* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 11.10.2021***

Pronounced on: 08.11.2021

\+ **O.M.P. (COMM) 297/2021 & I.As.12902-12904/2021**

KANODIA INFRATECH LIMITED ..... Petitioner

Through: Mr.Sandeep Sethi, Senior Advocate with Mr.Sunil Dalal, Mr.Kunal Vajani, Mr.Shikhar Khare, Mr.Ketul Hansraj, Mr.Gokula Krishnan, Mr. Harsh Agrawal & Mr.Devashish Bhaduria, Advocates

Versus

DALMIA CEMENT (BHARAT) LIMITED ..... Respondent

Through: Mr.Parag P. Tripathi & Mr.B.B. Gupta, Senior Advocates with Mr.Mahesh Agarwal, Mr.Rishi Agrawala, Mr.Tarun Singla, Mr.Pranjit Bhattacharya, Ms.Aarushi Tiku, Ms.Megha Bengani, Mr.Srinivasan & Mr.Achal Gupta, Advocates

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The present petition has been preferred by the petitioner challenging the Award dated 09.03.2021 passed by the learned Arbitrator in Case Ref. No. 3005/2018, titled as *"M/s Dalmia Cement (Bharat)*

Limited Vs. M/s Kanodia Infratech Limited" on the ground that the learned Arbitrator lacked inherent jurisdiction to entertain and try the disputes being unilaterally appointed by the respondent, which is contrary to the settled proposition of law.

2. Petitioner- *M/s Kanodia Infratech Limited*, a company incorporated under the provisions of Companies Act, is involved in the business of producing, grinding, blending, manufacturing, finishing, packaging, repacking, mixing, grading, supply of Portland cement and Portland Pozzolona cement. Respondent- *M/s Dalmia Cement (Bharat) Limited* is also in the business of manufacturing and marketing of cement.

3. According to petitioner, the parties to the present petition entered into a Memorandum of Understanding dated 13.12.2016 for use of cement griding plant at village Kurari, Distt. Kaimur (Bhabhua), Bihar by the respondent for conversion of clinker into cement at an agreed rate of conversion and further purchase of the plant itself by the respondent through a Share Purchase Agreement, in terms enumerated in Clause-12 thereof. In furtherance thereto, detailed discussions between the parties took place with regard to legal, financial and technical aspects and after due diligence, respondent vide its email dated 15.02.2017 shared a draft

of Share Purchase Agreement and thereby, parties were *ad idem* on the sale of the said plant through purchase of entire shareholding of the petitioner. Finally, respondent made an offer to take over the share holding of the petitioner in the said plant at a price of Rs.250 crores plus tax implications on the purchase, which is said to have been accepted by the petitioner. According to petitioner, in addition to above, the petitioner was also liable to release of VAT incentives offered by the State of Bihar, which were to accrue to the respondent upon eventual purchase of the plant. However, since the State Government took longer than expected to release the VAT incentives, the respondent deferred the execution of the proposed Share Purchase Agreement till the first instalment of VAT incentive was received. It was therefore agreed between the parties that the respondent shall operate the said plant till the time VAT incentives are released and thereafter, shall acquire the shareholding of the company and stationed its employees at the said plant from February, 2017.

4. At the hearing, learned counsel for the petitioner submitted that in order to discharge capital liabilities towards its creditors, petitioner had applied for loan of Rs.25 crores, which was sanctioned from Corporation Bank, Varanasi Branch. However, since respondent was poised to

purchase the plant, it discouraged the petitioner and offered Rs.25 crores being 10% of the total consideration of the plant agreed upon i.e. Rs.250 crores. Thereafter, formal negotiations were drawn into writing in minutes of meeting dated 06.03.2017, which were exchanged between the parties and thereafter, parties also entered into the following agreements:-

(a) The Cement Supply Agreement (CSA) dated 16.03.2017, which effective from 01.04.2017;
(b) The unattested Deed of Hypothecation (DOH) dated 17.03.2017; and
(c) The Operations and Maintenance Agreement (O&MA) dated 17.10.2017 effective from 01.04.2017.

5. It is the claim of petitioner that at the request of respondent, with an understanding that respondent shall bear the costs of operations and shall buy the entire cement under the terms of the CSA, the entire control of management, administration, accounts and books of the petitioner and operations of the plant, was handed over to the respondent. However, since petitioner was not being timely informed about the functioning of the plant, therefore, petitioner vide email dated 13.04.2017, called upon the respondent about lack of coordination in the plant and asked to provide details of production, dispatch etc.. However, in response thereto, respondent cautioned the petitioner to not poke nose in day to day affairs of the company. However, since petitioner was yet the owner of the plant,

vide further emails dated 20.03.2017 and 15.04.2017, it reminded the respondent of its statutory obligations and vide further email dated 31.08.2017, requested it to comply with all the legal and statutory compliances. Petitioner also claims to have sent emails dated 10.7.2017, 11.07.2017 and 24.01.2018 calling upon the respondent to share the data i.e. books of accounts and since these mails were not replied to, petitioner vide email dated 03.05.2018 to Mr. Biswanath Roy, the representative of the respondent, requested the user ID of respondent to tally the data. The petitioner vide email dated 04.05.2018 was informed by Mr. Biswanath Roy that only Mr.Akhilesh Srivastava, representative of respondent, is authorized to make changes in the books of accounts.

6. Learned senior counsel for petitioner submitted that respondent was operating the said plant from 01.04.2017 till 01.06.2018 and thereafter holded it over till 29.10.2018 and also the intent of respondent to take over the plant is clear from respondent's own presentation of June, 2018 pertaining to the financial years 2019-21 wherein respondent -company had shown its intent to expand its business by acquiring the said plant. It was contended by learned senior counsel for petitioner that respondent was in full control over the day-to-day affairs and accounts, books and

management of the plant, in order to smooth function of respondent-company and in good faith, petitioner had given full control over one of petitioner's bank accounts (HDFC bank) to the respondent, including the net banking password and also employees of respondent used to upload the GST returns from the website of the said plant. Since eventual sale was yet to take place, again in good faith petitioner used to append its digital signatures of the said uploaded files. In this manner, respondent was in full control over the plant and its management with the statutory compliances like appointment of Company Secretary, books of accounts, VAT & GST filing etc. However, petitioner had a vested right to know every minute detail with regard to the plant during the tenure of CSA and O& MA, but petitioner was kept in dark in manner the books of accounts were kept and despite repeated requests, respondent never disclosed the details of operations and also since, the bank account was also under control of respondent, petitioner was unaware of the financial status of the plant. Thereby, all the material information relating to finance and management of the plant was supressed from the petitioner.

7. Learned senior counsel for petitioner next submitted that in terms of recital- C of O & MA, the respondent was to enhance the quality of the

cement produce, however, respondent vide its email dated 16.04.2018 apprised the petitioner of the constraints in clinker transportation to the grinding unit, which had impacted the production. But respondent indicated that it would run the plant at 60% capacity utilization despite the constraints in clinker transportation.

8. Further it came to the knowledge of petitioner that due to certain disputes with DCF (subsequently acquired by Ultratech), respondent failed to procure the clinker for the said plant, though the said plant was the only plant procuring clinker from the DCF. Thus, if the agreement was to be terminated or supply of clinker from DCF was to be stopped, in order to continue operations, respondent was required to source clinker from some other source, which was not commercially viable and it will not be viable for respondent to purchase the plant. The respondent was running into losses and found itself unable to run the plant. According to petitioner, wrong and bogus account entries were made in books by the respondent between the period January to March, 2018.

9. Thereafter, a meeting took place on 20.06.2018 between the representatives of petitioner and respondent to work out the modalities to terminate the contracts. Petitioner claims to have sent series of emails to

respondent to smoothly handover the possession of plant and in order to mitigate its losses, petitioner appointed FLSmidth to settle the accounts. Petitioner requested the respondent to hand over the plant to petitioner and so, vide email dated 09.08.2018, respondent was informed that in the event failure of respondent handing over of plant to petitioner, the fee of FLSmidth shall be recovered from the respondent.

10. During the course of hearing, learned senior counsel for petitioner submitted that respondent did not at all reply to the aforesaid emails of petitioner and even though cement was not produced in the plant post May, 2018 and the plant was lying idle and that the agreements in question i.e. CSA, DoH and O & MA were terminated from 01.06.2018, yet respondent illegally sold the raw material, packing bags, spare parts etc. without concurrence of petitioner, against which no consideration was ever received by the petitioner.

11. To the further shock of petitioner, respondent vide its email dated 05.09.2021, referring to the termination of aforesaid three Agreements, also referred to the amount of Rs.25 crores and the purported cost incurred by the respondent towards alleged improvement of the structure of the plant and raised total claim of Rs.39.45 crores. Besides, respondent

also claimed VAT incentives to the tune of Rs.7.00 crores. The aforesaid claim of respondent was refuted by the petitioner vide its emails dated 15.09.2018 as well as 26.09.2018. At this stage, petitioner approached this Court on 11.10.2018 under the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 to restrain respondent from interfering in the plant of petitioner and providing books of accounts, passwords, bills, vouchers and statutory ledgers and books. However, a day prior thereto i.e. 10.10.2018, respondent invoked the arbitration and appointing the sole Arbitrator. The aforesaid Section 9 petition filed on behalf of petitioner is said to have been withdrawn, with liberty to file application under Section 17 of the Act before the learned Arbitrator.

12. Learned senior counsel for petitioner emphasized that the parties were bound by the aforesaid three agreements i.e. CSA, DoH and O&MA, however, they were working on an underling understanding with each other and therefore, these agreements cannot be read in isolation and these have to be seen and considered in view of the conduct and functioning of the parties on the basis of underling understanding between them. Learned senior counsel further drew attention of this Court to the purported RMSA relied upon by the respondent, whereunder petitioner

was liable to pay facilitation fee of Rs.422 per MT for procuring the clinker.

13. The foremost challenge to the impugned arbitral Award is based on the premise that the learned sole Arbitrator lacked inherent jurisdiction to entertain and try the disputes raised before him in the arbitral proceedings on the fundamental ground that his unilateral appointment by the Respondent is contrary to settled law. Reliance was placed upon Hon'ble Supreme Court decision in ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.*** *2019 SCC OnLine SC 1517* to submit that unilateral appointment of Arbitrator is impermissible.

14. Attention of this Court was also drawn to the post invocation of arbitration proceedings, whereunder parties filed their statement of claims and counter claims and petitioner in specific challenged the purported RMSA, it being forged and fabricated document. According to petitioner, both the sides filed application under Section 17 of the Act (for stay or interim relief) before the learned Arbitrator and in addition, petitioner also filed an application under Section 16 of the Act challenging the jurisdiction of the learned Arbitrator. The learned sole Arbitrator heard both the sides on these applications and appointed one Local

Commissioner to visit the plant. The Local Commissioner submitted its report dated 26.02.2019 and thereafter, vide orders dated 05.03.2019 and 17.03.2020, with the consent of both the sides framed the issues for determination. The evidence was led by both the sides and after hearing the arguments by both the sides, the learned sole Arbitrator pronounced the Award in favour of respondent and against the petitioner directing as under:-

(a) refund of Rs.25 crores with interest @18% p.a. with quarterly rests w.e.f. 17.03.2017 till 10.10.2018;
(b) a sum of Rs. 20,83,87,643/- crores as principal cost of supply of raw material as on 10.10.2018 with interest @18% p.a.
(c) pendente lite and future interest on the amount calculated at point (a) @18% p.a. with quarterly interest w.e.f. 11.10.2018 till actual payment;
(d) pendente lite and future interest on the amount calculated at point (b) @18% p.a. with quarterly interest w.e.f. 11.10.2018 till actual payment;
(e) a token compensation of Rs.4.00 crores with interest @18% p.a. w.e.f. 01.06.2018 till 10.10.2018 and also pendente lite and future interest @18% p.a. till actual payment;
(f) fees paid by respondent to the arbitral tribunal;
(g) secretarial fee paid by respondent; and
(h) statutory amount of stamp duty payable by the respondent on the award.

15. Attention of this Court was drawn to Para-16(a) to (i) to establish how the functioning of the plant was entirely under the possession and power of respondent and how petitioner despite various email failed to

gather any information about accounts of the plant. Attention was drawn to extracts of report of Local Commissioner and observation of learned Arbitrator thereon in the impugned Award itself etc. and also it is averred that as many as 52 persons were deployed for operations at the plant as against only 07 junior employees of petitioner and their payroll and PF status has also been shown, in support of above claims. The case of petitioner is that it is only during the course of arbitration proceedings, it came to know that due to disputes of respondent with DCF, it had failed to procure clinker for the plant, which had ultimately deterred respondent to fulfil the share purchase agreement. Learned senior counsel submitted that the learned sole Arbitrator while passing the impugned Award and by granting reliefs, has interpreted the contracts i.e. CSA, DoH and O&MA in absolute violation of commercial wisdom and ignored that underlying understanding.

16. In support of present petition, learned senior counsel for petitioner placed reliance upon several decisions of Hon'ble Supreme Court and this Court.

17. To strengthen the argument that unilateral appointment of Arbitrator is impermissible, learned senior counsel for petitioner placed

reliance upon decision of this Court in ***Proddatur Cable TV Digi Services Vs. Siti Cable Networks Limited*** 2020 SCC OnLine Del 350. Reliance was placed upon Hon'ble Supreme Court's decision in ***Bharat Broadband Network Limited Vs. United Telecoms Limited*** *(2019) 5 SCC 755* to submit that proceedings conducted by an Arbitrator, who is ineligible under Section 12(5) of the Act, are void *ab initio.*

18. Reliance was also placed upon decision of Hon'ble Supreme Court in ***Lion Engineering Consultants Vs. State of Madhya Pradesh and Others*** (2018) 16 SCC 758 wherein in Para-4 it has been observed that there is no bar to the plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16.

19. Attention of this Court was also drawn to Paras 16 to 18 of decision in ***Hindustan Zinc Limited (HZL) Vs. Ajmer Vidyut Vitran Nigam Limited*** (2019) 17 SCC 82 to submit that if there is lack of inherent jurisdiction, the plea can be taken up at any stage and also in collateral proceedings.

20. Hence, it was submitted that the present petition filed under the provisions of Section 34 of the Act seeking setting aside of the arbitral

Award deserves to be allowed.

21. The submissions advanced on behalf of petitioner were vehemently opposed by learned senior counsel appearing on behalf of respondent.

22. Learned senior counsel for respondent submitted that the objections raised by the petitioner in the present petition are beyond the scope of Section 34 of the Act. It was submitted that the grounds urged in the present petition requires this Court to reappreciate the evidence and findings returned by the learned Arbitrator, which is not permissible in law. It was submitted that the plea put-forth by the petitioner that learned Arbitrator has failed to interpret the Contract/Agreements in question in their right perspective, deserves to be rejected as these contracts have already been examined by the learned Arbitrator and that quantification of claims falls within the ambit and scope of the Arbitrator and cannot be interfered with.

23. Learned senior counsel for respondent also submitted that in the present petition unilateral appointment of Arbitrator at the behest of respondent has been challenged, which is beyond the scope of Section 34 of the Act and inasmuch as this objection has for the first time been raised in the present petition. Further submitted that during the course of arbitral

proceedings, petitioner never challenged appointment of learned Arbitrator under Sections 11,13,14 & 16 of the Act nor disqualification of learned Arbitrator was sought under Section 12(5) of the Act.

24. It was submitted before the Court that petitioner's application filed under Section 9 of the Act being OMP(I)(Comm) No. 402/2018, was withdrawn by the petitioner while seeking liberty to file application under Section 17 of the Act before the learned Arbitrator. Learned senior counsel for respondent strenuously submitted that by filing application under Section 17 of the Act, petitioner had submitted to the jurisdiction of learned Arbitrator and thereafter, by filing of application under Section 16 of the Act, petitioner had only challenged the composite reference of the disputes to arbitration arising out of four separate Agreements/Contracts. Not only this, petitioner had also filed its counter claims before the learned Arbitrator, wherein no objection was raised to the appointment of learned Arbitrator and therefore, cannot now be allowed to raise this objection after pronouncement of the Award. Furter submitted that on 20.08.2019 and 16.03.2020, the petitioner gave its consent for the extension of time under Section 29(A)(iii) of the Act for completion of arbitral proceedings and also petitioner made several applications before

the learned Arbitrator such like framing of additional issue, filing of additional documents etc. and thereby, petitioner actively participated in arbitration proceedings.

25. Learned senior counsel for respondent next submitted that the objection of petitioner of learned Arbitrator having considered different Agreements/Contracts and passing a composite Award deserves to be rejected, as petitioner in its application under Section 9 of the Act had admitted that the subject agreements constitute a single composite transaction and therefore, the disputes arising under the same should be consolidated and heard together.

26. It was further submitted by learned senior counsel that the sum of Rs.4.00 crores awarded by the Arbitrator is not on account of damages/ compensation under Section 73 of the Indian Contract Act, 1872 but it is compensation for violation of orders of injunction and respondent's rights by petitioner, after going through the evidence produced before him and by giving valid reasons for the same (as is evident from paragraph 30.16.38 of the Award). Lastly, it was submitted by learned senior counsel for respondent that the compensation of Rs.4.00 crores awarded by the petitioner is independent of all the other issues and prayed this

Court it be considered being severable.

27. In support of above submissions, learned senior counsel for respondent placed reliance upon decisions in ***Perkins Eastman Architects DPC v HSCC (India) Ltd***., *2019 SCC Online SC 1517*; ***Select Realty And & Ors. Vs. Intec Capital Limited***, judgment dated 09.09.2021 in OMP (COMM) 204/2021; ***Project Director, National Highways Vs. M. Hakeem & Anr.,*** 2021 SCC OnLine SC 473; ***Govind Rubber Limited Vs. Louis Dreyfus Commodities Asia Pvt. Ltd.*** (2015) 13 SCC 477; ***National Highway Authority of India Vs. Oriental Structure Engineers Ltd.*** 2012 (132) DRJ 769 (FB); ***Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd***. Civil Appeal No. 5628 of 2021; ***Madhya Pradesh Power Generation Company Limited Vs. Ansaldo,*** (2018) 16 SCC 661; ***Associate Builders Vs. DDA***, (2015) 3 SCC 49; ***NHAI Vs. ITD Cementation***, (2015) 14 SCC 21; ***Ssangyong Engineering and Construction Company Limited Vs. National Highway Authority of India***, (2019) 15 SCC 131 and ***PSA SICAL Terminals Pvt Ltd. Vs. Board of Trustees of V.O. Chidambranar Port Trust***, 2021 SCC OnLine SC 508.

28. The contentions raised by learned senior counsel representing both

the side were heard at length and the material placed on record has been perused.

29. Pertinently, the present petition has been filed under Section 34 challenging the arbitral Award dated 09.03.2021 passed by the learned Arbitrator. For ready reference, Section 34 of the Act reads as under:-

> *"34 Application for setting aside arbitral award. —*
> *(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*
> *(2) An arbitral award may be set aside by the Court only if—*
> *(a) the party making the application furnishes proof that—*
> *(i) a party was under some incapacity, or*
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*
> *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a*

provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
(b) the Court finds that—
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
(ii) the arbitral award is in conflict with the public policy of India."

30. Relevantly, the primary challenge to the arbitral Award has been made by the petitioner while relying upon decision of Hon'ble Supreme Court in ***Perkins Eastman (Supra)*** to submit that the sole Arbitrator was unilaterally appointed by the respondent, which is impermissible in law. Appositely, the Hon'ble Supreme Court in ***Perkins Eastman (Supra)*** has categorically stated that *"in cases where one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator."*

31. In the case in hand, the respondent vide Notice dated 10.10.2018 had invoked arbitration and appointed a former Judge of Punjab and Haryana High Court for adjudication of disputes between the parties. It is not disputed that petitioner had filed an application under Section 9 of the

Act being OMP(I)(Comm) No. 402/2018 before this Court on 09.10.2018, which was dismissed as withdrawn by the petitioner on 23.10.2018 with liberty to file application under Section 17 of the Act before the learned sole Arbitrator. The said order reads as under:-

> *"Learned senior counsels appearing for the parties submit that the Arbitrator has entered reference and has fixed 30.10.2018 as the next date of hearing for further proceedings.*
>
> *In view of the above, learned senior counsel for the petitioner prays for leave to withdraw the present petition with liberty to file the same in form of an application under Section 17 of the Arbitration and Conciliation Act, 1996 before the Arbitrator. She submits that such application shall be filed within two days.*
>
> *Learned senior counsels appearing for the respondent assure that reply to such application shall be filed before 30.10.2018 and no adjournment shall be taken before the Arbitrator on that date.*
>
> *In view of the above, the petition is dismissed as withdrawn with liberty to the petitioner to file an appropriate application before the Arbitrator.*
>
> *It is made clear that this Court has not expressed any opinion on the merits of the claim of either party. The respondent shall be equally entitled to file any appropriate*

application before the Arbitrator, if so advised."

32. The contention of learned counsel appearing on behalf of petitioner recorded in the order 23.10.2018 in OMP(I)(Comm) No. 402/2018 clearly shows that petitioner had given its intention to file an application under Section 17 of the Act before the learned Arbitrator. Pursuant thereto, petitioner had filed an application on 26.10.2018 under Section 17 of the Act (praying for interim relief) and thereafter, had also preferred an application on 29.11.2018, under Section 16 of the Act before the learned Arbitrator, whereunder it had challenged the composite reference of the disputes to arbitration arising out of 4 separate agreements but not the appointment of learned Arbitrator. Also, petitioner had filed its counter claims on 01.02.2019 before the learned Arbitrator and thereafter, vide order dated 05.03.2019 with the consent of both the sides, the learned Arbitrator had framed issues arising out claims and counter claims.

33. It is not disputed that in its application under Section 9 of the Act filed before this Court, petitioner had admitted that the subject agreements constitute a single composite transaction and therefore, the disputes arising under the same should be consolidated and heard together. Also, by filing applications under Sections 16 & 17 of the Act and as well as

counter claims before the learned Arbitrator, petitioner had in fact submitted to the jurisdiction of learned Arbitrator. After appreciation of the material on record, the arbitral Award came to be passed on 09.03.2021 and in the meanwhile, the Hon'ble Supreme Court marked its decision in ***Perkins Eastman (Supra)*** on 26.11.2019. That is to say, amidst pendency of arbitral proceedings, the ***Perkins Eastman (Supra)*** was pronounced, however, no objection to the appointment of learned Arbitrator was raised even at the said time. However, when the arbitral Award so pronounced by the learned Arbitrator does not favour the petitioner, it has approached this Court challenging jurisdiction of Arbitral Tribunal itself.

34. During the course of hearing, learned counsel for petitioner had drawn attention of this Court to Para-28 of decision in ***Perkins Eastman (Supra)*** to submit that in ***TRF Limited Vs. Energo Engineering Projects Limited*** (2017) 8 SCC 377, wherein the Hon'ble Supreme Court has held that once the mandate of Managing Director to be appointed as Arbitrator becomes ineligible by virtue of amendment of 2015 and arbitrator becomes ineligible, he cannot nominate another person as Arbitrator and thereby, there was no hinderance in entertaining the application under

Section 11(5) read with Section 11(6) of the Act.

35. Now, even if at this belated stage this Court tests the case of petitioner applying the ratio of law laid down in ***Perkins Eastman (Supra)*** and ***TRF Limited (Supra),*** it finds that in those cases the Hon'ble Court had dealt with petition filed under the provisions of Section 11 (6) of the Act, whereas the present petition has been filed under Section 34 of the Act, provisions whereof prescribe the ground on which an arbitral award can be challenged and set aside and not the mandate of appointment of Arbitral Tribunal. Hence, reliance placed upon decision in ***Perkins Eastman (Supra)*** is of no help to the case of petitioner.

36. Petitioner has also placed reliance upon decision in ***Proddatur Cable TV Digi Services (Supra),*** which deals with a case where mandate of Arbitrator was challenged during pendency of arbitral proceedings in a petition filed under Section 12(5) of the Act, whereas in the present case, petitioner has not claimed disqualification under any of the grounds enumerated under Section 12(5) read with Seventh Schedule of the A&C Act.

37. Similarly, reliance is placed by petitioner's counsel upon decision in ***Bharat Broadband Network Limited (Supra).*** In the said case, after

dismissal of unilateral appointment of Arbitrator by the Arbitral Tribunal itself, petition under Sections 14 and 15 of the Act was filed before the Court and applicability of Section 12(5) of the Act was considered, whereas in the instant case the arbitral Award is challenged under Section 34 of the Act.

38. Reliance is also placed by petitioner's counsel upon decision in ***Lion Engineering Consultants (Supra).*** In the said case the Hon'ble Supreme Court had to deal with a case where the High Court of M.P. had allowed amendment in objection filed under Section 34 of the Act after three years of passing the arbitral award against which an appeal was filed, however since the amendment was later not pressed before the Hon'ble Supreme Court, the appeal against the said order was rendered infructuous. This case does not deal with the issue of challenge to the appointment of the arbitrator and only dealt with jurisdictional challenge *qua* limitation of certain claims. Hence, the said case is also of no assistance to petitioner being distinct on facts.

39. Further, reliance placed upon decision in ***Hindustan Zinc Limited (Supra)*** is also of no help to the case of petitioner, as in the said case jurisdiction of learned Arbitrator was challenged on the ground that State

Commission had no authority to make the appointment and no challenge was made to the unilateral appointment of an arbitrator.

40. In view of abovesaid narration, this Court is of the opinion that appointment of learned Arbitrator by the respondent was never objected to by the petitioner, who had actively participated in the arbitration proceedings, which is evident from the fact that as many as 45 orders were passed by the learned Arbitrator during pendency of arbitral proceedings. Moreover, the learned Arbitrator himself is a retired Judge of Punjab and Haryana High Court and his integrity cannot be doubted. Accordingly, the case of petitioner challenging the mandate of Arbitral Tribunal is hereby rejected.

41. So far as the plea of petitioner challenging the arbitral Award having compositely dealt with different Agreements is concerned, this Court finds that this issue has already been agitated by the petitioner in its application under Section 16 of the Act, which stood rejected by the learned Arbitrator vide order dated 16.01.2019 on *inter alia* petitioner's own admission as regards a single composite transaction. Further, it is also not disputed that petitioner in its application under Section 9 of the Act had admitted that the subject agreements constitute a single

composite transaction and therefore, the disputes arising under the same should be consolidated and heard together. Hence, on this count also the petitioner's challenge to the impugned Award has failed.

42. In so far as challenge to the arbitral Award on the premise of erroneous findings returned by the learned Arbitrator, this Court finds that the dispute *inter se* parties rests upon the following agreements:-

(a) The Cement Supply Agreement (CSA) dated 16.03.2017, which effective from 01.04.2017;
(b) The unattested Deed of Hypothecation (DOH) dated 17.03.2017; and
(c) The Operations and Maintenance Agreement (O&MA) dated 17.10.2017 effective from 01.04.2017.
(d) Raw Material Supply Agreement dated 16.10.2017 (effective from 01.04.2017.

43. Pertinently, in the light of afore-noted Agreements, the learned Arbitrator dealing with claims and counter claims of both the sides, had framed issues and after recording of evidence had passed the impugned Award. The Hon'ble Supreme Court in ***Bharat Coking Coal Ltd. Vs. Annapurna Construction*, (2003) 8 SCC 154** has held as under:-

> *"22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has*

travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

44. In ***National Highways Authority of India v. ITD Cementation India Ltd.*, (2015) 14 SCC 21** the Hon'ble Supreme Court has observed that:-

"*25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do."*

45. Further, the Hon'ble Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd.*** 2021 SCC OnLine SC 695 has observed as under:-

"25. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for

annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

26. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award

suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

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36. *The Division Bench referred to various factors leading to the termination notice, to conclude that the award shocks the conscience of the court. The discussion in paragraph 97 of the impugned judgment amounts to appreciation or re-appreciation of the facts which is not permissible under*

Section 34 of the 1996 Act. The Division Bench further held that the fact of the AMEL being operated without any adverse event for a period of more than four years since the date of issuance of the CMRS certificate, was not given due importance by the Arbitral Tribunal. As the arbitrator is the sole judge of the quality as well as the quantity of the evidence, the task of being a judge on the evidence before the Tribunal does not fall upon the court in exercise of its jurisdiction under Section 34. On the basis of the issues submitted by the parties, the Arbitral Tribunal framed issues for consideration and answered the said issues. Subsequent events need not be taken into account."

46. Applying the ratio of law laid down by Hon'ble Supreme Court in in the cases mentioned herein above to the present case, this Court finds that under the provisions of Section 34 of the Act, scope of interference in arbitral Award is quite limited and can be gone into only when the Arbitral Tribunal has gone beyond the scope of contracts/agreements and exceeded its jurisdiction. On this count, the only perversity pointed out by the petitioner in the impugned arbitral Award, which falls for consideration by this Court, is award of compensation to the tune of Rs.4.00 crores with interest @18% p.a. w.e.f. 01.06.2018 till 10.10.2018

and also pendente lite and future interest @18% p.a. till actual payment, against the petitioner.

47. On this aspect, the stand of respondent is that though the learned Arbitrator has justified in the Award in question the grant of compensation, however, this relief being totally severable and independent of other issues and this Court may consider it in terms of Proviso to 34(2)(iv) of the A&C Act, which reads as under:-

> **"Section 34(2)(a)(iv) in THE ARBITRATION AND CONCILIATION ACT, 1996**
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

48. The relevant Para- 30.16.38 of the impugned Award reads as under:-

> *"Leaving the contemplation, the Tribunal moved forward for granting compensation. To compensate the claimant for reckless violation of its rights as per Issue No.11 under the agreements intentionally by the respondent (for which no actual loss is to be proved), token compensation of Rs.4 Crores is granted to the claimant payable by the respondent which this Tribunal considers fit and proper in the facts and circumstances of the case."*

49. The reasons for arriving at the aforesaid conclusion have been narrated by the learned Arbitrator in Paras 30.16.36 and 30.16.37 of the impugned Award, which are based upon Issue No.11 (whether claimant is entitled to injunction) so framed by the learned Arbitrator, which read as under:-

> *"30.16.36 Respondent has clearly violated Clauses 2.2, 5.6 and 7 of DoH when violation has already been committed, remedy of claimant is either by way of contempt action against the respondent or by way of compensation. So far as action of respondent any further is concerned, entitlement to restrain order in favour of the claimant against any further possible violations of respondent has already been held. Reliefs of declaration as have been sought by the claimant, are also granted to the claimant.*
>
> *30.16.37. As already mentioned, so far as violations which have already been committed by the respondent under unfounded belief that its liability to honour the commitments made in the agreements no more subsists, on the arrogated plea that advance has already been adjusted,*

cannot now be remedied. Time clock cannot be pushed back."

50. Against award of compensation of Rs.4.00 crores by the learned Arbitrator, petitioner has placed reliance upon Hon'ble Supreme Court's decision in ***Associate Builders Vs. Delhi Development Authority*** (2015) 3 SCC 49, wherein it has been held as under:-

"36. The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice"."

51. Reliance was also placed by petitioner upon another decision of Hon'ble Supreme Court in ***Bachhaj Nahgar Vs. Nilima Mandal and Another*** (2008) 17 SCC 491 to submit that when there is no prayer for a particular relief and no pleading to support a particular relief and the court

grants it, this would lead to miscarriage of justice.

52. Even during the course of hearing, learned senior counsel appearing on behalf of respondent submitted that the compensation of Rs.4.00 crores awarded by the learned Arbitrator is distinct of all other issues and did not press on it.

53. In the light of what has been observed by this Court hereinabove, the Award dated 09.03.2021 is partly modified to the effect that the compensation of Rs.4.00 crores awarded against petitioner is herby set aside.

54. The present petition with pending applications, is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 08, 2021
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