IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 17TH DAY OF JANUARY 2022 / 27TH POUSHA, 1943

ARB.A NO. 17 OF 2013

AGAINST THE ORDER DATED 15.11.2012 IN OP(ARB) 632/2010 OF II ADDITIONAL DISTRICT COURT,ERNAKULAM

APPELLANT/(PETITIONER IN THE LOWER COURT):

LLOYED INSULATIONS (INDIA) LTD.
5, HADDOWS LANE, HADDOWS ROAD, NUNGAMBAKKAM, CHENNAI, HAVING ITS BRANCH OFFICE AT H.B 29, 4TH CROSS ROAD, OPP UNION BANK OF INDIA, AMBILY NAGAR, KOCHI 36

BY ADVS.SRI.S.VINOD BHAT
SRI.LEGITH T.KOTTAKKAL

RESPONDENT/(RESPONDENT IN THE LOWER COURT):

FOREMEXX SPACE FRAMES
30/4473-87, ANEEB BUILDING, OPP. KSFE LIMITED, KAVOOR, CHEVEYOOR P.O, KOZHIKODE 17, RERPESENTED BY ITS PROPRIETOR, SAJJID PASHA

BY ADVS.SRI.K.L.VARGHESE (SR.)
SRI.RANJITH VARGHESE
SRI.RAHUL VARGHESE
SMT.SANTHA VARGHESE

THIS ARBITRATION APPEAL HAVING COME UP FOR ADMISSION ON 20.12.2021, THE COURT ON 17.01.2022 DELIVERED THE FOLLOWING:

"C.R."

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

Arb.Appeal No.17 of 2013

Dated this the 17th day of January, 2022

J U D G M E N T

C.S.Sudha, J.

Can an Arbitral Tribunal pass more than one award? Does the Arbitration and Conciliation Act, 1996 (the Act) contemplate a Majority Award and a Minority Award? Can the Presiding Arbitrator direct the remaining two Arbitrators to write separate Awards and then adopt one, without giving separate or independent reasons either for accepting one and rejecting the other? No, says Sri.S.Vinod Bhat - the learned counsel for the appellant. According to him, passing multiple awards and the procedure adopted by the Presiding Arbitrator in accepting one Award without giving his reasons for the same, are

violations or breach of the provisions of Sections 29 and 31 of the Act. We will examine the tenability of this argument advanced by the learned counsel for the appellant.

2. The appellant herein is the sole respondent and the respondent herein, the claimant in the arbitration proceedings before the Arbitral Tribunal consisting of three Arbitrators, namely, Mr. Justice J.B. Koshy, the Presiding Arbitrator; Mr. Justice K.A. Abdul Gafoor (Arbitrator no.1) and Mr. Justice K. Sampath (Arbitrator no.2). Aggrieved by the Award passed by the Arbitral Tribunal, the appellant herein moved the District Court under Section 34 of the Act. The court below partly set aside the Award. Not satisfied with the same, the present appeal has been filed. Parties will be referred to as described before the Arbitral Tribunal.

3. A brief reference to the facts of the case -

The Greater Cochin Development Corporation (GCDA) which owns the Jawaharlal Nehru International Stadium (the Stadium), Kaloor, Kochi decided to construct a roof for the Stadium and hence invited

tenders for the same *vide* tender notice dated 14.03.2006. The claimant quoted for the work and was qualified in the technical bid. However, they failed to qualify for the commercial bid as they had no previous experience of completing a job of the value of ₹5 Crores, which was a pre-requisite for the bid. As the respondent was the successful bidder, the work was allotted by the GCDA to them. Pursuant to this, there were discussions between the claimant and the respondent as the former had drawings ready with them for the work which the respondent desired to utilise for the work. The claimant expressed willingness to execute the work as a sub-contractor under the respondent. Hence, the respondent entered into a sub-contract with the claimant relating to designing, submission of drawings, supply of materials, fabrication and erection of the roof structure, except the roofing. The total value of the work was fixed at ₹615 lakhs. The Letter of Intent (LoI) dated 16.07.2007 issued by the respondent was approved by the GCDA. The period for completion of the work was fixed as five months from 22.10.2007. Accordingly, the work order was

issued. As per the work order, the claimant had to design, fabricate the frames of the roof and erect the same using scaffoldings. During the course of execution of the work, disputes arose relating to the demand made by the claimant for clearing the periodical bills. The request of the claimant was not acceded to by the respondent. According to the claimant due to the nonpayment of the bills as well as labour unrest, the progress of the work was affected. Out of the 28 modules of space frame, only one could be erected. Due to the slow pace of work, negotiations and talks took place between the parties. It was then decided that the claimant would be relieved of the job of erection of the frames, which would be taken over by the respondent. Accordingly, M/s. BECPL was engaged for the erection of frames by using a crane. Thereafter, M/s.BECPL also withdrew from the work and then M/s.BAVA Engineers Pvt. Ltd. was engaged for executing the work of erection of the frames. While so, disputes again arose between the parties relating to the working of M/s.BAVA Engineers Pvt. Ltd. The claimant wanted the services of the said agency to be terminated, which

request was rejected by the respondent. Differences of opinion also arose relating to the functioning of the Manager of the respondent. The claimant wanted the Manager to be removed which was again refused by the respondent. Thereafter, due to several other intervening reasons and differences of opinion, the claimant citing nonpayment and delay in clearing the part bills, informed the respondent that they were closing the site and stopping the work. On 06.09.2008 the respondent terminated the contract citing lack of progress in the execution of the work besides prolonged delay by not adhering to the contractual schedule of completion and also due to the poor quality of work. This was followed by the parties invoking the arbitration clause in the agreement.

4. One Arbitrator was appointed by either side. The Arbitrators could not agree on the Presiding Arbitrator. Hence, on an application moved by the respondent, this Court by order dated 09.06.2009, appointed Mr. Justice J.B. Koshy as the Presiding Arbitrator. Several claims were moved by the claimant before the

Arbitral Tribunal (the Tribunal). The total sum claimed was ₹2,46,98,065/- with interest @ 18% from 01/09/2008 till realization and costs of arbitration. An amount of ₹92,26,312/- with interest @12% from 06.09.2008 till realization and cost of ₹5,00,000/- was awarded. The respondent moved the District Court under Section 34 of the Act. The court below confirmed the Award except on the findings of the Tribunal relating to refund of VAT and payment of costs, both of which were set aside. Aggrieved, the respondent has come up in appeal.

5. The first and foremost argument advanced on behalf of the respondent is the violation/breach of the provisions of Sections 29 and 31 of the Act. According to the learned counsel for the respondent, there can only be one Award of the Tribunal and never multiple awards. According to him, in the instant case there are 4 different awards of different dates which is impermissible. Hence for the said reason alone, the Award ought to have been set aside by the court below, which it failed to do. In support of this argument, reference is made to

Dakshin Haryana Bijli Vitaran Nigam Ltd. vs. M/s.Navigant Technologies Pvt. Ltd. [AIR 2021 (SC) 2493].

6. As stated earlier, the Tribunal consisted of two Arbitrators and one Presiding Arbitrator. Apparently, the Arbitrators were not able to agree on the claims and hence separate findings were rendered by Arbitrator No.1 and 2, which are dated 24.02.2010 (Appendix A) and 19.03.2010 (Appendix C) respectively. The Presiding Arbitrator by Award described as Appendix B dated 05.04.2010, concurred with the reasonings and findings of Arbitrator No.1 based on which, an Award described as Majority Award dated 05.04.2010 signed by the Presiding Arbitrator and Arbitrator No.1 was passed. In the last page of the Majority Award, it is stated that the dissenting Award of Arbitrator No.2 has been appended as Appendix C.

7. It would be apposite to refer to Sections 29 and 31 of the Act which read -

> "***29. Decision making by panel of arbitrators***. — *(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a*

majority of all its members.

(2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator."

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"***31. Form and contents of arbitral award.*** *— (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may

include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation. —The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).

(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A."

8. Here, we refer to **Dakshin Haryana Bijli** (*supra*) referred to by the learned counsel for the respondent from which we quote a few paragraphs-

"*4. xxx*

(i) S.2(1)(c) of the 1996 Act defines "arbitral award" to include an interim award. The phrase "arbitral award" has been used in several provisions of the 1996 Act.

The statute recognises only one arbitral award being passed by an arbitral tribunal, which may either be a unanimous award, or an award passed by a majority in the case of a panel of members. *An award is a binding decision made by the arbitrator/s on all the issues referred for adjudication. The award contains the*

reasons assigned by the tribunal on the adjudication of the rights and obligations of the parties arising from the underlying commercial contract. The award must be one which decides all the issues referred for arbitration. The view of a dissenting arbitrator is not an award, but his opinion. However, a party aggrieved by the award, may draw support from the reasoning and findings assigned in the dissenting opinion.

(ii) The phrase 'arbitral tribunal' has been defined by S.2(1)(d) to mean a sole arbitrator, or a panel of arbitrators.

(iii) Chapter VI of the Arbitration and Conciliation Act provides the procedure for making of an arbitral award, and termination of arbitral proceedings.

S.28 to 31 relate to the procedure for making the award. S.28 provides the rules applicable for the determination of a dispute by arbitration.

(iv) S.29 of the 1996 Act deals with decision making by a panel of arbitrators. S.29 reads as: xxxxxxxx

An "arbitral award" is the decision made by the majority members of an arbitral tribunal, which is final and binding on the parties.

S.35 provides that an arbitral award shall be "final and binding" on the parties and persons claiming under them. A dissenting opinion does not determine the rights or liabilities of the parties which are enforceable under S.36 of the Act.

(v) The reference to the phrase "arbitral award" in S.34 and S.36 refers to the decision of the majority of the members of the arbitral tribunal. A party cannot file a petition u/S.34 for setting aside, or u/S.36 for enforcement of a dissenting opinion. What is capable of

being set aside u/s.34 is the "arbitral award" i.e., the decision reached by the majority of members of the tribunal. Similarly, u/s.36 what can be enforced is the "arbitral award" passed by the majority of the members.

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(vii) Legal requirement of signing the award.

The legal requirement of signing the arbitral award by a sole arbitrator, or the members of a tribunal is found in S.31 of the 1996 Act, which provides the form and content of an arbitral award. S.31 provides that:

"31. Form and contents of arbitral award. -

xxx xxx xxx

xxx xxx xxx"

(viii) S.31(1) is couched in mandatory terms, and provides that an arbitral award shall be made in writing and signed by all the members of the arbitral tribunal. If the arbitral tribunal comprises of more than one arbitrator, the award is made when the arbitrators acting together finally express their decision in writing, and is authenticated by their signatures (Malhotra's Commentary on the Law of Arbitration, Wolters Kluwer, 4th Ed., Vol.1, p.794.). An award takes legal effect only after it is signed by the arbitrators, which gives it authentication. There can be no finality of the award, except after it is signed, since signing of the award gives legal effect and validity to it. The making and delivery of the award are different stages of an arbitration proceeding. An award is made when it is authenticated by the person who makes it.

The statute makes it obligatory for each of the members of the tribunal to sign the award, to make it a valid award. The usage of

the term "shall" makes it a mandatory requirement. It is not merely a ministerial act, or an empty formality which can be dispensed with.

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(xi) xxx

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(xiii) S.32 provides that the arbitral proceedings shall be terminated after the final award is passed. With the termination of the arbitral proceedings, the mandate of the arbitral tribunal terminates, and the tribunal becomes functus officio.

(xiv) In an arbitral tribunal comprising of a panel of three members, if one of the members gives a dissenting opinion, it must be delivered contemporaneously on the same date as the final award, and not on a subsequent date, as the tribunal becomes functus officio upon the passing of the final award. The period for rendering the award and dissenting opinion must be within the period prescribed by S.29A of the Act.

(xv) In the treatise on 'International Commercial Arbitration' authored by Fouchard, Gaillard, Goldman, it has been opined that: "1403. - A dissenting opinion can only be issued when the majority has already made the decision which constitutes the award. Until then, any document issued by the minority arbitrator can only be treated as part of the deliberations. However, once the majority decision has been reached, it is preferable for the author of the dissenting opinion to communicate a draft to the other arbitrators so as to enable them to discuss the arguments put forward in it. The award made by the majority could then be

issued after the dissenting opinion, or at least, after the draft of the dissenting opinion..." (Fouchard, Gaillard, Goldman, International Commercial Arbitration, Ed. Emmannuel Gaillard, John Savage, p.786 (Kluwer Law International).)

(xvi) There is only one date recognised by law i.e. the date on which a signed copy of the final award is received by the parties, from which the period of limitation for filing objections would start ticking. There can be no finality in the award, except after it is signed, because signing of the award gives legal effect and finality to the award.

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(xx) Relevance of a dissenting opinion

(a) The dissenting opinion of a minority arbitrator can be relied upon by the party seeking to set aside the award to buttress its submissions in the proceedings under S.34.

(b) At the stage of judicial scrutiny by the Court under S.34, the Court is not precluded from considering the findings and conclusions of the dissenting opinion of the minority member of the tribunal.

(c) In the commentary of 'Russel on Arbitration', the relevance of a dissenting opinion was explained as follows:

"6-058. Dissenting opinions. Any member of the tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate "dissenting opinion". The arbitrator should consider carefully whether there is good reason for expressing his dissent,

because a dissenting opinion may encourage a challenge to the award. This is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award." (David St. John Sutton, Judith Gill and Matthew Gearing QC, Russel on Arbitration, 24 ed. (Sweet and Maxwell), p.313.) (emphasis supplied)

(d) Gary B. Born in his commentary on International Commercial Arbitration opines that:

"Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the tribunal's related obligation to make a reasoned award. Although there are legal systems where dissenting or separate opinions are either not permitted, or not customary, these domestic rules have little application in the context of party - nominated co-arbitrators, and diverse tribunals. Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his / her adjudicative mandate, particularly in circumstances where a reasoned award is required. Only clear an explicit prohibition should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process, and can provide a valuable check on arbitrary or indefensible decision making." (Gary Born, International Commercial Arbitration, Wolters Kluwer, Ed. 2009, Volume II, p. 2466.)

It is further commented that:

"There is nothing objectionable at all about an arbitrator "systematically drawing up a dissenting opinion, and insisting that it be communicated to the parties". If an arbitrator believes that the tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he / she may express that view. There is nothing wrong - and on the contrary, much that is right - with such a course as part of the adjudicatory process in which the tribunal's conclusion is expressed in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a "systematic" discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process, and the requirement of a reasoned award." (Gary Born, International Commercial Arbitration, Wolters Kluwer, Ed. 2009, Volume II, p. 2469.)

It is further observed that:

"...the very concept of a reasoned award by a multi - member tribunal permits a statement of different reasons - if different members of the tribunal in fact hold different views. This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process." (Emphasis supplied)

9. Therefore, as held in the aforesaid case, there can only be one Award and the same is the decision made by the majority

members of the Tribunal, which would be binding on the parties. If the Arbitral Tribunal comprises of more than one Arbitrator, the Award is made when the Arbitrators acting together, finally express their decision in writing and is authenticated by their signatures. An Award is made when it is authenticated by the person(s) who make it. In other words, an Award takes legal effect only after it is signed by the Arbitrators, which gives it authentication. There can be no finality of the Award except after it is signed, since signing of the Award gives legal effect and validity to it. Further, as held in the aforesaid decision, though there can only be one Award, there is nothing objectionable at all about an Arbitrator drawing up a dissenting opinion, unless there is a clear and explicit prohibition precluding the making and publication to the parties of a dissenting opinion. It is true that in the Act, there is only provision for passing an interim award [S.31(7)]. Though there is no specific provision in the Act providing for passing a dissenting view, the Act does not prohibit such a opinion being rendered by the minority member(s). The findings/opinions/views of the Minority Tribunal is not

an Award, but only the dissenting view and the same does not form part of the Award. Such dissenting view/opinion cannot be made the basis of a proceeding under Section 34 or under Section 36 for its enforcement. But it can be relied upon by the party seeking to set aside the Award to buttress his submissions in the proceedings under Section 34. Therefore, we certainly agree with the argument advanced by the learned counsel for the respondent that there can only be one Award of the Tribunal, signed by the majority members.

10. Now the question to be answered is - are there more than one Award or multiple Awards in this case, as argued by the learned counsel for the respondent. In the case on hand, the findings of Arbitrator No.1 dated 24.02.2010 referred to as Appendix A in the document described as Majority Award, matured into an Award only on 05.04.2010 when the same was concurred to by the Presiding Arbitrator and his concurrence recorded in Appendix B. It is true that Appendix A is signed by Arbitrator No.1 alone and Appendix B by the Presiding Arbitrator. The Presiding Arbitrator could not have signed

Appendix A on 24.02.2010 itself, that is, the date on which it was prepared by Arbitrator No.1, because the former decided to concur with the findings in the same only after he went through Appendix C dated 19.03.2010, which is the dissenting view of Arbitrator No.2. Though Appendix C is described as an Award, apparently it is not so, whereas it is only the dissenting view/opinion of the minority Arbitrator, namely, Arbitrator No.2. As held by the Apex Court, the dissenting opinion can only be issued when the majority has already made the decision which constitutes the Award. Until then, any document issued by the minority arbitrator can only be treated as part of the deliberations. Therefore, Appendix C matured into a dissenting view/opinion only on 05.04.2010 when the Majority Award was passed. Till then Appendix C was only part of the deliberations. The Presiding Arbitrator on 05.04.2010 records in Appendix B that he is concurring with the findings/views/reasons given in Appendix A by Arbitrator No.1. Thereafter the gist of the claims allowed and rejected, the details of which are contained in Appendix A, are reproduced and engrossed in

stamp papers, which document described as the Majority Award contains the signature of the majority members of the Tribunal, that is of Arbitrator no.1 and the Presiding Arbitrator. Appendix A, Appendix B and the document described as the Majority Award together constitute the final Award and the date of the Award is 05.04.2010. It is true that all the aforesaid three documents are described as 'Award'. Merely because they are described so, it does not make them separate awards. In our opinion they are only parts of one final Award. Therefore, the arguments to the contrary are liable to be negatived.

11. Further the argument that the majority award is not supported by any reason(s) is incorrect because detailed reasons have been given in Appendix A, which reasons have been wholly adopted by the Presiding Arbitrator and made part of the Majority Award. It is true that the Presiding Arbitrator has not given reasons of his own in Appendix B. But that is unnecessary because he states in Appendix B thus-

"*I had the opportunity to go through separate awards written by*

Sr.Justice K.A.Abdul Gafoor and Sri.Justice K.Sampath. I have considered the pleadings, documentary evidence adduced by both sides, oral evidence in this case and arguments of both sides. On a careful consideration of the above and after studying the awards written by my co-arbitrators, I fully agree with the award of Sri.Justice K.A.Abdul Gafoor. Since I fully concur with the reasoning and findings in the award and relief granted by Sri.Justice K.A.Abdul Gafoor, I am not reiterating the same. But, I am enclosing herewith the list of documents arranged chronologically."

12. As per sub-section (1) of Section 29 of the Act, any decision of the Arbitral Tribunal consisting of more than one Arbitrator has to be made by majority of all its members, unless otherwise agreed to by the parties. Sub-section (2) empowers the Presiding Arbitrator to decide on the question of procedure if authorised by the parties or by all the members of the Tribunal. Here nobody has a case that any particular procedure had been agreed to or that the parties had authorised the Tribunal to follow any particular procedure. Therefore, the Presiding Arbitrator was well within his powers to decide on the procedure to be adopted in passing the Award. That being the position, the argument that the aforesaid provisions of the Act have been

infringed, is liable to be negatived.

13. It is true that the Majority Award is not signed by Arbitrator No.2, but only by Arbitrator No.1 and the Presiding Arbitrator. However, that is not necessary which is clear from Section 31. Section 31(1) says that an Award shall be in writing and signed by the members of the Tribunal. Section 31(2) says that where there is more than one Arbitrator, the signatures of the majority of the members of the tribunal shall be sufficient so long as the reason for any omitted signature is stated. This can apply only in the case of a unanimous Award and it can have no application when there is a dissenting view rendered by one of the Arbitrators. As held by the Apex Court in the aforesaid decision, any member of the Tribunal who does not assent to an Award need not sign it but may set out his own views of the case, either within the Award document or in a separate dissenting opinion. The dissenting view is not part of the Award. Here, in the Majority Award, Arbitrator No.1 and the Presiding Arbitrator have authenticated it by affixing their respective signatures in it. Therefore, the argument

that the provisions of Section 31 have also not been complied with is rejected.

14. It is further pointed out that when Appendix A Award was passed on 24.02.2010 by Arbitrator No.1, the Arbitral Tribunal had become *functus officio* and hence Arbitrator No.2 or the Presiding Arbitrator could not have passed Appendix C or Appendix B Awards. This argument again will have to fail as we have already found that neither Appendix A, B nor C, independently/separately are Awards. Appendix A as on 24/02/2010 signed by Arbitrator No.1 only, is his findings/views/opinions and Appendix C, the dissenting notes/views/opinions of Arbitrator No.2. Appendix A matured into an Award only when the Presiding Arbitrator accepted the same by recording his concurrence in Appendix B. Thereafter the majority members of the Tribunal proceeded to get the Majority Award engrossed in the requisite stamp paper by incorporating the gist of the Award and authenticating the same by affixing their respective signatures in the same. Hence, only after the Majority Award was

signed on 05.04.2010, the Arbitral Tribunal became *functus officio*. Arguments to the contrary are therefore liable to be negatived and so the court below was right in declining to interfere with the Award on this score.

15. Having answered the preliminary point raised, we now proceed to deal with the challenge mounted on the findings arrived at by the Tribunal. We are quite conscious of the fact that the scope of interference by this court is very limited. In the light of the serious challenge raised against the findings of the Tribunal, we are examining in detail the said findings and the reasons for the same to see whether they are justified. According to the learned counsel for the respondent, the findings of the Tribunal regarding delay in the execution of the work; holding the respondent liable for the failure to procure materials at the site on time; mulcting the respondent with the liability of payment of charges towards the engagement of crane at the site and the finding that there has been a novation of Ext.C13(R11) agreement executed between the parties and that Ext.C13 (R11) had been replaced

by Ext.C22A and that the claimant had been discharged of his obligations under Ext.C13 (R11), are patent errors going against the very terms of the contract and the evidence on record, which constitute a clear perversity as defined in the judgments of the Apex Court and this Court. According to the respondent, the court below should not have brushed aside the patent errors committed by the Tribunal in misapplying the statutory provisions by merely saying that the errors in the award are relatable to interpretation of the contract and within the jurisdiction of the Tribunal. This is apparently contrary to the decisions of the Apex Court and this Court, which have consistently held that in case of errors such as those committed by the Tribunal in this case, would constitute perversity warranting interference under Section 34. Therefore, the argument advanced is that the impugned award is liable to be set aside on the ground of patent illegality as contemplated under sub-section 2-A of Section 34 of the Act. However, the court below failed in exercising its jurisdiction.

16. We shall first deal with the finding of the Tribunal that

there has been a novation of the contract between the parties; that Ext.C13 (R11) had been replaced by Ext.C22 A and that the claimant had been completely discharged of his liabilities under Ext.C13(R11). The District Court in the proceedings under Section 34, disagreed with the findings of the Tribunal that there has been a novation of the agreement. According to the respondent, after having found that novation under Section 62 of the Contract Act had not taken place and that the claimant was bound to carry out the work in accordance with the original agreement as modified by Ext.C22A, the court below ought to have found that the finding of the Tribunal to the contrary in the impugned award is perverse.

17. Admittedly, the respondent was the successful bidder in the tender quoted by the GCDA for providing roof to the Stadium. Ext.R4 dated 21.07.2007 is the Government order accepting the tender of the respondent and Ext.R27 dated 30.07.2007 is the formal order by the GCDA to the respondent confirming the tender for the roofing of the Stadium in favour of the respondent. The estimated cost of the

work as per Ext.R4 is ₹10,04,83,261/-. As per Ext.R2 tender notice the work was to be completed within a period of ten months. Pursuant to the same, the claimant and the respondent entered into a sub contract by which the claimant took up the job of designing, drawing, supply of materials, fabrication and erection of the roof structure. The roofing was excluded and the same was to be done by the respondent on completion of the sub-contract by the claimant. Accordingly, Ext.C3 LoI dated 04.09.2007 was issued by the respondent to the claimant. As per Ext.C3, the total value of the contract is ₹615 Lakhs. Pursuant to Ext.C3, the parties entered into Ext.C13(R11) agreement dated 19.10.2007 as per which work order for a total value of ₹615 Lakhs was issued to the claimant. In Ext.C13(R11) it is stated that the total value of ₹615 Lakhs is the Firm Price Contract and that the claimant is not eligible to any escalation due to increase in the price of raw materials and that the price indicated is inclusive of labour, loading, unloading, scaffolding and all relevant activities related to the work. Payment of the bills of the claimant as per Ext.C13(R11) was to be on a

back-to-back basis as per the terms of payment of the GCDA. Ext.C13(R11) further states that time is the essence of the contract and that the claimant has to complete the entire work within five months from 22.10.2007, i.e., by 22.03.2008. Work commenced at the site. However, disputes arose between the parties relating to the payment of periodical bills. Out of the 28 modules of space frames, only one could be erected by the claimant. Therefore, talks and negotiations took place between the parties and as per Ext.C22A dated 03.03.2008, which is the minutes of the meeting that took place in the office of the respondent, an agreement was arrived at between the parties relating to the erection of the remaining 27 modules. The main points that were agreed to as per Ext.C22A are - (i) that 27 modules would be fabricated and assembled by the claimant and handed over to M/s.Builders Engineering Constructions Pvt. Ltd. (M/s.BECPL) for erection in a phased manner; (ii) that the required quantity of balance materials would be arranged by the respondent on behalf of the claimant and the actual cost debited to the latter; (iii) that the claimant

would make arrangements to give the exact quantity of the materials required for the work and that it would be their sole responsibility to follow up with the supplier and to procure the materials on time; (iv) that the fabrication of the rear portion would be done by the claimant and the erection of the rear portion by M/s.BECPL as per mutually agreed rates; (v) that erection of all the modules would be the scope of work of M/s.BECPL for which the rate was fixed at ₹13,500/- per ton. The tools and equipment of the claimant available at the site would be supplied free of cost to M/s.BECPL. The claimant would also provide power if necessary to M/s.BECPL; (vi) that the work was to be completed by 30.06.2008 and the sheeting of the roof by the respondent would be started after the erection of the space frame; (vii) that M/s.BECPL was to start the erection from 10.03.2008; (viii) that the claimant was to arrange for the third module fabrication immediately and also the balance modules according to the schedule required by M/s.BECPL so that there would not be any delay in erection.

18. Now the question is, does Ext.C22A completely replace Ext.C13(R11) ? The court below relying on **Lata Construction vs. Dr.Ramesh Chandra Ramaniklal Shah (AIR 2000 SC 380)** found that novation takes place only when the existing contract is fully modified or altered by a subsequent contract; that in this case no substitution of Ext.C13 (R11) contract had taken place and what had happened by way of Ext.C22A was only alteration or modification of certain terms of Ext.C13(R11) original contract. Hence the court below found Section 63 of the Contract Act to be applicable and that no novation of the original agreement had taken place as contemplated under Section 62 of the Contract Act. It was found that the parties were bound to perform the contract as per the terms contained in Ext.C13 (R11) modified by Ext.C22A. The court below concluded that the Tribunal had committed an error in the interpretation of the contract. The court below further held that though the Tribunal entered into a finding that due to novation, the claimant had been discharged from all the obligations contained in Ext.C13, they did not proceed on that

premise. On the other hand, the Tribunal placed reliance on Ext.C13 (R11) agreement in matters relating to the price of the contract, in fixing the proportionate erection charges and such other matters, which according to the court below was evidence of the fact that the Tribunal had proceeded on the premise that it was only Section 63 of the Contract Act that was applicable. The court below also held that, had it not been so and had novation actually taken place, then even the arbitration proceedings would not have been possible as the arbitration clause is available only in Ext.C13. Relying on the dictum in **Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd. [(2009)10 SCC 63]**, in which the Hon'ble Supreme Court held that an error relatable to the interpretation of the contract by an Arbitrator is an error within his jurisdiction; that such error is not amenable to correction by the court and that such error is not an error on the face of the award, refused to set aside the award.

19. As held in **Lata Construction** *supra*, one of the essential requirements of novation as contemplated under Section 62 of

the Contract Act, is that there should be a complete substitution of the new contract in place of the old. It is in that situation that the original contract does not require to be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the previous contract.

20. We have already referred to the relevant terms of the contract contained in Ext.C13 (R11) original agreement and the subsequent agreement in Ext.C22A. Ext.C13(R11) has not been completely substituted by Ext.C22A. As per Ext.C13 (R11) the claimant was responsible for designing, submission of drawings, supply of materials, fabrication and erection of the roof structure. Due to the inability of the claimant in supplying materials and in erection of

the roof structure, the said part of the contract alone was taken over by the respondent by way of Ext.C22A. The remaining terms of the contract as agreed to by the claimant as per Ext.C13, continued to be their responsibility. Therefore, the finding of the Tribunal that there had been a novation of the original agreement as contemplated under Section 62 of the Contract Act is incorrect and so the finding of the court below on this point is therefore justified.

21. According to the respondent, the finding of the Tribunal on novation is a perverse finding and so the court below ought to have exercised its jurisdiction under section 34 and set aside the award. It is true that the Tribunal went wrong in concluding that Section 62 of the Contract Act applies in this case. However, as rightly pointed out by the court below, the Tribunal did not completely ignore Ext.C13 (R11) original agreement. On the other hand, the terms of the original agreement were taken into account in arriving at its various conclusions. Therefore, no infirmity has been committed by the court below in refusing to set aside the award on the aforesaid ground.

22. As per the claim statement of the claimant, an amount of ₹1,84,60,564.24/- was due to them. However, according to the respondent, who had put in a counter claim, only an amount of ₹87,78,121.44/- was due to the claimant. The value of finished and unfinished work and the cost of materials at the site, according to the claimant, was ₹366 Lakhs, whereas according to the respondent, it was only ₹346 Lakhs. The difference is ₹20 Lakhs. The bone of contention before the Tribunal was mainly relating to the amount stated to have been received/paid to the claimant. This, according to the claimant, was only ₹2,46,92,582/-. However, according to the respondent, it was ₹4,34,59,836/-. The difference is ₹1,87,67,254/-, out of which, an amount of about ₹117 Lakhs is towards the crane charges. Paragraph 14 of Appendix A refers to the other items of claims of the claimant relating to which there does not appear to have been any serious dispute. After considering the evidence let in by either side and hearing both sides, the Tribunal allowed the following claims. Paragraphs 77 and 78 of Appendix A reads-

"*77. Thus from out of the payments said to be made by the Respondent directly or indirectly to the Claimant as shown in* ***Annexure 2*** *the following alone are admissible.*

a) Direct payment to the Claimant-
(as found in para 53 above) - Rs.1,10,39,060.00
*b) Indirect payment towards Materials - Rs.1,21,98,695.00 **
c) Indirect Payment to Erection Agencies
(as found in para 60 above) - Rs.24,62,809.00
d) Indirect Payment to Erection Equipment
(as found in para 74 above) - Rs.32,88,418.00
e) Insurance Premium
(as found in para 75 above) - Rs.2,41,110.00
f) Electricity Charges paid
(as found in para 76 above) - Rs.60,455.00

TOTAL Rs.2,92,90,547.00

**Rs.13119677 (total in Annexure 2A to the Written Statement) -Rs.9,20,982 (total of amounts found in paras 58 above)*

78. It has been found in paragraph 51 above that the value of the work done by the Claimant including the materials returned and the electricity deposit is Rs.3,54,40,260/-. Total payments to be accounted against the Claimant is Rs.2,92,90,549/-. Thus balance amount payable to the Claimant, towards the cost of the work done, is Rs.61,49,711/-, as against the claim of

Rs.1,84,60,564/- urged in ***Annexure I*** *to the Claim Statement."*

23. As pointed out by the Tribunal, the bone of contention between the parties is the payment towards charges for the engagement of a crane for erecting/lifting the space frame. It was argued by the learned counsel for the respondent that as per Ext.C13(R11), the claimant had in addition to the task of designing, submission of drawings and supply of materials, agreed to the erection of space frames or the roof structure. As is evident from Exts.C13 and C22A, time was the essence of the contract. In Ext.C13(R11) original agreement, the work was agreed to be completed within five months from 22.10.2007, which means that the claimant ought to have completed the work by 22.03.2008. However, the claimant miserably failed in this task as their engineering skills failed. The claimant realising that lifting the space frame with the aid of scaffolding was a time-consuming process, went in for the Derrick method. However, both methods turned out to be unsuccessful. As on 03.03.2008, the

claimant was able to erect only one module out of the total 28 modules to be erected. Therefore, with hardly three weeks to spare, the claimant realising that he would not be able to comply with the terms of Ext.C13(R11), expressed their inability to do the work which was conveyed to the respondent by Ext.C18 letter dated 17.03.2008. The respondent was also bound by the agreement they had entered into with the GCDA, the principal employer, as per which they had to complete the work within a specified time limit. If not, they would have to pay a heavy penalty and therefore when help and assistance was sought and requested by the claimant, the respondent stepped in and helped the former in engaging the services of a crane for erection of the space frame. It was only due to the inability of the claimant to carry out the work which they had agreed to do as per Ext.C13 (R11) and on the invitation of the claimant, the respondent had stepped in and engaged the services of a crane on behalf of the claimant. That being the position, Sri.Vinod Bhatt, the learned counsel for the respondent stressed that the Tribunal ought not to have mulcted the respondent

with any liability to pay the charges of the crane. This finding of the Tribunal is against facts, evidence and therefore is totally perverse which warranted an interference by the court below. It is also pointed out that the Tribunal had contradicted itself on this aspect. In answer to claim no.1, the Tribunal in the document described as the Majority Award (which is at page 58 of the paper book) says - "*We hereby decline that in view of the reasons stated in the majority award re-arrangement by the respondent of the left over work pursuant to the termination of the contract shall not be at the claimant's risk as to cost and consequences.*" But in paragraph 71, the Tribunal says - "*That does not mean that the entire liability of the crane charges shall be shouldered by the Respondent and that the Claimant can escape totally away from that liability.*" This according to the learned counsel, is a totally inconsistent and contradictory view/finding/conclusion arrived at by the Tribunal. These aspects, according to him, are sufficient to substantiate the argument that the Award suffers from patent illegalities which warranted an interference by the court below.

24. The payment made to the crane companies, the major disputed item, comes to ₹1,18,84,227/-. The vouchers relied on by the respondent to establish this are Exts.R63 series, R65 series and R65 series. The claimant contended that the engagement of the services of a crane and the fixation of charges to be paid for the same were done without their involvement, which is evident from Ext.C25 work order issued by the respondent to the Company from which the crane was hired and that as per Ext.C25, the respondent themselves had taken up the said responsibility. It was their further case that as per Ext.C13 (R11), the agreement was to use scaffolding for lifting the space frame. The claimant had at no point of time agreed to the use of a crane. Even in Ext.C22A, the claimant never agreed for hiring the services of a crane. Further relying on Ext.C29 also, in which the respondent voiced their apprehension relating to payment of additional charges for the crane in case of delay in the completion of the work by the claimant, the latter contended that the responsibility to pay the charges was squarely on the former.

25. The Tribunal took note of Exts.C13 (R11), C22A and C29 to conclude that the responsibility was on the respondent to pay the charges of the crane. It was further noticed that the crane charges paid as per Ext.R63 series, which alone came to ₹1,06,83,809/-, was the payment from 13.05.2008 onwards which was apparently after Ext.C22A dated 03.03.2008. After Ext.C22A, the claimant had no duty to do erection work and it was the sole responsibility of the respondent. Ext.R45 dated 14.05.2008 relied on by the respondent to contend that the claimant had been informed before the engagement of the crane that the expenses for the same would have to be borne by the claimant since erection was within their scope of work, was disputed by the claimant. They contended that they had never received the same and that Ext.R45 is a cooked-up document created to suit the case of the respondent. The claimant in support of the said contention referred to an anomaly contained in Ext.R45. It was pointed out that in all the communications sent by the respondent before and after Ext.R45, the name is spelled as ‘Sajid Pasha' (the representative of the claimant),

whereas in Ext.R45 the name is spelled as 'Sajjid Pasha'. This mistake occurred for the first time in the court proceedings initiated after the termination of the contract by the respondent on 06.09.2008, i.e., in Ext.C56 interim order dated 13.09.2008 and thereafter in subsequent court documents. This anomaly pointed out to suspect/doubt Ext.R45 found favour with the Tribunal. The Tribunal further referred to Ext.R47 dated 26.05.2008 sent by the respondent to the claimant in which it is stated that if the latter does not make the necessary frames for erection ready, the former would have to pay ₹1 Lakh per day for the 250-ton crane that had been assembled at the site. According to the Tribunal, Exts.R45 and R47 cannot go together, because, if by Ext.R45 the respondent had already intimated the claimant that the responsibility for charges of the crane is on the claimant, then there was no necessity for Ext.R47 letter to be issued just 12 days after Ext.R45. The Tribunal further took note of Ext.C29 also to disbelieve Ext.R45. As per Ext.C29 dated 07.07.2008, the respondent urges the claimant to make arrangements for unhindered and smooth flow of the

work as they have to pay ₹6 Lakhs towards crane charges. The Tribunal held that if Ext.R45 had actually been sent to the claimant, then there was no necessity to send Ext.C29 dated 07.07.2008. Ext.R26 dated 19.03.2008 relied on by the respondent was also disputed by the claimant for the same reasons as raised by them against Ext.R45.

26. The respondent produced their dispatch register to establish that Exts.R26 and R45 had in fact been sent to the claimant. However, the Tribunal disbelieved the dispatch book because of the interpolations seen to have been made in the entries with different ink relating to the dispatch of the aforesaid letters. The Tribunal found that by Ext.C22A, the claimant had been relieved of their duties of erection of space frame and therefore the erection work could not have been within the scope of the work of the claimant as stated in Ext.R45. The Tribunal further found that the respondent had engaged M/s.Bava Engineers for carrying out the erection work and had issued Ext.C26 work order. The rate fixed as per Ext.C26 dated 27.05.2008 was without the junction of the claimant. Therefore, the Tribunal concluded

that the responsibility for procuring the crane was that of the respondent. However, it further held that the claimant cannot completely escape from this liability. So, saying the Tribunal fixed the liability thus -

> "*73. For the purpose of arriving at the rates for partially finished work, the Respondent has worked out a computation in* ***Annexure 4B****. I have already found while considering the rate so calculated for partly finished work, that it was on lower level so far as the real material cost is concerned. Necessarily going by the total cost calculation in* ***Annexure 4D****, the cost for the work to be performed including erection will be on correspondingly higher level. Giving this advantage to the Respondent, when the cost of erection is calculated based on* ***Annexure 4B****, the rate for erection shall be Rs.23,000/- MT (See 1st two lines under heading* ***Item No:4 Assembled frames kept on floor*** *in* ***Annexure 4B****). The rate for erection agreed by M/s.Bava Engineers in* ***Ext.C26*** *is Rs.8000/- MT. Only this rate was paid to them, by the Respondent as revealed by* ***Ext.R64 series****. When erection Charges are reckoned at Rs.23,000/- MT as mentioned above based on the Respondent's own calculation in* ***Annexur 4B*** *and* ***4D****. Rs.15,000/- MT can be allocated towards charges for erection equipments. This will be on*

any court very reasonable, which we notice the rate paid to M/s.BECPL at Rs.13,500/- MT all inclusive, even if there was escalation subsequently."

"74. The quantity erected after ***Ext.C22A*** *is 139.20 MT, as per Respondent's own showing in the first sheet of* ***Ext.R64 series****. AT the rate of Rs.15,000/- MT, the total charges for erection equipments would be Rs.20,88,000/-. Along with this the charges for small cranes for removing the frame from the ground as met by the Respondent as per* ***Exts.65*** *and* ***66*** *series, amounting to Rs.12,00,418/- as found in para 62 shall also be added. Thus total charges for erection equipment, therefore shall be Rs.32,88,418/-"*

27. This finding of the tribunal has been upheld by the court below. The court held that the Tribunal had taken into account all the relevant documentary evidence and attending circumstances for arriving at its conclusion. This is a finding based on evidence adduced before the Tribunal. No perversity was found in the findings warranting an interference. The finding of the Tribunal on the above aspect and the refusal of the court below to interfere with the same is seriously challenged by the respondent. It is true that the claimant as per Ext.C13

(R11) had agreed to do the work of erection of the space frame also. However, pursuant to Ext.C22A, the responsibility was taken over by the respondent. The fact that the claimant cannot be completely absolved of the liability was also taken note of by the Tribunal. It was after considering all the documentary evidence adduced by the parties, the Tribunal had arrived at the conclusion referred to above. The reasonings given by the Tribunal cannot be said to be *per se* perverse or one that shocks the conscience of the court to term it as a patent illegality as contemplated under sub-section 2-A of Section 34. A perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration, the finding cannot be said to be perverse. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would

be perverse. But, if there is some evidence on record which is acceptable and which could be relied upon, howsoever concise it may be, the conclusions would not be treated as perverse and the findings would not be interfered with. [See **Laxmi Pat Surana v. Voltas Ltd. (2019 KHC 4553)**].

28. The Court while exercising jurisdiction under S.34 of the Act does not sit as the Court of appeal. It is settled law that the Arbitral Tribunal is the final adjudicator of facts and evidence adduced before it. The Court is not permitted to re-appreciate the evidence placed before the Arbitrator as the Arbitrator is the best judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the Arbitrator. It is not permissible for the Court to interfere with the Arbitrator's view merely because another view of the matter is possible. The aforesaid principles have been repeatedly reiterated by different Courts in India including the Hon'ble Supreme Court. Some of the authorities are **McDermott International Inc. Vs. Burn Standard**

Co. Ltd. [(2006) 11 SCC 181], **Steel Authority of India Limited Vs. Gupta Brother Steel Tubes Limited [(2009) 10 SCC 63]**, **M/s.Sumitomo Heavy Industries Ltd Vs. Oil and Natural Gas Company (AIR 2010 SC 3400)**, **Navodaya Mass Entertainment Limited Vs. J.M. Combines [2015 (5) SCC 698]**, **MMTC Ltd. Vs. M/s.Vedanta Ltd. [AIR 2019 SC 1168]**, **SSangyong Engineering and Construction Co. Ltd. Vs. National Highways Authority of India (NHAI) [2019 SCC (Online) SC 677]**, **Associate Builders Vs. Delhi Development Authority [(2015)3 SCC 49]**, **Mahanagar Telephone Nigam Ltd. Vs. Fujitshu India Private Limited [2015 SCC (Online) Del. 7437]** and **Mahanagar Telephone Nigam Ltd. Vs. Finolex Cables Limited reported at [2017 SCC (Online) Del. 10497]**.

29. Now coming to the finding of the Tribunal relating to the question of delay and the party liable for the breach of the contract. As per Ext.C13 (R11), the claimant had the duty to supply materials also. However, after Ext.C22A, the said responsibility was taken over

by the respondent. After examining the various communications that took place between the parties, the Tribunal found that there was no evidence on record to conclude that there was any delay in the supply of materials till 03.03.2008. On the other hand, Ext.C30 dated 08.08.2008, a letter from the GCDA to the respondent showed the former reminding the latter that no material had reached the site since 23.06.2008. The Tribunal hence concluded that after Ext.C22A dated 03.03.2008 came into being, any delay if at all had occurred, was due to the fault of the respondent alone as they had taken over the task of supply of required materials at the work site.

30. The court below on the other hand found that there was delay on the part of the claimant because admittedly, only one space module out of the 28 modules had been erected before 03.03.2008. The period of contract as per Ext.C13 original agreement was 22.03.2008. Therefore, the court below found that delay till 03.03.2008 was caused by the claimant. However, it noted that the claimant had all along been complaining that the reason for the delay

was due to the nonpayment of part bills by the respondent. The court below found that in spite of the slow pace of work, the respondent had not terminated the contract. On the other hand, they entered into Ext.C22A by which certain modifications were made to the terms of Ext.C13. Therefore, after entering into Ext.C22A, the respondent could no longer complain about delay by the claimant, said the court below. Here also, we find that the reasons given by the Tribunal are plausible and cogent. We find no perversity in the same, warranting an interference. Therefore, the court below was justified in refusing interference.

31. Further, the Tribunal found that breach of the contract had been committed by the respondent. As per Ext.C18 dated 17.03.2008, the claimant had sought for termination of the contract. However, the respondent did not immediately terminate the contract. Differences of opinion between the parties mounted, as a result of which the claimant sent Ext.C33 (R25) dated 26.08.2008 informing the respondent that the site was being closed and that they were stopping

the work as payments assured by the respondent were not forthcoming. The respondent did not act on this. But as per Ext.R53 dated 27.08.2008, the respondent demanded the claimant to remove their site Manager from the site as he was supposed to have threatened the workers of the respondent. The respondent in Ext.R53 letter also threatened cancellation of the contract if their demand was not acceded to by the claimant. This reason cited by the respondent for termination of the contract, according to the Tribunal, was a flimsy one. The respondent followed up Ext.R53 letter by sending an e-mail dated 27.08.2008, i.e., Ext.C34, stating that matters relating to payment would be discussed only after the claimant removed their Manager. The claimant did not accede to this demand. The respondent then by Ext.C35 letter dated 06.09.2008 terminated the contract alleging total lack of progress in the work by the claimant.

32. The Tribunal noted that the work that has been referred to in Ext.C35 is - "*Execution of work of Design, Supply and Erection of Space Frame, Structure*" of the Stadium. However, after

the execution of Ext.C22A, the supply and erection were within the scope of the work of the respondent. Ext.C35 did not mention lack of progress in the fabrication work. No complaint by the erection agency about the non-availability of fabricated frames was produced before the Tribunal. The Tribunal found from Ext.C37 commission report that partially and fully fabricated and painted frames were available in sufficient quantity at the site. The quantity of materials available on the site was not disputed by the respondent. Ext.C20 bill dated 20.05.2008 and Ext.C21 letter dated 22.08.2008 showed the amount of work that had been completed till 18.08.2008. The Tribunal also noticed that there had been considerable increase in the erection of space frame which was evident from Exts.C20 and C21. This could be attained only due to sufficient fabrication work being done by the claimant, which alone was their responsibility at that point of time. Therefore, the Tribunal concluded that as on the date of Ext.C35, it could not be found that there was '*total lack of progress in work*' by the claimant as contended by the respondent. The termination of the contract by the

respondent for flimsy reasons was held to be unjustified and that it amounted to breach of contract on the part of the respondent. According to the Tribunal, total lack of progress of work alleged in Ext.C35 was only a ruse for the termination of the contract.

33. The Tribunal further held that even if there was lack of progress in the fabrication work, the claimant could not be held responsible because the said work could be done only if there was sufficient supply of materials, which was the responsibility of the respondent at that time in terms of Ext.C22A. The Tribunal referred to Ext.C30 (R50) dated 08.08.2008 in which the GCDA had blamed the respondent for the shortage of materials and the consequent inadequate labour output. The claimant had by letter dated 20.08.2008 (described in the Award as part of Ext.C21 letter) informed the respondent that "*the materials position is very feeble at the site now and due to this the work progress is slow.*" In Ext.R52 letter dated 14.08.2008 also, the claimant had informed the respondent about the urgent requirement of the balance materials. Therefore, taking into account all these aspects,

the Tribunal held that if at all anybody was responsible for the lack of progress in work, the liability squarely fell on the shoulders of the respondent because it was their duty to ensure adequate supply of materials at the site. That being the position, the Tribunal held that the claimant could not be found liable for the breach.

34. The court below refused to interfere with the Award on this score also. It found that the Tribunal had considered all the relevant materials and evidence before it arrived at the conclusion. Therefore, relying on **McDermott International Inc. vs. Burn Standard Co.Ltd [(2006)11 SCC 181]**, the court held that appreciation of evidence is the realm of the Tribunal and that the court under Section 34 cannot re-appreciate the evidence as is done in civil appeals and that it is only when the Tribunal bases its conclusion on irrelevant and extraneous matters, an interference would be called for. In the instant case, the Tribunal has not considered any irrelevant evidence or extraneous matters and therefore the court below refused to interfere with the matter. The conclusions arrived at by the Tribunal as rightly

held by the court below are conclusions arrived at by the Tribunal after appreciating the evidence on record. The court below under Section 34 or this Court under Section 37, cannot re-appreciate the evidence and substitute its own views or findings even assuming that a different view is possible. In these circumstances, we find no infirmity or perversity as contemplated under sub-section 2-A of Section 34 in the findings of the Tribunal and therefore the court below was right in refusing interference.

In the result, the appeal is dismissed. There is no order as to costs.

All pending interlocutory applications, pending if any, shall stand closed.

Sd/-

P.B.SURESH KUMAR
JUDGE

Sd/-

C.S.SUDHA
JUDGE

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