

(2009) 03 MAD CK 0026
In the Madras High Court
Case No : O.P. No. 886 of 2006

Chennai Container Terminal Private Limited

APPELLANT

Vs

Board of Trustees, Mr. Justice M. Maruthamuthu, B.A., B.L.,
Former Judge, High Court, Presiding Arbitrator, Shri M. Velu,
B.E., M.B.A., F.I.V., Arbitrator, Dy. Chairman (Retd.), Chennai
Dock Labour and Shri B.R. Zaiwalla, Senior Advocate

RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Arbitration Act, 1940 — Section 29, 30
Arbitration and Conciliation Act, 1996 — Section 30, 31(7), 34
Contract Act, 1872 — Section 55, 73

Citation : (2009) 03 MAD CK 0026

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Rafeeq Dada for S. Raghunathan, for the Appellant; Somayajulu for R. Karthikeyan, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—The petitioner is challenging the award dated 04.09.2006 passed by the second and third respondents/Arbitrators, u/s

34 of the Arbitration and Conciliation Act 1996.

2. The petition averments are as under:

The petitioner is the licensee under a Licence Agreement dated 9.8.2001 entered into with the Board of Trustees, Chennai Port Trust, the

Licensor, who is the first respondent herein, under which, the Licensor granted an Exclusive licence to the petitioner for designing, engineering,

financing, constructing, equipping, operating and maintaining the Container Terminal facilities and services at the Chennai Port for a period of thirty

years. The first respondent handed over possession of the Container Terminal to the petitioner on 30.11.2001 together with equipment, machinery and spares as per the terms set out in the agreement. As per Clause 2.04(c) of the agreement, the petitioner was required to purchase machinery, equipments and spares set out in the Appendix to the agreement. The purchase price was to be determined by an independent Valuer who was selected in terms of the agreement from a Panel of three submitted by the petitioner to the first respondent. The independent Valuer price Water House Coopers (P) Ltd. (hereinafter called P.W.C) was selected from the panel of three i.e. P.W.C., KPMG India (P) Ltd. and S.R. Batliboi Consultants (P) Ltd. by the first respondent. Each of the three Valuers submitted in advance the method that they would be adopting for the purpose of valuation of equipment, machinery and spares. Each of the Valuers was given a copy of the agreement entered into between the petitioner and the first respondent and each of them was called to submit the method of valuation which they would adopt, taking into consideration the provisions of Article 5.05 of the agreement. After the valuation was made by P.W.C., the entire payment was made by the petitioner to the first respondent on the basis of the said valuation. The first respondent raised a dispute challenging the valuation and submitted that they were entitled to a larger amount in respect of the value of the equipment and machinery and also in respect of the value of spare parts. The petitioner contested the claim of the first respondent to seek an enhancement of the valuation. The payment by the petitioner was accepted by the first respondent under protest and the first respondent handed over the possession of the Container Terminal to the petitioner on 30.11.2001.

3. Thereafter, the first respondent referred the dispute to Arbitral Tribunal consisting of the second to fourth respondents herein. On 4.9.2006, two of the arbitrators namely the second and third respondents herein passed an award in terms of which, a sum of Rs. 304.47 lakhs together with interest thereon at 9% per annum from November 30, 2001 was payable to the first respondent. As per the majority award, the Valuer did not follow the straight line method of depreciation and the Valuer ought to have taken 5% as scrap value or residual value on all the equipments and machineries. Therefore, the majority award, by adopting 5% residual value in the straight line method of valuation, awarded a sum of Rs. 304.47

lakhs together with interest at 9% per annum. The fourth respondent herein, who is also a member of the Arbitral Tribunal, gave a dissenting award

by dismissing the claim of the first respondent in its entirety. Aggrieved by the majority award, dated 4.9.2006, the petitioner herein filed the above

Original petition u/s 34 of the Arbitration and Conciliation Act, 1996.

4. Heard Thiru Rafeeq Dada, the learned Senior Counsel for the petitioner and Thiru Somayajulu, the learned Senior Counsel for the first

respondent. I have also gone through the entire records including the impugned Award.

5. The learned Senior Counsel for the petitioner submitted that P.W.C. was selected by the first respondent and the first respondent had the

proposal of P.W.C., where the P.W.C. clearly intimated that it would take the replacement cost minus depreciation. P.W.C. further indicated that

no "Salvage Value" would be taken into account. The first respondent asked many questions on the method of valuation adopted by the P.W.C.

and all the questions were answered by P.W.C. Having known the entire method to be adopted by P.W.C., it is not open to the first respondent

to question the same later on. He further submitted that any dispute with regard to the valuation made by an independent Valuer could not have

been entertained as a dispute covered by the Arbitration Agreement between the parties. He added that if at all the first respondent had any

grievances against the Valuer, namely P.W.C., they could only proceed against the independent Valuer and therefore, the Arbitral Tribunal has no

jurisdiction to entertain the dispute. The learned Senior Counsel further urged that the methodology adopted by the independent Valuer was based

on an interpretation of Clause 5.05 of the agreement and no residual or scrap value was mentioned anywhere in the agreement in respect of the

equipment. Therefore, according to him, the award of the majority is contrary to Clause 5.05 read with Clause 13.06 of the agreement. He

strongly took exception to the valuation done by the Arbitration Tribunal based on a residual value of 5%, which according to him, is perverse. The

learned Senior Counsel further pointed out that the witness, which, the tribunal itself summoned, namely Thiru Nripeshkumar from P.W.C.

completely supported the case of the petitioner. He also questioned the method adopted by the Arbitral Tribunal by calling the Valuer as its own

witness when neither the petitioner nor the first respondent did not come forward to do so. That apart, the learned Senior Counsel submitted that

having called the witness as its own witness, the arbitral tribunal ought not to have rejected the evidence of Thiru Nripeshkumar of P.W.C. The

learned Senior Counsel further contended that the majority award wrongly granted the interest at 9% per annum from the date of handing over the

possession of equipment and container terminal facilities. According to him, the award of interest by the majority is contrary to Section 31(7) of the

Act, 1996. Hence, he prayed for setting aside the award. In support of his submissions, the learned Senior Counsel relied on the following

decisions:

1. Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,
2. M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others,
3. Bharat Coking Coal Ltd. Vs. Annapurna Construction,
4. 1992 (2) ALL ER 170 (Jones and Ors. v. Sherwood Computer Services plc)
5. Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation,
6. Centrotrade Minerals and Metal Inc. Vs. Hindustan Copper Limited,

6. Per contra, the learned Senior Counsel for the first respondent submitted that a reasoned award has been passed by the majority and none of

the grounds as set out u/s 34 of the Act, 1996 was made available to set aside the award. The learned Senior Counsel pointed out that when the

independent Valuer did not value the machineries, etc. as per the Clauses contained in the agreement, a definite dispute arose under the agreement

and therefore, the dispute is very much arbitrable. He further pointed out that when the independent Valuer is not a party to the arbitration

agreement, it is not open to the first respondent to proceed against the independent Valuer. The learned Senior Counsel for the first respondent

further urged that when different formulae can be applied in different circumstances, the arbitrator chose to apply a particular formula in

consonance with the method contemplated under the contract, the same could not be questioned before the court u/s 34 of the Act, 1996. The

learned Senior Counsel has also supported the award with regard to grant of interest by saying that the same is within the jurisdiction of the

Arbitrator. In support of his submissions, the learned Senior Counsel for the first

respondent relied on the following decisions:

1. Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.,
2. McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others,
3. Bharat Coking Coal Ltd. Vs. L.K. Ahuja,
4. (2001)2 SCC 721 (Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj and Ors.)
5. U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd.,
6. M/s. Arosan Enterprises Ltd. Vs. Union of India and Another,
7. Em and Em Associates Vs. Delhi Development Authority and Another,
8. Indian Lead Ltd. Vs. R.L. Dalal and Co. Pvt. Ltd.,
9. Oil and Natural Gas Commission Ltd. Vs. Garware Shipping Corporation Ltd., .

7. I have considered the rival submissions carefully with regard to facts and citations.

8. The first respondent entered into an agreement with the petitioner on 9.8.2001 for development and maintenance of the Container Terminal at

Chennai Port, for a period of 30 years and granted an exclusive license to the petitioner. The first respondent handed over possession of the

terminal to the petitioner on 30.11.2001. From that date onwards, the petitioner is carrying on their activities by using the machineries and

equipments of the first respondent. As per Clause 2.04(c) of the Agreement, the petitioner should purchase the assets of the first respondent. The

first respondent agreed to hand over the equipments to the petitioner within 90 days of the date of the agreement, upon receiving the payment from

the petitioner calculated in terms of Article 5.05 of the agreement. The market value of the equipment, cost of tools and plants, office furniture and

stores, as on one month before the handing over date, shall be determined and fixed by an independent Valuer to be appointed from the mutually

acceptable panel of three provided by the petitioner (the licensee) and selected by the first respondent (the licensor). The cost and expenses of the

said Valuer shall be entirely borne and paid by the petitioner. Accordingly, P.W.C was appointed as an independent Valuer for the above said

purposes.

9. It is the claim of the first respondent before the Arbitral tribunal that P.W.C. instead of submitting a draft report for comments by either parties,

as stipulated in the bid, submitted an unsigned draft sheet to the first respondent and the said draft sheet did not contain a working sheet, comparison sheet, present market value and quotations collected from any of the companies or manufacturers. They contended (the first respondent) that the value was below the book value as on 31.03.2001 and caused heavy loss to the licensor, the first respondent herein. At the meeting held on 31.03.2001, the first respondent's valuation Committee informed the officials of P.W.C. that, no decision could be taken with the single page draft as it lacked transparency without any information about the methodology of calculation and the relevant records to assess the replacement cost. The first respondent further informed P.W.C that the valuation of equipment and machinery at Rs. 2293.93 lakhs was very low and much less than the book value of Rs. 2864.54 lakhs as on 31.03.2001. It was pointed out by the first respondent that the intention of including article 5.05 in the licence agreement was to get a reasonable value which is well above the book value of the equipment and machinery.

10. Thereafter, P.W.C. submitted a final report of valuation on 1.11.2001, in which, the equipment and machinery alone were valued at Rs.

2669.78 lakhs. The Valuation Committee of the first respondent examined the final report and found that the draft sheet and the final report did not

contain any details about the methodology and calculation (or) any documentary evidence in support of the replacement cost for the valuation of

equipments and machinery and spare parts. They further found that the replacement cost of equipment and machinery was very much less than

those in the draft sheet submitted by P.W.C. The replacement cost of equipment and machinery furnished in the final report was Rs. 9248.85 lakhs

as against the replacement cost of Rs. 12548.50 lakhs in the draft sheet submitted by them. Therefore, the first respondent contended before the

arbitral tribunal that the report of the independent Valuer is inconsistent and arbitrary.

11. The first respondent referred to the fact that in the year 1988, in connection with obtaining the ADB loan, they appointed M/s.Shanmugavel

Associates to value the assets and M/s.Shanmugavel Associates valued the replacement cost for Container handling equipment at Rs. 11,25,814/-

lakhs and assessed the depreciated value equipment and machinery at Rs. 3835.48 lakhs. According to the first respondent, the assessed value of

equipment and machinery after allowing depreciation in the replacement cost under straight line method was Rs. 6408.35 lakhs. It is the case of the

first respondent that except top lift trucks, 2 Nos. of tractors and 8 Nos. of trailers which were in the condemned stage, all other equipment and

machinery were in working condition at the time of handing over of the container terminal to the petitioner.

12. M/s.Shanmugavel Associates submitted their report in the year 1988 prior to the agreement dated 9.8.2001 and therefore, according to the

first respondent, the cost of equipments and machinery payable to them should be the value assessed by them.

13. It is the further contention of the first respondent in the claim statement that the purchase value of the spare parts and electrical cables handed

over from the Central Stores worked out to Rs. 959.62 lakhs and the spare parts held at shop floors which were also handed over worked out to

Rs. 307.42 lakhs. The total purchase value of spares and electrical cables worked out to Rs. 1267.04 lakhs. P.W.C. informed that the valuation

based on the replacement cost minus the depreciation by straight line method was not possible for spare parts since there were large number of

items. This according to the first respondent was a deviation from the licence agreement. The first respondent contended that the spare parts

should be valued as per book value plus 20% towards the inventory carrying cost. According to the first respondent, some of the spare parts

handed over to the petitioner had already been consumed by the petitioner for maintenance of equipments. P.W.C. valued the above items at Rs.

573.73 lakhs. This was not accepted by the first respondent as the Valuer depreciated 65% for insurance spares and 50% for non-insurance

spares.

14. By letter dated 3.11.2001, the first respondent informed the Executive Director of P.W.C that their valuation was not as per Clause 5.05 of

the licence agreement. The reasons given by the first respondent are:

1. The report did not adhere to the stipulated formula;
2. The report did not furnish the evidence of replacement cost and it was arrived at on assumption; and
3. The depreciated value of some of the assets is shown as negative value i.e. nil value which cannot be accepted as the equipments were

functioning at the time of taking over the terminal by the petitioner.

15. The Valuation Committee of the first respondent and the representatives of P.W.C. held a meeting on 6.11.2001, but, no consensus was

reached. The first respondent did not accept the clarifications offered by the petitioner that the value was got strictly as per the terms of Clause

5.05 of the agreement. It was pointed out by the first respondent that P.W.C. has also given 5% of the replacement cost as residual value for the

items which had been shown by them as ZERO value in the final report and it worked out to Rs. 24.52 lakhs and this clearly showed the

inconsistency, after-thoughts and adjustments and lack of judgment on the part of P.W.C. The petitioner paid a total sum of Rs. 3268.01 lakhs for

the equipment, machinery and the spare parts. The details are as under:

1. Equipment and machinery ... Rs. 2669.78 lakhs

2. Spare parts and cables ... Rs. 573.73 lakhs

3. Value assessed by P.W.C. for 12 Rs. 24.50 lakhs

Total Rs. 3268.01 lakhs

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16. The Container Terminal was handed over on 30.11.2001. On 20.12.2001, the petitioner requested the first respondent to hand over the

overhauled and re-conditioned 21 items for their use in various container terminal equipments. M/s.MECON Ltd. valued 23 old and reconditioned

items for a sum of Rs. 326.32 lakhs including the 21 items required by the petitioner. The petitioner took over twenty one items on payment of Rs.

273.11 lakhs as valued by M/s.MECON Ltd.

17. A meeting of the officials of the first respondent and the petitioner was held on 01.02.2002 for arriving at an amicable settlement in accordance

with article XV i.e. Dispute Resolution Clause of the licence agreement. In the said meeting, the first respondent suggested that the assets value of

Rs. 3835.48 lakhs based on the replacement cost taken by M/s.Shanmugavel Associates and Rs. 1267.04 lakhs being the book value of spares

plus 253.41 lakhs being 20% storage charges (totally Rs. 1520.45 lakhs) should be paid to the first respondent by the petitioner. On that basis, the

petitioner had to pay Rs. 5355.95 lakhs (Rs.3835.48 + Rs. 1520.45) to the first

respondent. Since the petitioner has paid only Rs. 3268.03 lakhs under these heads, the balance of Rs. 2087.90 lakhs is due to the first respondent from the petitioner. As there was no settlement between the parties in this regard, on 18.02.2002, the first respondent decided to go in for arbitration.

18. Before the Arbitral Tribunal, the first respondent contended that the petitioner had to pay a sum of Rs. 7928.80 lakhs, whereas the petitioner paid only a sum of Rs. 3268.03 lakhs and therefore they made a claim for the balance amount of Rs. 4660.77 lakhs plus interest at 18% per annum on the said amount from 30.11.2001, till the date of payment.

19. The petitioner herein resisted the above said claim of the first respondent by filing a reply. They raised a preliminary objection as to the arbitrability of the claim itself. According to the petitioner, it is only disputes and differences arising out of the licence agreement between the parties alone can be referred to arbitration. The valuation done by the independent Valuer would be final and binding and it would not lead to any dispute that could be referred to arbitration. If at all, they contended that, the first respondent nurtured any grievances in the valuation done by the independent Valuer, they could only claim a relief against the independent Valuer and not against the petitioner. On merits, the petitioner contended that the independent Valuer valued the assets in accordance with article 5.05 of the licence agreement. They denied that the independent Valuer, namely P.W.C., adopted a method which was different from the one mentioned in the licence agreement. Hence, they prayed for the dismissal of the claim made by the first respondent.

20. On the basis of the above pleadings, the tribunal framed the following issues, namely:

1. Whether the arbitration is maintainable?
2. Whether the first respondent/claimant is entitled to a claim of Rs. 5989.09 lakhs as set out in the claim statement?

If not, to what extent?

21. The Arbitral Tribunal first took out the question whether P.W.C. correctly valued the assets following the straightline method as per Clause

5.05 of the agreement in the valuation in respect of machineries and equipments, as this was the major point.

22. It is not in dispute at all that the method to be adopted by the Valuer was nothing else except the straight line method stipulated in Clause 5.05

of the agreement. It is also an admitted fact that P.W.C. was selected as an independent Valuer by the first respondent. Clause 5.05 of the

agreement makes it clear that the petitioner shall take over all the purchased equipments, machineries and their spares owned by the first

respondent and listed in Appendix-8 on payment of their value as replacement cost minus depreciation by straightline method and based on the life

norms indicated for the Cranes, tractors/trailors and straddle carrier. According to the first respondent, the straightline method should be worked

as follows:

i) Depreciation (D) = (Replacement cost (RC) -
Scrap value) X No. of years served

Normal life in years

ii) Net Replacement = Replacement cost (RC) -
cost (NRC) Depreciation (D)

23. The Arbitral Tribunal after referring to ""Valuation of plant and machineries
1/2 Theory and Practice"" written by Dr.P.C.Gupta, ""Valuation of

Plant and Machineries"" by Kirit Buth Bhatti and on the basis of the evidence given by Thiru Sunirmal Guha, the witness of the petitioner, came to

the conclusion that the valuation should be for the sale of the equipment as a whole on a going concern basis and on an ""as is where is"" basis on the

valuation date, as contended by the first respondent. In so far as M/s.Shanmugavel Associate's report is concerned, the majority of the tribunal

found that neither the first respondent nor the petitioner would be entitled to seek support to their respective claims and contentions because that

the Valuer valued the equipments on a higher figure of Rs. 3268/- lakhs and the replacement cost at Rs. 11,258/- lakhs than the value arrived at by

P.W.C. in its valuation. The majority award found that the valuation made by M/s.Shanmugavel Associates came into existence in a different

context and for a different purpose. Therefore, according to the majority award, it is immaterial whether M/s.Shanmugavel Associates followed the

straightline method or not in the matter of valuation. The award under challenge

referred to the meeting held on 6.11.2001 between the officials of the first respondent and P.W.C., in which the Chief Mechanical Engineer of the first respondent expressed that some of the assets which completed their life are in working condition and that the valuation should be made as per the accepted principle of minimum 7.5% of purchase price. The minutes of the meeting i.e. Ex.C95 was referred to in this regard. The majority award dealt with the point that there is nothing to show that P.W.C. got an agreement on the method of valuation with the first respondent to make the valuation of P.W.C. binding. It was observed in the award that the tribunal has to hold that the replacement cost of the equipment determined by P.W.C. will gain acceptance in the absence of a satisfactory proof that the replacement cost determined by P.W.C. is arbitrary. Once the replacement value determined by P.W.C. is accepted by the Tribunal, the tribunal posed a next question, that is whether P.W.C. followed the formula to determine the depreciation as per the agreement. Since the replacement cost and normal life of the equipment in years are available before the tribunal, the tribunal decided to determine the scrap value (S).

24. The Tribunal adverted to the fact that P.W.C. made drastic changes between the draft report between 31.10.2001 and final report dated 01.11.2001, especially in the case of Quay Cranes and Transfer Cranes which are all six in number. There is increase in replacement cost less depreciation from draft valuation to final valuation and this was pointed out by the first respondent as an indication of arbitrariness. The tribunal has also adverted to the very vital fact that P.W.C. deemed it necessary to give 5% amounting to Rs. 24,52,000/- as residual value for four items of equipments which completed their life norms even after submission of the final valuation report. It is very pertinent to mention here that P.W.C. not only assigned Zero Value in their draft report, but also, in their final report for these equipments. But, P.W.C. did not choose to assign the salvage value/scrap value for other items also which is the bone of contention in the matter of following the straightline method. The salvage value of an asset is the estimated amount which will be received at the time the asset is disposed of less the cost of removing and disposing it of. In the case on hand, the tribunal found that this value is too high to be neglected or omitted as

insignificant. The majority award found that taking note of the salvage/scrap value is an integral part of the valuation by straightline method. According to the majority award, it is of little consequence, if Clause 5.05 is not explicit with regard to the scrap value. The scrap value occurs while working out the method of depreciation under straightline method.

If that being so, if P.W.C. has omitted to consider the scrap value in their letter dated 7.9.2001 when the pre-tender valuation process was on, it must be a flaw. It was the obligation of P.W.C. to assess and work out the scrap value while determining the depreciation method.

25. The majority award also dealt with the letter of P.W.C. dated 7.11.2001 (Ex.C107), which is six days after submission of the final valuation report, wherein P.W.C. revealed that the practice of assigning the residual value normally for the items which had completed the prescribed life norm. But, it was reluctant to assign the same value in the case of the assets of the first respondent, for which, also life norms have been prescribed. It is only after the final valuation dated 1.11.2001, P.W.C. deemed it fit to assign residual value of 5% of the Replacement Cost and that too restricting it to four items only. The tribunal also found that P.W.C. have not marked a copy of Ex.C107 letter to the first respondent direct for its comments. The tribunal was also of the view that someone who was associating or participating in the valuation exercise made by P.W.C. ought to have come forward and submitted their evidence especially on the point whether the straightline method was correctly followed and why the residual value of 5% was not allowed for all the items including those which have not completed the life norms.

26. As regards valuation of spares for equipments and machineries, the majority award after considering the licence agreement, found that the words ""mutually agreed upon"" apply to the valuer to be selected and not to the value determined by the Valuer. The tribunal found that the value to be determined by the independent valuer would have to be accepted by the parties. No life norms for the spares have been specified and in its absence, the valuation as per Clause 5.05 of the licence agreement will not be applicable. The tribunal found that P.W.C. is correct in saying that the value of spares should be linked to the remaining life of the equipments and depreciated the value with the remaining life of the asset. The

tribunal also found it correct that the valuation of spares could not be carried out exactly as specified in Clause 5.05. Accordingly, the tribunal

accepted the value of the spares determined by P.W.C. as correct and binding on the first respondent.

27. The tribunal considered the contention of the petitioner that the claim is not maintainable as the claim raised is not arbitrable. The tribunal found

that the dispute on valuation is essentially a dispute between the first respondent and the petitioner and it is not a dispute between the first

respondent and P.W.C. Admittedly, P.W.C. the Valuer is not a party to the licence agreement and both the petitioner and the first respondent

treated P.W.C. as a third party. When P.W.C. is not a party before the Arbitral proceedings, no award can be passed against P.W.C. and if

P.W.C. committed a mistake in the job of valuation, the cause of action would arise only against the petitioner for seeking the remedy. Therefore,

the tribunal rejected the contention of the petitioner that the claim is not maintainable and the first respondent should only proceed against P.W.C.

in this connection. The majority award also rejected the contention of the petitioner that as P.W.C. is a reputed firm and expert in the field of

valuation, the valuation submitted by P.W.C. is binding on the first respondent. The majority award found that the valuation report submitted by

P.W.C. can be subjected to challenge if there is fundamental or patent error in the methodology adopted by P.W.C. to the detriment of the first

respondent. The majority award found that P.W.C. failed to follow the straightline method strictly as per Clause 5.05 of the licence agreement and

therefore P.W.C. committed a patent and fundamental error. According to the majority award, P.W.C. completely failed to take note of the scrap

value and failed to assign any value in this regard in the final valuation report dated 01.11.2001. Thus, the majority award of the tribunal came to

the conclusion that the straightline method and the formula contemplated therein should consider the salvage/scrap value, but, P.W.C. failed to do

so which is an illegality. In support of their decision, the majority award referred to the ""Hand Book Modern Accounting"" by Sydney Davidson and

held that there could be be no Zero salvage/scrap value for assets and that there should be reasonable salvage value though depreciation

calculation may differ for tax and other similar purposes. Accordingly, it was held that the first respondent is not bound to accept the value as

determined by P.W.C. Considering the fact that P.W.C. themselves suggested a salvage value of 5% for four equipments which completed their

life norms, the tribunal found that the same rate as salvage value/scrap value could be assigned for other assets also. Consequently, it was held that

it is open to the first respondent to claim salvage value/scrap value at 5% and the tribunal would be within its rights to award such value of 5%.

28. The majority award also considered the contention of the petitioner on the basis of Clause 13.06 and 13.12 of the agreement and held that a

combined reading of Clauses 5.05, 3.07 and 13.06 would reveal the intent of the parties not to consider the residual value of the assets beyond its

life term either on its purchase or acquisition is not acceptable. After considering this contention and the relevant clauses, the majority award did

not accept the contention and found that the question of considering or not considering the salvage does not arise at all. Accordingly, the majority

award held that the dispute is arbitrable, that P.W.C. committed patent error in not taking into account the salvage value/scrap value, for which, the

norms have been fixed in the methodology adopted for stragithline method, that a residual value of 5% of the replacement cost is just and

reasonable, that the valuation made by P.W.C. is not binding on the first respondent and it is open to challenge, that the contention of the

petitioner, that the first respondent should seek its remedy only against P.W.C. is rejected, that the claim of the first respondent that P.W.C. have

not correctly valued the spares is rejected, that the first respondent is entitled to the balance amount of Rs. 304.47 lakhs and that the first

respondent is entitled to simple interest at 9% per annum on Rs. 304.47 lakhs from 30.11.2001 till the date of payment.

29. Thus, I am of the considered view that a reasoned award has been passed by the arbitral tribunal, consisting of the majority arbitrators. The

majority award has correctly identified the question as to whether P.W.C. properly valued the assets and equipments and found that there was a

deviation by P.W.C. from the straightline method as no scrap value was given by P.W.C. in determining the depreciation for equipments and

machineries. Having found that P.W.C. has committed a patent illegality as they failed to take into account the scrap/salvage value, the majority

award assigned a residual value of 5% of the replacement cost which was also given by P.W.C. for some of the equipments. The tribunal,

especially the majority award also dealt with the jurisdiction of the tribunal in deciding the claim and it correctly held that the claim is arbitrable and

the first respondent could not be asked to proceed against the independent Valuer i.e. P.W.C. to redress their grievances.

30. I am aware that u/s 34 of the Act 1996, this court is not sitting in its appellate jurisdiction and the object and Scheme of the Act 1996 itself

contemplates minimum interference by the courts in the award passed by the arbitrators. When the tribunal consisting of majority arbitrators,

correctly framed the relevant issues and decided those issues properly on the basis of the evidence by giving reasons which are reasonable and

logical, it is not possible for this court to interfere with the same even though this court can come to a different conclusion on the basis of the very

same evidence. Therefore, I find no infirmity or illegality in the majority award passed by the arbitral tribunal.

31. Now let me consider the judgments relied on by both the learned Senior Counsel, to find out the legal principles settled thereon.

32. In AIR 2003 SC 2629 (cited supra), the Hon''ble Supreme Court held as under:

75. For the reasons stated above, the impugned award directing the appellant to refund US \$ 3,04,970.20 and Rs 15,75,559 with interest which

were deducted for the breach of contract as per the agreement requires to be set aside and is hereby set aside. The appeal is allowed accordingly.

There shall be no order as to costs.

33. In AIR 1990 SC 1277 (cited supra), the Hon''ble Supreme Court held as under:

58. Price fixation is not within the province of the courts. Judicial function in respect of such matters is exhausted when there is found to be a

rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in Mississippi Valley Barge Line Co. v. United

States of America 45:

The structure of a rate Schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience

is qualified to form.... It is not the province of a court to absorb this function to itself.... The judicial function is exhausted when there is found to be

a rational basis for the conclusions approved by the administrative body.

34. In *Bharat Coking Coal Ltd. Vs. Annapurna Construction*, , the Hon''ble Supreme Court held that there lies a clear distinction between an error

apparent within the jurisdiction and an error in excess of jurisdiction, the role of the arbitrator is to arbitrate within the terms of the contract and he

has no power apart from what the parties have given him under the contract.

35. In 1992(2) All ER 170 (cited supra), the court of appeal held that where the parties to a contract expressly agreed that certain matters arising

in relation to the contract were to be determined by an independent expert whose determination was conclusive and final and binding for all

purposes, then in the absence of fraud or collusion, the expert's determination only could be challenged on the ground of mistake, if it was clear

from the evidence that the expert has departed from its instructions in a material respect.

36. In *Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation*, , the Hon''ble Supreme Court held as under:

14. The High Court did not have the benefit of the principles laid down in *Saw Pipes*⁴, and had proceeded on the assumption that award cannot

be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked

into for examining the correctness of the award. This Court in *Saw Pipes*⁴ has made it clear that it is open to the court to consider whether the

award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of

India.

37. In *Centrotech Minerals and Metal Inc. Vs. Hindustan Copper Limited*, , the Hon''ble Supreme Court observed as under:

100. We are not unmindful that the decision of this Court in *ONGC Ltd. v. Saw Pipes Ltd.* ¹²¹ had invited considerable adverse comments but

the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise

of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. (See *The Law and*

Practice of Arbitration and Conciliation by O.P. Malhotra, 2nd Edn., p.1174.)

102. One may agree with the said view of the learned author or may not but, as at present advised, we have to abide by the decision in *ONGC*²¹

and, thus, the doctrine of public policy must be held to be a ground for setting aside an arbitration agreement and consequently an award.

38. In *Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.*, , the Hon"ble Supreme Court held as under:

24. This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power u/s

30, cannot re-appreciate the evidence or examine correctness of the conclusions arrived at by the Arbitrator. The jurisdiction is not appellate in

nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with

the award merely because in the opinion of the court, other view is equally possible. It is only when the court is satisfied that the Arbitrator had

misconducted himself or the proceedings or the award had been improperly procured or is "otherwise" invalid that the court may set aside such

award.

31. In *Bharat Coking Coal Ltd. v. Annapurna Construction*, this Court held that there is distinction between error within jurisdiction and error in

excess of jurisdiction. The role of the Arbitrator is to arbitrate within the terms of the agreement, his decision cannot be set aside. It is only when he

travels beyond the contract that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be

questioned in an appropriate court.

39. In *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, , the Hon"ble Supreme Court observed as under:

52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of

the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot

correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of

the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a

conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

59. Such patent illegality, however, must go to the root of the matter. The public

policy violation, indisputably, should be so unfair and

unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the

contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the

applicability of the aforementioned principles while noticing the merits of the matter.

Method for computation of damages

102. What should, however, be the method of computation of damages is a question which now arises for consideration. Before we advert to the

rival contentions of the parties in this behalf, we may notice that in *M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co.*¹⁴ this Court held

that the method used for computation of damages will depend upon the facts and circumstances of each case.

102-A. In the assessment of damages, the court must consider only strict legal obligations, and not the expectations, however reasonable, of one

contractor that the other will do something that he has assumed no legal obligation to do. (See *Lavarack v. Woods of Colchester Ltd.* 15 All ER p.

690 G.)

103. The arbitrator quantified the claim by taking recourse to the Emden Formula. The learned arbitrator also referred to other formulae, but, as

noticed hereinbefore, opined that the Emden Formula is a widely accepted one.

105. Before us several American decisions have been referred to by Mr Dipankar Gupta in aid of his submission that the Emden Formula has since

been widely accepted by the American courts being *Nicon Inc. v. United States* 19, *Gladwynne Construction Co. v. Mayor and City Council of*

Baltimore 20 and *Charles G. William Construction Inc. v. White* 21.

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances

and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and

circumstances of a particular case, would eminently fall within the domain of the arbitrator.

107. If the learned arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an

error warranting interference by this Court.

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of

construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature,

scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into

consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration

for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to

determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* 26 and *D.D. Sharma v. Union of India* 27.)

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction

unless it is found that there exists any bar on the face of the award.

115. A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or

the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator

in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our

opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.

40. In *Bharat Coking Coal Ltd. Vs. L.K. Ahuja*, , the Hon''ble Supreme Court held that when the Arbitrator has applied his mind to the pleadings,

the evidence adduced before him and the terms of the contract, there is no scope for the court to re-appraise the matter, as if it was an appeal and

even if two views are possible, the view taken by the arbitrator would prevail.

41. In 2001(2) SCC 721 (cited supra), the Hon''ble Supreme Court held as under:

25. If that be the position, courts which of late encourage litigants to opt for and avail of the alternative method of resolution of disputes, would be

penalising or placing those who avail of the same in a serious disadvantage. Both logic and reason should Counsel courts to lean more in favour of

the arbitrator holding to possess all the powers as are necessary to do complete

and full justice between the parties in the same manner in which the civil court seized of the same dispute could have done. By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise it could have successfully asserted before courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of its substantive rights under the various laws in force, according to which only even the arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the court thereunder, has to be upheld.

The submission that the arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers upon him power, is too stale and technical to be countenanced in our hands, for the simple reason that in every case the appointment of an arbitrator or even resort to court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved, and that if the arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an arbitrator, it is beyond comprehension as to why and for what reason and with what justification the arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same.

42. In (2001)3 SCC 397 (cited supra), it was reiterated that when the arbitrators

have applied their minds to the pleadings, the evidence adduce before them and the terms of the contract, there is no scope for the court including the Supreme Court to re-apprise the matter as if it was an appeal. When two views are possible, the view taken by the arbitrator would prevail.

43. In (1999)9 SCC 449 (cited supra), the Hon"ble Supreme Court held that Section 30 of the Arbitration Act 1940 providing for setting aside an award of an arbitrator is rather restrictive in its operation and the statute is also categorical on that score. The legislature obviously had in its mind that the arbitrator being the Judge chosen by the parties, the decision of the arbitrator as such ought to be final between the parties. The Hon"ble Supreme Court further observed in the above judgment that in the event of two views are possible on a question of law as well, the court would not be justified in interfering with the award and the Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view, the award or the reasoning contained therein cannot be examined.

44. In AIR 2003 DEL 128 (cited supra), a Division Bench of the Delhi High Court held as under:

6. As has already been mentioned above, in the present case the perspective of the Arbitrator and the Learned Single Judge is irreconcilable. In Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, (supra the opinion expressed in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, was, extracted and followed. This observation was that if the conclusion is reached that the Umpire/Arbitrator has travelled outside the permissible territory not by the construction of the contract but by merely looking at the contract, the Award can be interfered with. In other words, if only one understanding is possible from a reading of the relevant Clauses of a contract and this understanding is at variance with that preferred by the Arbtrator, the Courts may step in and modify the Award. Where, however, multiple understandings and interpretations are possible on a perusal of the contract, the Court cannot impose its own interpretation on that of the Arbitrator. It would be transgressing its own boundaries and

interloping upon those of the Arbitrator, in substituting the view preferred by it for the latter.

8. The learned Single Judge in setting aside the amounts awarded by the Arbitrator against Claims 3 and 4 has departed from the principles

established in Associated Engineering Co.'s case (supra), and Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, all of which

have, more recently, been affirmed and applied in Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, . His Lordship

B.N.Kirpal, J. has opined that ""it is clear that when the arbitrator is required to construe a contract when merely because another view may be

possible the Court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the

arbitrator has exceeded the jurisdiction in making the award."" The Arbitrator's trend of thought is evident from the Award. In his opinion the

erroneous specifications led the contractor to make a faulty bid, thus justifying that he should be compensated. This interpretation of the contract is

not implausible. In these circumstances, the order of the Learned Single Judge is set aside and the Award on Claims 3 and 4 is restored.

45. In 2006 Mhlj-2 260 (cited supra), the Bombay High Court observed that court could not interfere with the findings of fact recorded by the

arbitrator and it is not possible for the court to scrutinise the accounts for the purpose of determination that whether the running bill or the final bill

contained the accurate claim or not as per the correct or in accordance with the work carried out by the petitioner. The court was of the view that

such exercise was left to the decision of the arbitrator and the arbitrator is the sole authority to determine the same. u/s 34 of the Act, 1996, the

court cannot re-determine the work actually carried out and the amount computed thereon is payable or not.

46. In 2005 Mhlj-1-838 (cited supra), the Bombay High Court observed as under:

14. In light of the aforesaid contentions of the rival parties, I am required to determine the question of legality and validity of the award impugned

herein. Insofar as the contention of the learned Counsel for the petitioner is concerned that the Second Sexena Committee Report and the formula

adopted therein as well as the integrated report of the High Level Working Group is binding on the petitioner and consequently binding on the

respondent Corporation, I find no difficulty in accepting the said argument. In fact, the respondent corporation is not disputing the formula on the basis of which the said recommendations were made to reimburse the amount of overhead expenses incurred by the Indian ship owners. The only dispute which is raised is that the said formula has to be applied by taking which particular year into consideration. It is because under the formula the yardstick for reimbursement is taken on the basis of amount expended by Shipping Corporation of India which is a government of India undertaking. This formula is not in dispute. However, for applying the said formula the date of induction of ship is to be taken into consideration or merely a financial year is the bone of contention between the parties which was referred to arbitrator. I find that even in the Award the Arbitrator has categorically stated that what is looked into is not the legality and validity of the formula fixed but the implementation of the said formula by the respondent-corporation.

17. The five ships of the respondent Corporation were inducted in the year 1983 and 1984 whereas the ships of the Shipping Corporation of India were all inducted in 1984-85. The aforesaid position is an admitted fact since the same is set out by the petitioners themselves on page 7 of the petition. If, therefore, the date of induction is taken as the relevant date then 11th year of operation of the vessel of the respondent corporation would be the 10th of the operation of the vessel of the Shipping Corporation of India. Therefore, to compute the 11th year as the base year for the purpose of next five years, it is necessary that the date of induction is taken into consideration and the 11th year of operation of the vessels of Shipping Corporation of India should be taken as 12th year of vessel operation of the respondent herein. I find that the said dispute was specifically referred to the arbitrator. Thus, in my view the decision of the arbitrator is wholly within jurisdiction and is final and binding. It is well settled that the interpretation of the Clause of the agreement between the parties is an exclusive domain of the arbitrator and the Court in its jurisdiction u/s 34 cannot interfere with such an interpretation even if two views are possible. In my view, the arbitrator has not himself fixed the charter rate as contended by the petitioner but only interpreted the formula prescribed by the Second Saxena Committee report as accepted by

the High Level Working Group. In that view of the matter, I did not find any merit in the aforesaid contention advanced by the learned Counsel for the petitioner and therefore reject the same.

47. Even if the principles of law settled in the above decisions are applied to the present case, I am of the considered view that the facts and circumstance of the case do not warrant interference by this court to the award impugned in this petition. It is a case where the first respondent claimed that the valuation done by the independent Valuer was not in accordance with the Clauses contained in the contract. This was seriously disputed by the petitioner by saying that the valuation was exactly in consonance with the particular clause. The Arbitral Tribunal in its majority award, found that the valuation of the independent Valuer has failed to take into account the salvage/scrap value which is mandatory in a straight line method as contemplated under article 5.05 of the licence agreement and accordingly upheld the contention of the first respondent that the independent Valuer committed an illegality in valuing the equipments in total disregard of Clause 5.05. Having held so, the arbitral tribunal proceeded to give residual value of 5% which was given by the independent Valuer themselves for four items, that too after the final valuation dated 01.11.2001. The majority award has also given reasons for granting the award by evaluating and appraising the evidence adduced before it. In such circumstance, this award is a reasoned one and even if another view is possible in this matter, this court cannot interfere with the same u/s 34 of the Act, 1996.

In the result, the Original petition is dismissed. No cost.