 SC 1677], relied upon by Mr.G.Masilamani, learned senior counsel for the claimant, it was held that once an award, on its face, intended and purported to decide all disputes raised for adjudication, the Court will presume that every claim made or defence raised was considered. Though the said decision arose under the 1940 Act, under which the Arbitrators were

not even obliged to record reasons, the underlying principle is that Arbitrators, unlike Judges, are privileged to pass brief awards, that could be sustained in proceedings challenging the same.

30. On this issue, Mr.G.Masilamani, learned Senior Counsel for the Claimant also relied upon the provisions of Section 33 of the Act. Sub-section (4) of Section 33 enables a party to the arbitration proceedings, to request the Arbitral Tribunal within 30 days from the receipt of the Arbitral Award, to make an additional award as to claims presented in the Arbitral Tribunal but omitted in the Arbitral Award. Sub-section (5) enables the Arbitral Tribunal to consider such a request, if it is justified and to make the additional Arbitral Award within sixty days of the receipt of the request.

31. As a matter of fact, the respondent could not have invoked Section 33(4) and made a request to the Arbitral Tribunal to consider the claims that were omitted from the Award. This is on account of the fact that in paragraph 60 of the Majority Award and in paragraph 92 of the Minority Award, the Arbitral Tribunal had rejected the counter claim. At least the award of the Minority is very clear to this effect and hence the respondent could not have invoked Section 33(4) of the Act.

32. As a matter of fact, Section 33(4) of the Act is not intended to provide a remedy of Review. Perhaps, it is intended to deal with situations where a finding is recorded with regard to a particular claim, but the same is not carried into effect in the form of a specific award. A careful look at the language of Section 33(4) of the Act would show that it does not use the expression "non-consideration" or "failure to consider". The last portion of sub-section (4) reads as follows:-

> ".....as to claims presented in the Arbitral Proceedings but omitted from the Arbitral Award".

33. In Mc Dermott International vs. Burn Standard Co., Ltd., [2006 (11) SCC 181], the Supreme Court laid down the conditions under which Section 33(4) could be invoked as follows:-

> "(1) There is no contrary agreement between the parties to the Reference;
>
> (2) A party to the Reference makes a request to the Arbitral Tribunal after notice to the other party, to make an additional award;
>
> (3) Such a request is made within 30 days; and (4) The Arbitral Tribunal considers the request to be justified".

34. The very reason why the respondent had not invoked Section 33(4) of the Act is that rightly or wrongly issue Nos.14 and 15 have been answered against them, though not in the manner one would have expected a quasi judicial Tribunal to do. Therefore, the first ground of attack to the Arbitration Award cannot be sustained.

CONTENTION NO.2 :

35. The second ground of attack to the arbitration award is that the agreement between the parties marked as Ex.C.17 was not duly stamped and that therefore, the proceedings could not have gone on, without the agreement being impounded and the deficiency rectified.

36. But, as rightly contended by Mr.G.Masilamani, learned Senior Counsel appearing for the claimant, both parties filed copies of the same agreement dated 20.5.2006 as exhibits. While the claimant marked it as Ex.C.17, the respondent also marked it as Ex.R.9. It was marked on the side of the claimant, through C.W.1. At that time, there was no protest. There was also no cross examination of C.W.1., on the question of admissibility of the document. In any case, the respondent also referred to and relied upon the very same agreement in their defence statement. A copy of the agreement was also produced by the respondent along with the defence statement. The proof affidavit of R.W.1 referred to the agreement and consequently, the agreement was marked as Ex.R.9 even on their side. The claimant did not object to the marking of this document even on the side of the respondent.

37. Under Section 36 of the Indian Stamp Act, 1899, once an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Section 61(1) of the Act provides for a suo motu power of revision upon an appellate court. Such a contingency has not arisen in this case.

38. In Hindustan Steel Ltd vs M/S. Dalip Construction Company [1969 (1) SCC 597], it has been held that the Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument.

39. In any case, the agreement in question, according to the respondent, ought to have been made on stamp papers of the value of Rs.60/-. It was typed on stamp papers of the value of Rs.20/-. Therefore, it is contended by the claimant that under Section 35 of the Indian Stamp Act, the claimant can, at the most, be called upon to pay the deficit stamp duty with penalty, which may not exceed 10 times the deficit duty.

40. The learned Senior Counsel appearing for the respondent places reliance upon a decision of this Court in Yasodammal Vs. Janaki Ammal [AIR 1968 Madras 294] and two decisions of the Supreme Court, one in Avinash Kumar Chauhan vs. Vijay Krishna Mishra [2009 (2) SCC 532] and another in S.M.S. Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited [2011 (14) SCC 66].

41. In Yasodammal, a Division Bench of this Court was concerned with an appeal arising out of a suit for title. The defendant resisted the suit on the basis of an agreement of sale and the benefit of Section 53 of the Transfer of Property Act. It was in that context that the Division Bench held that in the case of an unstamped document, the prohibition contained in Section 35 was absolute and wide. But, the Division Bench did not deal with the effect of Section 36. In any case, the case before the

Division Bench was not one where both parties had marked the very same agreement as exhibits on their sides.

42. In Avinash Kumar Chauhan, the Supreme Court was concerned with a mere suit for recovery of money. The claim was based upon an unregistered and insufficiently stamped sale agreement, that could not be enforced on account of the refusal of the District Collector to grant permission for such a sale, as it was a protected tribal land. The District Court, upon production of the agreement of sale, impounded the document directing the plaintiff to deposit the unpaid duty along with penalty. The plaintiff filed a revision before the High Court, but the same was dismissed. It was his special leave petition that came up before the Supreme Court in Avinash Kumar Chauhan. An argument was advanced in the said case that the document was admissible for collateral purposes. But, rejecting the said contention, the Supreme Court held that the purpose for which a document is sought to be admitted in evidence, is not a relevant factor for invoking Section 35.

43. But again, Avinash Kumar Chauhan is not a case where both parties marked the very same document as exhibits on their respective sides and both parties allowed the proceedings to conclude in the Court/Tribunal of first instance. Therefore, the situation is not comparable.

44. S.M.S.Tea Estates Private Limited is also not a case where both parties marked the copies of the very same document as exhibits.

45. As a matter of fact, the respondent had also relied upon the very same agreement, in support of the core defence taken by them before the Arbitral Tribunal. The respondent was not merely a defendant in the Arbitral proceedings. They were also plaintiffs in the sense that they made a counter claim. Therefore, Ex.R-9 was marked on the side of the respondent, not merely as a shield but also a sword. All the contentions of the respondent revolved around Appendix 4 to the agreement and some of the sections such as section 5 and 20 of the agreement. Therefore, after having marked the very same agreement as Ex.R.9 and after having invited the Arbitral Tribunal to the various covenants in the agreement, for the purpose of establishing not only their defence, but also their claim for set off/counter claim, it is not open to the respondent now to contend that the arbitral award is vitiated in view of Section 35 of the Indian Stamp Act. Therefore, even the second ground of attack to the award cannot be sustained.

CONTENTION NO.3 :

46. The third ground of attack is that the award goes beyond the terms and conditions of the agreement. This argument is advanced on the ground that under Section 20 of the agreement dated 20.5.2006, liability is restricted only in cases of gross negligence and willful misconduct. According to the respondent, this Section 20 does not entitle the claimant for loss of profits.

47. The grievance of the respondent is that after reproducing the argument of the claimant on gross negligence and willful misconduct respectively in paragraphs 42 and 44, the Arbitral Tribunal reached a conclusion in paragraph 45, without reference to the submissions of the respondent. Therefore, the contention of Mr.Arvind P.Datar, learned Senior Counsel appearing for the

respondent is that there is no consideration of the defence raised by the respondent to the plea of gross negligence and willful misconduct.

48. If the majority award suffered from non-consideration of the contentions of the respondent, the minority award actually recorded a finding in favour of the respondent that there was no willful misconduct or dishonest intention. Still, the minority held that the respondent is liable on account of gross negligence.

49. Therefore, the conclusions of the majority as well as the minority are assailed by the respondent primarily on the following grounds namely (a) that the majority failed to consider the defence of the respondent, before coming to the conclusion that there were gross negligence and willful misconduct; and (b) that the minority, after holding that there was no willful misconduct and after holding that the claimant did not have the capacity to produce 3 Million user guides and that the claimant did not even have quality control requirements, passed an award for payment of damages, based upon the available capacity of 1.72 Million user guides.

50. In response to the above contentions, it is argued by Mr.G.Masilamani, learned Senior Counsel appearing for the claimant that there were specific pleadings in the claim statement of the claimant accusing the respondent of gross negligence and willful misconduct; that at least on the question of gross negligence, there was concurrence of opinion between the majority and the minority; that in paragraph 43 of the majority award, the Arbitral Tribunal considered the defence of the respondent before arriving at a finding; that the finding of the minority both with regard to the capacity of the claimant to make 3 Million user guides and with regard to quality control requirements, are not in tune with the evidence on record; that no quality control issues were ever put forth by the respondent as a reason for not placing orders or for committing breach of contract; that quality control issues were raised for the first time in the defence statement; and that therefore, the third contention is not well founded.

51. I have carefully considered the above submissions.

52. At the outset, it should be pointed out that the very fact that the majority recorded a finding against the respondent both with regard to gross negligence and willful misconduct and that the minority recorded a finding that there was gross negligence alone would go to show that the evidence on record as well as the rival contentions were meticulously taken into account. Time and again, Courts have held that arbitral awards are not like judgments of civil courts, covering each and every aspect, with reference to each and every material placed before the Tribunal. What falls for consideration in a petition under Section 34 is as to whether or not, there was overall appreciation of the crucial material on record by the Arbitral Tribunal for arriving at a finding.

53. It is seen from paragraph 39 of the majority award that the issue relating to quality control was taken up despite the fact that it was raised for the first time in the defence statement. In paragraph 40, the Tribunal took into account the letter dated 25.4.2006 marked as Ex.C.12 and the Audit Inspection Report as well as the letter dated 11.5.2006 marked as Ex.C.14, to come to the conclusion that the claimant passed the ISO Audit. In paragraph 41, the majority took into account Ex.R.79 and

came to the conclusion that the suggestion for improvement made therein was not in respect of a major defect. One observation was found to have been made not against the claimant, but against the respondent. It is only after analyzing all these that the majority came to the conclusion in paragraph 42 that issues relating to quality and quantity did not constitute the basis for denying the work to the claimant as contemplated by Ex.C.17.

54. In paragraph 43 of its award, the majority took note of Section 20 of the agreement. In the same paragraph, the majority listed out certain defects, from which, gross negligence could be inferred. It was in one of the sub-paragraphs of paragraph 43, the majority recorded a finding that there was no indication of NOKIA Audit being a pre-condition for the agreement. Consequently, the majority concluded that the contention of the respondent could not be true.

55. As a matter of fact, the majority has pointed out that there was a discrepancy between what was pleaded by the respondent in the defence statement and what was argued in the course of hearing. Towards the end of paragraph 43, the majority has pointed out that while the defence statement raised a plea of failure on the part of the claimant with reference to the first audit conducted on 15.6.2006, the respondent shifted their stand at the time of arguments by attributing the failure, to the audit held on 19.7.2006. Therefore, I do not think that there is any non-consideration on the part of the majority, of the defence raised by the respondent.

56. It is true that the minority differed from the majority in so far as the finding with regard to willful misconduct is concerned. Still, the minority arrived at the very same conclusion that the claimant was entitled to damages. In such circumstances, I am of the view that the third contention cannot be upheld especially in the light of the scope of enquiry under Section 34.

57. The reliance placed by Mr.Arvind P.Datar, learned Senior Counsel appearing for the respondent on the decision of the Supreme Court in Seth Thawardas Pherumal Vs. Union of India [AIR 1955 SC 468] in this regard, does not appeal to me. The said case concerned mutual obligations. It arose out of a contract entered into by a contractor with the Dominion of India (pre-independence days) for the supply of bricks to the Central Public Works Department. There was a delivery schedule for the contractor and a reciprocal promise on the part of the Public Works Department to remove the bricks as soon as they were ready for delivery. The Arbitrator found that there was a failure on the part of the Central Public Works Department to remove the baked bricks. Consequently, there was delay in the contractor supplying the material. Therefore, the Supreme Court held that the contractor had a duty under Section 73 of the Contract Act to minimize the loss by removing the bricks by himself. While holding so, the Court pointed out that under the terms of the contract, the Government was made not liable for any loss occasioned by a consequence that was remote. The Court held that if there is an express term in the contract, the contractor must be tied down to it.

58. But, in the case on hand, the majority found that it was a case of both gross negligence and willful misconduct. The minority award did not go to the rescue of the respondent in full. Therefore, I am of the view that the third ground of attack cannot also be upheld.

CONTENTION NO.4 :

59. The next contention of the respondent is that there was a gross mis-interpretation of the contents of Appendix 4 to the agreement dated 20.5.2006. According to the respondent, Section 5 of the agreement dated 20.5.2006 made it clear that what was contemplated under the agreement was only a forecast. It was made clear in Section 5 of the agreement that the forecasts indicated therein are not to be taken as offers for the purchase of products. But, the majority proceeded on the basis that Section 5 and Appendix 4 are to be treated as mutually exclusive and that there was no obligation to place orders on the part of the respondent.

60. In this connection, the respondent raises one more argument that even assuming that the respondent is obliged to place orders as per Appendix 4, the claimant was obliged to ramp up its capacity and that these terms of the agreement constituted reciprocal promises in terms of Sections 51 and 52 of the Indian Contract Act. The respondent contends that once it is found that the claimant never ramped up the capacity to reach 3 Million user guides at any point of time, the question of enforcement of the promise, even if there was one under Appendix 4, did not arise.

61. For finding out whether the above contentions would hold good, it is necessary to take a look at Section 5 of and Appendix 4 to the agreement. Hence, they are extracted as follows :

> "Section 5 : Ordering, Logistics and Term of Delivery :
>
> The parties shall comply with the separate mutually agreed ordering and logistics procedure(s). R.R.D. provides Canara Printers with forecast(s) of R.R.D's anticipated need for products. Canara Printers agrees to use the forecast(s) to determine its manufacturing capacity requirements for products. Canara Enterprises shall, without delay, confirm in writing to what extent Canara Printers agrees to meet such forecast(s). Canara Printers agrees that forecasts referred to in Section 5 and other forecasts are not offers to purchase products and are not binding on R.R.D., unless otherwise mutually agreed. R.R.D. shall not have any minimum ordering and/or purchase commitment for products. Canara Printers agree not to refuse to deliver products in accordance with purchase orders that have been placed in accordance with this agreement.
>
> Appendix 4 - Start up Conditions Monthly user guide capacity ramp up at Canara Printers :
>
> July 3,00,000 August 6,00,000 September 10,00,000 October 15,00,000 November 20,00,000 December 25,00,000 January 2007 30,00,000 Thereafter 3,000,000 every month.
>
> Canara Printers agrees to reserve this capacity for R.R.D., for a minimum period of 36 months from the date of agreement.
>
> R.R.D. will fill this capacity providing that Canara Printers pricing remains competitive and that R.R.D.'s client's demands remain significantly above this

capacity level.

R.R.D. recognise the investment in equipment Canara Printers has made to enable the technical documentation production.

R.R.D. will assist Canara Printers with a forward payment on orders to the value of $100,000. This will be covered by separate agreement.

Pricing :

Prices will be set as per Price Matrix. The first pricing/cost review will take place in July 2006 and will be on an 'open book' basis during which Canara Printers will share the costs of production with R.R.D."

62. If we have an independent look at Section 5 and Appendix 4, it will be clear that Section 5 contains a general condition. But, in Appendix 4, specific quantities are indicated for every month commencing from July 2006. In Appendix 4, there is also an obligation imposed upon the claimant to reserve the entire capacity ramped up as per Appendix 4, for a minimum period of 36 months from the date of the agreement. Though the respondent was given an option either or not to fill up this capacity, the exercise of that option was confined only to two contingencies namely (a) that of the pricing of the claimant remaining competitive; and (b) that of the demands of the respondent's client remaining significantly above the capacity level.

63. It was not the case of the respondent that the above two contingencies arose, forcing them not to fill up the capacity as stipulated in Appendix 4 as Start- up Conditions. Therefore, despite the fact that this Court, under Section 34, will not engage in independent appreciation of evidence, I have done that and found out that I could not have reached a different conclusion than what the Arbitral Tribunal had done.

64. I have one more reason to reject the fourth ground of attack. As I have earlier indicated, the fulcrum of this contention of the respondent is that Section 5 of the agreement eclipsed Appendix 4 and that the Arbitral Tribunal wrongly held both to be mutually exclusive.

65. Assuming for a minute that the Arbitral Tribunal had wrongly construed the effect of Section 5 of and Appendix 4 to the agreement upon each other, even then, it is not a case for interference under Section 34. In a catena of decisions, the Supreme Court has held that the jurisdiction under Section 34 does not extend to the correction of an erroneous interpretation of an agreement between the parties. Even if the Tribunal interprets a contract erroneously, it is not a case for interference under Section 34.

66. Keeping this in mind, if we have a look at the award of the majority and the minority, it is seen that the majority considered this aspect in paragraphs 36, 37 and 38. The majority found that the respondent never took a stand that they could not place orders as per Appendix 4 on account of the failure of the claimant to ramp up capacity. Even the minority recorded a finding that the claimant

was fully geared up to meet the contingency. There was no evidence or even pleading to show that the two contingencies, under which, the respondent was entitled not to place orders to the extent of the quantity indicated in Appendix 4, ever arose.

67. The reliance placed upon Sections 51 and 52 of the Indian Contract Act, is of no avail to the respondent. This is for the reason that the respondent had always taken a stand that they were not obliged to go by the prescriptions contained in Appendix 4. At no point of time before the reference of the dispute to arbitration, did the respondent ever come up with a plea that they could not place orders as per Appendix 4 only on account of the failure of the claimant to ramp up their capacity. Hence, the fourth contention of the respondent is also liable to be rejected.

68. Incidentally, one more contention is raised by the respondent, as a fall out of the fourth contention. This relates to the NOKIA Audit and the mystery surrounding the same. The majority held that the claim of the respondent that the claimant failed NOKIA Audit, was fraudulent.

69. It is contended by Mr.Arvind P.Datar, learned senior counsel for the respondent that the fact that the claimant had to pass NOKIA Audit was clearly borne out by Exx.C18 and C19 as well as by Exx.R79 and R80. According to the learned senior counsel, Exx.R13, which is a mail sent on 16.6.2006, clearly mentioned about the rejection of the claim by NOKIA. But, the majority award rejected Ex.R13 on the ground that it was an internal communication and that it was not forwarded to the claimant. The grievance of the learned senior counsel for the respondent is that the same yardstick as applied to Ex.R13 was not applied to Ex.C22. Therefore, the learned senior counsel contends that the finding with regard to NOKIA Audit was completely perverse.

70. But, it is seen from paragraph 44 of the majority award that the plea with regard to NOKIA Audit was rejected by the majority, as a new and untrue story. The finding was actually a sequel to the fact that the oral evidence of RW1 did not inspire the confidence of the majority at all.

71. The Arbitral Tribunal had the advantage of witnessing the demeanor of RW1. The answers given by him to various questions, which are discussed in paragraph 44(ii) of the award and the inference drawn by the majority from those answers show that the arbitrators found it difficult to believe his theory.

72. There was also one more thing. Under Ex.C2, the respondent had warned the claimant never to communicate with NOKIA. There was also a Non Disclosure Agreement. In none of the documents filed as Exx.C1 to C16, which constitute the pre-contract correspondence between the parties, was there any mention about NOKIA Audit. Therefore, there was nothing wrong in the Arbitral Tribunal rejecting the theory of NOKIA Audit as false and unfounded. If the view taken by the majority is a possible view, this court will not upset the same on the ground that another view is also possible.

73. As rightly pointed out by Mr.G.Masilamani, learned senior counsel for the claimant, the majority dealt with the communication dated 21.7.2006, by which Ex.R79 was communicated to the claimant along with Ex.C19. The majority came to the conclusion that the said letter did not put an end either to Appendix IV or to the agreement itself. Therefore, I do not think that the respondent can now

make much ado about the failure of the claimant in NOKIA Audit.

CONTENTION NO.5

74. The last ground of attack to the award revolves around the claim for damages and the manner in which the claim was dealt with by the Arbitral Tribunal and an award passed. Before proceeding to consider the submissions of the learned senior counsel on both sides on this aspect, it is necessary to take note of the fact that while the majority assessed the quantum of damages at Rs.16.5 crores, the minority assessed the damages at Rs.9,43,33,320/-. The majority arrived at the quantum of damages with reference to two distinct periods, namely (i) May 2007 to May 2009 constituting a period of 25 months, and (ii) July 2006 to April 2007. In paragraph 68, the majority held that if 3 Million user guides per month is taken as the basis, the loss that the claimant could be stated to have suffered could be estimated at Rs.1.6 to 1.7 Crores per month. But, even then, the majority did not award a compensation of Rs.1.6 to Rs.1.7 Crores per month. The majority took nearly 1/3rd of what would have been the probable loss and awarded only Rs.60.00 Lakhs per month, for a period of 25 months from May 2007 to May 2009.

75. Insofar as the period from July 2006 to April 2007 is concerned, the majority found in paragraph 69 of the award that the loss could be quantified between Rs.1.07 to Rs.1.43 Crores for the months of January to April 2007. But, the majority reduced the said probable loss to a net figure of Rs.1.5 Crores for the entire period from July 2006 to April 2007.

76. While the majority took 3 Million user guides per month as the basis, the minority took 1.72 Million user guides per month as the basis, on the basis of the actual capacity made available in the factory of the claimant. The minority awarded Rs.20.00 Lakhs per month for the first period, namely from January 2007 to April 2007 and Rs.35.00 Lakhs per month from May 2007 onwards.

77. The grievance of the respondent is that the Arbitrators failed to consider the audited accounts of the claimant from April 2006 to March 2007. According to the respondent, the audited balance sheet showed only a profit of Rs.54.81 Lakhs on a sales turnover of Rs.28.00 Crores. Drawing my attention to the explanatory note submitted on the last date of hearing, when arguments were heard and award reserved, it is contended by Mr.Arvind P.Datar, learned senior counsel for the respondent that for the period from July 2006 to April 2007, the amount claimed by the claimant themselves was only Rs.1,05,76,531/-. But, the majority awarded Rs.1.50 Crores. Therefore, it is contended that there was total non application of mind.

78. It is also contended that the Arbitral Tribunal erroneously shifted the burden of proof in this regard.

79. Another contention of the learned senior counsel for the respondent is that as per the audited balance sheet as on 31.3.2008, the claimant had incurred a loss of Rs.1.13 Crores, though the provisional accounts showed a profit of Rs.1.34 Crores. Therefore, it is contended that when the actual loss showed in the audited balance sheet was only Rs.1.13 Crores, the probable loss noted by the Arbitral Tribunal at Rs.7.2 Crores was completely contrary to Section 73 of the Contract Act.

80. But, I do not think that a Court exercising jurisdiction under Section 34 can hardly do anything about the above grievances. I am not dealing with a regular appeal under Section 96 of the Code of Civil Procedure. Time and again, the Courts have cautioned against any adventurous pursuit that one may tend to take while dealing with a petition under Section 34.

81. Though perversity of claim may be one of the grounds for interference, the same proves to be a razor's edge many times.

82. In the case on hand, the claimant had pleaded the nature of loss that they had sustained. They also specifically pleaded the method of calculation of such loss. In paragraphs 39 to 42 and 47 to 50 of the claim statement, the claimant had pleaded sufficient facts for establishing a claim for damages.

83. I do not wish to deal with each head of claim, as it would be outside the purview of the jurisdiction under Section 34. Suffice it to point out that the Tribunal took note of the pleadings as well as the evidence on record. They took note of the calculations provided in Ex.C97, which showed the commitment made by the respondent as per the agreement, in terms of quantities, the actual quantity for which orders were placed, the fixed cost, the variable cost and the gross profit. Therefore, nothing could be done beyond verifying whether the Arbitral Tribunal based its conclusions upon some material on record or not.

84. As pointed out earlier, the Arbitral Tribunal actually recorded a finding with respect to the notional loss at an amount of Rs.1.6 to Rs.1.7 Crores per month. Yet, the Tribunal awarded only 1/3rd of the same and fixed it at Rs.60.00 Lakhs per month. Therefore, if at all anyone could be aggrieved, it is the claimant who could have come up and said that no reason was attributed by the Tribunal to take only 1/3rd of what they actually found to be a probable loss.

85. Though there was a variation between the majority and the minority with respect to the quantum of damages, there was no disagreement between them with regard to the entitlement of the claimant to compensation.

86. The reliance placed by the respondent on the balance sheet of the claimant, in my considered view, is misplaced. The loss of profit that the claimant incurred in their actual business transactions, during the period in question is of no relevance to arrive at the damage suffered by them on account of the breach of contract by the respondent.

87. Section 73 of the Contract Act, on which heavy reliance is placed by the learned senior counsel for the respondent merely states that the party who suffers a breach of contract is entitled to receive compensation for any loss or damage which naturally arose in the usual course of things. Section 73 cautions that the compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach.

88. I do not know how the award is in violation of the provisions of Section 73. There is nothing on record to show that the compensation claimed by the claimant was for any remote or indirect loss.

The fact that the claimant was lured to invest huge sums of money, mostly through borrowings, for the purpose of capacity utilisation by the respondent, is not in doubt. The fact that the claimant was obliged even under Appendix IV to the Agreement, to reserve its entire capacity for utilisation by the respondent, is also not in doubt. Therefore, all that the claimant did was to make a claim for what they would have actually earned, had the respondent fulfilled their promise.

89. No one can point out with precision the quantum of loss that a person could have suffered on account of non fulfillment of an obligation by a contracting party, especially if it is in the nature of a business transaction. If the contract is one for sale of some property, movable or immovable, the loss for the breach of the contract could be arrived at with some amount of precision. But, in the case on hand, the agreement is for the placement of orders for the production of user guides. Therefore, a mathematical precision is impossible while arriving at the quantum of damages.

90. As an argument incidental to the last contention, Mr.Arvind P.Datar, learned senior counsel for the respondent submitted that the entire claim for damages was based upon the calculations provided by a Cost Accountant. During cross-examination, he conceded that he prepared the statement of loss on the basis of the information submitted by him. The minority award rejected the tabular statements provided by the Cost Accountant. Therefore, it is contended that the Arbitral Tribunal ought not to have proceeded on the basis of the evidence of the Cost Accountant.

91. But, I do not think that the above argument will advance the cause of the respondent any further. Despite holding that the evidence of the Cost Accountant cannot be accepted, the minority also concurred with the majority with respect to the entitlement of the claimant for damages. The minority differed from the majority only on the question as to whether 3 Million user guides per month should be taken as the basis or 1.72 Million user guides should be taken as the basis for calculation.

92. Therefore, the findings recorded by the minority in paragraph 79 of his award that CW3 had not gone through the accounts and that no value can be attached to the Cost Accountant, who was only a name lender, cannot tilt the balance in favour of the respondent.

93. If at least the respondent is in agreement with the minority award, on the ground that the some of the findings therein are in their favour, I could have appreciated the stand of the respondent. But, the respondent wants to make use of some of the findings of the minority for assailing the correctness of the findings of the majority. But, in respect of the ultimate conclusion, the respondent wants both the majority and the minority awards to be set aside.

94. Therefore, the fact that the minority rejected the evidence of Cost Accountant, cannot really save the respondent from the inevitable.

OBJECTIONS AS TO THE AWARD OF COSTS

95. The last submission of the respondent is as to the award of costs. It is the contention of the learned senior counsel for the respondent that the Arbitral Tribunal reserved orders on 10.8.2010

and that the counsel for the claimant filed a memo of costs on 02.12.2010 and that the copy of the same was not furnished. Therefore, the learned senior counsel for the respondent contends that Section 24(3) of the Arbitration and Conciliation Act is violated.

96. But, I do not think that on the above ground, the entire award could be set aside. Even in civil proceedings, costs are assessed not on the basis of rival contentions. A Schedule of costs is filed only after judgment is delivered, even in civil proceedings. Therefore, the question of opportunity with regard to the quantum of costs and a hearing on the same, is far-fetched.

97. It is true that in civil proceedings, the costs are not what parties can claim as far as their imagination could go. It is also true that costs in arbitral proceedings are prohibitively high. But, it does not alter situation. I do not know what was the cost implication for the respondent themselves. Therefore, the last contention is rejected.

98. In view of the above, the challenge made by the respondent to the arbitral award is bound to fail. Accordingly, O.P.No.717 of 2011 is dismissed.

99. This is a petition filed by the claimant themselves, finding fault with the Arbitral Tribunal for not awarding interest for the period prior to the date of the award.

100. Section 31(7)(a) of the Act contemplates the award of interest for (i) the pre-reference period, (ii) the pendente lite period, and (iii) the post award period. This is subject to the condition that there is no prohibition for the award of interest under the terms of the contract.

101. The grievance of the claimant is that there was no agreement to the contrary, under the contract dated 20.5.2006. The Supreme Court has held in Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. [(2005) 6 SCC 462] that the Arbitral Tribunal has the power to grant interest both for the pre-reference period and the pendente lite period.

102. However, by a memo filed during the course of hearing, the claimant restricted their claim in the main petition O.P.No.433 of 2012 to the pendente lite period alone.

103. The arbitration proceedings commenced on 18.4.2008 and the first hearing was held on 22.6.2008. The award was passed on 19.9.2011. Therefore, Mr.G.Masilamani, learned senior counsel for the claimant contends that the Tribunal ought to have awarded interest for the pendente lite period.

104. But, what is sauce for the goose is the sauce for the gander. What applies to the respondent with regard to the scope of the jurisdiction under Section 34 would equally apply to the claimant.

105. In paragraphs 71 and 72 of their award, the majority took note of the general principles with regard to the award of interest, under the Indian Contract Act and the Specific Relief Act, compared them with the provisions of Section 31(7)(a) and came to the conclusion that they were not inclined to award interest for the period up to the date of the award. Though it is not stated explicitly, the

rationale behind such a conclusion is that what was awarded was only damages. As I have pointed out, damages have been awarded by the majority for two distinct periods, one from July 2006 to April 2007 and another from May 2007 to May 2009. Admittedly, the arbitration had commenced in April 2008 itself. The damages awarded to the claimant had run up to May 2009, during which period the proceedings were already in progress.

106. Therefore, the non awarding of interest for the pendente lite period, especially when the award itself was only for damages, cannot be found fault with. Hence, the petition filed by the claimant also deserves to be dismissed. Accordingly, O.P.No.433 of 2012 is also dismissed.

107. This is an application taken out by the claimant, seeking a direction to the respondent to deposit the award amount, pending disposal of the main O.P. This application was necessitated on account of the fact that the very admission of the petition under Section 34 was treated as an automatic stay of execution of the award.

108. Now that the main O.P. under Section 34 is dismissed, there is no question of issuing a direction to the respondent to deposit the award amount. It is up to the claimant to execute the award. Hence A.No.3752 of 2012 is dismissed. However in the special facts and circumstances of the case, I direct the parties to bear their respective costs in the proceedings before me.

09-12-2014 Index : Yes Internet : Yes RS/GR/kpl V.RAMASUBRAMANIAN,J RS/GR/kpl COMMON ORDER IN O.P.Nos.717 of 2011 & of 2012 09-12-2014