Airport Authority Of India vs M/S Lok Shail Enterprises on 17 October, 2023

IN THE COURT OF MR. SATYABRATA PANDA, ADJ-04,
PATIALA HOUSE COURTS, NEW DELHI

Arbtn no.326 of 2018

Date of institution:2
Date of arguments:18.
Date of judgment:17.

Airports Authority of India
Regional Headquarters Northern Region
Operational Office Rangpuri
New Delhi-110037 .....Peti

VERSUS

1. M/s Lok Shail Enterprises,
H-15/B, Chitranjan Marg,
C-Scheme, Jaipur-302001

2. Shri G. C. Khattar, Sole Arbitrator
Flat No.1025, Apna Villa Aptts., Plot No. 23,
Sector 10, Dwarka, New Delhi-110075. .....Respo

JUDGMENT

1. The petitioner has filed the present petition under section 34 of Arbitration and Conciliation Act (hereinafter referred to as the 'A&C Act') against the award dated 16.11.2017 passed by the ld. sole arbitrator.

2. The petitioner herein had awarded to the respondent no.1 (hereinafter referred to as the 'respondent'), under letter of acceptance dated 10.01.2011, the works of providing and laying flooring with tiles and granites stones in the terminal building at Amritsar Airport for tender amount of Rs. 39,27,739.48. The date of commencement of the works was 20.01.2011 and the stipulated date of completion was 05.03.2011 but the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.1 actual date of completion was 15.06.2011. The final bill was prepared by the petitioner on 19.12.2011 for Rs. 38,76,727.71. The respondent raised certain disputes in relation to the payments and the matter was referred to arbitration under clause 25 of the contract and the sole arbitrator was appointed by the petitioner under the arbitration clause for adjudicating the disputes. The respondent had raised claims under 18 heads before the Ld. Arbitrator. By way of the impugned arbitral award, the learned arbitrator has allowed Claims Nos. 1 to 4 and 10 to 17 raised by the respondent and the rest of the claims were rejected. The petitioner

has filed the present petition challenging the award of the claims to the respondent.

3. I have considered the submissions of the learned counsels for the parties and I have perused the record including the written submissions filed by the parties.

4. At the outset, it would be appropriate to observe that the basic principle of adjudication u/s. 34 of the A&C Act is that the challenge to an arbitral award is not to be adjudicated as if it were an appeal. The grounds of challenge u/s. 34 of the A&C Act are narrow and limited to grounds such as perversity, patent illegality, failure of principles of natural justice, errors of jurisdiction, or if the award is contrary to the fundamental policy of India, and such other grounds available under section 34. It is also clarified in section 34 of the Act that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. It is also clarified in section 34 that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. The arbitrator is the master of the facts and evidence as well as interpretation of the contract and the Court cannot in exercise of jurisdiction u/s. 34 of the Act, reappreciate the evidence or substitute the interpretation given to the contract by the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.2 arbitrator. The application of the law is also within the jurisdiction of the arbitrator and even an erroneous application of the law by the arbitrator would not be ground for interference with the award u/s. 34 of the Act.

5. It would also be appropriate to refer at the outset to the judgment of the Hon'ble High Court of Delhi (Division Bench) in Delhi Development Authority v. Bhardwaj Brothers, 2014 SCC OnLine Del 1581, in which the scope and ambit of jurisdiction of the Court u/s. 34 A&C Act has been delineated. In this judgment, the Hon'ble High Court has also referred to its earlier judgments in State Trading Corporation of India Ltd. v. Toepfer International Asia Pte Ltd. MANU/DE/1480/2014, and in Delhi State Industrial & Infrastructure Development Corporation Ltd. v. Rama Construction Company MANU/DE/1518/2014. The relevant portion of the judgment in DDA v. Bhardwaj Brothers (supra) is extracted hereunder:

> "8. We have enquired from the counsel for the appellant whether not the said challenge is a challenge on the merits of the arbitral award. We have yet further put to the counsel for the appellant that as to how, misinterpretation of a contractual provision or misinterpretation of a contract by the Arbitral Tribunal constitutes a ground of challenge under Section 34 of the Arbitration Act.
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> 9. We have in State Trading Corporation of India Ltd. supra held :-
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> "5. The challenge in this appeal is on the ground that the learned Single Judge ignored that the interpretation of the contract between the parties given by the Arbitral Tribunal is contrary to the express terms and conditions thereof and the Arbitral Tribunal has given a meaning to the terms and conditions which is not contemplated in the contract. The senior counsel for the appellant thus wants us to read the contract between the parties, particularly the clauses relating to demurrage,

and then to judge whether the interpretation thereof by the Arbitral Tribunal is correct or not.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.3

6. In our view, the interpretation in Saw Pipes Ltd. supra (ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705) of the ground in Section 34 of the Act for setting aside of the arbitral award, for the reason of the same being in conflict with the public policy of India, would not permit setting aside, in the aforesaid facts. A Section 34 proceeding, which in essence is the remedy of annulment, cannot be used by one party to convert the same into a remedy of appeal. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act.

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an arbitral award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand, the decision under review may either be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.4 in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate

process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. *** *** ***

11. Arbitration under the 1940 Act could not achieve the savings in time and money for which it was enacted and had merely become a first step in lengthy litigation. Reference in this regard can be made to para 35 of Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.5 without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground, of the award being in conflict with Public Policy of India, was also incorporated. However the juxtaposition of Section 34(2)(b)

(ii) shows that the reference to 'Public Policy' is also in relation to fraud or corruption in the making of the award.

The new Act was being understood so [see Konkan Railway Corporation Ltd. v. Mehul Construction Co. (2000) 7 SCC 201 (para 4 and which has not been set aside in S.B.P. & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618)] till the Supreme Court in Saw Pipes Ltd. (supra) held that the phrase 'Public Policy of India' is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so

unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.6 to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consonance with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international commercial arbitration of the United Nations Commission on International Trade Law (UNICTRAL). It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

15. Applying the aforesaid test, we are afraid, the arguments of the senior counsel for the appellant are beyond the scope of Section 34.

16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe v. Steel Authority of India MANU/DE/1853/2011 and Shree Vinayak Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.7 Cement Clearing Agency v. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments.

17. The Supreme Court in Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran (2012) 5 SCC 306 refused to set aside an arbitral award, under the 1996 Act on the ground that the view taken by the Arbitral Tribunal was against the terms of the contract and held that it could not be said that the Arbitral Tribunal had travelled outside its jurisdiction and the Court could not substitute its view in place of the interpretation accepted by the Arbitral Tribunal. It was reiterated that the Arbitral Tribunal is legitimately entitled to take the view which it holds to be correct one after considering

the material before it and after interpreting the provisions of the Agreement and if the Arbitral Tribunal does so, its decision has to be accepted as final and binding. Reliance in this regard was placed on Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (2010) 11 SCC 296 and on Kwality MFG. Corporation v. Central Warehousing Corporation (2009) 5 SCC 142. Similarly, in P.R. Shah, Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594 it was held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence and an award can be challenged only under the grounds mentioned in Section 34(2) and in the absence of any such ground it is not possible to reexamine the facts to find out whether a different decision can be arrived at. A Division Bench of this Court also recently in National Highways Authority of India v. Lanco Infratech Ltd. MANU/DE/0609/2014 held that an interpretation placed on the contract is a matter within the jurisdiction of the Arbitral Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.8 Tribunal and even if an error exists, this is an error of fact within jurisdiction, which cannot be reappreciated by the Court under Section 34 of the Act. The Supreme Court in Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relatable to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more res integra that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion.

18. If we were to start analyzing the contract between the parties and interpreting the terms and conditions thereof and which will necessarily have to be in the light of the contemporaneous conduct of the parties, it will be nothing else than sitting in appeal over the arbitral award and which is not permissible."

Before proceeding further, mention may also be made of New Delhi Apartment Group Housing Society v. Jyoti Swaroop Mittal MANU/DE/9107/2007 which remained to be noticed and where a Division Bench of this Court held that Saw Pipes Ltd. supra cannot be read as permitting a Court exercising powers under Section 34 to sit in appeal over the findings of fact recorded by the Arbitrator or interpretation placed upon the provisions of the agreement.

10. We have in Delhi State Industrial & Infrastructure Development Corporation Ltd. supra further held that : -

> "...the parties, by agreeing to be bound by the arbitral award and by declaring it to be final, agree to be bound also by a wrong interpretation or an erroneous application of law by the Arbitral Tribunal and once the parties have so agreed, they cannot apply for setting aside of the arbitral award on the said ground. Even under the 1940 Act where the scope of Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.9 interference with the award was much more, the Apex Court in Tarapore and Co. v. Cochin Shipyard Ltd., Cochin (1984) 2 SCC 680 and U.P. Hotels v. U.P. State Electricity Board (1989) 1 SCC 359 held that the arbitrator's decision on a question of law is also binding even if erroneous. Similarly, in N. Chellappan v.

> Secretary, Kerala State Electricity Board (1975) 1 SCC 289 it was held that even if the umpire committed an error of law in granting amount, it cannot be said to be a ground for challenging the validity of the award; the mistake may be a mistake of fact or of law."

11. We are further of the view that the scope of judicial review of an arbitral award is akin to review under Article 226 of the Constitution of India of the decisions of bodies, where it is a settled principle of law (See State of U.P. v. Maharaja Dharmander Prasad Singh (1989) 2 SCC 505 and State of U.P. v. Johri Mal (2004) 4 SCC 714) that the judicial review is of the decision making process and not of the decision on merits and cannot be converted into an appeal. This is quite evident from the various Clauses of Section 34(2)(a) which prescribe the grounds of challenge on the lines of violation of the principles of natural justice in making of the award or invalidity of the arbitral agreement and nonarbitrability of the disputes arbitrated and of the composition of the Arbitral Tribunal or arbitral procedure being not in accordance with the agreement between the parties. Section 34(2)(b) adds the ground of the arbitral award being in conflict with the public policy of India. None of the said grounds are the grounds of challenge on the merits of the award. The ground of challenge of the award being in conflict with the public policy of India is explained as the award being induced or affected by fraud or corruption or being in violation of Section 75 or Section 81. Thus the grounds of challenge are akin to the grounds of judicial review under Article 226 and not to grounds of appeal or revision. We are reminded of the merits legality distinction in judicial review as culled out by Lord Hailsham in The North Wales v. Evans (1982) 1 WLR 1155 by observing "the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.10 decide for itself a conclusion which is correct in the eyes of the Court". Lord Brightman in the same judgment held that judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made and it would be an error to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself. It was clarified that only when the issue raised in judicial review is whether a decision is vitiated the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors. In our opinion the same is an apt test also for judicial review of the arbitral awards and just like a mere wrong decision without anything more is not enough to attract the power of judicial review, the supervisory jurisdiction conferred on the Court under the Arbitration Act is limited to see that the Arbitral Tribunal functions within the limits of its authority and that the arbitral award does not occasion miscarriage of justice. The Supreme Court in Mc. Dermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181 commenting on the radical changes brought about by the re- enactment of the arbitration law observed that the role of the Courts under the new law is only supervisory, permitting intervention in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice etc. and the Court cannot correct the errors of arbitrators and can only quash the award leaving the parties free to begin arbitration again.

12. Of the finality of arbitral awards, there is no doubt under our arbitration law. The Supreme Court as far back as in Union of India v. A.L. Rallia Ram AIR 1963 SC 1685 held that : -

> "An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Courts are also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.11 which are severable from those referred..... The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided in the arbitration agreement."

Of course the said judgment being under the Arbitration Act, 1940 proceeds to hold that an award is bad on the ground of error of law on the face of it. However the legislature while re-enacting the arbitration law has removed the ground of challenge of error of law on the face of the award. In Mc. Dermott International Inc. supra also it was held that the parties to the Arbitration Agreement make a conscious decision to exclude the Courts jurisdiction as they prefer the expediency and finality offered by arbitration. We are bound to respect the said change brought about by the legislature and cannot dogmatically review the awards on the grounds of challenge which have been intentionally taken away by the legislature.

13. It cannot also be lost sight of that non-conferring of finality on the arbitral awards not only affects the speed and expense of arbitration but also has a more subtle consequences of, extensive judicial review changing the nature of the arbitral process to an even greater extent. If arbitration becomes simply another level of decision making, subject to judicial review on merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards against judicial reversal producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model, in which decision makers are free to focus solely on Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.12 the case before them rather than on the case as it might appear to an Appellate Court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, in our opinion would substantially undercut the ability of arbitrators to successfully resolve disputes. The Courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the Court will deem

meritorious. The Courts if start undertaking to determine the merits of the grievance, would be usurping the function which under that Arbitration Act, 1996 is entrusted to the Arbitration Tribunal. This plenary review by the Courts of the merits would make meaningless the provisions that the arbitral award is final, for in reality it would almost never be final. We though may admit that sieving out the genuine challenges from those which are effectively appeals on merits is not easy.

14. Arbitration will not survive, much less flourish, if this core precept is not followed through by the Courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the Courts appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it. The power to intervene must and should only be exercised charily, within the framework of the Arbitration Act. Minimal curial intervention is underpinned by need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. The parties having opted for arbitration, must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the Courts. It would be neither appropriate nor consonant for the Court to lend assistance to a dissatisfied party by exercising appellate function over arbitral awards, save to the extent statutorily permitted.

15. As it would be obvious from the above, the contention aforesaid of the counsel for the appellant does not constitute a challenge to the arbitral award on the grounds permitted and as Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.13 discussed hereinabove. It is not the case of the appellant that the arbitral award is vitiated, for us to go into the merits of the challenge."

(Emphasis supplied by me)

6. The Hon'ble High Court has in a subsequent judgment in National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd., 2015 SCC OnLine Del 6524 relied upon the judgments in Delhi Development Authority v. Bhardwaj Brothers (supra) and State Trading Corporation of India Ltd. v. Toepfer International Asia Pte Ltd. (supra). After referring to the said judgments in paragraph 9 of the judgment, the Hon'ble High Court proceeded to observe as follows:

> "10. I have enquired from the senior counsel for the petitioner whether not at least this Court would be bound by the judgment aforesaid of the Division Bench and as per which the grounds urged by the petitioner for setting aside of the Arbitral Award are not within the ambit of Section 34(2) of the Arbitration Act.
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> 11. The senior counsel for the petitioner has not shown any judgment to the contrary.
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> 12. I may add, an indication of what the legislature, while re- enacting the arbitration law, meant by including the ground, of the arbitral award being in conflict with public policy of India, for setting aside of arbitral awards can be had from the Explanation to Section 34(2) which declares that an award is in conflict with the public policy of

India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81. Sections 75 as well as 81 are contained in Part III titled 'Conciliation'. Section 75 requires the parties and the conciliator to keep confidential all matters relating to conciliation proceedings and the settlement agreement. Section 81 provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, views expressed or suggestions made by the other party in respect of a possible settlement of the dispute, the admissions made by the other party in course of the conciliation Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.14 proceedings, the proposals made by the conciliator, the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator. Thus, if the arbitral award is based on what had transpired in the conciliation proceedings which ultimately failed and not on adjudication by the Arbitral Tribunal, it would be deemed to be in conflict with the public policy of India. Though the explanation to Section 34(2) containing the ground of the arbitral award being in conflict with the public policy of India is prefaced with "without prejudice to the generality of Section 34(2)

(b)(ii)" but the declaration therein of the award being in conflict with the public policy of India if the making of the award was induced by fraud or corruption or was in violation of Sections 75 or 81, in my humble view is suggestive of the expression "the public policy of India" being required to be read as meaning grounds ejusdem generis with the grounds of fraud or corruption or the award being based on material exchanged in conciliation which ultimately failed. In my view, the same cannot be read as referring to public policy of India qua adjudication of disputes in Courts, where error of law or fact is a ground for interference by higher Court. If the intent was to make the award liable to be set aside if contrary to the substantive law applicable to the decision thereof the legislature would have provided so. Even under the 1940 Act, neither the error of law nor of fact in the arbitral award was a ground for setting aside thereof. The preamble to the re-enacted Act states the purpose of the re-enactment to make our domestic law relating to arbitration in consonance with the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the grounds of interference with the arbitral award under the same were/are much narrower than the grounds of interference under the 1940 Act. If the words "in conflict with the public policy of India" are to be read as permitting interference with the arbitral award whenever the same is found to be contrary to the substantive law applicable to the merits of the dispute, the same in my view would be in violation of the preamble to the re-enacted law.

13. I may however notice Oil and Natural Gas Corporation Ltd. v. Western GECO International Ltd. (2014) 9 SCC 263 where also it was held : -

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.15 "35. What then would constitute the 'Fundamental policy of Indian Law' is the

question. The decision in Saw Pipes Ltd.

(supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

36. In Ridge v. Baldwin [1963 2 All ER 66], the House of Lords was considering the question whether a Watch Committee in exercising its authority Under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.16 furnishing to the Appellant a specific charge, it was a nullity. Dealing with the Appellant's contention that the Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin L.J. in [1924] 1 KB at pp. 206, 207:

> Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in A.C. Co. Ltd. v. P.N. Sharma AIR 1965 SC 1595 where Gajendragadkar, C.J. speaking for the Court observed:

> In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorised to reach Under Section 191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be

revised Under Article 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi- judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.17 while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

14. I have considered the challenge aforesaid to the arbitral award on the anvil of the above latest adjudication also. No ground, of the Arbitral Tribunal in the instant case having not adopted a judicial approach or having acted in violation of the principles of Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.18 natural justice has been urged. It is also not the case that the Arbitral Tribunal has not acted bona fide or not dealt with the subject in a fair, reasonable and objective manner or that the decision of the Arbitral Tribunal was actuated by any extraneous consideration. Non application of mind by the Arbitral Tribunal is also not pleaded or argued. No case of perversity or irrationality has also been made out. The entire challenge is on the ground of the findings of the Arbitral Tribunal being factually erroneous and which is not a ground even as per the judgment (supra) of the Supreme Court. Of course, the Supreme Court in para 40 of the judgment has held that if the Arbitral Tribunal, from the facts proved before it fails, to draw an inference which ought to have been drawn or draws the inference which on the face of it is

untenable, the arbitral award would be in conflict with public policy of India and the test of "fails to draw inference which ought to have been drawn or draws an inference which is untenable" is very wide but the said test is qualified with the words "resulting in miscarriage of justice". I am unable to read the judgment of the Supreme Court as opening the doors of challenge to an Arbitral Award by a detailed examination of all the facts and material before the Arbitral Tribunal and to determination of whether the inferences drawn and the consequences reached by the Arbitral Tribunal therefrom are correct or not and whether the Court agrees with the same or not. If the same were to be permitted, it would do away with the difference between the Court exercising appellate power and power of judicial review of Arbitral Award under Section 34 of the Act and would be against the several other judgments of the Supreme Court and which, in the judgment (supra) were neither considered nor differed from. The judgment (supra) of the Supreme Court, cannot be read in isolation, forgetting all other judgments of the Supreme Court and none of which have been overruled.

15. The expression "miscarriage of justice", used by the Supreme Court in the judgment (supra) as qualifying the test laid down in para 40 thereof of the validity of the Arbitral Award, is an expression well recognized in law and generally associated with grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite a lack of evidence on an essential element of a Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.19 crime (per Black's Law Dictionary, Eight Edition). The Supreme Court in Union of India v. Ibrahim Uddin (2012) 8 SCC 148 cited with approval Bibhabati Devi v. Ramendra Narayan Roy AIR 1947 PC 19 holding that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all.

16. Thus, it is not every inference drawn or not drawn by the Arbitral Tribunal from the material before it and which the Court finds to have been wrongly drawn or not drawn, which could be held to be resulting in miscarriage of justice. Such inference/failure to interfere by the Arbitral Tribunal, even if in the opinion of the Court wrong, would permit interference under Section 34 of the Arbitration Act only if it results in a grossly unfair outcome.

17. There is another aspect of the matter. A detailed inquiry into the correctness of the inference drawn/not drawn by the Arbitral Tribunal would require the Court not only to go through and dissect the arbitral record which is often voluminous in cases as the present but to also give an opportunity to the parties/their counsels to address on the inferences drawn/not drawn by the Arbitral Tribunal and to only thereafter form an opinion. The same would again make a proceeding under Section 34 of the Arbitration Act and hearing thereof akin to an appeal from original decrees of the Court and would be an antithesis to the very concept of judicial review of arbitral award, even if the Court at the end of such a marathon hearing were to conclude that there has been no miscarriage of justice. It is thus for the contracting party challenging the Arbitral Tribunal to, in the memorandum of challenge itself, make out a case of miscarriage of justice within the parameters aforesaid. No such case has been made out in the petition in the present case. Without any such case having been made out in the memorandum of petition, this Court would not embark upon an exercise of requisitioning the arbitral record and giving an opportunity to the parties/their counsels to address on the correctness of the inference drawn/not drawn by the Arbitral Tribunal and on the

aspect of whether there has been a miscarriage of justice.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.20

18. Mention may also be made of another recent dicta in Associate Builders v. DDA where on conspectus of plethora of cases including Western GECO International Ltd. supra, the judgment of the Single Judge of this High Court dismissing the petition under Section 34 of the Arbitration Act was restored and the judgment of the Division Bench in appeal thereagainst interfering with the award was set aside holding that the Division Bench exceeded its jurisdiction in interfering with the pure finding of facts forgetting that the arbitrator is the sole Judge of the quantity and quality of evidence before him and that the Division Bench has no business to enter into the pure question of fact to set aside the award. It was further held that the same cannot be done by any Court under jurisdiction exercised under Section 34 of the Act. The Supreme Court further held that the expression 'justice' when it comes to setting aside an award under the public policy ground can only mean that the award shocks the conscience of the Court and that it cannot possibly include what the Court thinks is unjust on the facts of a case for which the Court then seeks to substitute its own view for the arbitrator's view and does what it considers to be 'justice'. The Supreme Court observed that the Division Bench had lost sight of the fact that it is not a first Appellate Court and cannot interfere with errors of fact. The Supreme Court held that if the arbitrators have decided the dispute with a sound head and a good heart and after hearing both sides, the Courts should not interfere with their award, even if the Court disagrees with the reasons assigned by the arbitrator.

19. It is not the case of the petitioners that the arbitrators in the present case have not decided with a sound head and a good heart.

20. I therefore do not find any case for entertaining the challenge to the Arbitral Award by way of this petition and dismiss the same." (Emphasis supplied by me)

7. With the aforesaid principles in mind, it would now be appropriate to deal with the impugned award and the submissions of the learned counsels for the parties, claim-wise.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.21

8. Claim No.1: Claim Rs. 3,26,221/- Respondent had measured less area by taking the measurement for the finish area of flooring only.

8.1. The claimant/respondent had raised this claim in respect of short-

measurement of certain items. The findings of the learned arbitrator in the impugned award in respect of this claim are extracted hereunder:

> "Claim No. 1: Claim Rs. 3,26,221/- Respondent have measured less area by taking the measurement for the finish area of flooring only.

For this claim, the Claimants all along have contended that the respondents have short measured the quantities under item Nos. 1(a), 1(b) and 1(c). Referring to the note filed by the claimants during the hearing on 18.7.2016, the claimants explained about the less measurements in flooring area for these items. Referring to the measurements on page 102 of this note for some quantity of Item No. 1 (a) stated to have been executed by M/s Woodfun a query was raised the quantity of 118.72 sqm. (page 103 of the note) for Item No. 1 (a) stated to have been executed by M/s Woodfun had actually been paid to M/s Woodfun by the respondents. In view of the alleged short measurements of flooring area by the respondents, the Claimants proposed to have the next hearing at Amritsar where the actual site measurements could be verified. This was agreed to by the Respondents and the undersigned.

The work of joint measurements of work done at site was done during the hearings on 28th and 29th of September 2016 at Amritsar in the presence of the representatives of claimants and the respondents. The measurements of whole of the flooring skirting to skirting and also the skirting end to end were recorded including the works carried out in Rotunda Nos. 2 and 4. No measurements could be done in Rotunda Nos. 1 and 3 as these were found locked. Measurements for one toilet falling between Rotunda Nos. 1 and 2 were also recorded.

The Claimants in their final written submission of dated Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.22 10.04.2017 have re-worked out their above Claim based on the quantities of item Nos. 1(a), 1(b) and 1(c) measured at site on 29 of Sept 2016. The revised claim amount for this claim as worked out by the Claimants is Rs. 18,23,530.90.

The respondents' contention regarding this claim on account of short measurements has been that the measurements were done jointly and the same were not disputed by the claimants and that the RA bills were prepared based on the joint measurements and the claimants had not raised any objections while accepting the RA bills. The respondents also pointed out that the claimants had raised their objections regarding short measurements for the first time after 4 years and also that the claimants had not given the basis of the quantities taken by them under claim No.1. The Respondents in their post hearing submissions have not refuted the revised claim of Rs. 18,23,530.90 as worked out by the claimants based on the quantities of Item Nos. 1(a), 1(b) and 1(c) measured at site on 29" of Sept 2016.

After going through the contentions and pleadings of both the parties, I find that the claim amount of Rs. 18,23,530.90 for Claim No. 1 as worked out by the Claimants is justified as the respondents have neither disputed this amount nor have they adduced any record to the contrary, However, as the claim amount as referred by the Member (Planning) vide his letter No. ENGG/Motro/ASR/Vitrified/ LOK-ARB/2015/44 dated 08.01.2015 is Rs. 3,26,221/-, I award an amount of Rs. 3,26,221/- towards Claim No. 1 in favour of the claimants as against the

respondents."

8.2. In respect of the award of the aforesaid claim, the learned counsel for the petitioner has made the following submissions:

> i) That the impugned award was passed on the basis that the petitioner had not disputed the joint measurements in the post-hearing submissions which was an erroneous observation. The petitioner had Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.23 disputed the measurements made in the joint inspection in its written submissions filed on 22.08.2017. The claim no.1 was disputed by the petitioner both in the statement of defence and in the written submissions filed by the petitioner. Once the petitioner had disputed the measurement, the petitioner had also clearly disputed the calculations based on the joint measurement. As such, the impugned award was perverse as it was based on the erroneous assumption that there was no dispute raised by the petitioenr to the calculations in the joint measurement.
>
> ii) That the arbitrator made the award without giving opportunity to the petitioner to produce further evidence. The joint measurements were recorded on 29.09.2016 and the hearings came to an end on 26.12.2016. The respondent submitted the revised calculations based on the joint measurements in its written submissions dated 10.04.2017. The petitioner was never provided with an opportunity to dispute the said calculations. Thus, the petitioner was not given a full opportunity to present its case which was violative of section 18 of the Arbitration and Conciliation Act.

iii) That the award on the Claim No.1 was based on a complete ignorance of the express terms of the Contract. As per Clause 8 of the contract, to prepare the running bills, joint measurements by both the parties had to be recorded in the measurement books. As per Clause 8(ii), in case of any difference, the same had to be recorded within a week from the date of measurement. However, in the present case, the respondent had failed to put on record any notice recording the difference within the prescribed period. That there were running bills bearing RB No. 1 dated 30.03.2011 which was Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.24 paid on 20.04.2011, RB No. 2 dated 09.05.2011 which was paid on 0.05.2011 and RB No. 3 dated 8.07.2011 which was paid on 2.07.2011. After accepting payments, the respondent had after two months written the letter regarding measurements as an afterthought.

iv) That the arbitrator had passed the award in ignorance of Clauses 7, 8 and 16 of the contract. Clause 8 read with Clauses 16 and 7 laid down the procedure for raising any dispute with respect to the measurement recorded in the Measurement Books which was ignored by the arbitrator.

v) That the arbitrator had awarded the claim in the absence of any evidence. The respondent had failed to adduce any evidence to substantiate the amount it claimed. The respondent had only produced letters dated 12.09.2011 and 31.10.2011 sent by the respondent post completion of the work, which were relied upon by the arbitrator. This would not constitute sufficient evidence to

substantiate the amount claimed.

8.3. Per contra, the learned counsel for the respondent has submitted that the award on the said claim was based on the actual joint measurement conducted at the site in the presence of both the parties and the learned arbitrator on 29/09/2019 during the course of arbitration and as such there was no ground for any interference with the said award. It is submitted that the reworked calculations had come to Rs. 18,23,530.90, however, the learned arbitrator had allowed the claim to the extent of Rs. 3,26,221 only, in as much as only this amount had been claimed by the respondent. It is submitted that the claim was allowed as it was purely based on the actual measurements conducted at site by both the parties. It is submitted that the award on the said claim was not violative of the public policy or the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.25 fundamental policy of Indian law nor was it perverse or patently illegal.

Decision:

8.4. The learned arbitrator has observed that the claim amount of Rs.

18,23,530.90 for Claim No.1 as worked out by the respondent was justified as the petitioenr had neither disputed this amount nor had the petitioner adduced any record to the contrary, however, as the claim amount as referred for arbitration was Rs. 3,26,221/-, the learned arbitrator has awarded amount of Rs. 3,26,221/- only towards Claim No. 1. It is seen from the record that in the hearing dated 18.07.2016, it was submitted on behalf of the respondent herein that there was short-measurement of the flooring by the petitioner and it was proposed that the next hearing of the arbitration be at Amritsar where the actual site measurements could be verified. As recorded in the minutes of the hearing, the petitioner herein had agreed to this. As per the record, the joint measurements were actually carried out on 29.09.2016 at Amritsar in the presence of both the parties and the learned arbitrator and the joint measurement sheets were prepared. The respondent had thereafter filed its written submissions revising its claim for short-measurement to Rs. 18,23,530.90. In these written submissions, the respondent herein had given the details as to how the calculations had been arrived at on the basis of the revised measurements which had been done on 29.09.2016. These calculations based on the revised measurements were annexed to the written submissions. The learned arbitrator has in the award observed that the claim amount for Claim No.1 as worked out by the respondent was justified as the petitioner had neither disputed this amount nor had the petitioner adduced any record to the contrary. It has been argued by the learned counsel for the petitioner herein that this observation was patently illegal in as much as the petitioner had in the post-hearing written submissions disputed the measurements Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.26 made in the joint inspection. I have gone through the post-hearing written submissions of the petitioner which are available on the record and I am unable to find any cogent dispute being raised by the petitioner to the joint measurement or the calculations made by the respondent based on the joint measurement. The relevant portion of the written submissions of the petitioner with respect to the measurements done on 29/09/2016 in relation to the Claim No.1 are reproduced hereunder:

> "Even the measurements taken by the parties in presence of Ld. Tribunal at Amritsar's site on 29/09/2016 ie. after more than 5 ½ years after completion of the work cannot be accepted nor taken into consideration and that to without bifurcated identification of the work carried out by various agencies at site. The claimant did not submit the final bill despite repeated call letters and reminders Exbs.R-2, R-3, R-4 & R-5, which final bill was prepared by the respondent AAI and on making the payment of the same to the claimant on 19/12/11, copy of the final bill was sent to the claimant. Exbs. R-15, R-16, R-17 & R-18 are to be looked into. In such circumstance, this claim of the claimant on his own made up and self created measurements cannot be entertained and is worth rejection.
>
> As submitted during the arguments before the Ld. Tribunal, if there is a mistake in calculating and reaching out the area with a difference of 20.32 sqm and if the Ld. Tribunal finds the same in favour of the claimant, the same shall be paid to the claimant."

8.5. In the written submissions, the petitioner has not mentioned that it was disputing the joint measurements made on 29/09/2016. The petitioner has also not stated in what manner the joint measurements were incorrect or Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.27 that the calculations which were made by the respondent herein on the basis of the joint measurements in its written submissions were incorrect. The joint measurement was agreed to by the petitioner and the joint measurement took place on 29/09/2016 in the presence of both the parties and the measurements were taken down on the measurement sheets. Thereafter, the respondent filed its written submissions making the calculations based on such measurements. It was for the petitioner to clearly make out a case as to why the joint measurements made on 29/09/2016 could not be relied upon or as to why the calculations made by the respondent were incorrect. However, I do not find any such thing done by the petitioner. It is in these circumstances that the learned arbitrator has observed that the claim of the respondent herein was justified as the petitioner had neither disputed this amount nor had the petitioner adduced any record to the contrary. I find nothing perverse or patently illegal in the finding of the learned arbitrator in this regard.

8.6. Once the petitioner itself had agreed in the arbitration that measurements be again taken in the presence of the learned arbitrator in respect of the claim for short-measurement, then it was no longer open for the petitioner to argue that the respondent had not raised any dispute as to the measurements at the time of clearing of the running bills. In any case, the respondent had raised a dispute as to measurements prior to clearing of the final bill. As such, there cannot be said to be any perversity in the award of the claim no.1 by the learned arbitrator. Accordingly, I am not inclined to interfere with the award of the claim no.1 in exercise of jurisdiction under section 34 of the A&C Act.

9. Claim No. 2: Claim Rs. 2,73,805/- payment against cost of cement mortar 1:4 of 20mm thick which was not Included in the nomenclature of Item No.1 a, b, c.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.28 Claim No. 3: Claim Rs. 20,803/- payment against cost of cement mortar 1:3 of 12mm thick which was not included in the nomenclature of Item No.2 (a).

9.1. These claims were raised by the claimant/respondent in respect of certain extra items which were executed but were allegedly not included in the nomenclature of items in the agreement. The findings of the learned arbitrator in the impugned award in respect of these claims are extracted hereunder:

> "Claim No. 2: Claim Rs. 2,73,805/- payment against cost of cement mortar 1:4 of 20mm thick which was not Included in the nomenclature of Item No.1 a, b, c.
>
> The Claimants have contended that there is an ambiguity in the nomenclature of these items regarding the inclusion of the 20 mm thick cement mortar 1:4. As per the claimants, the 20 mm thick cement mortar 1:4 was not included in the rate of these items and, therefore, has to be paid extra to them.
>
> As per the Respondents, the nomenclature of Item Nos.1 a, 1 b and 1 c of the agreement was quite clear and it showed that the cost of 20 mm thick cement mortar 1:4 was included in the rate of these items and, therefore, nothing extra was payable to the claimants on this account.
>
> The nomenclature of agreement Item Nos. 1(a), 1(b) and 1(c) reads as under :-
>
> "Providing and laying flooring in combination with machine cut, mirror polished or flame finished Sierra Grey granite, with Jol black granite as per approved design and pattern in floors and landings laid over 20mm thick bed of cement mortar 1:4 (1 cement : 4 coarse sand) jointed with white cement mixed with matching pigment complete as per direction of Engg-in-Charge".

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.29 On going through the above nomenclature of agreement Item Nos. 1(a), 1(b) and 1(c) it is noted that this nomenclature does not specifically say that this includes all items required for the execution of the work and therefore nothing shall be payable extra. As such there is an ambiguity in this nomenclature as contended by the claimants. As the Respondents have not disputed the amount of this claim as worked out by the claimants, I award an amount of Rs. 2,73,805/- towards Claim No. 2 in favour of the claimants as against the respondents."

> "Claim No. 3: Claim Rs. 20,803/- payment against cost of cement mortar 1:3 of 12mm thick which was not included in the nomenclature of Item No.2 (a).
>
> The Claimants contended that there is an ambiguity in the nomenclature of Item No.2(a) regarding the inclusion of the 12 mm thick cement mortar 1:3. As per the claimants, the 12 mm thick cement mortar 1:3 was not included in the rate of this

> Item and, therefore, it has to be paid extra to them. As per the Respondents the nomenclature of Item No.2(a) of the agreement was quite clear and it showed that the cost of 12 mm thick cement mortar 1:3 was included in the rate of this item and, therefore, nothing extra was payable to the claimants on this account.
>
> The nomenclature of agreement Item No. 2(a) roads as under :-
>
> "Providing and laying mirror polished, machine cut granite stone slabs of required size, shade and texture laid in skirting, risers of steps, dado and pillars laid on 12mm thick bed of cement mortar 1:3 (1 cement: 3 coarse sand) jointed with white cement slurry mixed with pigment to match the shade complete as per direction of Engg-in-Charge".

On going through the above nomenclature of agreement Item No. 2(a) it is noted that this nomenclature does not specifically say that this includes all items required for the execution of the work and therefore nothing shall be payable extra. As such there is an Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.30 ambiguity in this nomenclature as contended by the claimants. As the Respondents have not disputed the amount of this claim as worked out by the claimants, I award an amount of Rs. 20,803/- towards Claim No. 3 in favour of the claimants as against the respondents."

9.2. In respect of the award of the aforesaid claims, the learned counsel for the petitioner has made the following submissions:

> i) That the aforesaid claims have been awarded on a complete ignorance of the specific terms of the contract. The interpretation given by the ld. arbitrator to relevant provisions of the contract being the definitions of Items Nos. 1(a), 1(b), 1(c) and 2(a) was completely perverse and which interpretation could not have been arrived at by any reasonable person. The nomenclature of the aforesaid items was not ambiguous in any manner and that the learned arbitrator had given a perverse finding that the nomenclature was ambiguous and had awarded the claim on this faulty reasoning.
>
> ii) That the arbitrator completely ignored clause 12.2 of the contract which provided the procedure for raising of demand by the contractor for extra items. The respondent had never followed the procedure under clause 12.2 which shows that the respondent always understood that the items which were claimed in the arbitration were not extra works but were already included in the nomenclature of the Items Nos. 1(a), 1(b), 1(c) and 2(a). However, the arbitrator has completely ignored this aspect and had proceeded to give a perverse interpretation to the contract.
>
> iii) That the respondent had failed to give any proof of the quantity of Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.31 cement which was actually used by the respondent on site. The arbitrator had passed

the award in the absence of any evidence.

9.3. Per contra, the learned counsel for the respondent has submitted that the award on these claims was based on a possible interpretation of the relevant clauses. It is submitted that the arbitrator was a civil engineer and former Additional Director General in the Central Public Works Department, who was appointed by the petitioner itself, and that the arbitrator was experienced with construction contracts. It is submitted that a possible interpretation by the arbitrator cannot be interfered with by the court under section 34 of the A&C Act to reach to a different conclusion. It is further submitted that the petitioner was the author of the contract and that in case of ambiguity in the wordings of a clause, as per the rule of contra preferentem, the interpretation had to be against the drafter of the agreement.

Decision:

9.4. It is well settled that the interpretation of the terms of the contract is well within the jurisdiction of the arbitrator and the courts in exercise of jurisdiction under section 34 of the A&C Act would not interfere with an interpretation given by the arbitrator if it is a plausible interpretation even if two views were possible. However, as rightly submitted by the learned counsel for the petitioner, the interpretation of the contract should not be perverse or such that no reasonable person can arrive at such an interpretation. With this principle in mind, I have approached the reasoning given by the learned arbitrator.

9.5. It was the case of the respondent in the arbitration that the nomenclatures of Item Nos. 1(a), 1(b) and 1(c) was ambiguous regarding the inclusion of Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.32 the 20 mm thick cement mortar 1:4, and that the 20 mm thick cement mortar 1:4 was not included in the rate of these items and, therefore, had to be paid extra to them. It would be appropriate to again set out the relevant terms of the contract which form the basis of the aforesaid claim, as under:

The nomenclature of agreement Item Nos. 1(a), 1(b) and 1(c) reads as under :-

"Providing and laying flooring in combination with machine cut, mirror polished or flame finished Sierra Grey granite, with Jol black granite as per approved design and pattern in floors and landings laid over 20mm thick bed of cement mortar 1:4 (1 cement : 4 coarse sand) jointed with white cement mixed with matching pigment complete as per direction of Engg-in-Charge".

9.6. Similarly, it was the case of the respondent that there was ambiguity in the nomenclature of Item No.2(a) regarding the inclusion of the 12 mm thick cement mortar 1:3, and that the 12 mm thick cement mortar 1:3 was not included in the rate of this Item and, therefore, had to be paid extra to them. It would be appropriate to again set out the relevant terms of the contract which form the basis of the aforesaid

claim, as under:

The nomenclature of agreement Item No. 2(a) reads as under :-

"Providing and laying mirror polished, machine cut granite stone slabs of required size, shade and texture laid in skirting, risers of steps, dado and pillars laid on 12mm thick bed of cement mortar 1:3 (1 cement: 3 coarse sand) jointed with white cement slurry mixed with pigment to match the shade complete as per direction of Engg-in-Charge".

9.7. I have considered the aforesaid terms of the contract and I find that there is nothing perverse in the interpretation of the learned arbitrator, although, there could also be an interpretation that the cost of the cement mortar was Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.33 included in the nomenclature of the items which may even have been a more preferred interpretation. However, in exercise of jurisdiction under section 34 of the A&C Act, it would not be permissible to substitute the interpretation given by the learned arbitrator merely on the basis that another interpretation could have been more preferable. The interpretation of the contract was within the domain of the learned arbitrator, and ultimately, the question is whether the interpretation made by the learned arbitrator was perverse or such that no reasonable person could have come to. In my view, the interpretation of the learned arbitrator cannot be considered perverse. I am also mindful that the learned arbitrator in the present case was a retired senior officer from the Central Public Works Department and would have been generally conversant with such terms and nomenclature in a works contract. The learned arbitrator had considered the nomenclature of the items and has come to a finding that there was an ambiguity whether the cost of the cement mortar was included in the nomenclature of the items and has given the benefit of the doubt to the respondent herein and has held that the cement mortar could not be considered to be included in the nomenclature, and as such has awarded the claims to the respondent. I do not find any patent illegality or perversity in the interpretation given by the learned arbitrator as such, and would not interfere with the award of the said claims in exercise of jurisdiction u/s. 34 of the A&C Act.

9.8. In so far as the other argument in relation to clause 12.2 of the contract is concerned, I find that this argument was never raised by the petitioner in its statement of defence or in its written submissions before the learned arbitrator and as such would not be available to the petitioner now. A perusal of the statement of defence and the written submissions filed by the petitioner before the learned arbitrator shows that the sole objection of the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.34 petitioner to the said claim was that the cement mortar was already included in the nomenclature of the concerned items. As such, I find no ground to interfere with the award of the aforesaid claims.

10. Claim No. 4: Claim Rs. 36000/- for the work of existing wall repairing and levelling complete as per the site requirement were made but no payment was made by the Respondent.

10.1. The said claim was raised by the respondent/claimant in respect of an extra item of work. The findings of the learned arbitrator in the impugned award in respect of this claim are extracted hereunder:

> "Claim No. 4: Claim Rs. 36000/- for the work of existing wall repairing and levelling complete as per the site requirement were made but no payment was made by the Respondent.
>
> For this claim, the claimants contended that they had executed the work of existing wall repairing and leveling as per the site requirements and directions of the respondents. The claimants further contended that as this work was not covered under any of the Agreement Items, it was an extra item for which the respondents had made no payment. As per the claimants an amount of Rs. 36,000/- based on market rates is payable to them for this work.
>
> Regarding this claim, the respondents pointed out that there was no direction from their side for carrying out any such work and also that the claimants were required to give a notice to the respondents as per Clause 16 of the Agreement. As per the respondents, no notice was given by the claimants in this regard. The respondents also questioned as to how the market rates and the quantities under this claim had been worked out by the claimants. The respondents have also contended that the claimants have not adduced any correspondence regarding this work.
>
> However, on going through the Exhs C-5, C-6, C-7, C-9 it is Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.35 noticed that the Claimants contractor had been continuously writing about having done this work and had been requesting for its measurements and payment. In view of this, the contention of the respondents that as per record available no such repairing work had been done by the claimants does not hold good. The respondents have also referred to Exh R-46 (cement Register) stating that no cement was issued to the claimant for this work. On going through the cement Register (Exh R-46), it is noticed that the Items of work for which cement is shown as issued are very general in nature and no specific location is mentioned therein. As such the statement of the respondents that no cement was issued to the claimant for this work is not correct.
>
> In view of the facts and circumstances discussed above, I award an amount /- of Rs 36,000 towards this claim No. 4 in favour of the claimants as against the respondents."

10.1. In respect of the award of the aforesaid claim, the learned counsel for the petitioner has made the following submissions:

> i) That this claim was awarded in ignorance of the express terms of the contract. The learned arbitrator has ignored Clause 12.2 of the contract which provided the

procedure for claims for extra items and required that the claims towards extra items were to be submitted within 15 days of occurrence of the work. However, the respondent submitted this claim only on 12/09/2011 much after the completion of the contract on 15/06/2011.

ii) That the award of this claim was in the absence of any evidence led by the respondent. The award was made solely on the basis of letters written by the respondent after the completion of the work i.e. letters dated 24/03/2011, 12/09/2011, 31/10/2011 and 13/11/2011 which was erroneous. The respondent had failed to produce any cost analysis towards the said claim towards calculation of the extra Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.36 works. The letters are silent on the quantity of cement by the respondent on site towards the works or the rate at which the cement was procured. The award of the amount was thus without any evidence to substantiate the costs towards the alleged extra work.

10.2. Per contra, the learned counsel for the respondent has submitted that the award on the said claim was based on the appreciation of the documentary evidence by the learned arbitrator and that the court could not in exercise of jurisdiction under section 34 A&C Act, reappreciate the documentary evidence to reach a different conclusion.

Decision:

10.3. The learned arbitrator has come to a finding that the respondent had been continuously writing about having done this work and had been requesting for its measurements and payment, and as such has accepted the case of the respondent that this work had been done. After going through the cement register, the learned arbitrator has also observed that the stand of the petitioner that no cement was issued to the claimant for this work is not correct. It is on the basis of these findings that the learned arbitrator had awarded the claim to the respondent. The arbitrator was the master of the facts and the evidence. There is nothing perverse in the approach of the learned arbitrator and as such the award of this claim does not call for any interference u/s. 34 of the A&C Act.

11. Claim No. 10: Claim Rs. 23,365/- on account of recovery/withheld amount of water charges.

11.1. This claim was made by the respondent in respect of recovery made by the petitioner on account of water charges. The findings of the learned Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.37 arbitrator in the impugned award in respect of this claim are extracted hereunder:

"Claim No. 10: Claim Rs. 23,365/- on account of recovery/withheld amount of water charges.

> Regarding this claim on account of recovered withhold amount of water charges, the claimants pointed out that they had arranged water on their own and in this connection they referred to Exh C-2 and Exh C-14 (point No. 6).
>
> For this claim, the respondents referred to Exh R-47 page 87 of the CSF wherein the claimants had requested the respondents for providing the water connection as per the provisions of the contract agreement. The respondents also referred to para 6 of the Exh R-22. page 50 of the CSF wherein the claimants had been informed about the recovery on account of water charges.
>
> On going through Exh C-2 which is a letter dated 01.04.2011 from the claimants, it is noted that the claimants had intimated the respondents that they had made their own arrangements for water. The Exh R-47 (which is a letter of the claimants) which the respondents have referred to in their reply is of dated 28.02.2011 I.e. earlier to the claimants' Intimation that they had made their own arrangements for water. On going through page 55 of the note submitted by the claimants during the hearing dated 18 July 2016, is noted that the manager Engg. (C) had certified that the contractor had made his own arrangement of water. The respondents have not refuted the claimants' contention about having made their own arrangements for water. The respondents have also not adduced any evidence of having intimated the claimants that the water arrangements had been made by them in reply to the request dated 28.02.2011of the claimants.
>
> In view of the facts and circumstances discussed above, I award an amount of Rs. 23,385/- towards this claim No. 10 in favour of the claimants as against the respondents."

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.38 11.2. In respect of the award of the aforesaid claim, the learned counsel for the petitioner has made the following submissions:

> i) That the learned arbitrator has awarded this claim upon an erroneous interpretation of the chain of events. The respondent had vide letter dated 28/02/2011 requested the petitioner for an alternative water connection, however, vide letter dated 01/04/2011 the respondent informed the petitioner that they had made alternate arrangement towards water connection and requested the petitioner to not recover any amount towards it. The letter dated 01/04/2011 was delivered to the petitioner only on 19/05/2011 and as the petitioner was genuinely unaware of the respondent's letter dated 01/04/2011, recoveries on account of water consumption were made in the first and second RA bills only which were accepted and signed by the respondent. Later when the petitioner received the information about the alternate arrangements for water supply made by the respondent, no recoveries were made in the third and fourth and final bills. The petitioner had made recoveries towards water consumption only on the basis of the respondent's letter dated

28/02/2011.

ii) That the award of this claim was based on an ignorance of clause 30 of the contract which provided that the respondent was to make its own arrangement of water supply.

11.3. Per contra, the learned counsel for the respondent has submitted that the award was based on the appreciation of evidence by the arbitrator and there was no error of jurisdiction committed and the award does not call for interference u/s. 34 of the A&C Act.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.39 Decision:

11.4. The learned arbitrator has awarded the aforesaid claim on the basis of a finding of fact that the respondent had intimated to the petitioner that it had made alternative arrangements for water supply and hence the petitioner could not have recovered amount towards water charges. This finding was within the jurisdiction of the learned arbitrator and there is nothing perverse or patently illegal in the award of this claim. As such, the award of this claim does not call for any interference in exercise of jurisdiction under section 34 of the A&C Act.

12. Claim No.11: Claim Rs. 1,28,000/- recovery/withheld amount against the Agreement Clause 35A for Deployment of technical staff.

12.1. The respondent/claimant had raised this claim towards recoveries made by the petitioner on account of non-deployment of technical staff. The findings of the learned arbitrator in the impugned award in respect of this claim are extracted hereunder:

"Claim No. 11: Claim Rs. 1,28,000/- recovery/withheld amount against the Agreement Clause 35A for Deployment of technical staff.

Regarding this claim, the claimants have contended that the Agreement Clause 35(A) was void as it provided ambiguity. Referring to Exh C-3, the claimants also pointed out that there was no letter from the Respondents about non employment of technical staff by the Claimants. The claimants have also contended that the quality of work had been certified to be very good by the respondents and as such this recovery is illegal. In their final written submission the claimants have pointed out that as per Clause 35(1), the technical staff was required to be deployed for Building, Road and Wall work and not for the flooring work. It has also been Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.40 pointed out that in the Tender Inviting Notice, it was specified that tenders would be issued to only those firms having experience of having executed the Flooring work. The claimants have also referred to Exh C-14 wherein they have stated that the work had been executed fully as per required specifications and quality as per the directions of the respondents and that the department never faced any difficulty in this regard. In Exh

C-14, the Claimants have also objected to this recovery.

Regarding this claim, referring to Cl 35(1) of the agreement, the respondents stated that the work was covered under building work and as per this clause the claimants had to employ one graduate engineer and one diploma holder engineer. As per the respondents, the claimants did not deploy the required technical staff and hence the recovery on this account had been effected as per the agreement provisions. In this regard, the respondents also referred to para 5 of Exh-R-22 wherein it had been stated that this recovery had been done as the provisions of the agreement and that the claimants had accepted this recovery made from the running bill. In this connection, the respondents also referred to pars 5 of Exh-R-16, second para of Exh-R-23 and para 3 of Exh-R-38 wherein the respondents have stressed that this recovery had been done as per the agreement provisions.

In this regard, the respondents have also referred to the various entries in Site Order Book (Exh-R-0 to R-14) wherein deployment of technical staff has been stressed by the respondents and that the Claimants have signed these entries by way of acknowledgement of the same.

On going through the Cl 35(1) Para (B) of the agreement, it is noted that the contractor was to employ the technical staff as per the requirement as indicated in the technical bid I.e. Envelope B. In the note below CI 35(1) Para (B) it has been provisioned that any one of Para (A) or Para (B) of Cl 35(1) shall be retained as per two or three envelope bid system. As the present tender is of two envelope bid system containing Envelope 'A' and Envelope 'B', any one of Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.41 Para (A) or Para (B) of Cl 35(1) had to be retained but in the present agreement both Para (A) and Para (B) have been retained. In view of this the contention of the claimants that the Agreement Clause 35(A) was void as it provided ambiguity is correct. The claimants' other contention that the quality of work had been certified to be very good by the respondents has also not been refuted by the respondents.

In view of the facts and circumstances discussed above, I award an amount of Rs. 1,28,000/- towards this claim No. 11 in favour of the claimants as against the respondents."

12.2. In respect of the award of the aforesaid claim, the learned counsel for the petitioner has made the following submissions:

i) That the finding of the learned arbitrator that the petitioner had not refuted the contentions of the respondent was incorrect as the petitioner had clearly communicated to the petitioner vide letters which were filed with the statement of defence that a graduate civil engineer was to be deployed on site, however, the learned arbitrator has ignored this.

ii) That there were no pleadings in the statement of claim as to how Clause 35(1)(A) of the contract was void. It was the case of the respondent in the statement of claim that it had distributed the necessary technical staff and it was never stated by the respondent that the Clause 35(1)(A) of the contract was void. The argument taken by the respondent in the written submissions was beyond the pleadings

iii) That the learned arbitrator could not have declare a clause void merely on the ground of ambiguity.

12.3. Per contra, the learned counsel for the respondent has submitted that the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.42 learned arbitrator had passed the award upon appreciation of the evidence and interpretation of the contract which was well within his jurisdiction and, as such, the award calls for no interference u/s. 34 of the A&C Act.

Decision:

12.4. In awarding the aforesaid, the learned arbitrator has observed that the respondent's contention that the petitioner had certified that the quality of work was very good was not refuted by the petitioner and that as such the amount could not have been withheld on the ground of non-deployment of technical staff. As such, there is nothing perverse or patently illegal in the award of this claim. Furthermore, the learned arbitrator has observed that as per the tender conditions only one of the Para (A) or Para (B) in Clause 35(1) could have been retained, but in the present case both had been retained, hence there was ambiguity. This interpretation of the terms cannot be considered as perverse. The interpretation of the terms was within the jurisdiction of the arbitrator and I find nothing perverse in the interpretation taken by the learned arbitrator. In view of the ambiguity, the learned arbitrator has given the benefit of the doubt to the respondent and has held that the amounts could not have been recovered. Again, there is no perversity in this conclusion, and as such, the award of this claim does not call for any interference in exercise of jurisdiction under section 34 of the A&C Act.

13. Claim No. 12: Claim Rs. 30,000/- amount recovered/deducted on account of extension of time.

13.1. This claim was made by the respondent/claimant in respect of the recoveries which had been made by the petitioner towards extension of time. The findings of the learned arbitrator, in respect of this claim are Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.43 extracted hereunder:

"Claim No. 12: Claim Rs. 30,000/- amount recovered/deducted on account of extension of time.

The claimants in their statement of claims have contended that this compensation levied by the respondents under Clause 2 was bad in law as the work had been delayed due to breaches and lapses on the part of the respondents. The claimants also stated that the time which was the essence of the contract but by the conduct and construction of various clauses of the Agreement, the time was not the essence of the contract and so no action could be taken without fixing the time as essence of the contract by mutual consent of both the parties. The claimants further contended that after the work had been declared completed on 15.06.2011, the contract became non est and no action could be taken under the said contract as no clause excepting clause 25 survived thereafter.

The claimants have also stated that the action taken by the respondents under Clause 2 of the agreement was beyond jurisdiction, illegal and arbitrary, it has also been pointed out by the claimants that the action under clause 2 read with clause 5 is in the nature of liquidated damages and it has been held by the Hon'ble Supreme Court that the actual loss need to be proved for imposing such compensation/penalty. Regarding this claim, the claimants referred to Exh C-5 and C-12.

In their final written submission, the claimants have pointed out that as per the Agreement, the date of start of work as per correction slip No. 5 (page 12 of the Agreement) works out to 4.02.2011 and not 20.01.2011 and accordingly the stipulated date of completion works out to 20.03.2011 instead of 5.03.2011. In their final written submission, the claimants have also stated that as per the documents received by them through the Right To Information, no work had been done on quite a large number of days during the period from February 2011 to June 2011 as per the Pass/Token Issue Register. In their final written submission, the claimants have also Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.44 contended that as per the Pass/Token Issue Register received by them through the Right To Information, the work had already been completed in April 2011.

Regarding this claim, the respondents stated that the recovery on account of Extension of time had been done as per the provisions of the agreement as there was a delay of 102 and that as per CI-5 of the agreement, the claimants were required to apply in writing to the Engineer- in- charge within 30 days of the date of hindrance on account of which the claimants desired to have extension but there was no such request from the claimants for Extension of time. In this connection, the respondents also referred to Exh-R- 24 to R-35.

In their final written submission, the respondents have stated that as per the Clause 5 of the contract, the claimants had to submit the request for EOT in writing stating the reasonable grounds and unavoidable circumstances, which the claimants had failed to do. The respondents further pointed out that after repeated calls and reminders, the EOT performa submitted by the claimants was not correct and this was intimated to the claimants vide Exh R-19. The respondents have further stated that as the EOT

performa submitted by the claimants was not acceptable, the respondents processed the EOT as per the records available with them. In this connection, it has also been pointed out that show cause notice dated 19.10.2011 (Exh R-32) and a reminder dated 8.11.2011 (Exh R-33) were issued to the claimants but they failed to respond to these notices.

In their final written submission, the respondents have also pointed out that an amount of Rs. 1,70,000/- was withheld from the RA bills on account of EOT and that after the levy of compensation of Rs. 30,000/-, the balance amount of Rs. 1,40,000/- was released to the claimants. The respondents referred to Exh R-34 and R-22 in this connection. The respondents also pointed out that the claimants had never objected to the withheld amount of Rs. 1,70,000/- from the RA bills on account of pending EOT.

On going through the Exh C-5 referred to above by the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.45 claimants, it is noted that the Claimants had listed a number of hindrances such as arranging of the required quantity of granite stone of the required quality from Bangalore, extra work of laying of plain cement concrete over the existing surface to maintain the required level, repair of side wall and the several hurdles and laws related to security to enter the operational areas. Apart from these, it has also been stated in para 8 of Exh C-5 that the decision for laying stone on stairs of Ratunda 183 was given very late after completing the floor area of the building. The claimants have also stated that they were kept in waiting for the decision of laying stone on stairs the same for Rotunda 284 which was ultimately not given to the claimants despite the fact that enough quantity of stone was available with them. As per the claimants, all these are stated to have created several hindrances. Though the respondents vide their letter dated 05.09.2011 (Exh-R-19) have stated that the contents at para 5, 7 and 8 of claimants letter dated 24.08.2011 (Exh-C-5) which are pertaining to repair and levelling of side toe wall, expansion joints and laying of stone on stairs of Ratunda 183 respectively were not correct. However, on going through the details as discussed under Claim No.4 above and the copy of the 4 th and final bill (Exh-C-24), it is noted that the claimants had carried out the repair and levelling of the side toe wall, had laid the cement concrete and also provided the expansion joints. As such the contention of the respondents that the contents at para 5, 7 and 8 of claimants letter dated 24.08.2011 (Exh-C-5) were not correct is not found to be correct. On going through the Hindrance Register (Exh R-6), it is noted that there is only one entry regarding the 'Secutity measures for Republic Day' in whole of the Hindrance Register which shows that the respondents had given no consideration to hindrances highlighted by the claimants. On going through para 3 of the letter dated 20.04.2011 (Exh R- 23), it is noted that the respondents had made up their mind to impose the compensation/penalty much before the finalization of EOT case and actual completion of the wok and in pursuance to this the respondents withheld an amount of Rs. 20,000/- from the first RA bill (Exh-C-21) and Rs.1,50,000/- from the 2nd RA

> bill (Exh-C-22) on account of the pending EOT case. These actions on the part of the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.46 respondents indicate a prejudiced mind of the respondents while finalising the EOT case. On going through Clause 2 under correction slip No. 5 (page 13 of the agreement), it is noted that there is no provision of withholding of any amount on account of EOT. This Clause 2 states that in the event of the contractor falling to comply with the provision of Clause 2, the contractor shall be liable to pay compensation/liquidated damages.
>
> In view of the facts and circumstances discussed above, I award an amount of Rs. 30,000/- towards this claim No. 12 in favour of the claimants as against the respondents."

13.2. In respect of the award of the aforesaid claim, the learned counsel for the petitioner has made the following submissions:

> i) That the interpretation of Clause 2 of the contract by the learned arbitrator was completely perverse, absurd and unreasonable. Clause 2 of the contract very clear terms provides for imposition of liquidated damages in case of the contractor's failure to comply with the clause 2. The interpretation of the learned arbitrator that there was no provision for withholding any amount on account of EOT was perverse.

ii) That the learned arbitrator had ignored Clause 5 of the contract which stipulated that in case the contractor sought an EOT, the contractor shall apply in writing within 30 days to seek extension of time. However, the respondent had failed to do so despite repeated communications and letters by the petitioner.

13.3. Per contra, the learned counsel for the respondent has submitted that the award of the learned arbitrator was based on the appreciation of the documentary evidence and the learned arbitrator came to the conclusion Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.47 that the petitioner had not given due weight to the hindrances and as such was not entitled to withhold amounts towards extension of time. It is submitted that all this was within the jurisdiction of the learned arbitrator and the award does not call for any interference u/s. 34 of the A&C Act.

Decision:

> 13.4. The learned arbitrator has given a finding of fact that the petitioner gave no consideration to the hindrances highlighted by the respondent and has on this basis observed that as such the petitioner could not recover/withhold amounts towards extension of time. This finding was well within the jurisdiction of the learned arbitrator and I find no error of jurisdiction in the arbitrator's award on the said claim. The learned arbitrator has arrived at the finding upon consideration of the documentary evidence before him, and as such there is no perversity in the award of

this claim. As such, the award of this claim also does not call for any interference in exercise of jurisdiction under section 34 of the A&C Act.

14. Claim No.13: Claim Rs. 3,11,204/- withheld on account of EPF.

14.1. This claim was made by the claimant/respondent towards amount withheld on account of EPF. The findings of the learned arbitrator in respect of this claim are extracted hereunder:

"Claim No. 13: Claim Rs. 3,11,204/- withheld on account of EPF.

Regarding this Claim, the claimants have stated that the Respondents have arbitrarily and illegally withheld an amount of Rs. 3,11,204/- on account of EPF which was their liability. The claimants further pointed out that they were required to deposit the amount as per the EPF rules and regulations and as they were not falling under those rules, there was no question of depositing the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.48 amounts on this account. The claimants have also pointed out that the work had been completed on 15.08.2011 but till date no liability had been raised against them for which the amount had been withheld by the respondents. The claimants have further stated that the withhold amount is still lying with the respondents which is against the provisions of the contract. It has further been pointed out that they had already filed an affidavit in this regard (Exh C-28). In this regard, the claimants referred to Exh C-9) wherein they have stated that as per EPF rules, there would be no EPF deduction in rospect of the emplyees whose monthly salary was more than Rs. 6,500/- por month. In Exh C-9 the claimants had also urged the respondents to get the above rule position verified at their level.

For this claim, the respondents referred to correction slip No.8 under Cl 10(F) on page 23 of the agreement which provided for withholding 32.11% on account of EPF. In this connection, the respondents referred to Exhs R-35, R-36, R-37 and R-38 vido which the claimants were requested to submit proof of depositing EPF with the concemed authorities. In Exh R-37 the respondents had mentioned that the photocopies marked as page Nos. 1 to: 4 submitted by the claimants with their lotter of dated 16.02.2012 were not legible. The respondents have contended that as the claimants had not submitted the requisite documents as requested vide Exhs R- 35, R-36, R-37 and R-38, the amount had been withheld as per the provisions of the agreement.

On going through the Exh C-28 and its enclosures, it is noted that the Claimants in their affidavit have reiterated their contention that as per the EPF rules, there would be no EPF deduction in respect of the employees whose monthly salary was more than Rs. 6,500/- per month. This rule is corroborated by the extract (page 74 of the statement of Claims) of the EPF Rules filed by the claimants along with their affidavit. The Claimants, in Exh C-9 had urged the respondents to get the above rule

position verified at their level. The Respondents have not given any comments on this and have not refuted the EPF Rule position stated above. In Exh R-37 the respondents had mentioned that the photocopies marked as paga Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.49 Nos. 1 to 4 submitted by the claimants with their letter of dated 16.02.2012 were not legible. During the hearing dated 20 th December 2016, the undersigned had asked the respondents to file these photocopies, which the respondents have failed to file. The contention of the claimants that the withheld amount is still lying with the respondents is found to be correct.

In view of the facts and circumstances discussed above, I award an amount of Rs. 3,11,204/- towards this claim No. 13 in favour of the claimants as against the respondents."

14.2. The learned counsel for the petitioner has submitted as follows:

i) That the findings of the learned arbitrator were on the basis of no evidence and upon an ignorance of vital evidence. The learned arbitrator failed to appreciate that the respondent had provided no evidence to show that as per the EPF rules there could be no deduction in respect of employees whose monthly salary was more than Rs. 6,500 per month. Furthermore, the arbitrator had incorrectly relied upon the illegible copies of the EPF challans furnished by the respondent and has failed to see that it was the responsibility of the respondent to provide proper copies, and to this extent, the learned arbitrator erroneously passed on the responsibility to the petitioner to provide legible copies without any such provision in the contract.

ii) That the award was in ignorance of clause 10 of the contract. The learned arbitrator has not given any finding towards the EPF rules and as to why the respondent was not covered under the same and has instead relied upon an affidavit filed by the claimant which was actually a letter and not legible. This demonstrates non-application of mind by the learned arbitrator.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.50 14.3. Per contra, the learned counsel for the respondent has submitted that the learned arbitrator has considered the EPF rules relied upon by the respondent which was not controverted by the petitioner, and has on this basis made the award. It is submitted that there is no perversity in the approach of the learned arbitrator and the award does not call for interference u/s. 34 of the A&C Act.

Decision:

14.4. The learned arbitrator has awarded the claim on the basis that the respondent had relied upon the relevant EPF rules under which the respondent was not liable for EPF deduction in respect of employees whose salary was less than Rs. 6,500 per

month and that this was corroborated by the extract of rules filed by the respondent and that the petitioner had been urged to verify the position with respect to the rules and that the petitioner had not refuted the same. On this basis, the learned arbitrator has observed that the petitioner could not have withheld money on account of EPF. Again, I find that there is nothing perverse or patently illegal in the award of this claim. There is no error of jurisdiction committed by the learned arbitrator. Moreover, it was also the case of the respondent before the learned arbitrator that the works had already completed and no claim or liability towards EPF had been raised which was not refuted by the petitioner, and even as such I do not find any reason to interfere with the award of this claim. As such, the challenge to the award of this claim is rejected also does not call for any interference in exercise of jurisdiction under section 34 of the A&C Act.

15. Claim No. 14: Claim Rs. 5,000/- amount recovered/withheld on account of non-submission of completion plan.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.51

15.1. The respondent/claimant had made this claim towards amount withheld by the petitioner on account of non-submission of completion plan. The findings of the learned arbitrator in respect of this claim are extracted hereunder:

"Claim No. 14: Claim Rs. 5,000/- amount recovered/withheld on account of non submission of completion plan.

Regarding this Claim, the claimants have stated that there is no provision in the contract to withhold this amount and that the respondents had never issued any notice to the claimants for this alleged default. The Claimants have further stated that no liability had been established against them for this amount. The Claimants also pointed out that no plan wassupplied to them by the respondents. The Claimants have further pointed out that the respondents have not intimated whether they have spent any amount on this account and asper the claimants, this withhold amount is still lying with the Respondents which is against the provisions of the contract.

For this claim, the respondents referred to Clause 6(B) on page 14 of the agreement which provides for submission of three sets of completion plan within thirty days of the completion of the work. Referring to Exh R-40 page 74 of the CSF, the respondents stated that the claimants had not submitted the completion plan of the work till 14.12.2011. In this connection, the respondents also referred to point No. 7 of their letter dated 18.02.2012 (Exh R-22 page 56 of the CSF) which stated that an amount of Rs. 5000/- had only been withheld for non submission of completion plan as per the Clause 6(B) of the agreement and no recovery had been done on this account.

On going through the details, it is noted that the claimants' contention that there is no provision in the contract to withhold this amount and that the respondents had never issued any notice to the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.52 claimants for this alleged default is correct as the Clause 6(B) of the agreement provides that in case the contractor fails to submit the completion plan within thirty days of the completion of the work, he shall be liable to pay a sum of Rs. 25000/- or lesser. Thus there is no provision of withholding any amount under this Clause. As regards the contention of the claimants that the respondents had never issued any notice to the claimants for this alleged default, it is noted from Exh R-40 page 74 of the CSF that this lotter is not signed by the Respondents Sr. Manager Engg. and it is also not received by the Claimants representative. On going through the 4 and final bill (Exh C-24), it is noted that the date of Abstract of this bill is 02.11.2011 and there is no recovery on account of non submission of completion plan while working out the net amount of Rs. 70030/- payable to contractor. An entry in hand has been made at the end of this bill by the Sr. Manager Engg on 14.12.2011 Ie, on the date on which the notice (Exh R-40) is stated to have been issued to the claimants for submission of completion plan within seven days of the issue of that letter. As noted from the 4th and final bill, the cheque of Rs. 62,219/- had been issued to the claimants on 19.02.2011 Ie. without waiting for the seven days from the issue of the notice dated 14.12.2011(Exh R-40). Thus it is found that the notice dated 14.12.2011(Exh R-40) was just a mere eye wash.

In view of the facts and circumstances discussed above, I award an amount of Rs. 5000/- towards this claim No. 14 in favour of the claimants as against the respondents."

15.2. In respect of the aforesaid claim, the learned counsel for the petitioner has submitted that the claim was incorrectly granted by the learned arbitrator in ignorance of the terms of the express clause in the contract that permitted the petitioner to withhold the sums towards non-submission of completion plan.

15.3. Per contra, the learned counsel for the respondent has submitted that the learned arbitrator has awarded the claim upon appreciation of the facts and Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.53 evidence which was within the jurisdiction of the learned arbitrator and as such no grounds for interference u/s. 34 of the A&C Act were made out.

Decision:

> 15.4. The learned arbitrator has observed that the petitioner was required to give notice of 7 days to the respondent in respect of submission of the completion plan and that the recovery was made even prior to the notice period and that as such the notice was only an eye wash to make the recovery. On this basis, the learned arbitrator has held that the petitioner could not have withheld amount on account of non-submission of completion plan. There is no error of jurisdiction committed by the learned arbitrator and neither can the award be said to be perverse or patently illegal. As such, the award of even this claim does not call for any interference in exercise of jurisdiction under section 34 of the A&C Act.

16. Claim No. 15: Claim on account of interest @ 18% on delayed payment of withheld amount.

Claim No. 16: Claim to Interest @ 18% p.a. on account of delay or non- payment of final bill and delay in refund of Security Deposit.

16.1. The respondent/claimant had made these claims towards interest on delayed payments. The findings of the learned arbitrator, in respect of these claims are extracted hereunder:

"Claim No. 15: Claim on account of interest @ 18% on delayed payment of withheld amount.

As per the Claimants, this claim is for the interest on account of the delayed payments of withheld amount. The Claimants have Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.54 stated that an amount of Rs. 1,50,000/-had been withheld from the 2 RA Bill on 12.05.2011 and an amount of Rs. 1,40,000/- had been released by the respondents on 6.02.2012 causing a delay of 8 months and 25 days. The Claimants have worked out the interest amount of Rs. 18,550/- on this delayed payment @ 18% pa.

Regarding this claim, the Respondents have stated that in spite of several requests to the claimants, there was a considerable delay on the part of the claimants in finalisation of EOT and the settlement of the final bill which effected the release of the withhold amount of Rs. 1,40,000/- The Respondents have contended that this delay was solely on the part of the claimants.

On going through the detail of first RA bill (Exh-C-21), it is noted that an amount of Rs. 20,000/- was withhold on 6.04.2011 by the respondents on account of EOT. Similarly an amount of Rs. 1,50,000/- was withheld on 12.05.2011 from the 2 RA bill (Exh-C-

22) on account of EOT. As discussed under Claim No. 12 above, there is no provision of withholding of any amount on account of EOT under Clause 2 of the agreement which states that in the event of the contractor failing to comply with the provision of Clause 2, the contractor shall be liable to pay compensation/liquidated damages. Respondents vide their letter of dated 19.12.2011(Exh R-

34) levied a compensation of Rs. 30,000/- and the balance amount of Rs. 1,40,000/- remained with the respondents till its payment to the claimants on 6.02.2012 as stated at para 2 of Exh R-22. The claimants have worked out the interest amount of Rs. 18,550/- on this delayed payment which has not been contested by the respondents.

In view of the facts and circumstances discussed above, I find that the Claimants are entitled to the interest on this delayed payment and, therefore, I award an amount of Rs. 18,550/- towards this claim No. 15 in favour of the claimants as against the respondents."

"Claim No. 16: Claim to Interest @ 18% p.a. on account of delay or Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.55 non-payment of final bill and delay in refund of Security Deposit.

The Claimants have claimed interest @ 18% p.a. on account of delay or non finalisation of final bill and delay in refund of security deposit from the date these amounts became due till the date of realisation.

The respondents have stated that in spite of several requests from them to the claimants, there was considerable delay on the part of the claimants for settlement of the final bill. The respondents have contended that this delay was solely on the part of the claimants who failed to respond to the repeated calls and reminders of the respondents. The respondents have further stated that the payment of the final bill has already been made.

On going through the various exhibits brought on record by both the parties, it is noted that the Claimants had requested for early finalisation of EOT and the final bill vide their letter dated 12.09.2011 (Exh-C-6). In response to this letter dated 12.09.2011 of theclaimants, the respondents vide their letter dated 23.09.2011 (Exh-R-2) asked the Claimants to submit the final bill as per the Clause 7(A) of the Agreement. In this letter (Exh-R-2), the respondents further stated that in case the final bill is not received in the prescribed period, the respondents would finalise the same as per the records and measurements recorded by them.

The Claimants vide their lotter dated 31.10.2011 (Exh-C-7) had again requested the respondents for oarly finalisation of EOT and the final bill without further delay.

The respondents vide their lotter dated 31.10.2011 (Exh-R-3) stated that as no final bill had been received by them from the claimants, they had prepared the final bill as per tho records and measurements recorded by respondents office. In this lotter (Exh-R-

3), the respondents also asked the claimants to como forward and sign the final bill as acceptance within seven days. Vide their letter dated 11.11.2011 (Exh-R-4), the respondents again asked the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.56 claimants to come forward and sign the final bill for acceptance within ten days of the issue of this letter failing which it would be prosumed that the claimants had accepted the final bill and that they would have no right to dispute the final bill in any mannor. As seen from Exh-C-24, the respondents had finalised the 4" and final bill on 19.12.2011 and payment of Rs. 62,219/- was

made to the claimants.

In the 4th and final bill, a total recovery of Rs. 3,78.443/- (Rs 95000/- EMD + Rs. 2,83,443/- SD) has been made on account of the security deposit. The Claimants vide their letter dated 6.08.2012 (Exh-C-16) requested the respondents for release of the security deposit and the withheld amounts as the defects liability period was over on 15.06.2012. As per respondents letter No. AAV/ASR/PRO/PO-Vitrified/2016 did. 15.07.2016, the EMD and the SD was released on 28.08.2012. After considering all the facts and circumstances of the case, I allow, under this claim No.16, a simple interest of 10% p.a. on the withheld security deposit amount (excluding the EMD) for the period from 15.06.2012 till the date of actual payment in favour of the claimants as against the respondents."

16.2. In respect of the award of these claims, the learned counsel for the petitioner has submitted as follows:

> i) That the learned arbitrator had failed to consider clause 7 of the contract under which the respondent was not entitled to claim any interest due to delay in payment.
>
> ii) That the learned arbitrator has failed to consider that it was the respondent which had delayed the submission of the RA and final bills and hence was not entitled to any interest on the delayed payments.
>
> iii) That the learned arbitrator has failed to consider clause 7A of the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.57 contract under which no further claims could be made by the contractor after submission of the final bill.

16.3. Per contra, the learned counsel for the respondent has submitted that the learned arbitrator has granted the interest for the delay in payment and there was error of jurisdiction or any ground for interference u/s. 34 of the A&C Act.

Decision:

> 16.4. I have perused the reasoning given by the learned arbitrator in respect of award of these claims. The learned arbitrator has come to the finding that there was delay in payment of the amounts which were withheld which was not attributable to the respondent and as such has awarded the claim for interest on the said amounts. The learned arbitrator has committed no error of jurisdiction in giving this finding. This finding was well within the jurisdiction of the arbitrator. As such, the award of these claims also does not call for any interference in exercise of jurisdiction under section 34 of the A&C Act.
>
> 16.5. In so far as the submission of the petitioner herein that interest for delay was barred under the contract the same is also without any merit as I find that no such

argument was raised by the petitioner before the learned arbitrator. I have perused the statement of defence and the written submissions of the petitioner and I find that the petitioner had not raised any ground that the payment of interest for delay was barred under the contract. Once no such submission was made by the petitioner before the learned arbitrator and the learned arbitrator never had occasion to consider the same, then the petitioner cannot now raise any such ground in a petition u/s. 34 of the A&C Act.

Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.58

17. Claim No. 17: Claim to Interest @ 18% p.a for the amounts due for pre reference, pendente lite and future.

17.1. The respondent/claimant had made this claim towards the pre-reference, pendente lite and future interest. The findings of the learned arbitrator in respect of this claim are extracted hereunder:

"Claim No. 17: Claim to Interest @ 18% p.a for the amounts due for pro reference, pendentilite and future.

The claimants in their statement of facts have contended that their claims are justified and legally correct and, therefore, the respondents had to refer them for arbitration. The claimants have further contended that as provided in the Interest Act-1978, the Arbitrator can award interest for the period prior to the commencement of Arbitration proceedings. In their statement of facts, the claimants have stated that the Arbitrator is well within powers to eward interest for all the three stages i.e. pro-suit, pandenentelite and future as held by the Apex Court in the matter between Mannalal Prabhudayal Vs Oriental Insurance Co.(2006(3) ALR-364 (SC).

The respondents have submitted that the claimants have been defaulter in forming and discharging their duties and obligations and so the present claims are not tenable.

After considering all the facts and circumstances of the case, I allow a simple interest of 12% p.a. on the amounts awarded by me above under claim nos. 1, 2, 3, 4,10, 11, 12, 13 and 14 for the period from the date when these disputes were raised by the claimants till the date of actual payment in favour of the claimants as against the respondents."

17.2. In respect of the award of these claims, the learned counsel for the Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.59 petitioner has submitted that as the awarded claims are liable to be set aside, the award of pre-reference, pendente lite and future interest cannot stand.

17.3. Per contra, the learned counsel for the respondent has submitted that no grounds for interference under section 34 of the A&C Act are made out in respect of the claims awarded and that the award of interest was within the jurisdiction of the learned arbitrator.

Decision:

> 17.4. I have already held that the award of the claims made by the learned arbitrator does not call for any interference u/s. 34 of the Act. The award of interest was within the domain of the learned arbitrator and also calls for no interference u/s. 34 of the Act.
>
> 18. In view of the aforesaid discussion, in the result, the petition u/s. 34 of the A&C Act filed by the petitioner is dismissed. Parties to bear own costs.

Judgment pronounced in open court.

File be consigned to record room after due compliance.

(SATYABRATA PANDA) Additional District Judge-04 Judge Code- DL01057 PHC/New Delhi/17.10.2023 Arbtn no.326/18 Airport Authority of India Vs. M/s Lok Shail Enterprises page no.60