Hindustan Shipyard Limited vs Essar Oil Limited And Ors. on 29 September, 2004

Equivalent citations: 2005(1)ALD421, 2005(1)ALT264, 2005(1)ARBLR454(AP)

JUDGMENT

T. Meena Kumari, J.

1. As the parties in both the CMAs are one and the same and the issue involved in those CMAs are identical, they are being disposed of by this common order.

2. CMA No. 255 of 2003 has been directed against the decree and order dated 10-10-2002 in OP. No. 989 of 2001 on the file of the Principal District Judge's Court, Visakhapatnam whereas CMA No. 624 of 2003 has been filed against the decree and order dated 1-11-2002 in O.P. No. 96 of 2002 on the file of the Principal District Judge's Court, Visakhapatnam.

3. The appellant herein is the petitioner in OPs and the respondents herein are the respondents in the OPs. The appellant in both the OPs is Hindustan Shipyard Limited rep. by its Chairman and Managing Director through Deputy Manager (Legal) whereas the first respondent in both the OPs is M/s. Essar Oil Limited and the second respondent is the Chairman of the Arbitrary Tribunal and respondents 3 and 4 are the arbitrators of the said Tribunal.

4. The brief facts that led to the filing of the above CMAs are as follows:

> The Oil and Natural Gas Commission Limited has awarded a contract to the appellant herein for carrying out works of fabrication, skidding, load out, sea fastening, transportation, installation, book up, testing and pre-commissioning of PB PD and PE and RV 10 and RV 17 platforms at PANNA and RAVVA fields respectively. The appellant herein awarded the said contract to the first respondent herein by different agreements. According to the pricing formula between the parties, the appellant company has to get from the owners actual cost paid to the Contractor plus mark up ranging from 7 1/2 to 10%. Later, it was agreed, at the instance of the first respondent, to make payments directly to the first respondent by the owners and a copy would bo marked to the appellant- company. Later, the first respondent commenced the work of the assigned contract to it by the appellant and consequently the first respondent invoked the arbitration clause by its letter and appointed the third respondent as their arbitrator and the appellant appointed the fourth respondent as its arbitrator and both the arbitrators appointed the second respondent as its Chairman of the Arbitrary Tribunal as stipulated in the contract. As far as the said arrangement, there is no dispute raised by either parties. Various

substantial claims besides costs of the arbitration proceedings have been placed by the first respondent before the Arbitration Tribunal relating to both the projects. The majority view of the Arbitrary Tribunal is that there is no privity of contract between ONGC and EOL and the appellant is contractually liable to pay the outstanding amounts as may be found due to the first respondent which remain unpaid by ONGC and there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts clue to them nor can such a suit lie under law. On the other hand, the dissenting view is that there was privity of contract exists between the first respondent and the ONGC. The Arbitrary Tribunal passed the award in those matters after adjudication. Questioning the said awards, the appellant herein filed O.P. Nos. 989 of 2001 and 96 of 2002 before the Principal District Judge, Visakhapatnam on various grounds.

5. The Award passed in the case of RAVVA project has been challenged before the learned District Judge on the following grounds:

(i) The award, in question, is not a reasoned award;

(ii) The arbitrators have failed to decide the matter according to law;

(iii) Various claims were beyond the contract and the arbitrators ignored the express terms of the contract;

(iv) The arbitrators erred in holding that there is no privity of contract between the ONGC and the first respondent;

(v) The majority view of the arbitrators is manifestly contrary to law of the land and also terms of the contract;

(vi) That the arbitrators allowed the claims contrary to law, to the evidence and the material on record;

(vii) The arbitrators failed to see that some of the claims, especially, claim No. 4 is time barred;

(viii) That the arbitrators failed to conform to the agreed terms of the contract insofar as the claim No. 3 is concerned.

(ix) That the arbitrators failed to recognize the unsustainability of the claim of interest as all the claims are being questioned and challenged by the company and no interest is awardable until the amounts are quantified and on the same ground the award of future interest is erroneous.

(x) The appellant also sought declaration of rejection of the counter claim by the Arbitrary Tribunal as arbitrary and contrary to law.

6. Almost similar grounds have been raised questioning the award passed in the case of PANNA Project by the appellant herein before the learned District Judge.

7. The learned District Judge after hearing both sides confirmed the award in respect of the claims of the first respondent regarding RAVVA project and in so far as the counter claim of the appellant is concerned, the award was set aside and the matter was remanded to the arbitrators to adjudicate the counter claim. With regard to the award passed in respect of PANNA project, the same has been confirmed by the learned District Judge.

8. Questioning those awards, the petitioner in the OPs filed these CMAs.

9. Heard the learned Senior Counsel Sri Anantha Sabu appearing for the appellant and Cri B. Audinarayana Rao for the first respondent and perused the written arguments filed by the parties.

10. The main contention urged before this Court by the learned Senior Counsel Sri Anantha Babu for the appellant is that the appellant is only a certifying agency to certify the work done by the first respondent company. On such certification, the ONGC has to pay the cheques directly to the first respondent. The learned Senior Counsel has further argued that the mode of direct payment has been incorporated in Schedule E of the agreement at the instance of the respondent company which is evident from its letter dated 30-1 -1992. The learned Senior Counsel has also further argued that in spite of the stand taken by the appellant herein in the counter and also written arguments before the arbitrator that though the work was entrusted by the ONGC to the appellant and the appellant has called for the tenders for carrying out works in RAVVA and PANNA Fields which consist of fabrication, skidding, load out, sea fastening, transportation, installation, hookup, testing and pre-commissioning of platforms and the first respondent was awarded the contract pursuant to the tenders called for by the appellant and the first respondent on its own got the amendment to the terms of contract seeking direct payment from the ONGC and therefore the intention of the first respondent is that it wants to have direct contacts with the ONGC and the first respondent restricted the role of the appellant to that of certification of the bills and hence it has to be held that there is a privity of contract between the ONGC and the first respondent but not between the appellant and the first respondent.

11. The learned Senior counsel further argued that the letter of intent has been issued incorporating the modification of mode of payment at the instance of the first respondent to the effect that mode of payment should be direct by way of cheques from ONGC on the certification made by the appellant and to that effect Schedule E has been introduced on 3-3-1992 and hence the appellant has no liability to the first respondent, if any amount is not paid by the ONGC.

12. The learned Senior Counsel also submitted that in spite of filing voluminous corrrespondence that took place between the three parties i.e., the appellant, the first respondent and the ONGC and in spite of taking the stand taken that privity of the contract exists by way of tripartite agreement,

the majority of the arbitrators felt that there is no need to make ONGC as a party which finding is contrary to the material on record and the learned District Judge also did not properly appreciate the said fact. Further it is submitted that the arbitrators have not considered the voluminous documents placed by the appellant and they have chosen to pass the award without taking all those documents particularly without considering the amendment made with regard to the direct payment as per Schedule E. Further, the arbitrators wrongly disallowed the counter claim made by the appellant without properly appreciating the material on record. Under the above circumstances, the appellant filed OPs before the learned District Judge under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') seeking to set aside the awards passed by the Arbitral Award (sic. Tribunal) and to allow the counter claim of the appellant with interest.

13. The learned Senior Counsel further argued that the civil court has also negatived the contentions of the appellant on the ground that Section 5 of the Act has cut down the powers of the Court and no judicial authority shall intervene with the Award under certain circumstances provided in the Act. The learned counsel submitted that the Supreme Court in catena of decisions has held that an Award can be set aside under Section 34 of the Act if the same is against the principles of public policy and violates any of the provisions of the substantial law of the land i.e., Indian Contract Act, Transfer of Property Act etc. The learned Senior Counsel has further argued that the Schedule E is introduced into the contract and number of meetings were held between the ONGC, the appellant and the respondent herein and in those meetings it has been concluded that the duty of the appellant is that it is only certifying agency, which is evident from Schedule E and hence the award of the arbitral tribunal is illegal.

14. The learned Senior Counsel also submitted that as per Section 19(4) of the Arbitration Act, the arbitral tribunal has power to determine the admissibility, relevance and materiality and weight of any evidence. It is further submitted that if the Arbitral tribunal has taken into consideration the entire material and particularly the amendment made by way of Schedule E, the arbitral tribunal should not have passed the award against the appellant company and equally the learned District Judge also failed to appreciate the said documents in proper perspective, it is also argued that had the arbitral tribunal had gone into the documents filed, the arbitral tribunal would have come to the conclusion that it is a tripartite agreement among the ONGC, the appellant and the respondent and it is a case where ONGC has to be made as a party to the proceedings with reference to the payment. However, the arbitrary tribunal felt that there is no need to make the ONGC as a party which has been confirmed by the learned District Judge by making the award as a rule of the Court without taking all these factors into consideration. The learned counsel has argued that the contract is a creature of the tripartite discussions and in view of incorporating Schedule E, the obligation of the appellant to pay the amounts to the first respondent did not remain in view of the fact that the first respondent itself has chosen to have direct mode of payment from the ONGC by way of cheques on the certification made by the appellant. In view of incorporating Schedule E, the liability of payment has to be fastened only on the ONGC but not on the appellant.

15. The learned counsel has further argued that as per terms of the contract at clause 13.2.3, the appellant has to certify and approve the invoice for payment only. As per Section 41 of the Indian Contract Act, when a promisee accepts performance of the promise from a third person, he cannot

afterwards enforce it against the promisor. In this case, he contends that the respondent company itself having got the Schedule E introduced in the conditions of the Contract, now cannot enforce it against the appellant and it amounts to violation of Section 41 of the Indian Contract Act. Having accepted the mode of payment from the ONGC by the respondent, who is a third party to the arbitral proceedings, the contract itself cannot be enforced under law. Thus, this Court has got every power to set aside the award as confirmed by the learned District Judge under Section 34 of the Act since the said award is contrary to the provision of Section 41 of the Indian Contract Act in view of the fact that the respondent company itself has sought the mode of payment from the ONGC. The learned Senior Counsel also submits that the learned District Judge has misunderstood the scope of Section 5 of the Arbitration Act. The learned Senior Counsel also submits that there is no clause in the terms of the contract that the appellant has to pay the money to the first respondent in view of Exhibit E and hence no liability can be fastened on the appellant since it is only a certification agency. Further, he submits that pursuant to the said terms, the ONGC has directly made advance payment of Rs. 5 crores to the first respondent and hence the appellant has no liability to the amounts payable to the first respondent by the ONGC and if any amount is not paid to the first respondent, it has to proceed against the ONGC only but not against the appellant herein.

16. The learned Senior Counsel further submits that as per the judgment of the Apex Court in the case of Rickmers Verwaltung Gambh v. Indian Oil Corporation Limited . the correspondence that took place among the parties has to be taken into consideration while construing the intention of the parties to the contract. The learned Senior Counsel submits that the Arbitral Tribunal as well as the learned District Judge failed to take note of the correspondence that exchanged among the parties which amply indicate that the first respondent and the ONGC have entered into a contract. Had the entire correspondence been taken into consideration, the arbitral tribunal as well as the learned District Judge would have held that the agreement is a tripartite agreement among the appellant, the first respondent and the ONGC and hence it has to be held that the Arbitral Tribunal and the learned District Judge erred in holding that the appellant is liable for the amounts due to the first respondent.

17. The learned Senior Counsel also submitted that the Arbitral Tribunal and the learned District Judge failed to look into the entire material available on record particularly various letters exchanged between ONGC and the first respondent on 28-9-1992 (page 1 of volume III), 4-9-1992 (page 102 of Volume 111), 8-7-1993 (page 107 of Volume III), 29-3-2004 (page 2 volume 111) and 8-11-1994 (page 3 of volume III) and various other correspondence and it amounts to utter violation of the provisions of the substantial law of India i.e., the Indian Contract Act and the Evidence Act.

18. In reply to the above contentions, the learned counsel for the first respondent Sri B. Adinarayana Rao submits that there is no privity of contract between the ONGC and the first respondent and the contract is entered into between the appellant and the first respondent and it is only a bilateral contract and not tripartite contract. The learned counsel has also argued that clause 13.1 of the terms of the Contract deals with the payment. The learned counsel by placing reliance on clauses 13.1 and 13.2.1, 16.2 which deals with Arbitration and clause 28.0, which deals with termination, submits that the contract is in between the appellant and the first respondent only, With regard to introduction of Schedule E in the terms of the contract, the amounts which were certified by the

appellant and due by the appellant alone have to be paid to the first respondent and the appellant alone has to pay the amount and the agreement is between the appellant and the installation contractor i.e., the first respondent herein.

19. The learned counsel for the first respondent while supporting the award on the ground has further argued that the first respondent is a party to Schedule E with regard to the receipt of payment from ONGC and he has also contended that a third party to a contract cannot sue or be sued and the exceptions to that general principle is the Trust and by way of family arrangement. However, he has contended that the first respondent company has received some payments from the ONGC on the certification of the invoices by the appellant- HSL and hence the contract entered between the HSL and the first respondent company is enforceable under law as it is a bilateral agreement and is controlled by clauses 13.1 and 13.2 of the terms of the contract and hence there is no violation of any of the provisions of substantial law i.e., the Indian Contract Act by the Arbitral Tribunal and therefore the award needs no interference.

20. The learned counsel has also argued that even though several meetings have been held among the appellant, the first respondent and the ONGC, those meetings could not result in any contractual obligations between the parties in the absence of ONGC being a party to the contract. The learned counsel has further argued that the ONGC cannot be made as a party merely because there is a correspondence and it is the appellant alone that is responsible for fastening the liability in view of the privity of contract between the two parties. The learned counsel also further argued that as per Section 11 (3) of the Act, each party to the agreement be required to be appointed as an arbitrator and the appellant company has never asked ONGC to have its own arbitrator and hence now it is not open to the appellant to contend that the liability should be fastened on the ONGC. The learned counsel has also further argued that in the absence of any privity of contract between the ONGC and the first respondent, it is the responsibility of the appellant for payment of the certified amount and the arbitral award needs no interference. The learned counsel also submits that Exhibit E incorporated with regard to the mode of payment shall not have the overriding effect of the instructions to the bidders and hence as per the bid agreement, the appellant company alone is responsible but not ONGC.

21. Both the counsel have submitted voluminous records in 13 volumes before the Arbitral Tribunal. After hearing both the parties, this Court felt that the point with regard to the privity of contract has to be dealt with in extenso basing on the rival contentions urged before this Court so as to enable this Court to decide as to whether the award can be set aside under Section 34 of the Act in view of the peculiar circumstances of the case.

22. The material filed along with the record goes to show that the provisional cost for the works awarded to HSL i.e., the appellant, as per certificate dated 2-1-1990 issued by the ONGC, is Rs. 40 crores for RAVVA Project. The said provisional cost as stated in the said certificate for fabrication and installation of off shore platforms with associated facilities meant for oil production from RAVVA field in Godavari offshore is as follows: (page 4 of volume I).

"The provisional cost for the works awarded to HSL is Rs. 40 crores (Rupees forty crores only) which is fully financed by the ONGC."

23. The appellant company invited tenders by Tender Notice No. GT/OPF/ CONTR/0806/89 stating that the appellant company has been awarded with the contract for Design/Engineering, procurement, Fabrication, Assembly, Welding, Testing Installation and Commissioning of Well Head Platforms RV-5 and RV-1 by the ONGC and the appellant in turn intends to appoint an Installation Contractor for carrying the activities such as Skidding, Load out, Transportation, installation, Hookup and Pre- commissioning including Laying of Submarine Pipelines. (page 114 of volume No. 1). The respondent company is one of the tenderers. As per pricing and terms of payment by ONGC to the HSL, filed as one of the material papers at page 8 of volume 1, it has been stated as follows:

"Considering the cash flow restraints being experienced by HSL and the actual physical position that ONGC is being asked by HSL to either backup the LCs opened by HSL or to make the payment directly to HSL's suppliers/ contractors, it was proposed by ONGC that rather than backing up the LCs or making direct payment to suppliers/ contractors on request from HSL, the frequency of which is multiplying, it would expedite of ONGC makes direct payments to the supplies/contractors on the basis of authorization by HSL. In this respect, the following was agreed to between ONGC and HSL.

3. PAYMENT IN INDIAN RUPEES TO INDIAN CONTRACTORS/ SUPPLIERS:

(a) HSL would award the contract/ supply order on the Indigenous supplier/contractor following stores procedure as applicable in HSL and forward a copy of such supply order/ contract to ONGC, BRBC.

(b) Such supply order/contract shall be certified by ONGC/EIL representative at Visakhapatnam certifying that equipment/services are for the ONGC project under execution by HSL.

(c) HSL on selective basis would incorporate in such supply order/ contract that payment would be made by ONGC on certification by HSL of the invoices of the work done. Therefore, the requirement of opening of LC for Indian Suppliers/ Contractors would not be incorporated.

(d) Invoices of the Suppliers/ Contractors as received by HSL would be certified and authorized to ONGC to make the payment. On this basis. ONGC would make the payment to the concerned Indian Suppliers/Contractors and debit the HSL account in its books. ONGC would also inform HSL as and when the payment is made XXX".

24. After various correspondence between the appellant and the first respondent, a letter of intent has been placed by the appellant on the first respondent company on 24-1-1992. A reading of letter

of intent goes to show that lot of correspondence has taken place between the parties and after several deliberations and meetings, the letter of intent has been issued. On 30-1-1992, the first respondent company has issued a telex message to the appellant company acknowledging the letter of intent dated 24-1-1992 and according their acceptance to the same subject to the following clarifications:

> "1. SUBJECT: XXXX
>
> 2. LIST OF CORRESPONDENCE: XXX
>
> 3. FOREIGN EXCHANGE RELEASE: XXX
>
> 4. MODE OF PAYMENT: In respect of mode of payment we wish to clarify that ail payments shall be made against invoices certified by HSL by Bank Cheques issued by Oil and Natural Gas Commission in favour of Essar.
>
> All such payment shall be made by the Oil and Natural Gas Commission, without effecting any additional deduction on any account whatsoever from the amount certified by HSL as due and payable to Essar by HSL.
>
> 5. SCHEDULE OF WORKS: XXXX
>
> 6. MOBILISATION NOTICE: XXX
>
> 7. PERFORMANCE GUARANTEE AND ADVANCE PAYMENT GUARANTEE: XXX
>
> 8. ADVANCE PAYMENT: XXX
>
> 9. INSURANCE:
>
> 10. OFFICIAL SCOPE OF WORK
>
> 11. SECOND PARA PAGE 4 OF LOI
>
> 12. CONTRACT:
>
> The preparation of contract is under way and will be submitted to HSL on or before 5th February, 1991 for signature by HSL."

25. In pursuance of the said letter of intent, an agreement has been entered into between the appellant and the first respondent on 3-3-1992 stipulating some terms with regard to mode of payment i.e., Exhibit E, which reads as follows:

> "All payments shall be made against invoices certified by the Company/ Oil and Natural Gas Commission/ Engineers India Limited and shall be effected through Bank Cheques issued by Oil and Natural Gas Commission in favour of the Installation contractor.
>
> All such payments shall be made by the Oil and Natural Gas Commission without effecting any deduction from the amount except for recovery of advance payment made by ONGC certified by the company as due and payable to the Installation Contractor by the company."

26. It is to be seen that while forwarding the tender documents to the first respondent company, it has been stated by the appellant in its letter dated 6-2-1990 that the appellant has been awarded contract by the ONGC and in turn it intends to appoint an Installation Contractor for carrying the activities in RAVVA and PANNA fields such as Skidding, Load out, Transportation, installation, Hookup and Pre-commissioning including Laying of Submarine Pipelines and the works are to be executed from post monsoon 1990 to pre-monsoon 1991. Further, as per the agreement dt.3-3-1992 entered into between the appellant and the respondent, it has been stated that the documents annexed with the said agreement, shall be deemed to form and be read and construed as integrated and in case of any discrepancy, conflict or dispute they shall be referred in order of priority. In that regard Exhibit E deals with method of payment which has been incorporated pursuant to the letter (sent through fax) of the first respondent company dt.30-1-1992 wherein a clarification has been sought that the method of payment should be by direct payment. The payment shall be made by the Oil and Natural Gas Commission without effecting any deduction to the first respondent. The same was marked as Exhibit E. In that agreement, Ex. B deals with the instructions to Bidders, General Conditions of Contract and the Project Instructions.

27. While forwarding the tender applications by letter dated 6-2-1990, the appellant company has made it clear that they have been awarded the contract work of design engineering etc. by ONGC, Madras and it in turn intends to appoint Installation Contractor. Clause 19 of the tender conditions deals with jurisdiction. Clause 8.2 of the Tender Conditions states that the tender document shall be accompanied by a certified true copy of the power of attorney duly executed in his favour by such other person or by all the partners stating that he has authority to bind such other person or the firm as the case may be, in all matters pertaining to the contract including the Arbitration clause. Condition No. 19 deals with jurisdiction. It states that the enforcement of terms of tender as well as all the transactions entered into by the contractors with the appellant shall be deemed to have taken place within the jurisdiction of Visakhapatnam where the works of the appellant are situated and any cause of action arising in the due performance or breach of the contract by either of the parties hereto shall be deemed to have arisen within the jurisdiction of Visakhapatnam notwithstanding the residence or place of business of the contractors. Exhibit B is the instructions and conditions of the contract and project instructions.

28. As per instructions to the Bidders, clause 1.1 deals with Introduction, wherein it has been stated that the appellant company has been awarded a turnkey Contract by ONGC for complete design, engineering, procurement, fabrication, load out, tie-down, transportation, erection/installation,

hook-up, testing, pre-commissioning, start-up and assistance during commissioning for the facilities described therein.

29. Clause 1.1-General Conditions of the Contract deals with definitions. In clause 1.1.1, 'owner' has been defined wherein it has been stated that 'owner' means Oil and Natural Gas Commission and its permitted assignees. As per clause 1.1.2, 'Company' means Hindustan Shipyard Limited and in clause 1.1.3 'Installation Contractor1 has been defined as being the party to this contract so defined in the preamble to the substantive articles of Contract. In clause 8.6.3 of the General Conditions of the Contract, it has been stated that the Owner may accept at its discretion either for flowing oil or gas or for any other use any work which has been substantially completed to the satisfaction of the Owner representative at site by issuing a part certificate of completion and acceptance before issuing a final certificate of completion and acceptance to the Company. Clause 13 pertains to Contract Price Payment/ discharge certificate etc. Contract Price has been dealt with under clause 13.1. The company shall pay to the installation Contractor for satisfactory completion of all the works covered by the scope of work under the Contract Price. Payment Procedure has been mentioned under clause 13.2.

30. Clause 16.0 of the General Conditions of Contract deals with 'Laws/ Arbitration'. Under clause 16.1, it has been stated that all questions, disputes or differences arising under, out of or in connection with this contract shall be subject to the laws of India and to the exclusive jurisdiction of the courts in India. Clause 16.2 deals with arbitration.

31. Clause 24.0 which deals with Consequential Damages reads as follows:

> "Neither the installation Contractor nor his sub-contractor shall be responsible for or liable to the Company or owner or any of their affiliates for consequential damages which shall include but not limited to loss of profits, loss of revenue, loss or escape of product (hydrocarbons) or facilities downtime, suffered by the Company or Owner or any of its affiliates, and the Company shall protect, defend, indemnify and hold harmless the Instillation Contractor and his Sub-Contractors from such claims even if such liability is based or claimed to be based upon:
>
> (i) any breach by the Installation Contractor or his sub-contractor of his obligation under the contract OR
>
> (ii) any negligent act or omission in whole or in part, of the Installation Contractor or his sub-contractor of any of his affiliates of them in connection with the performance of the works.

The Company or Owner shall in no event be responsible for or liable to the Installation Contractor or his sub- contractors for consequential damages suffered by the Installation Contractor or his sub-contractor including without limitations, business interruption or loss of profit, whether such liability is based or claimed to be used upon:

(i) any breach by the Company or Owner of its obligations under the contract, OR

(ii) any negligent act or omission on the part of the company or Owner or any of its employees, agents or appointed representatives in connection with the performance of the works.

32. It is pertinent to note that in a letter addressed by the first respondent on 31-1-1998, with regard to settlement of balance payments and other outstanding issues with regard to Ravva project, to the appellant it has been stated that the ONGC had to clear the outstanding payment to the first respondent a sum of Rs. 321.70 lakhs and in that statement it was also stated that ONGC will return LD BG to Essar a sum of Rs. 453 lakhs. At the end of the letter, the Vice President of the first respondent has expressed a hope that the Essar has taken a big step forward to close this issue and they were hopeful that HSL/ONGC Limited will also respond positively.

33. A lot of correspondence had taken place among the first respondent, the appellant and the ONGC. By letter dated 18-12-1997, the appellant company has intimated the first respondent company with regard to the settlement of outstanding issues in pursuant of the fax messages dated 28-11-1997 and 6-12-1997 that they have taken up the matter with ONGC and they have received fax message from ONGC on 15-12-1997 giving their competent authority's approval and they have also communicated a copy of the said fax message to the respondent company. The ONGC by its fax message dated 15-12-1997 informed as follows:

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 "Positive change order                 - Approved for Rs. 3,01,46,078/-
Negative change order                 - Approved for Rs. 90,00,000/-
Net payment approved                  - Rs. 2,11,46,078/-


Xxxx
Additional Mobilization claim         - Not approved
Release of payment for mobilization
   of putrabelait                     - Not approved
Additional Insurance claim            - Not approved
Contractual payment HSL               - Approved for Rs. 66 lakhs
Contractual payment to Essar          - Approved for Rs. 81 lakhs
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Ad hoc payment of Rs. 125 lakhs towards F.E. Variation claim recovery approved."

34. The first respondent in its letter dated 6-12-1997 also made that ONGC/HSL have not given any indication of their outstanding/ firm payments which are due to it and also requested the appellant to note that the outstanding payments with the interest due on the said amount itself is a substantial amount which was withheld without any justification. In that letter, the first respondent requested the appellant to convene a tripartite meeting between the Essar, ONGCL and HSL in Madras. A lot of correspondence has taken place wherein the appellant company has made it clear to the first respondent that the ONGC has to take a decision for payment of due amounts to the first respondent herein. The first respondent also addressed number of letters to the appellant and also to the ONGC for early settlement. For example, in the letter dated 10-9-1995 it was requested to process the

invoices. As the efforts of the first respondent company to get the amount as per the invoices became futile, it has invoked the arbitration clause by its letter dated 16-10-1998 to the appellant and three arbitrators have been appointed.

35. Before the Arbitral Tribunal, the stand of the appellant is that ONGC is the owner and the first respondent vide Exhibit E, which was incorporated in the terms of the contract as per its letter, has claimed the amounts directly from the ONGC and it has also filed written arguments before the Arbitral Tribunal stating that ONGC is the owner of the work and Schedule E has been incorporated at the instance of the first respondent and there is a privity of contract between the ONGC and the first respondent and its rote is restricted only for certification and that the said contract has become tripartite one among the ESSAR, HSL and ONGC and the first respondent has to pursue its remedies against the ONGC but not against the appellant herein. The appellant also brought to the notice of the arbitrators the letter dated 25-10-1991 in which the first respondent sought payment directly from the ONGC on certification by the appellant. Thus, it has to be held that the first respondent claimant itself wanted direct payment from the ONGC and the appellant also disputed the claims made by the first respondent company and they have also raised the other issues with regard to the limitation etc. The first respondent company also filed written arguments.

36. The appellant in his written arguments filed before the Arbitral Tribunal stated as follows:

> "The first issue for consideration is whether there is privity of contract between the Claimant and ONGC. The claimants rely on Ex. E of Vol. III. The contract contains a method of payment. In the agreement dated 3-3-1992 condition III says that the company covenants to pay the amounts at the time and in the manner hereinafter described. In the contract, Ex. E of page 62 of Volume III says, all payments shall be made against the invoices certified by Company/ONGC/ EIL and shall be effected through Bank cheques issued by ONGC in favour of the claimant. It therefore shows that all such payment shall be made by ONGC without effecting any deduction from the amounts certified by the company as due and payable to the installation contractor by the company."

Further, it is also submitted that:

> "Minutes dt. 28-8-1995 at page 177 of Vol. VII also clearly shows that all the minutes were tripartite and the entire correspondence shows that either letters were directly written to ONGC or copies were marked to them. The respondent refers to the Minutes dt. 22/23-3-1995 page 165 to 172 of Vol. VII wherein, it is clearly mentioned that Essar would keep the performance guarantee alive. It was even agreed that they would give bank guarantee directly to ONGC."

37. From the above written arguments filed before the arbitrator, it is very clear that both the parties have filed voluminous documents before the arbitrators for their consideration, particularly correspondence between the parties i.e., appellant, the first respondent and the ONGC.

38. The arbitrators have passed the award and two arbitrators have upheld the claim of the respondents holding that there is no privity of contract and the concurrent view of the two of the arbitrators is that Exhibit E, which deals with mode of payment, is only a medium through which HSL has to effect the payments of invoices certified even though the variation has been made with regard to the mode of payment i.e., ONGC instead of HSL and it was also held that the said variation has been made at the instance of the first respondent and even then also it does not exempt the HSL from the contractual liability in the event of non- payment by ONGC. It has also been held by the arbitrators that the ONGC issues the cheques only on certification of the appellant. The arbitral tribunal further held that there is no direct commitment from ONGC to the first respondent herein and they held that in the absence of any such commitment, they were not persuaded themselves to the contentions of the appellant herein that there is a privity of contract between the ONGC and the first respondent herein. The Arbitral Tribunal has further held that there is no privity of contract between the ONGC and EOL and the appellant company is liable to pay the amounts as may be found which remained unpaid by the ONGC. The Tribunal also held that there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them, nor any such suit lies under law.

39. However, the dissenting view of one of the arbitrators was that as there was amendment to the clause regarding 'payment procedure' in the General Conditions of contract vide Exhibit E of the agreement between HSL and EOL at the request of EOL and in view of the fact that as per Exhibit E, ONGC were to pay to the first respondent the invoiced amounts as certified by the appellant without any deduction but the facts of the case show that ONGC has raised many issues and deferred payments/ reduced payments and also not paid some invoices even though HSL certified the same and that the ONGC had been making payments by way of cheques drawn in favour of the first respondent in view of the understanding reached between the ONGC, EOL and the HSL and hence the dissenting view of the Arbitral Tribunal is that there is a privity of contract between the ONGC and the first respondent. It was also further observed that in view of the joint meetings held between the ONGC, EOL and the HSL, the agreement was a tripartite one but not bilateral agreement. The Arbitral Tribunal having gone into the counter claim made by the appellant has dismissed the same and the appellant herein filed OPs before the learned District Judge to set aside the awards passed in respect of RAVVA and PANNA projects but the learned District Judge dismissed the OPs, however the counter claim made by the first respondent has been remanded back to the Arbitral Tribunal.

40. As stated supra, arguments have been advanced by both the counsel in extenso. It has to be seen on the background of filing of voluminous records produced by both the parties before the Arbitral Tribunal and also before this Court whether the Arbitrators have got the duty to follow the procedure as laid down under Section 19(4) of the Act, which reads as follows:

> "The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence"

41. The undisputed fact remains that the ONGC had convened number of meetings with both the appellant and the first respondent and also lot of correspondence has taken place between the

parties. It is also an undisputed fact that Exhibit E has been brought into existence at the instance of the first respondent, which has been incorporated in the agreement. The Exhibit E deals with regard to the mode of payment by ONGC to the first respondent and the said Exhibit E was incorporated by the first respondent company itself. As per the said Exhibit E, the ONGC has to pay the amount by way of Bank cheques directly to the first respondent on certification made by the appellant.

42. The main contention urged by the learned Senior Counsel appearing for the appellant is that the Arbitral Tribunal was constituted on the basis of the terms of the contract and the approach of the lower court confirming the award of the Arbitral Tribunal is vitiated in view of the fact that voluminous documents filed by the parties have not been taken into consideration which go to show that it is tripartite agreement between the ONGC, HSL and the ESSAR and those documents have not been taken into consideration while deciding the issue. He placed reliance on the judgments of the Supreme Court in the case of Oil and Natural Gas Corporation Limited v. Saw Pipes Ltd. . and in the case of Rickmers Verwaltung Gambh (1st supra). The learned Senior Counsel also submits that as per sub-section(4) of Section 19 of the Act, the District Court is functioning like any other Court and the court has to follow the principles of CPC and if the said principle is not followed, the award or the judgment will have no effect. In support of his contention he placed reliance in the case of Union of India v. Jain and Associates .

43. It is also contended that a duty is cast on the arbitrators to follow the rules of evidence and it has to look into the material filed before it but the Arbitral Tribunal as well as the learned District Judge have ignored the same and it is also a ground for setting aside the award. The tribunal also ignored the letters addressed by the ONGC for settling the claims which would amount to acknowledgment of the liability.

44. The Apex Court in the case of Rickmers Verwaltung Gmbh (1 st supra) held as follows;

> "An agreement, even if not signed by the parties, can be spelt out from correspondence exchanged between the parties. It is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."

45. In this case, as observed above Exhibit E has been brought into the terms of contract with the knowledge of ONGC by the first respondent wherein the first respondent as well as ONGC has agreed that on certification by the HSL, the ONGC has to pay the amount directly to the first respondent by Bank Cheque. It is not the case of the first respondent that the appellant refused to certify the invoices but the case of the first respondent is that the ONGC did not pay the amounts even after certification. In view of the above observations of the Apex Court, it has to be held that, in view of introduction of Exhibit E into the terms of the contract, the agreement in question is not bilateral one but it is tripartite agreement. However, it has to be observed that though both the parties have submitted voluminous documents including the correspondence that exchanged between the appellant, the first respondent and the ONGC, the same has not been taken into consideration. As noted above, Exhibit E was incorporated in the conditions of the agreement with regard to the mode of payment by the ONGC to the first respondent by the first respondent itself. It shows that there is privity of contract between the ONGC and the first respondent. It is also to be noticed that as per the said Exhibit E, the amount has to be paid by the ONGC to the first respondent on the certification of the appellant, it means that the ONGC has to pay the amount to the first respondent as and when the appellant has given certification and the ONGC has no option except to pay the amount which was certified by the appellant to the first respondent. As noted above, what has happened is that even after certification of the appellant, the ONGC did not release the amount to the first respondent and also withheld some amounts and also deferred to pay some claims. Thus, the ONGC did not act in terms of the agreement and the ONGC has adopted its own assessment to release the amount to the first respondent. This shows that the agreement is a tripartite one but not bilateral, one.

46. It is also to be kept in mind that the ONGC is a public sector undertaking and it cannot act as per its whims and fancies and it cannot directly pay the amount to anyone unless there is an agreement to that effect. In this case, the ONGC has paid some amounts to the first respondent on the certification of the appellant. This shows that the ONGC is a party to the terms of the contract which was entered between the appellant and the first respondent and for any dispute, the ONGC has to be made as a party in view of its conduct. Thus, it has to be held that non-impleadment of the ONGC as a party to the arbitration is bad and it amounts that the arbitration proceedings has been concluded without making the ONGC as a party which is also a necessary party. It is well settled law that if any award is passed without joining a necessary party, the proceedings have no force at all.

47. The learned Senior Counsel has argued that as per Section 41 of the Indian Contract Act, when a promisee accepts performance of the promise from a third person, no contract could be enforced against the promissor. In this connection, it is relevant to extract Section 41 of the Indian Contract Act, which reads as follows:

> "SECTION 41. EFFECT OF ACCEPTING PERFORMANCE FROM THIRD PERSON:
>
> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promissor".

48. In this case, the first respondent has initiated for amendment of the conditions of the contract by introducing Exhibit E wherein the first respondent sought payments directly from the ONGC and it has also accepted the amounts paid by the ONGC also and hence the first respondent cannot proceed against the appellant alone. But, the ONGC is not made as a party to the proceedings before the Arbitral Tribunal.

49. In the case of Kapurchand v. Himayatalikhan, . the Apex Court while interpreting Sections 41 and 63, illus. (c) of the Contract Act held as follows:

> "The defendant, the Prince of Berar, had executed in 1937, a promissory note in favour of the plaintiff for a sum of 13 lakhs and odd rupees due on account of purchase of jewellery from the plaintiff. After the Military occupation of Hyderabad, the Prince Debts Settlement Committee set up by the Military Governor decided that the plaintiff should be paid a sum of Rs. 20 lakhs in full satisfaction of his claim of Rs. 27 lakhs, under the note. The Government also made it clear that unless full satisfaction wads recorded payment would not be made. The plaintiff after some initial protests agreed to accept the sum of Rs. 20 lakhs in full satisfaction of his claim and duly discharged the promissory note by endorsement of full satisfaction and received the payment. He then brought a suit against the defendant for recovery of the balance of Rs. 7 lakhs.
>
> (8). The legal position is clear enough. Section 63 of the Indian Contract Act reads:
>
> "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

Illustration (c) to the section says:

> "A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim."

It seems to us that this case is completely covered by Section 63 and illustration (c) thereof. The appellants having accepted payment in full satisfaction of their claim are not now entitled to sue the respondent for the balance. A reference may also be made in this connection to Section 41 of the Contract Act under which when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promissory. There is some English authority to the effect that discharge of a contract by a third person is effectual only if authorized or ratified by the debtor. In India, however, the words of Section 41 of the Contract Act leave no room for do>>>>>t, and when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor, namely, the respondent."

50. In this case, as held above, the first respondent has accepted the amounts from the ONGC directly and moreover the first respondent sought direct payment from the ONGC and to that effect

a condition as per Exhibit E has been incorporated in the conditions of contract and hence the first respondent cannot claim any amount from the appellant without making the ONGC as a party to the arbitral proceedings. Thus, non- making the ONGC as a party to the arbitral award and ignoring the said fact by the Arbitral Tribunal, in our opinion, would amount to violation of the provisions of the Contract Act and therefore it has to be held that the Arbitral Tribunal passed its award without taking note of the provisions of the Contract Act and thus violated the provisions of substantive law of India i.e., Indian Contract Act and the Indian Evidence Act and therefore on that ground also, the award has to be set aside.

51. Further, the Arbitral Tribunal and the learned District Judge did not properly consider the documents filed by both the parties. Section 19 of the Act which deals with determination of rules of procedure, which is extracted below for ready reference:

> "19. DETERMINATION OF RULES OF PROCEDURE:
>
> (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).
>
> (2) Subject to this part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
>
> (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.
>
> (4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

Section 19 of the Act deals with determination of procedure. A reading of the conditions of the contract, do not show that the parties have arrived at a procedure. However, sub-section (4) of Section 19 of the Act says that the Arbitral Tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. The undisputed fact remains that both the parties have filed voluminous documentary evidence before the arbitrator but as observed above, the documents, which show that the first respondent made correspondence directly with the ONGC and the ONGC was responding to the demands/ requests of the first respondent have been ignored by the Arbitral Tribunal and the learned District Judge in the OPs. In the case of Sathyanarayana Bros. (P) Limited v. T.N, Water Supply and Drainage Board (2004) 5 SCC 319. wherein it was emphasized that the arbitrator while making his award cannot ignore very material and relevant documents relevant to determine the controversy so as to render a just and fair decision. As observed above, both the Arbitral Tribunal and the learned District Judge did not consider all the documents which amply indicate that the agreement in question is a tripartite one but not bilateral one and non-consideration of entire documents would amount to violation of principles of natural justice and also violation of the provisions the Evidence Act and thereby it would amount to violative of Public Policy of India.

52. In the case of State Bank of India v. Ram Das and Ors., (D.B.). it has been held, if the arbitrator failed to appreciate the entire material on record, as follows:

> "38. Failure to indicate evidence on which the arbitrator has reached the conclusion would amount to an error apparent on the face of the award. It is true sufficiency of evidence upon which conclusions are based may not be a factor to be taken into consideration by the Court in the arbitration proceedings; but, the sufficiency of reasons is a factor to be taken into consideration in deciding as to whether the arbitrator has made any error of law in reaching this finding of fact.
>
> 39. It is true that the arbitrator-Umpire is not expected to recite at great length communications exchanged or submissions made by the parties. But the arbitrator/Umpire is duty bound to explain what is findings are and how the conclusions are reached."

53. The Calcutta High Court in the case of Chandrabhan v. Ganpatrai and Sons AIR 1944 Calcutta 127. it has been held that the Arbitral Tribunals must follow the procedure agreed by parties and if no such procedure has been adopted by the parties, it must follow its statutory procedure, if any, right or wrong, so all decisions as to the course to be adopted in general by a contractual tribunal must be read as subject to that course.

54. Further, the High Court of Bombay in the case of Aboobaker v. Congress Reception Committee AIR 1937 Bombay 410. has held that if material piece of evidence is tendered and rejected, it may amount to misconduct entitling party to set aside the award. In that context, it has been held as follows:

> "Legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any mortal turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which cause miscarriage of justice. Misconduct is a question of fact in each case and has to be ascribed from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings, and the onus of proof lies on the party who alleges it. The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged by the party have been strictly proved. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to set aside the award. And a party is not precluded from impeaching the award on the ground of misconduct even if the arbitrator has been suggested by such party."

In this case, as held above, the following letters dated 28-9-1992, 4-9-1992, 8-7-1993, 29-3-1994, 8-11 -1994 and 3-12-1994 were exchanged between the first respondent and the ONGC by-passing the appellant and therefore it would go to show that the first respondent wanted to have direct links with ONGC and the said fact has been ignored by the Arbitral Tribunal and on the contrary it has

held that there was no privity of contract between the ONGC and the first respondent, which goes to show that material piece of evidence though tendered has been rejected by the Arbitral Tribunal as well as the learned District Judge.

55. The High Court of Calcutta in the case of Bengal Jute Mill Co. v. Lalchand . has held that though the Arbitral Tribunal is not bound by technical and strict rules of evidence, the arbitrary tribunal must not disregard the public policy. It has been held as follows:

> "An arbitration proceedings is not governed by the Evidence Act. In an arbitration proceedings, however, the principles embodies in Sections 91 and 92 of the Evidence Act lay down the principles of natural justice, and the court in such a case of violation should come to the aid of the aggrieved party. In case the reference proceeds, and the Arbitrator gives effect to the principles embodied in Sections 91 and 92 and the decision is in favour of the party and then the point is agitated in court, then the court is bound to give effect to the principles of Sections 91 and 92 of the Evidence Act. Hence, in either view the court should not encourage the party in these circumstances by staying the suit"

56. In the case of Bharat Coking Coal Limited v. M/s. Annapurna Construction 2003 (7) SCALE 20. it has been held that passing Award ignoring the material document would amount to misconduct in law. In the case of Sikkim Subba Associates v. State of Sikkim . it was held ignoring very material and relevant documents throwing light on the controversy to have a just and fair conclusion would vitiate the Award as it amounts to misconduct on the part of the Arbitrator. By following the above two decisions (10th and 11th supra), the Apex Court in the case of Sathyanarayana Brothers (P) Ltd. v. Tamil Nadu W.S. and D. Board 2004(1)Arb. L.R. 1 (SC). has re-iterated the above view that an Award, ignoring very material and relevant documents throwing light on the controversy to have a just and fair decision would vitiate the Award as it amounts to misconduct on the part of the Arbitrator.

57. In this case, no specific procedure has been fixed by the parties. When such procedure is not fixed, the Arbitral Tribunal has to follow the statutory procedure, it means it has to weigh the entire evidence on record properly and that it has to come to just conclusion within the parameters of the dispute. As observed above, the Tribunal has exceeded its jurisdiction by giving a finding that the first respondent cannot sue against the ONGC and such finding in our view is beyond the scope or purview of the reference to the Arbitral Tribunal and hence the award is liable to be set aside. In this case, it has to be held that there is no waiver of the procedure by the parties. A plain reading of the agreement goes to show that there is no waiver of the procedure by the parties and in the absence of such agreement with regard to the procedure, the arbitrary tribunal is bound to follow the procedure as contained under Section 19(4) of the Act and they have the duty to determine the admissibility and weight of evidence of the documents filed by both the parties. But, however, they have not considered the material documents filed before them which is evident from a reading of the Award itself as nothing is mentioned about the contents or relevance of the documents even though number of documents have been filed before them.

58. As observed above, Exhibit E has been incorporated at the request of the first respondent which deals with the mode of procedure for payment of the amount, wherein the first respondent company sought for direct payment from the ONGC on the certification of the appellant and more over the first respondent has entered into direct correspondence with the ONGC and tripartite meetings were held between ONGC, HSL and ESSAR on 2-5-1995 and 28-8-1995 and the minutes of those meetings clearly demonstrate the direct relationship between ONGC and the ESSAR. Further, the first respondent on 3-4-1995 faxed a letter to the ONGC stating that certified invoice worth Rs. 3.02 crores was pending with ONGC and requested the ONGC to release the amount of Rs. 1.70 crores from that after adjusting pending advance approximately to Rs. 1.32 crores. In that letter, it was stated that certified invoices amounting to Rs. 1.49 crores are under process with HSL and expected to reach ONGC during that week and requested the ONGC to release the total amount of Rs. 3.19 crores. This shows that the first respondent is in touch with the ONGC and it also by-passed the appellant, which goes to show that the first respondent acted with the ONGC as if it got the contract from the ONGC only but not from the appellant and hence the first respondent has to claim any amount due to it from the ONGC only but not against the appellant, particularly in view of the provision under Section 41 of the Indian Contract Act.

59. The learned counsel for the first respondent submits that clause 13.2.1 of the conditions of the agreement, which deals with the mode of payment, has become part of the contract and as per the said conditions, the HSL alone is responsible for the payment and as per the order of priority, the conditions incorporated would prevail over Exhibit E and hence the HSL alone is responsible for payment and the learned Arbitral Tribunal rightly held that the appellant alone is responsible and therefore the Award needs no interference.

60. In this case, the undisputed fact remains that the ESSAR sought direct payment from the ONGC which has been incorporated as Exhibit E with regard to mode of payment, which reads as follows:

> "All payments shall be made against invoices certified by the Company/Oil and Natural Gas Commission/ Engineers India Limited and shall be effected through Bank Cheques issued by Oil and Natural Gas Commission in favour of the Installation contractor.
>
> All such payment shall be made by the Oil and Natural Gas Commission without effecting any deduction from the amount except for recovery of advance payment made by ONGC certified by the company as due and payable to the Installation Contractor by the company."

61. from the above, it is clear that as per Exhibit E, which has been incorporated at the request of the first respondent, it sought direct payment from the ONGC by way of bank cheques. It has also to be seen that as the letter of intent itself has been issued after incorporating Exhibit E and the ONGC has paid some amounts directly to the first respondent, it goes without saying that after incorporation of Exhibit E in the terms of the contract, the original conditions and instructions to the bidders even though they are formed as part of the contract, the same will not become virtuous and the mode of payment would be as per Exhibit E alone. As per Exhibit E, an agreed condition

with regard to mode of payment between the appellant and the first respondent is that the first respondent is entitled to have direct payment from ONGC for which the ONGC never opposed. It is also to be seen that some payments have been made directly to the first respondent by the ONGC, which goes to show that there is a privity of contract between the ONGC and the first respondent and therefore the contention of the first respondent's counsel that the conditions in clause 13.2.1 will prevail over Exhibit E cannot be accepted.

62. As observed above, the contract in question is a tripartite one and there is privity of contract between the ONGC, HSL and ESSOR. But, it has to be noticed that the Arbitral Tribunal has observed that no privity of contract between the ONGC and the first respondent was established and HSL is contractually liable to pay the outstanding amounts as may be found due to EOL, which remain unpaid by ONGC. The Arbitrary Tribunal also hold that there was no ground en the basis of which EOL could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law.

63. Now, it has to be examined whether the said finding of the Arbitral Tribunal, which was confirmed by the learned District Judge is in conformity with the settled principles of law and whether it is within the purview of the Arbitral Tribunal and whether such a finding can be interfered with under Section 34 of the Act. Clause (iv) of sub-section (2) (a) and (2) (b) of the Section 34 of the Act is relevant to the issue involved in these CMAs, which is extracted below for ready reference:

> "34. APPLICATION FOR SETTING ASIDE ARBITRAL AWARD:
>
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if,-
>
> (a) the party making the application furnishes proof that-
>
> (i) to (iii) xxxx
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or Xxxx
>
> (b) the Court finds that,-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

64. Thus, it has to be seen whether the findings of the Arbitral Tribunal are within the domain of reference or it has gone beyond the scope of reference. In this connection, it is necessary to note the dispute put before the Arbitrators in respect of Ravva project as follows:

"4. The dispute put before the arbitrators was in respect of (A) EOL's following claims, as per their Statement of Claim and annexures thereto:

(i) Claim No. 1 for a sum of Rs. 2,14,29,046.00 being the amount short-paid/unpaid in respect of firm scope of work-Annexure 1 -A.

(ii) Claim. No. 2 for a sum of Rs. 4,55,41,693.00 being the original amount of unpaid invoices for extra work, but this sum was subsequently revised to stand at Rs. 3,02,00,000 00 vide Annexure '2-A' of the Claim Statement.

(iii) Claim No. 3 for a sum of Rs. 2,72,30,698.00 being the balance amount due towards foreign exchange variation - vide Annexure-3-A.

(iv) Claim No. 4 . for a sum of Rs. 7,09,00,000.00 being the amount of unpaid invoice for extra mobilization/de-mobilization.

(v) Claim No. 5 for Rs. 54,63,590/- in respect of Bank Guarantee Commission and Rs. 70,71,636.00 for loss of interest on Marring Money - vide Annexures - '5-A and '5-B'.

(vi) Claim No. 6 for Rs. 10,39,14,192.77 for Interest (including the component of Interest on Interest) on delayed payments an don unpaid amounts for the period up to 31-12-1998 - vide the 'Interest' columns in Annexures 1-A, 2-A, 3-A, 4-A, 5-A and 5-B and which were consolidated in Annexure '6-A' to the Claim Statement. In addition, Interest pendente lite, i.e., till date of the Award was also claimed.

(vii) Costs of the Arbitration proceedings were also claimed.

(B) HSL's counter-claim for Rs. 5,04,60,635/- towards liquidated damages together with interest @ 18% per annum thereon, as mentioned in their counter-statement."

65. But, the findings of the Arbitral Tribunal in respect of the above dispute are as follows:

"Now, based on our reasoning and analysis of facts as set out above, we hold:

(1) That no privity of contract between ONGC and EOL is established.

(2) That HSL is contractually liable to pay the outstanding amounts as may be found due to EOL, and which remain unpaid by ONGC.

(3) That there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them, nor can such a suit lie under law."

It is to be noted that in respect of PANNA field also (CMA No. 624 of 2003), the above findings have been assigned by the majority of the Arbitrators.

66. The findings of the Arbitral tribunal that there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them, nor can such a suit lie under law has to be examined with reference to the subject matter of the dispute in the absence of any such contention with regard to suing ONGC and whether such finding is beyond the scope of reference or not.

67. In the case of Oil and Natural Gas Corporation Limited v. Saw Pipes Limited (2nd supra), the Apex Court held as follows:

"Reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisos of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would meant hat it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

xxxx The phrase 'Public Policy of India' in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/decision is likely to adversely affect the administration of justice."

68. It is well settled law that the Arbitrator has no jurisdiction to go beyond the terms of reference, which is limited to the agreement as he could decide the disputes only arising out of or in connection with the agreement and could not adjudicate upon and decide the matter which falls outside the agreement.

69. Further, in the case of Steel Authority of India Limited v. J.C. Budharaja, . the Apex Court observed that the Arbitrator derives his authority from the contract and if he acts in manifest disregard of the contract, the Award given by him would be an arbitrary one.

70. The above view has been expressed by the Delhi High Court in the case of National Building Construction Corporation Limited v. Decor India Private Limited 2004 (2) Arb. L.R. 1 (Delhi). in the following words:

> "I have perused the said Award passed by the learned Arbitrator granting interest. The reamed Arbitrator has stated that he had ascertained that the prime lending rates of SBI is 12% p.a. and basing on that enquiry made by him and information received consequent thereto, he had ordered for payment of interest at the rate of 18% compound interest with monthly rests. Apparently, the learned Arbitrator made enquires from a third source behind the back of the parties and relied upon certain material, which is not disclosed to the parties. On that short ground itself, the said Award is vitiated."

71. As noted above, in the reference put forth before the Arbitral Tribunal, it was not the issue before the Arbitral Tribunal as to whether a suit would lie under law against the ONGC and whether the first respondent could validly sue ONGC. But, the Arbitral Tribunal has held that there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them nor can such a suit lie under law and this Court is of the view that such observation goes beyond the scope of reference.

72. The Apex Court in the case of Rajasthan State Mines and Minerals Ltd. v. Eastern Engg. Enterprises . has held that in order to determine whether the arbitrator acted in excess of his jurisdiction it would be necessary to consider the agreement between the parties containing , the arbitration clause and it was further held as follows:

> "44. (f) To find out whether the arbitrator has traveled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.
>
> (g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator, if there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction."

73. The Supreme Court in the case of Bharat Coking Coal Ltd. v. Annapurna Construction . it has been held that jurisdiction of the Arbitral Tribunal is confined to the four corners of the contract and he cannot ignore the provisions of the Contract, otherwise, he would be acting without jurisdiction.

74. It is a well settled law that if the award is in excess of jurisdiction of arbitrator, then it is liable to be set aside but if the award is within jurisdiction on the basis of construction of the contract which the arbitrator was required to do, then Court cannot set it aside merely because another view was

possible.

The above view was endorsed by the Supreme Court in the case of Himachal Pradesh S.E.B. v. RJ. Shah and Co., . which reads as follows:

> "The case where there is want of jurisdiction has to be distinguished from the case where there is error in exercise of jurisdiction. The award is liable to be set aside if there is error of jurisdiction but not if the error is committed in exercise of jurisdiction. When the arbitrator is required to construe a contract the merely because another view may be possible the court would not be justified in constructing the contract in a different manner and to set aside the award be observing that the arbitrator has exceeded the jurisdiction in making the award, xxxx xxxx In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim on the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction, the court may have to look into some documents including the contracts as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings."

In the case of M/s. Sikkim Subba Associates v. State of Sikkim, . it was held as follows:

> "An arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider it to be fair and reasonable. Arbitrator is not entitled to ignore the law or misapply it and cannot also act arbitrarily, irrationally, capriciously or independent of the contract. If there are two equally possible or plausible views or interpretations, it is legitimate for the Arbitrator to accept one or the other of the available interpretations. It would be difficult for the Courts to either exhaustively define the word 'misconduct' or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of Law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of Arbitration to interfere, when on the face of the Award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational there no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record on the governing position of law."

The Supreme Court in the case of Harish Chandra Bajpai v. Triloki Singh, . 20. held as follows;

> "Section 34 read conjointly with other provisions of the Act indicates that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it could not be set aside by the court. Holding otherwise would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, is would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be sot aside under Section 34.
>
> Such interpretation of Section 34(2){a){v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. The principle is - there cannot be any wrong without a remedy."

In the case of Dhannalai v. Kalawatibai, the Supreme Court has held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with under Section 34. However, such failure of procedure should be patent affecting the rights of the parties."

75. Further, in the cases of Bengal Jute Mills v. Juraj AIR 1943 Cal. 13. and Mohinder v. Raminder AIR 1944 P.C. 83. it has been held that an arbitrator, derives his power from reference which tarnishes the source and prescribes the limit of his authority and he is bound to make an award in conformity with it both, in substance and in form and the award would become bad if the arbitrators go beyond the scope of reference and decide disputes not submitted to them.

76. As noted above, as per sub-section (2)(a)(iv) of Section 34 of the Act, an Arbitral award may be set aside by the Court only if the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Since this Court has held that the observation made by the arbitral Tribunal that there was no ground on the basis of which the first respondent could validly sue ONGC for the unpaid amounts due to them nor such a suit could lie under law is beyond the scope of the reference in view of Section 34(2){a)(iv) of the Act, the finding of the Arbitral Tribunal, which was confirmed by the learned District Judge, to that extent is set aside.

77. Further, it is to be seen that on behalf of the appellant it has been categorically urged by the appellant that there is a privity of contract between the parties i.e., ONGC, HSL and EOL and on the contrary and on behalf of the first respondent, it has been urged that there is no privity of contract between it and the ONGC. Even assuming that there is no privity of contract between ONGC and EOL, a duty is cast upon the arbitrators to come to a just and fair conclusion and it is not within the parameters of the arbitrators to come to the conclusion that a suit will not lie against the ONGC.

78. The finding that the Arbitral Tribunal, which was confirmed by the District Court, that there was no ground on the basis of which EOL could validly sue ONGC for the unpaid amounts due to them, nor can such a suit lie under law is contrary to the substantial provisions of law and against the

terms of the contract and the scope of reference and hence such finding has to be held as patently illegal and hence it has to be interfered with under Section 34 of the Act.

79. In view of the findings arrived at it has to be held that the Arbitrary Tribunal acted beyond the scope of its jurisdiction and this Court feels that there is no need to go into the merits of the claims. Further, the record which has been produced before the Arbitrators goes to show that the ONGC has acted as per Exhibit E by making certain payments to the first respondent company. Further, that part of the evidence has not been looked into by the Arbitrator to arrive at a just and fair conclusion as to the existence of privity of contract between the parties as a result of which it has to be held that the Arbitral Tribunal has violated the provisions of substantive law of India i.e., Indian Contract Act and the Indian Evidence Act. Further, it shows that the ONGC by acting upon Exhibit E paid some amounts directly to the first respondent, and hence it cannot be said by the first respondent that there is no privity of contract between them and the ONGC.

80. The learned counsel for the first respondent relies on the following decisions in support of his contentions:

(i) U.P. Hotels v. U.P. State Electricity Board .

(ii) Coats Viyella India Limited v. India Cement Limited (2000) 9 SCC 376.

(iii) H.P. State Electricity Board v. R.J. Shah and Company .

(iv) Pure Helium India (P) Limited v. Oil and Natural Gas Commission (2003) 8 SCO 593.

(v) State of U.P. v. Allied Constructions .

(vi) P. V. Subba Naidu v. Government of A.P. .

(vii) Babu Ram v. Dhan Singh. .

(viii) Tamil Nadu Electricity Board v. M/s. Bridge Tunnel Construction .

But, as we have come to the conclusion that the Arbitral Tribunal has gone beyond the scope of reference and that the Award in question is passed without taking into consideration of the material available on record and as the same is contrary to the substantive law of India and that there is privity of contract between the ONGC, the appellant and the first respondent, we do not want to go into those decisions as they are not relevant to the facts of the present case.

81. As observed above, in view of the correspondence that has been made by the first respondent directly to the ONGC i.e., Fax dated 9-7-1996, 29-3-1994, 24-1-1995, 14-2-1995, 3-4-1995, 8-9-1995, 18-9-1995, 28-9-1992, 2-11-1995, 20-11-1995, 15-12-1995, 20-12-1995 and of the direct correspondence from ONGC to the first respondent i.e., Fax dated 8-11-1994, 14-12-1995 etc. (the

above correspondence has been placed before this Court in Volume III of the material papers in C.M.A. No. 255 of 2002); and the minutes of the meetings dated 7/8-2-1992, 20-2-1992, 26-2-1992, 4-9-1992, 8-7-1993, 22/23-3-1995, 2/3-5-1993, 28-8-1995 and 23-4-1996, which were filed as material papers in Volume III in C.M.A. No. 255 of 2002; and also considering the fact that the ONGC has made payments directly to the first respondent and in view of the fact that the first respondent has sought amendment of the conditions of the terms of contract with regard to mode of direct payment from the ONGC and considering the fact that the role of the appellant is confined only to the extent of certification of the invoices and also considering the fact that the ONGC has withheld the payments to the first respondent even after certifieation made by the appellant, it has to be held that the agreement in question is a tripartite one i.e., privity of contract exists between the appellant company, ONGC and the first respondent company and not a bilateral one and hence this Court is of the view that the ONGC is a proper and necessary party to the dispute before the Arbitral Tribunal and as the ONGC is not made as a party by the first respondent before the Arbitral Tribunal, and as the award is passed without making a proper and necessary party as party to the dispute, the same has to be set aside as the award is violative of provisions of the substantive law of India i.e. the Indian Contract Act. The learned District Judge also failed to appreciate the said fact and hence the Arbitral Awards as well as the judgments in O.Ps. with regard to the claims made by the first respondent have to be set aside and accordingly set aside. With regard to the counter claim made by the appellant, the learned District Judge remanded the same to the Arbitral Tribunal for fresh disposal and the same is not subject matter before this Court in these C.M. As and hence no opinion is expressed on that aspect.

82. In the result, the C.M. As are allowed. No costs.