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

\+ O.M.P. (COMM.) 321/2017

Reserved on: 28th May, 2018
Date of decision : 28th August, 2018

M/S. CHANDOK MACHINERIES ..... Petitioner
Through: Mr.Sudhir Nandrajog, Sr. Adv. with Mr.Avi Singh, Mr.Shashank Dixit, Mr.Katyayini & Ms.Purnima Malik, Advs.

versus

M/S. S. N. SUNDERSON & CO ..... Respondent
Through: Mr.Jayant K. Mehta, Mr.Pulkit Agarwal & Mr.Shubhankar, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 12th June, 2017 passed by the Arbitral Tribunal consisting of three Arbitrators in Arbitration Case No.20017/ANL adjudicating the disputes that have arisen between the parties in relation to the two Memorandum of Understanding(s) dated 1st September, 2014.

2. By way of the Impugned Award, the Arbitral Tribunal has *inter alia* directed the petitioner to pay to the respondent a sum of

Rs.2,27,36,444.88, subject to the petitioner raising an appropriate invoice for the amount of Rs.1,32,99,020.11. The Arbitral Tribunal has further directed the petitioner to pay interest @ 9% per annum from the last date of dispatch.

3. The learned senior counsel for the petitioner contends that in terms of Section 29A of the Act, the mandate of the Arbitral Tribunal had terminated on 13th June, 2017. He submits that the Impugned Award, though has a typed date of 12th June, 2017, was passed only on 28th June, 2017, which is the date mentioned under the signatures of one of the Arbitrators and, therefore, the Impugned Award has been passed after the mandate of the Arbitral Tribunal had terminated and the same cannot be given effect to.

4. It is further contended that it is only after the signing of the Impugned Award by the Arbitral Tribunal on 28th June, 2017, that a copy of the same was dispatched to the parties by the Arbitral Tribunal on 7th July, 2017. It is submitted that in view of Section 31(5) of the Act, as supplying a signed copy of the Arbitral Award is mandatory, the date of the Award has to be considered as 7th July, 2017, which is after the mandate of the Arbitral Tribunal had expired.

5. On the other hand, the counsel for the respondent submits that the Arbitral Award was signed by two out of the three Arbitrators on 12th June, 2017 and therefore, was a valid and enforceable Award under Section 29(1) of the Act. He further submits that in a subsequent order dated 5th August, 2017 passed by the Arbitral Tribunal, while disposing of an application filed by the respondent under Section 33(1)(a) of the

Act, the Arbitral Tribunal has given reasons for non-signing of the Arbitral Award by the third Arbitrator on 12th June, 2017, thereby complying with Section 31(2) of the Act. He further submits that failure to give reasons for the omission of the signatures of the third Arbitrator in the Award dated 12th June, 2017, being a default in the 'form' of the Arbitral Award, cannot be construed as fatal. He further submits that in any case, as even the third Arbitrator has signed the Award, though belatedly, this Court, in exercise of its powers under Section 29A(4) of the Act can extend the time for making of the Award. In answer to the submission on Section 31(5) of the Act, he submits that the Arbitral Award comes into force on the date it is made, though for the purpose of Section 34 read with Section 36 of the Act, the time for filing of the objections against the Award and its enforceability would be counted from the date a signed copy has been received by the party to the arbitration proceedings.

6. I have considered the submissions made by the counsels for the parties. To answer the same, one would have to consider certain provisions of the Act. Section 29(1) of the Act provides that in arbitral proceedings with more than one Arbitrator, any decision shall be made by the majority of all its members. Section 29(1) of the Act is reproduced hereinbelow:

> *"**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."*

7. In the present case, a bare perusal of the Impugned Award would show that the Impugned Award has been signed by two members of the Arbitral Tribunal on 12th June, 2017, the printed date that it bears. This is also evident from the signature of the third Arbitrator which is prefixed by the remark 'approved'.

8. Sub-sections (1) and (2) of Section 31 of the Act are reproduced hereinbelow:-

> *"**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."*

9. A reading of the above provisions would show that an Arbitral Award has to be signed by the members of the Arbitral Tribunal and where the Arbitral Tribunal consists of 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'.

10. The above provision is a departure from Section 10(2) of the Arbitration Act, 1940, which did not contain such requirement of giving reasons for the Arbitrators in minority not signing the Award, however,

like Section 29(1) of the Act, the Arbitration Act, 1940 also of the Act provided that the Award of the majority of the Arbitrators shall prevail.

11. The Courts when confronted with such an Award under the Arbitration Act, 1940 have held that what was mandatory was for all the Arbitrators to have joined in the deliberation or have attended the important meetings in which the crucial questions for decision were deliberated; once the making of the Award is discussed by all the Arbitrators acting together and the majority comes to a certain conclusion and an Award is drawn up, the mere fact that the dissenting minority does not sign the Award, does not render the Award invalid. In this regard, reference may be made to the following judgments:

1. ***Y.L. Paul v. G.C.Joseph***, AIR 1948 Mad 512.
2. ***Johara Bibi v. Mohammad SadakThambiMarakayar***, AIR 1951 Mad 997
3. ***R.Dasaratha Rao v. K.RamaswamyIyengar***, AIR 1956 Mad 134

12. As the determination of the issue whether the Arbitrators have indeed considered and participated in the making of the Award had to be determined by the Court on a consideration of the evidence adduced by the parties, to obviate such a scrutiny, sub-section 2 of Section 31 now clarifies that 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. In ***Moti @ Maggie Noshir Irani & ors. vs. Sheroo Jal Vakil & Ors.*** 2009(6) Mah L.J.535, the Bombay High Court held that sub-section 2 of Section 31 is clarificatory and facilitative, in order to

avoid the kind of dispute, which arose under the Arbitration Act, 1940. It further held as under:

> *"16.....Sub-section (2) of section 31 now clarifies that the signatures of a majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. Sub-section (2) is clarificatory and facilitative, in order to avoid the kinds of dispute which arose under the earlier Act. Where an award has been signed by a majority of the arbitral Tribunal that award constitutes in fact and in law an award of the arbitral Tribunal. The omission of one of the Arbitrators to sign the award, or for that matter, to deliver his or her award would not affect the legitimacy or validity of the award of the majority. Nor for that matter does the fact that one of the Arbitrators has delivered a dissenting award affect the validity of the award of the majority. The Act now places the matter beyond doubt by providing that what is required in law for a valid award is an award of the majority constituting an arbitral tribunal. The reasons for the omission of the signature of an Arbitrator have to be stated. But that in certain cases may be obvious when one of the Arbitrators has made a dissenting Award....."*

13. The question therefore, to be determined is whether the failure to record reasons for the omitted signatures on the Arbitral Award is fatal to the Arbitral Award and if so, can it be provided by a supplementary document? Another question which would arise would be that, in case it is held that such reasons can be given by a supplementary document, what would be the date of the Award and can such supplementary document giving reasons for the omitted signature be issued by the majority Arbitrators after the period for making of the Award under Section 29A(1) or Section 29A(3) has expired.

14. The heading of Section 31 is 'Form and contents of arbitral award''. The purpose for requiring reason for any omitted signature to be given in the Award has been explained above. The legislature has, in Section 29(1) of the Act clearly provided that the decision by the majority of Arbitrators would be the decision of the Arbitral Tribunal. Therefore, the requirement of giving reasons for the omitted signature is only to assist the Court in reaching a conclusion whether the Arbitrator in minority was excluded from deliberations by the Arbitral Tribunal.

15. If the above intent of Section 31(2) of the Act is kept in mind, it would be apparent that an Award cannot be set aside merely because it fails to give the reason for omission of signature of the Minority Arbitrator. This would merely be a defect in 'Form' and does not affect the substance of the Arbitral Award.

16. It is to be noted that the Act is based on the United Nations Commission of International Trade Law (UNCITRAL) Model Laws and Rules. While deliberating on the draft of UNCITRAL Arbitration Rules, the Chairman of the Committee of the United Nations in its 328th Meeting observed that if the reasons for omitted signatures were not given, the parties to the Arbitral Award should request for the reasons from the Arbitrators. It is clear that the reasons for omission of the signature of the Minority Arbitrator can be provided by the Arbitral Tribunal later and by way of a separate document as well. The relevant quotation from the discussions of the United Nations Committee as held in the 328th meeting and recorded in the Year Book of the United Nations

Commission International Trade Law, 1985, Vol. XVI is reproduced hereinbelow:

> *"Article 31. Form and contents of award.*
>
> *Article 31(1)*
>
> *25. Mr.LAVINA (Philippines) said that the words "provided that the reason for any omitted signature is stated" should be deleted. In his view, whether the reason for an omitted signature was stated or not, the signatures of the majority of the members of the arbitral tribunal should be sufficient to validate the award. He asked what the position would be if the reason for an omitted signature was not given.*
>
> *26. The CHAIRMAN said that paragraph (1) represented a compromise between two extreme position: on the one hand, that the majority of the arbitrators could take any decision they wished; on the other, that all the arbitrators must sign an award. The latter position could lead to difficulties in the event of an arbitrator's death, illness, prolonged absence or refusal to sign. If the reason for an omitted signature was not given, the users of the arbitral award should request the reason from the arbitrators. He noted that a similar provision to paragraph (1) was found in article 32(4) of the UNCITRAL Arbitration Rules. He suggested that the Commission should retain the existing wording."*

17. In ***The Superintendent Engineer, Irrigation Circle, Eluru v. P.Ramaiah and three others,.*** 2017 SCC OnLine Hyd 275, the Andhra Pradesh High Court had negated the challenge to an Award on the ground of non-signing of the Award by one of the Arbitrator on the ground that the said Arbitrator had separately issued a letter stating the reason for him

not signing the Award. This was found to be a sufficient compliance with Section 31(2) of the Act.

18. The Federal Court of Canada in ***D.Frampton & Co. v. Sylvio Thibeault*** 1988 Carswell Nat 1128, has also held that where the reasons for non-signing of the Award by an Arbitrator are separately provided, the Award cannot be challenged merely on the ground of missing signature or the reasons for such missing signature.

19. In the present case, the reason for non-signing of the Arbitral Award by the third Arbitrator has been admittedly given in the order dated 05.08.2017 passed by the Arbitral Tribunal on an application filed by the respondent under Section 33 of the Act. Once the reasons are available on record, merely because they were not stated in the Award itself, cannot nullify the Award. This would defeat Section 29 of the Act which provides that the decision of majority of the members of the Arbitral Tribunal shall be binding on the parties. It would also be contrary to the underlying intent of the Act and render the entire arbitration process futile only because of a clerical mistake by the Arbitral Tribunal in not giving reasons in the Award itself for the missing signature of the Minority Arbitrator. Such a result cannot be countenanced or accepted. Form can never prevail over substance.

20. In ***Thakur Pratap Singh v. Shri Krishna Gupta & Ors.*** (1955) 2 SCR 1029, the Supreme Court has held as under:

> ***"3.*** *We do not think that is right and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are*

vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which is which judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad based, commonsense lines. This principle was enunciated by Viscount Maugham in Punjab Cooperative Bank Ltd., Amritsar v. Income Tax Officer, Lahore and was quoted by the learned High Court Judges:

> *"It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."*

21. Applying the above rule, once the reasons for non-signing of the Award by any Arbitrator are available, the Award cannot be held to be invalid only because such reasons are not stated in the Award itself but in another document and/or not simultaneously with the passing of the Award.

22. In this light, one may also take note of Section 33 of the Act, which empowers a party to the arbitration proceedings to request the Arbitral Tribunal to correct any clerical or typographical errors or any other errors of a similar nature occurring in the Award. Even the Arbitral Tribunal on its own initiative can correct such errors. Equally, under Section 34(4) of the Act, on a request of a party, the Court may adjourn the proceedings to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action which , as in

the opinion of the Arbitral Tribunal, will eliminate the grounds for setting aside the Arbitral Award. Therefore, even taking recourse to these provisions, the Arbitral Tribunal can be requested to state reasons for the omission of the signatures of any member of the Arbitral Tribunal on the Arbitral Award.

23. In ***Subhas Projects and Marketing Ltd. vs. Assam Urban Water Supply and Sewerage Board*** (2003) 2 Gauhati Law Reports 449, the Gauhati High Court held that matters of form are at best curable irregularity and for these reasons an Award cannot be held to be invalid. Paragraph 7 of the judgment is quoted hereinbelow:

> *"7. The submissions advanced by the learned counsel for the parties have been duly considered by us. Section 31 of the Act does not prescribe any particular form or manner of passing an award. An award is an expression of an adjudication of a dispute between the parties and as long as the manifestation of the decision on the dispute raised is clear and un-ambiguous, it will not be correct to hold an award to be invalid merely because it does not subscribe to any particular format. A unstamped or insufficiently stamped award is at best a curable irregularity. Viewed from the aforesaid perspective the objections of the respondent Board regarding the validity of the award on the aforesaid two grounds would hardly call for any serious consideration of this court."*

24. This now brings me to the second contention of the learned senior counsel for the petitioner, which is premised on Section 29A of the Act. It is submitted by the learned senior counsel for the petitioner that as the third Arbitrator had signed the Award on 28th June, 2017, which is

beyond the period of one year from the date of the Arbitral Tribunal entering upon the reference, the mandate of the Arbitral Tribunal already stood terminated and the Award could not have been signed by the third arbitrator.

25. He further submits that the copy of the Impugned Award had been dispatched by the Arbitral Tribunal only on 7th July, 2017. Relying upon Section 31(5) of the Act, he submits that the date of making of the Arbitral Award is, therefore, 7th July, 2017, which is beyond the period of one year from the Arbitral Tribunal entering upon the reference; therefore, the mandate of the Arbitral Tribunal had already terminated under Section 29A(4) of the Act and the Award cannot be sustained.

26. I have considered the submission made by the learned senior counsel for the petitioner, however, I find no merit in the same.

27. Sub-sections 1, 3, 4 and 5 of Section 29A are to be read together as forming one scheme of the Act. They are reproduced hereinbelow*:*

> ***"[29A.Time limit for arbitral award****.–(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.*
>
> *Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.*
>
> *xxxx xxxx*
>
> *(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.*
>
> *(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under*

sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court."

28. A reading of the above provision would show that upon expiry of the period of 12 months from the date the Arbitral Tribunal enters upon the reference, if the Award is not made and the parties do not extend the time period for making of the Award, the mandate of the Arbitrators shall terminate. This is not akin to the termination of the arbitration proceedings as provided in Section 32 of the Act. Further, the termination of mandate of the Arbitrators is subject to the power of the Court to extend the period for making of the Award either prior to or after the expiry of the period so specified.

29. Section 29A has been inserted in the Act with effect from 23rd October, 2015 with the intention that a time limit is necessary to be prescribed, having regard to the long delay and huge expenditure involved in arbitration. The First Schedule to Arbitration Act, 1940 prescribed that the Arbitrators shall make their Award within four months after entering upon the reference or within such extended time as the Court may allow. Section 28 of the Arbitration Act, 1940 vested a power in the Court to enlarge the time for making of the Award. In the Act as

originally promulgated, the time limit for making of the Award was not prescribed and equally, there was no requirement of granting any power to the Court for extending the time for making of the Award. With the insertion of Section 29A to the Act, the time limit for making of the Award has been re-introduced and so is the power of the Court to enlarge such time.

30. In ***Hindustan Steel Works Construction Ltd. vs. C.Rajasekhar Rao*** (1987) 4 SCC 93, the Supreme Court, *albeit* in the context of the Arbitration Act, 1940, has held that the Court has the power to extend the time even after the Award has been given or after the expiry of the period prescribed for the Award, but, the Court has to exercise its discretion in a judicial manner. In fact, the power could be exercised by the Appellate Court.

31. Even Section 29A(4) of the Act empowers the Court to extend the time for making of the Award even after the expiry of the period. Once the Court extends the time for making of the Award, the proceedings, if any, undertaken by the Arbitral Tribunal after the expiry of the prescribed period, shall stand validated.

32. In the present case, even assuming that the date of the Award has to be taken as 7th July, 2017, when a copy of the same was dispatched to the parties by the Arbitral Tribunal, this Court can extend the time for making of the Award in exercise of its powers under Section 29A(4) of the Act. It is not shown by the petitioner why the time limit should not be extended by this Court. The only submission made by the learned senior counsel for the petitioner is that such extension of time can be

granted only on an application made by any of the parties to the arbitration proceedings. In my opinion, such application need not only be in writing but can also be oral.

33. In ***State of West Bengal vs. Sree Sree MA Engineering & Anr.*** (1987) 4 SCC 452, the Supreme Court, while dealing with a case of unsigned Award, has held that the time taken and effort made in making of the Award should not be allowed to go waste on mere technicalities. It was held as under:-

> ***"4.*** *It is true that an unsigned award cannot be made the rule of the court. But it is only a formal defect. It appears that the award was handed over to the parties and a letter was sent to the parties concerned and award bore no signature of the arbitrator. The parties had acted upon the award. It is true that under the law the mandatory rule is that the award should be signed by the arbitrator. But law must subserve justice and endeavour to serve the purpose of law. The court can in such circumstances extend time for making the award and direct curing of the formal defect in the award. So much time and effort should not be allowed to go waste".*

34. It is next contended by the learned senior counsel for the petitioner that the petitioner was gravely prejudiced by the Arbitral Tribunal fixing an exorbitant fees which was not in accordance with the Fourth Schedule to the Act. In this regard, he placed reliance on the order dated 13th January, 2016 passed by the Arbitral Tribunal whereby the Arbitral Tribunal had decided to charge fee prescribed in the Fourth Schedule to the Act, however, such fee was to be paid separately to each Arbitrator.

It is submitted by the learned senior counsel for the petitioner that the Fourth Schedule to the Act does not allow each of the Arbitrators to charge fee separately and that such fee is prescribed for the entire Arbitral Tribunal collectively.

35. The argument made by the learned senior counsel for the petitioner need not detain me as it has already been considered by this Court in its order dated 15th March, 2017 passed in IA No.9/2017 in Arbitration Petition no.365/2015 titled S.N. Sunderson & Company vs. M/s Chandok Machineries. This Court has in paragraphs 13 and 28 thereof held as under:

> *"13. The difference in Section 31 (8) as it stood prior to 23rd October 2015 and Section 31 A inserted with effect from that date is that in the former the discretion of the AT to fix its fees was subject to an agreement to the contrary between the parties to the arbitration. Under Section 31A the discretion of the AT is not subject to an agreement to the contrary between the parties. Be that as it may, in the present case, there was no agreement between the parties as regards the fees payable to the AT. Thus the AT was, for both references, free to fix its own fees subject only to the requirement that it had to be 'reasonable'.*
>
> *xxxx xxxx*
>
> *28. The Court is unable to appreciate how the above passage in Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust (supra), answers the question concerning the power of the Court to judicially review a procedural order of an AT fixing its fees. Under Section 5 of the Act, the extent of judicial intervention is limited. Section 5 is categorical that "no judicial authority shall intervene except where so provided in this part". In other*

words, unless there is specific provision in the Act, permitting judicial intervention, the jurisdiction of the Court to interfere with the procedural orders passed by the AT cannot be presumed to exist as an inherent power of the Court or exercised even suo motu. In other words, there are no inherent powers of the Court, much less, a power similar to the one under Section 151 of the CPC, to exercise jurisdiction under the Act to interfere with the procedural orders of the AT."

36. It may further be noted that this Court, while appointing the Presiding Arbitrator, vide its order dated 27th November, 2015 in Arbitration Petition No. 365/2015, had directed that the fee shall be fixed by the learned Arbitrator himself. Therefore, it was for the Arbitral Tribunal to fix its own fee and merely because it gives a reference to the Fourth Schedule of the Act while fixing its fee, it cannot be said that it had bound itself to the said Fourth Schedule.

37. The learned senior counsel for the petitioner further submitted that the Arbitral Tribunal, vide its order dated 13th January, 2016, had directed that the fee shall be shared by the parties equally, however, later by its order dated 19th October, 2016 directed that while claimant shall pay the arbitral fee on its claims, the respondent shall pay the arbitral fee on its counter claims. He submits that in this manner there was disparity in the fee payable by the parties to the Arbitral Tribunal.

38. To answer the above submission, Section 38 of the Act would be relevant and is quoted hereinbelow:-

***"38. Deposits**.–(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as*

an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:
Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be."

39. A reading of Section 38 would show that the Arbitral Tribunal may fix separate amounts of deposit for the claims and counter claims. Though the deposit is payable in equal shares by the parties, on the failure of a party to pay its share of the deposit, the other party may pay that share and in case of failure of the other party to pay the aforesaid share in respect of the claims or the counter claims, the Arbitral Tribunal may suspend or terminate the arbitration proceedings in respect of such claims or counter claims.

40. In view of the above provision, no fault can be found in the direction issued by the Arbitral Tribunal with respect to its fee. A party cannot lay exorbitant claims on the premise that the cost would be shared by the opposite party, and when the opposite party refuses to share such cost, claim bias as it has been made to share the entire cost of such exorbitant claim. An innocent party, whose claims are genuine, is in case protected as such costs can be awarded in its favour by the Arbitral Tribunal in exercise of its powers under Section 31(8) read with Section 31A of the Act. I may only note that in the order dated 19th October, 2016 it had been "agreed /decided" that the claimant shall pay Arbitral fee on his claims and the respondent shall pay Arbitral fee on its counter claim. Therefore, even otherwise, the petitioner cannot be now heard to complain of this course adopted by the Arbitral Tribunal.

41. The next argument raised by the learned senior counsel for the petitioner is that the claim granted by the Arbitral Tribunal in favour of the respondent is beyond the terms of reference.

42. To appreciate this argument, a few facts would require notice. The parties had entered into two separate Memorandum of Understanding(s) both dated 4th September, 2012 whereby the respondent entrusted and assigned the operational work in respect of its mines at Amehta and Badari, Katni District to the petitioner. The term of the MOU(s) was one year till 3rd September, 2013.

43. Upon expiry of the period of MOU(s), the same were extended by the parties by MOU dated 4th September, 2013.

44. On 31st August, 2014, the respondent accepted the request of the petitioner for termination of the MOU(s) and recorded further agreement reached between the parties in relation to the mode of payment for the stock mined by the petitioner.

45. The parties thereafter, entered into two fresh MOU(s) both dated 1st September, 2014 whereby the respondent assigned the work of crushing, gitti breaking, transporting, loading into rakes and related works in respect of the abovementioned mines to the petitioner.

46. The respondent vide its letter dated 15th December, 2014, terminated the MOU(s) dated 1st September, 2014. The same gave rise to a dispute between the parties which was referred to the Arbitral Tribunal consisting of three Arbitrators; one appointed by each party and the third appointed by the Court vide order dated 27th November, 2015 passed in Arbitration Petition No. 365/2015.

47. Though, the petition for appointment of the third Arbitrator was filed by the respondent, the petitioner took the first step before the Arbitral Tribunal by filing an application under Section 17 of the Act seeking appointment of a Local Commissioner to quantify the material lying at the sites and to allow the petitioner to conduct videography of the sites.

48. The said application was dismissed by the Arbitral Tribunal vide its order dated 28th March, 2016, *inter alia* on the ground that the petitioner itself had admitted that the respondent had been working in its mines since January, 2015 and the limestone excavated and crushed by

the respondent had been mixed with those excavated and crushed by the petitioner. The Tribunal was of the view that as there was no way of ascertaining as to what part of the limestone lying at the mines was excavated and crushed by the petitioner, the prayer made by the petitioner cannot be granted.

49. In passing the above order, the Tribunal observed as under:

> *"The subject matter of the dispute is the extent of mineral processed by the claimant in accordance with the agreement dated 1st September, 2014."*

50. It is with these words that the petitioner claims that it got an impression that the Arbitral Tribunal will consider only the claims under the MOU(s) dated 1st September, 2014 and not the earlier MOU(s) or the letter dated 31st August, 2014. The petitioner therefore, sent a notice dated 8th April, 2016 to the respondent seeking reference of its claims under the MOU(s) dated 4th September, 2012. The same was refuted by the respondent vide its reply dated 10th May, 2016, however, the petitioner initiated second reference before the same Arbitral Tribunal purportedly under MOU(s) dated 4th September, 2012. The Arbitral Tribunal entered upon this second reference on 1st June, 2016. In this order itself, it is recorded that the respondent had taken a plea that the second reference was not maintainable.

51. The petitioner also filed an application seeking amendment of its Statement of Claim in the first reference. The same was allowed by the Arbitral Tribunal vide its order dated 10th June, 2016, however, subject to

payment of costs of Rs.50,000/-. By way of this amendment, the petitioner sought to add to its claim a sum of Rs.86,21,380.79. The petitioner thereafter, filed an application seeking review of the order of costs, however, for unexplained reasons, this application was filed in the second reference. The same was dismissed by the Arbitral Tribunal vide its order dated 29th September, 2016.

52. As the petitioner did not pay the costs, the Arbitral Tribunal vide its order dated 19th October, 2016, terminated the proceedings with respect to the additional claim and held that the amendment made in the claim petition shall not be considered.

53. The petitioner, undeterred by this order and seeking to cause further confusion in the matter, filed an amendment application, now in the second reference. The same was rejected by the Arbitral Tribunal vide its order dated 4th November, 2016. The Arbitral Tribunal made the following observations while dismissing the application:

> *"11. The second reference number 20,028 - ANL commenced on 1st June, 2016. On 10th June, 2016 the claimant was directed to file his claims within 10 days. On that date the first reference was pending and the amounts claimed by the claimant were also known to him. The claimant had also sought amendment to his claims in reference 20,017 - ANL (present reference) which were allowed by order dated 10th June, 2016. On 10 June 2016, the second reference 20,028 was also pending and therefore, the applicant/ claimant had to be careful not to include the claims of reference 20,028 - ANL in the claims of 20,017 - ANL, if the claims of reference 20028 - ANL were also included in the present reference. The claimant*

is blowing hot and cold and is taking mutually destructive pleas.

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14. When the applicant/claimant filed the first application for amendment enhancing the amount of claims, the second reference being 20,028 - ANL had already commenced and pending. The applicant was liable to delete the claims of reference 20028/ ANL from the claims of 20017-ANL incase they were also included in reference 20017 / ANL. According to the claimant the second reference 20,028- ANL pertains to the claims arising out of agreements dated 4th September 2012. Consequently if the claims arising from the agreements dated 4th September, 2012 were included in the reference 20,017 - ANL which allegedly pertain to the claims arising out of agreements dated 1st September, 2014 according to the claimant, then the claimant should have deleted the alleged claims arising from agreements dated 4th September, 2012 which were allegedly also incorporated in reference 20,017 - ANL according to the allegations of the claimant.

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16. From the perusal of the claims of the applicant/ claimant it is not very clear as to which claims pertain to which agreements that is whether the claims pertain to agreements dated 4th September, 2012 or 1st September, 2014 in which of the references. It is however, cannot be disputed that the claims arising from agreements dated 4th September, 2012 shall be distinct from the claims arising from agreements dated 1st September, 2014."

54. The petitioner, in the interregnum, had also filed an application seeking consolidation of the two arbitral proceedings. The same was dismissed by the Arbitral Tribunal vide its order dated 4th November, 2016, inter alia observing as under:-

> *"5. This Tribunal heard the plea of merger of two claims on different dates. Earlier the decision of the application for merger had been deferred as even the claims in the present reference 20,028/ANL had not even been filed by the claimant. Perusal of the claims filed by the claimant in both the reference, it is apparent that the scope of agreements dated 4th September, 2012 and agreements dated 1st September, 2014 are distinct. Primarily the agreements dated 4th September, 2012 pertain to excavation, whereas the agreements dated 1st September, 2014 pertain to processing of the mineral. The stages of two references at present are different and merger at this stage will definitely delay the adjudication of the claims of the claimant as well as the counterclaims of the respondent in reference 20017/ANL. The applicant has also not been able to show convincingly as to how merger of two references shall be helpful and conducive in disposing of the two references expeditiously. It may be that some of the evidence may be overlapping in these two references. Considering the entirety of facts and circumstances and the different stages of the two references, it will not be just and appropriate to merge the same. In any case, one of the objective of merger is that the same evidence may be read while deciding the claims of different references."*

55. Learned senior counsel for the petitioner submits that from the orders dated 28th March, 2016 and 4th November, 2016, passed by the Arbitral Tribunal, it would be evident that the two references were separate and distinct as they arise out of two different sets of MOU(s), one dated 4th September, 2012 and the other dated 1st September, 2014; He submits that the amount of Rs.2,27,36,444.88 allowed in favour of the respondent was admittedly against the advance given by the respondent to the petitioner under the terms of the MOU(s) dated 4th September,

2012. The same could have formed part of the second reference alone, however, in the second reference, there was no counter claim made by the respondent. As the first reference was in relation to the MOU(s) dated 1st September, 2014 under which no advance had been given by the respondent to the petitioner nor was there any term for carrying forward the liability from MOU(s) dated 1st September, 2014, the said amount could not have been awarded in favour of the respondent in the first reference.

56. The Arbitral Tribunal rejected the above plea of the petitioner observing as under:

> *C. This plea of CM is contrary to his pleadings. In his claims CM has not alleged that the counter claims of SNS are not within the jurisdiction of this Tribunal. CM did not file any application under section 16 of the act challenging the jurisdiction of this tribunal on this ground. From perusal of the claims filed in February, 2016, it is apparent that even the claimant has not claimed the amount which became due after 1st September, 2014 under the agreements of the same date. The plea of CM that this plea of jurisdiction can be taken by without pleading as it is a question of law cannot be accepted. Such a plea has never been taken by the CM and it is clearly an afterthought. This is also not a pure question of law. CM has referred to bills dated 31st March, 2014 and 18th April, 2014 in respect of which the information was never allegedly provided by SNS to CM and therefore, CM had claimed an amount of Rs.2,455,632.55. The plea of CM that the Counter Claims for the period prior to 1st September, 2014 are not to be adjudicated in the circumstances, is contrary to its own pleadings and cannot be accepted. CM itself has claimed the claims in his petition of February, 2016 from 2012. CM amended the*

claim petition in June, 2016 but the claims pursuant to agreements dated 2012 were not completely deleted. CM filed another arbitration reference which also did not state categorically that it was in respect of the claims arising out of the agreements of 2012 only and not of agreements of 2014. In any case all the claims of CM arising pursuant to agreements of 2012 and arising pursuant to agreements of 2014 have been terminated. SNS has also filed the counter claims in the claim petition which was in respect of the agreements of 2014 and agreements of 2012 and not in the later claim petition which was allegedly in respect of the claims arising from agreements of 2012. The CM has also maintained one account only and has not maintained separate accounts in respect of agreements of 2014 and 2012. The amounts have been debited and credited continuously by CM. Acknowledgment has been made by CM in respect of amount paid and amounts for which CM became entitled for agreements of 2014 and 2012. In the circumstances CM cannot contend that since the payments indicated in Exhibit RW 1/10 (Colly) had been made prior to 1st September, 2014, therefore, they cannot be adjudicated by this Tribunal.

57. The above recorded sequence of events and conduct of the arbitral proceedings itself show that the petitioner was only interested in causing confusion in the arbitral proceedings. On the one hand, it had raised claims in the first reference even in relation to the MOU(s) dated 4th September, 2012, however, thereafter, by taking advantage of some stray observations made by the Arbitral Tribunal, sought to abandon the proceedings by filing the second reference.

58. Interestingly, for both the references, the petitioner did not pay the arbitral fee leading to termination of its claims. The petitioner cannot

take advantage of its own wrong and thereafter plead that the first reference could not contain the claims in relation to the advance given by the respondent to the petitioner before entering into the second set of MOU(s) dated 1st September, 2014. The MOU(s) dated 1st September, 2014, gave the rates on which the petitioner would be paid for the crushed limestone including ones which had already been excavated before entering into the said MOU(s). The Arbitral Tribunal had taken note of the fact that till 31st December, 2014, the accounts between the parties have been reconciled except an amount of Rs.16.88 lacs, which alone remained un-reconciled. The petitioner also maintained one single account again in respect of agreements of 2012 and 2014, debiting and crediting the amounts continuously. The Arbitral Tribunal further relied upon the acknowledgment made by the petitioner in respect of the amount paid, an amount to which the petitioner was entitled to in terms of the MOU(s) dated 4th September, 2012 and 1st September, 2014 collectively. It is, therefore, clear that the plea raised by the petitioner was merely an afterthought and aimed at causing confusion rather than being a genuine plea.

59. In any case, once the Arbitral Tribunal, based on the appreciation of evidence led before it found that the claim raised by the respondent was within the ambit of MOU(s) dated 1st September, 2014 and, therefore, was a part of the reference to the Arbitral Tribunal, this Court in exercise of its powers under Section 34 of the Act cannot re-appreciate such findings as if sitting as a Court of appeal.

60. The learned senior counsel for the petitioner lastly argued that the figures of export given by the respondent have been taken by the Arbitral Tribunal as correct, without requiring the respondent to prove the same.

61. I am unable to agree with the said submission of the learned senior counsel for the petitioner.

62. The Arbitral Tribunal has noted that in terms of the order dated 21st January, 2015 and more particularly vide emails dated 31st October, 2015, 21st February, 2015, 1st April, 2015, 4th May, 2015, 25th May, 2015 and 21st June, 2015, respondent duly intimated the petitioner with the details of dispatches. Based on these e-mails and the records, the petitioner had vide email dated 18th June, 2015 sent its statement of account whereby it acknowledged that it had received Rs.3,43,47,038.08 in excess from the respondent. The parties exchanged emails dated 18th June, 2015 and 4th August, 2015 to reconcile their accounts. The accounts were reconciled till 31st December, 2014 save and except an amount of Rs.16.88 lacs which alone remained un-reconciled. The reconciled amount between the parties shows an acknowledged excess amount of Rs.3,43,47,038.08, without addition of Rs.16.88 lacs which the respondent claims to be further owed by the petitioner. The respondent has deducted the amount payable to the petitioner on account of dispatch of the material and has claimed an amount of Rs.2,27,36,444.88 from the petitioner with interest.

63. These e-mails had not been denied by the petitioner. The finding of the Arbitral Tribunal is quoted hereinbelow:

D. The plea of CM that it never admitted the amount of Rs.3,83,11,597.43 is contrary to records and cannot be accepted. CM has alleged that the relevant emails and other documents were sent to SNN only in order to reconcile the accounts for the work done from April 2014 to March 2015. The accounts are from 2012 and therefore, the allegation that reconciliation was to be done only for accounts arising out of agreements dated 1.9.2014 is unsustainable. Even according to the allegation of CM the accounts for the period prior to 1.9.2014 had to be reconciled. CM could reconcile the accounts only if it had his own accounts. CM could not reconcile its accounts with the accounts of SNN without having his own accounts. CM had sent his accounts in which the said amount was admitted and now CM cannot refute his own admission on the ground that it was only for the purpose of reconciliation. It is also pertinent to note that CM did not close the account of SNS in his books after execution of agreements on 1.9.2014, rather the same account continued. SNS has contended that CM admits having received advances which were more than the amounts payable by SNS to CM for the work done which is also apparent from the statement of account which was sent by CM along with e-mail dated 18.06.2015. The accounts in respect of mining operations are from pages 69 to 80 and those in respect of diesel and electricity charges are at pages 81 to 87 of SNS's documents filed on 02.02.2016. In respect of the mining operations, the closing balance is a debit of Rs.54,69,245.28 and in respect of diesel & electricity, the closing balance is a debit of Rs.2,88,77,792.80. These balances are as on 05.12.2014. Therefore, as on 05.12.2014 CM was required to refund to SNS an amount of Rs.3,43,47,038.08, in aggregate. SNS had also replied to this e-mail on 04.08.2015 claiming that the debit balance was actually Rs.3,60,35,464.99 (an addition of Rs.16,88,426.91) and not Rs.3,43,47,038.08 but CM did not respond to it. After taking possession of the mining sites, SNS made various dispatches including of the material raised and / or crushed by CM prior to 15.12.2014. For these dispatches, SNS was required to pay to CM. Considering that as on 05.12.2014, there was a debit balance of Rs.3,43,47,038.08 and that also the amounts payable by SNS to CM against such dispatches had to be adjusted from the said debit

balance by giving credit of amounts which became payable to CM by 23.06.2015, the entire mineral worked upon by CM (raised and/ or crushed) was exhausted, except a quantity of 3600 MT, which too was subsequently dispatched on 27.09.2016. For all these dispatches, an amount of Rs.1,32,99,020.11, inclusive of applicable service tax, became payable (i.e. adjustable) by SNS to CM. Adjusting this amount, the balance amount which will be payable by CM to SNS will be Rs.2,27,36,444.88. CM, however, shall be liable to raise invoices for the said amount for claiming adjustment of the same. Consequently the counter claim of SNS for recovery of Rs.2,27,36,444.88 is allowed. This shall be subject to CM raising appropriate invoices for the amount of Rs.1,32,99,020.11. SNS has also claimed interest on the said amount @18% per annum.

64. I do not find the findings of the Arbitral Tribunal to be incorrect or perverse. In any case, the Arbitral Tribunal being the final judge of the evidence led before it, it is not for this Court to re-appreciate the same as if sitting in a Court of appeal. In ***Associate Builders vs. Delhi Development Authority*** (2015) 3 SCC 49, the Supreme Court has held as under:

> *"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a*

high military officer in Jamaica who needed to act as a Judge as follows:

"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

65. In view of the above, I find no merit in the present petition and the same is dismissed, with no order as to costs.

NAVIN CHAWLA, J

AUGUST 28, 2018
RN/sd