

(2019) 07 BOM CK 0065
In the Bombay High Court
Case No : Arbitration Appeal No. 22 Of 2018

Container Corporation Of India Ltd And Ors	APPELLANT
Vs	
M/s. Kandla Cargo Handlers	RESPONDENT

Date of Decision : 12-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(a)(v)(i), 11, 28, 28(3), 31(3), 34, 34(2)2A, 34(2A)(2)(b), 34(2)(b)(ii), 34(2)(1)(ii), 34(2)(1)(iii), 37
Indian Contract Act, 1872 — Section 28, 28(b)

Citation : (2019) 07 BOM CK 0065

Hon'ble Judges : Z.A. Haq, J; Vinay Joshi, J

Bench : Division Bench

Advocate : Anil Mardikar, R.M. Mardikar, Rishabh Khemuka, M.G. Bhangde, Shyam Dewani, Sahil Dewani

Final Decision : Allowed

Judgement

Sr.No.,Particulars of Claim,Amount (Rs.),Remarks,

Claim

No.1",Regarding Outstanding Bills which have not been paid by Corporation to Cargo,"54,16,976.00",Allowed,

Claim

No.2", "Regarding Non- refund of amount of Security Deposit which according to Cargo, it was entitled to immediately on expiry of the contract period.", "5,00,000.00", Allowed,

Claim

No.3", "Regarding Bank Guarantee which according to Cargo has been illegally encashed by Corporation before

expiry of contract period without giving any notice.", "15,00,000.00", Allowed,

Claim

No.4", "Regarding Amount of Penalties which the Corporation has recovered from Cargo from the amount of bills to

be paid by the Corporation to Cargo on account of the alleged delay committed by the Cargo in

transportation though this delay is because of the situations beyond the control of the Cargo such as

restrictions imposed by the RTO on the delay committed by the Excise Department.", "78,05,450.00", Allowed,

Claim

No.5", "Regarding amount of penalty deducted from the bills by the Corporation without any initiation to

Cargo during the extended period of agreement.", "7,25,350.00", Allowed,

Claim

No.6", "Regarding carrying empty container to empty stacking park (steel yard).

According to Cargo, such carrying of empty containers to another spot was

not contemplated by the agreement and for this double handling it required additional expenditure

which Cargo as compelled to make by the officers of the Corporation.", "10,00,249.26", Allowed,

Claim

No.7", "Regarding Cargo of empty containers from empty part (steel Yard) to the places of their destination.

According to Cargo such carriage was not contemplated in the agreement.", "10,87,600.00", Rejected,

Claim

No.8", "Regarding Delivery of Containers at party's premises via more than one locations, which according to Cargo

is not contemplated in the agreement.", "23,36,640.00", Allowed,

Sr.No., Particulars of Claim, Amount (Rs.), Remarks,

Claim

No.1", "Regarding use of Shiper Trailers by Cargo in violation of Clause 17.4 of the contract.", "78,42,000.00", Rejected,

Claim

No.2", "Regarding payment for weightment of containers included by the Cargo in the bills, claim and payment

received.", "17,90,100.00", Rejected,

Claim

No.3", Regarding Payment made by Cargo for repairs/ washing of containers., "1,43,450.00", Granted,

Claim

No.4", Regarding recovery of payment made by the Corporation to Cargo for shifting of loaded containers, "2,10,000.00", Granted,

Claim

No.5", "Regarding recovery of payment made by Corporation to cargo for cleaning, stacking and/ or disposing

export/ import Cargo.", "4,84,840.00", Rejected,

Claim

No.6", Regarding excess payment of additional extra slab for empty work made to Cargo by the Corporation., "3,43,806.00", Rejected,

Claim

No.7", Regarding excess payment of transportation of empty containers of empty part of ICD Nagpur, "45,56,116.00", Rejected,

Claim

No.8", "Regarding Loss of Revenue due to less deployment of approximate 13 vehicles per day for entire

contractual period.", "06,07,36,000.00", Rejected,

Claim

No.9", "Regarding Loss of Revenue of Business and Loss of Credibility of Corporation due to entry of private

vehicles for factory stuffing/destuffing in the event of Cargo not providing adequate vehicles to Corporation.", "17,04,26,200.00", Rejected,

, Total claim allowed in terms of Award, "24,20,16,921.00",,

the District Court. The claimant also accepted the rejection of part of his claim No.10 and made no grievance that out of his claim of,,,

Rs.27,02,00,846/Â, the learned Arbitrator had granted only Rs.8,00,00,000/Â.

The claimant accepted grant of counter claim No.3 and counter claim" ,,,, No.4 by the learned Arbitrator and made no further grievance in the matter.,,,, 5. By the judgment dated 30th November 2018, the learned Principal District Judge decided the application filed by the CONCOR under Section 34 of" ,,,, the Act of 1996. The learned Principal District Judge has held that grant of claim of Rs.4,47,551/Â towards charges for carrying the containers for" ,,,, repairs is unjustified. The learned Principal District Judge has held that the amount of Rs.4,47,551/Â along with proportionate interest on it is required" ,,,, to be deducted from the amount granted by the learned Arbitrator. The learned Principal District Judge has held that the claimant is entitled for an ,,,, amount of Rs.9,69,43,564/Â along with pendente lite interest @ 18% per annum, and interest on the awarded amount from the date of award till" ,,,, realization of the amount from CONCOR, at 15% per annum." ,,,, Being aggrieved in the matter, CONCOR has filed this appeal. The claimant has accepted the rejection of its claim of Rs.4,47,551/Â along with" ,,,, proportionate interest on it by the learned Principal District Judge.,,,, 6. At the threshold, we are required to deal with the submission made on behalf of the claimant regarding scope of Section 34 and Section 37 of the" ,,,, Act of 1996. The learned Senior Advocate appearing for the claimant has emphasized on the provisions of subÂsection (2) and Section 2ÂA of ,,,, Section 34 of the Act of 1996 and has submitted that the arbitral award can be set aside only if the grounds / circumstances referred in subÂclauses ,,,, (i) to (v) of clause (a) of Section 2, in subÂclause (1) and (2) and explanation below clause (b) of subÂsection (2) and subÂsection 2ÂA of Section" ,,,, 34 of the Act of 1996 are found to be existing. It is argued that the scope of interference by this Court with the Arbitral award is very limited. To ,,,, support the submission, reliance is placed on the following judgments:" ,,,, i) Judgment given by the Hon'ble Supreme Court in the case of RD Corpn. vs. Gail (India) Ltd., reported in (2018) 12 SCC 471 (Paragraph No.18)," ,,,, ii) Judgment given by the Hon'ble Supreme Court in the case of Associate Builders vs. Delhi Development Authority, reported in (2015) 3 SCC 49," ,,,, (Paragraph No. 33),,,, iii) Judgment given by the Hon'ble Supreme Court in the case of Sutlej Construction Ltd. vs. State (UT of Chandigarh), reported in (2018) 1 SCC 718" ,,,,

(Paras 11, 12 & 13)," ,,,,

iv) Judgment given by the Hon'ble Supreme Court in t (Para 14),,,,

v) Judgment given by the Hon'ble Supreme Court in the case of Oil and Natural Gas Corporation Ltd. vs. Comex Services SA, reported in 2003 SCC" ,,,,

OnLine 287 (Para Nos. 13 & 15) = (2003) 5 Bom CR 146.,,,,

7. Per contra, the learned Senior Advocate appearing for CONCOR has argued that undisputedly the scope for interference with the Arbitral Award" ,,,,

while exercising the jurisdiction under Section 34 and under Section 37 of the Act of 1996 is limited. It is submitted that, however in the facts of the" ,,,,

present case, interference by this Court while considering the appeal under Section 37 of the Act of 1996 is necessary as the impugned arbitral award" ,,,,

suffers from vices which are amenable for judicial review under Section 37 of the Act of 1996.,,,,

To support the submission, reliance is placed on the following judgments:" ,,,,

i) Judgment given by the Hon'ble Supreme Court in the case of HRD Corpn. vs. Gail (India) Ltd., reported in (2018) 12 SCC 471 (Paragraph No.19)," ,,,,

ii) Judgment given by the Hon'ble Supreme Court in the case of McDermott International Inc. Vs. Burn Standard Co.Ltd., reported in (2006)11 SCC" ,,,,

181, (Paragraph Nos. 55 & 56)" ,,,,

8. In the judgment given in the case of HRD Corporation [(2018)12 SCC 471], the effect of amendment of Sections 28 and 34 of the Act of 1996 is" ,,,,

considered. Referring to 246th Law Commission Report pursuant to which Sections 28 and 34 of the Act of 1996 have been amended, the Hon'ble" ,,,,

Supreme Court has observed that the amendments are effected to narrow the grounds of challenge available under the Act of 1996. It is held that ,,,,

after the amendment of Section 34 of the Act of 1996 by Act No.III of 2016, the judgment given in the case of O.N.G.C. Vs. Saw Pipes [2003(5)" ,,,,

SCC 705] has been expressly done away with and the position of law contained in the judgment given in the case of Renu Sagar Power Co. Ltd.,,,,

(1994 Supp.1 SCC 644) is brought back. It is held that "public policy" as contemplated by sub-Âclause (ii) of clause (b) of sub-Âsection (2) of ,,,,

Section 34 of the Act of 1996 now includes only two considerations i.e. "fundamental policy of Indian Law" and "justice or morality". It is ,,,,

laid down that the third criteria/ consideration i.e. "the interest of India" is not available as a ground while exercising jurisdiction under Section 34 ,,,,

or Section 37 of the Act of 1996. It is laid down that the term "fundamental policy of Indian Law" as contemplated in clause (ii) of explanation (1),,,
to sub-section(2) of Section 34 of the Act of 1996, should be understood as laid down in the judgment given in the case of Renu Sagar Power Co.",,,
Ltd. It is laid down that the term "justice or morality" used in Clause (iii) of explanation (1) of sub-section (2) of Section 34 of the Act of 1996,,, should be understood to mean only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court.,,,
In the judgment given in the case of Associate Builders vs. DDA, reported in 2015(3) SCC 49, it is laid down that Section 28(3) of the Act of 1996",,,
has also been amended to bring it in line with the judgment given in the case of Associate Builders (supra). It is made clear that primarily it is for the,,
Arbitrator to decide on the construction of the terms of the contract, and the decision of the Arbitrator should not be interfered with, exercising",,,
jurisdiction under Section 34 or Section 37 of the Act of 1996, unless it is found that such a construction is not possible. It is laid down that while",,,
examining the legality of the arbitral award governed by Part I, arising out of the arbitration other than the international commercial arbitration," ,,,
additional ground of challenge is available i.e. patent illegality appearing on the face of the award. It is clarified that the ground of patent illegality,,,
would not be established, if there is merely an erroneous application of law or reappraisal of evidence." ,,,
In the judgment given in the case of Associate Builders, reported in 2015(3) SCC 49, it is laid down that while applying the "public policy test" to",,,
examine the legality of arbitral award, the Court does not act as the Court of appeal and therefore, errors of fact cannot be corrected. It is laid down",,,
that a possible view by the Arbitrator on facts cannot be faulted with as the Arbitrator is the ultimate master of appreciating the quantity and quality of,,,
evidence to be relied upon when it delivers the arbitration award. It is laid down that an award based on little evidence or on the evidence which does,,,
not measure up in quality to trained legal mind, should not be held to be invalid on the ground that the quantity or quality of the evidence is not up to the",,,
mark. It is laid down that if the approach of the Arbitrator is not found to be arbitrary or capricious, then the conclusions of the Arbitrator on factual",,,
aspects is the last word.,,,

In the judgment given in the case of Sattlite Construction Ltd., reported in (2018)1 SCC 718, referring to the judgment given in the case of Associate",,,,

Builders (supra), it is reiterated that the arbitral award can be set aside if it is in conflict with the public policy of India, if the arbitral award shocks the",,,,

conscience of the Court, but it is cautioned that this would not enable the Court to interfere with the arbitral award only because the Court thinks it to",,,,

be unjust in the facts of the case. It is laid down that the Court while exercising jurisdiction under Section 34 or Section 37 of the Act of 1996 cannot,,,

substitute its view for that of the Arbitrator only on the ground that in its view it would amount to rendering â??justiceâ??.,,,,

In the judgment given in the case of MMTC Ltd. vs. Vedanta Ltd., reported in 2019 SCC OnLine 220, it is reiterated that while exercising jurisdiction",,,,

under Section 37 of the Act of 1996, the Court cannot travel beyond the restrictions laid down under Section 34 of the Act of 1996. It is laid down that",,,,

the Court cannot independently assess the merits of the award and the Court will have to only ascertain whether the exercise of power by the Court,,,

under Section 34 of the Act of 1996 is within the limits and the jurisdiction conferred by Section 34 of the Act of 1996. A note of caution is sounded,,,

that if the arbitral award is confirmed by the Court under Section 34 of the Act of 1996, the Court while considering appeal under Section 37 of the",,,,

Act of 1996 must be extremely cautious and slow to disturb the concurrent findings.,,,,

In the judgment given by the Division Bench of this Court in the case of Oil and Natural Gas Corporation Ltd. vs. Comex Services SA, reported in",,,,

2003 SCC OnLine 287=(2003) 5 Bom.CR 146, it is held that the Arbitrator has power to grant lump sum damages. The Division Bench of this Court",,,,

has relied on the judgment given in the case of State of Rajasthan Vs. Puri Construction Co. Ltd., reported in 1994(6) SCC 485.",,,,

In the judgment given in the case of McDermott International Inc. Vs. Burn Standard Co.Ltd., reported in (2006)11 SCC 181, it is laid down that",,,,

unlike the Arbitration Act 1940, under the Act of 1996, the Arbitrator is required to assign reasons in support of the award. The question as to what is",,,,

meant by â??reasoned awardâ? is considered and it is laid down that mere statement of reasons does not satisfy the requirements of Section 31(3) of,,,,

the Act of 1996. It is laid down that the reasons must be based upon the material submitted before the Arbitrator/ Arbitral Tribunal and the Arbitrator/,,,,

Arbitral Tribunal has to give its reasons on consideration of the relevant material, including irrelevant material. It is laid down that the statement of",,,,,

reasons is a mandatory requirement, unless dispensed with by the parties or by the statutory provisions as laid down in Section 31(3) of the Act of",,,,,

1996.,,,,,

9. We have to examine the legality or otherwise of the impugned arbitral award keeping in view the parameters of jurisdiction under Section 37 of the,,,,

Act of 1996.,,,,,

10. The learned Senior Advocate appearing for the claimant has submitted that various clauses of the Tender(Bid) Document are required to be read,,,,

harmoniously to give effect to the intention of the parties and any particular/specific clause cannot be plucked out by the CONCOR to frustrate the,,,,

claim of the claimant.,,,,,

11. One more aspect which is required to be kept in mind while dealing with the controversy is applicability of Section 28 of the Contract Act, 1872, as",,,,,

amended by Act No.I of 1997 w.e.f. 8th January 1997. Section 28(as amended) reads as follows:,,,,

â??28. Agreements in restraint of legal proceedings, voidÂ? Every Agreement Â?"",,,,,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in",,,,,

the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or",,,,,

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the",,,,,

expiry of a specified period so as to restrict any party from enforcing this rights, is void to that extent."",,,,,

Exception 1 Saving of contract to refer to arbitration dispute that may ariseÂ?Â? This section shall not render illegal a contract, by which two or more",,,,,

persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that",,,,,

only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.,,,,,

Exception 2 â?" Saving of contract to refer questions that have already arisen â?" Nor shall this section render illegal any contract in writing, by which",,,,,

two or more persons agree to refer to arbitration any question between them which has already arisen or affect any provision of any law in force for,,,

the time being as to references to arbitration.â??,,,

Senior Advocate appearing for the claimant, relying on Section 28(b) has submitted that reliance on Clause 23 of the Tender (Bid) Document to",,,

contend that the claim for the services rendered to CONCOR under the agreement should have been made within three months of such service, is",,,

misdirected. Referring to the judgment given in the case of Union of India vs. Indusind Bank Ltd., reported in [(2016)9 SCC 720,] it is argued that",,,

such clause is required to be interpreted to mean that it reflects the period within which assertion of right/claim or demand is required to be made and,,,

such clause in the agreement cannot create any bar for making claim and/ or enforcing right in the Court of law. It is submitted that if Clause 23 is not,,,

interpreted in such manner then it will be hit by Section 28(b) of the Contract Act and the clause will have to be declared as void.,,,

12. After hearing the learned Senior Advocates for CONCOR and claimant and considering the nature of controversy we are of the view that,,,

reproduction of the clauses of the agreement, referred by them, will be helpful to examine the controversy. The relevant clauses referred by the",,,

respective parties are as follows:,,,

2.2 The tenderer should note that the scope and the quantum of work indicated in the chapter on Scope of Work are given only as a guide and the,,,

quantum of work is subject to variation or adjustment depending upon the actual requirements at NCT. Any variations, additions and/or deletions in the",,,

items of work actually to be carried out, shall not form the basis of any claim against CONCOR or of any claim for compensation on this account.",,,

CONCOR also reserves the right to get fresh quotations for any additional category of work.,,,

2.3 Tenderers should also note that CONCOR offers optional services for road transportation of containers. Any customer of CONCOR has the,,,

option of transporting his own containers under his own arrangements, subject to conditions laid down by CONCOR. Award of the Handling and",,,

Transportation contract envisaged by this tender document shall not give the contractor exclusive rights to all the transportation work at NCT.,,,

CHAPTERÂ??II,,,

6.1 All rates shall be quoted only on the proper form (Annexureâ"V) of the Schedule of Rates and each page of this schedule shall be signed in full,,,,

by the tenderer or his authorized signatory as described in paragraphs 5.7 to 5.10 above.,,,,

6.2 The rates in the Schedule of Rates should be filled in carefully after considering all the aspects of work as described in the chapter on Scope of,,,,

Work. No request for change or variation in rates or terms and conditions of the contract shall be entertained on the grounds that the tenderer had not,,,,

understood the work envisaged by this Handling and Transportation Contract, or did not understand or did not have full knowledge of site conditions,",,,,

method of working at Nagpur Container Terminal, method of working at other ICDs/CFSS/DCTs of CONCOR, various laws applicable to the work",,,,

relating to Container Terminals, various distances involved in the transportation work, etc.",,,,

6.3 â?|,,,,

6.4 â?|,,,,

6.5 â?|,,,,

6.6 â?|,,,,

6.7 Any variation, including addition and/or omissions, in the items of work to be actually carried out shall not form a basis of any dispute regarding the",,,,

rates quoted by the tenderer in the tender. The rates quoted by the tenderer shall be applicable irrespective of the volume of work.,,,,

â?|.,,,,

7.2 The tenders duly completed as described in paragraph 5 above must reach the designated office of Chief General Manager, Container Corporation",,,,,

of India Ltd., Inland Container Depot, Behind Narendra Nagar, PO Parvati Nagar, Ajni, Nagpur â?" 440027, before 1500 hours on 04.12.2001.",,,,

CHAPTERÂ"IV. (SCOPE OF WORK),,,,

1.3 The scope of work indicated in the paragraphs below is only a guide. The actual requirements are subject to variations/adjustments depending on,,,,

the pattern and volume of traffic.,,,,

1.4 â?|.....

1.5 The scope of work described in this chapter shall not be a basis for any dispute with regard to rates or for alteration of terms and conditions.,,,,

Doubts, if any, about the interpretation of any of the clauses in this chapter shall be referred to Director, Container Corporation of India Ltd., whose",,,,,

decision in the matter shall be final and acceptable to the tenderer/contractor.,,,,

3. SCHEDULE OF QUANTITIES,,,,,

3.1 The quantities indicated in the schedule below are only an approximate estimate of the volumes expected under various heads of activities,,,,,

described briefly in paragraph 02 above. It may be noted that evaluation of the Financial Bid shall be made on the basis of these quantities. The,,,,,

quantities below are only an approximate estimate and shall not be a basis for any dispute with regard to the rates quoted by the tenderer/contractor or,,,,,

for the alteration of Terms and Conditions Governing the Contract.,,,,

â?!.,,,,,

4.2 The contractor shall be permitted to raise charges for detention to trailers beyond the free time prescribed above, provided he produces written",,,,,

acknowledgement from the user of NCT regarding arrival and departure time of trailer at userâ??s premises.,,,,

CHAPTER V,,,,,

10. VOLUME OF WORK,,,,,

10.1 No definite quantum of work can be guaranteed. However, CONCOR expects to handle approximately the following volumes at NCT:",,,,,

A. 700 loaded export containers per month.,,,,

B. 700 loaded import containers per month.,,,,

C. 400 empty containers per month.,,,,

D. 1100 loaded domestic containers per month.,,,,

10.3 The description of work given in the chapter on Scope of Work or the volume of work given above in this chapter shall not be a cause of any,,,,,

dispute about the rates of contracts or nature and extent of operations. The nature and the extent of the work is and shall remain subject to variation,,,,,

and adjustments depending upon the actual operational and commercial requirements at the NCT. The description and volume of work as given in,,,,,

Scope of Work should be treated as guidelines and not as an exhaustive list of duties.,,,,

10.4 CONCOR reserves the right to negotiate fresh rates for any additional category of work arising during the currency of this contract for which,,,,,

the first preference will be given to the contractor. However, if the contractor fails to give reasonable rates, then CONCOR shall be free to make",,,,,

alternative arrangements.,,,,,

11.4 Wherever any Licence/Permission from or Registration with Local or State or Central Authorities is required under the above acts/law or any,,,,

other laws governing the work contracted for, including those for handling equipment and vehicles, the contractor shall at his own cost arrange for",,,,,

such Licence/Permission/ Registration. He shall also be liable for producing for inspection such certificates and licences as and when required by the,,,,

respective authorities or CONCOR.,,,,,

12. SCHEDULE FOR COMPLETING ASSIGNED WORK,,,,

12.1 The contractor shall carryout the various activities assigned to him under this contract with expedition within the time prescribed by CONCOR.,,,,,

Failure to comply with the time schedules for various activities shall be deemed as unsatisfactory performance and CONCOR shall be free to take,,,,

necessary action under paragraph 21 in addition to specific measures mentioned below.,,,,,

12.2 It should be noted that the work of handling and transporting containers in the Container Yards and at the Rail Siding of NCT shall be done round,,,,

the clock, seven days a week. The work of handling cargo at the CFS and at the DCT shall be done as per timings decided by CONCOR from time to",,,,,

time.,,,,,

S.

N.",EQUIPMENT,NUMBER,DESCRIPTION,REMARKS

01.,Reach stacker,02,"A. With capacity of handling upto 50 MT and LiftÂ?on/LiftÂ?
off from

second row â?" two deep. B. Capable of handling and stacking

both 20â?? and 40â?? loaded containers upto ground + three high.", "Must be
1997 or

beyond model &

owned by

contractor.

02.,Sling Crane,01,"A. With rubber tyres with capacity of handling upto 50 MT. B.
Capable of handling and

stacking both 20' and 40' loaded containers upto three high. C. Equipped with

40' spreader. D. Equipped with standard outriggers and wooden blocks.", "Must be owned by

contractor.

03., Forklift Truck, 01, "A. Rubber tyre with capacity of handling upto 10 MT. B. Capable of handling and

stacking empty containers upto three high.", "Must be owned by

the contractor.

04., Forklift, 01, "A. With two rubber tyres on front axle. B. Capable of handling cargo upto five MT for

stuffing/destuffing in containers.", "Must be owned by

the contractor.

05., Forklift, 02, "A. With four rubber tyres on front axle. B. Capable of handling cargo upto three MT for

stuffing/destuffing in containers. C. Should have optional Parrot Beak

attachments; and lateral clamp with fork arms and side shifters.", "Must be owned by

the contractor.

06., Forklift, 01, "A. With four rubber tyres on front axle. B. Capable of handling cargo upto five MT for

stuffing/destuffing in containers.", "Must be owned by

the contractor.

07., Hand Barrows, 25, Capable of carrying 1000 kg of non-palletized cargo, Must be owned by

08., Trailers, 07, Capable of carrying 20'/40' containers within the NCT., "the contractor.

Must be owned by

the contractor

09., "Weighing

Scale", 01, Digital platform type of 05 MT capacity, "Must be owned by

the contractor.

10., Mobile Ramp, 01, For direct stuffing/destuffing of container on trailer, "Must be

owned by

the contractor.

with the prior written permission of CONCOR. In case of violation of this clause the transport contractor shall be liable to pay a penalty of,,,,

Rs.2000/Â? (Two thousand only) in each case.,,,,

19. REPLACEMENT OF VEHICLES AND EQUIPMENT,,,,

19.1 The contractor shall ensure immediate replacement of a vehicle, crane or any other handling equipment due to its being involved in accidents," ,,,,

mishaps, detention and/or impounding by concerned authorities, becoming out of order or road unworthy, etc., for transportation of containers. In such" ,,,,

eventualities, the contractor shall inform CONCOR in writing without any loss of time." ,,,,

19.2 â?| ,,,,

19.3 â?| ,,,,

19.4 In case of contractor's vehicle or handling equipments, â?|...â??" ,,,,

19.5 Before commencement of work on any working day the contractor shall notify CONCOR about the condition of handling equipment(s) and,,,,

vehicles in the format required by CONCOR.,,,,

21.6 In the event of repeated instances of unsatisfactory service or any failure on the part of the contractor to comply with the terms and provisions of,,,,

this contract to the satisfaction of CONCOR, it shall be open to CONCOR to terminate this contract by giving sixty days notice. In the event of such" ,,,,

termination of the contract CONCOR shall be entitled (i) To forfeit the security deposit of the contractor as it may consider fit, (ii) To get the balance" ,,,,

of work done by making an alternative arrangement as deemed necessary and (iii) To recover from the contractor any extra expenditure incurred by,,,,

CONCOR in getting the work done and the damages which CONCOR may sustain as a consequence of such action.,,,,

22. PAYMENT,,,,

22.3. CONCOR will issue Job Orders for carrying out the various activities under this contract at the Nagpur Container Terminal. The contractor," ,,,,

immediately after completion of the work, shall report the compliance of the Job Order given in writing to CONCOR to enable it to issue the Work" ,,,,

Done Statement, which shall be enclosed along with the fortnightly handling and/

or transportation Bills for the work done in the previous fortnight. The" ,,,,

Bills will not be entertained without the Work Done Statement.,,,,

22.4 The contractor shall prepare and submit fortnightly Bills in prescribed forms based on the quantum of work handled during the previous fortnight.,,,,

to the Terminal Manager, NCT, described above. Payment of ninety percent of the amount claimed will be arranged after necessary checks of the" ,,,,

correctness of the claim, deducting all charges due, including income tax at the prescribed rates. The aforesaid payment of the Bill will ordinarily be" ,,,,

made within ten days of submission. Delay in payment, however, shall neither entitle the contractor to claim any interest nor provide a basis for" ,,,,

termination of contract.,,,,

22.7 CONCOR will have the right to recover any over payment which might have been made to the contractor by CONCOR through inadvertence," ,,,,

error, etc., or any cause whatsoever from handling bills and from the security deposit or any other amounts due to him. In the event of any such" ,,,,

recoveries or adjustments being made from the security deposit, the contractor shall at once make good deficiency in the amount of the security" ,,,,

deposit within fifteen days of payment to this effect, failing which CONCOR will be at liberty to deduct the said amount from the future bills." ,,,,

23. TIME LIMIT FOR SUBMISSION OF BILLS.,,,,

23.1 The contractor shall make a claim for the services rendered under this contract to CONCOR within three months of such service. If he does not.,,,,

prefer claim within the said period he shall be deemed to have waived his right in the respect thereof and shall not be entitled to any payment on.,,,,

account thereof.,,,,

23.2 No claim in respect of under payment to the contractor shall be considered valid or entertained unless a claim in writing is made thereof within.,,,,

three months from the date on which payment of the original claim thereto was made. Any claim for such under payment not received within the.,,,,

stipulated threeÂ?month period shall be liable to be summarily rejected by CONCOR.,,,,

26.1 The rates for any new items of work or substitution of existing items by a modified item would be derived in the manner given below.,,,,

29. ARBITRATION.,,,,

29.10 The award of the Arbitrator shall be final, conclusive and binding on all parties to the contract." ,,, ,,,

13. The submissions made on behalf of the respective parties are examined, keeping in mind the law laid down in the judgments referred earlier." ,,, ,,,

14. The appellant/ CONCOR has challenged the award passed by the learned Arbitrator, and the judgment passed by the learned Principal District" ,,, ,,,

Judge substantially maintaining the award passed by the learned Arbitrator on various grounds and substantial attack is to the award of ,,, ,,,

Rs.8,00,00,000/Â for claim No.10 under the head "Loss of Profit", alleged to have been suffered by the claimant on account of not providing" ,,, ,,,

sufficient business by the Corporation as per the Agreement/Tender(Bid) Document. For Claim No.10, Rs.8,00,00,000/Â have been awarded to the" ,,, ,,,

claimant out of the total award of Rs.9,73,91,115.46ps. As more than 80% of the amount of award is under Claim No.10 and the learned Senior" ,,, ,,,

Advocate for CONCOR and claimant have made substantial arguments on claim No.10, we feel it appropriate to consider the legality or otherwise of" ,,, ,,,

the impugned award regarding claim No.10. ,,, ,,,

15. The pleadings of the claimant are to the effect that the claimant suffered loss of business as CONCOR failed to provide the expected quantity of ,,, ,,,

work though sufficient work was available. According to the claimant, CONCOR provided work of transportation to Shippers and other contractors," ,,, ,,,

without any justification. CONCOR relied on Clause 2.3 of Chapter II of the Tender(Bid) Document to urge that the provision for transportation of ,,, ,,,

containers by road was optional and the customer had option of transporting his own containers under his own arrangement and the contractor i.e. the ,,, ,,,

claimant did not have exclusive right for all the transportation work at NCT. ,,, ,,,

Senior Advocate appearing for the claimant argued that reliance placed on Clause 2.3 of Chapter II of the Tender (Bid) Document is misplaced. It is ,,, ,,,

argued that though CONCOR claimed that the customer had option of transporting his own containers under his own arrangement, CONCOR has not" ,,, ,,,

brought any material/ evidence on record to show that whatever transportation work at NCT was allotted to Shippers and other contractors, it was as" ,,, ,,,

per the demand of the customers. ,,, ,,,

16. The Senior Advocate appearing for the CONCOR relied on Clause 3.1, Clause 10.1 and Clause 10.3 of Chapter IV of the Agreement / Bid" ,,, ,,,

Document and argued that the quantities indicated in the schedule shown in the Agreement/ Bid Document reflected approximate estimate of the,,,,
volume of work expected under various heads and definite quantum of work was guaranteed, and therefore the claim No.10 made on behalf of the",,,,,
claimant which is completely based on the quantity of work shown in the schedule is misconceived. Senior Advocate appearing for the claimant read,,,,
Clause 3.1 in a different manner and argued that the work was available with CONCOR as shown in the schedule and CONCOR was under,,,,
obligation to provide the entire work to the claimant. Referring to Clause 3.1 it is argued that the tenderers were put to notice that the quantity of work,,,,
shown in the schedule can be taken as basis for evaluation of the financial bid, however, it was provided that the quantity shown in the schedule shall",,,,,
not be basis for any dispute with regard to the rates quoted by the tenderer / contractor or for the alteration of the terms and conditions governing the,,,,
contract.,,,,,

17. The Senior Advocate appearing for CONCOR relied on Clause 23.1 and 23.2 of Chapter IV of the Agreement/Tender (Bid)Document and,,,,
argued that the claimant was required to make the claim within three months from the date when the claim/ payment became due, but the claimant",,,,,
failed to raise claim within the prescribed time and therefore, the claim cannot be examined and granted. The Senior Advocate appearing for the",,,,,
claimant relied on Section 28(b) of the Contract Act (as amended w.e.f. 8th January 1997) and argued that Clauses 23.1 and 23.2 referred above are,,,,
void and claim No.10 of the claimant cannot be rejected relying on Clause 23.1 and Clause 23.2 of the Tender (Bid) Document. The judgment given,,,,
by the Hon'ble Supreme Court in the case of Union of India Vs. Indusind Bank Ltd., reported in (2016)9 SCC 720 (paragraph Nos. 26, 27 and 28) is",,,,,
relied to support the above argument. It is alternatively argued on behalf of the claimant that CONCOR has not been able to show that Claim No.10 is,,,,
made by the claimant after three months of rendering of services and as the CONCOR has failed to discharge this burden, it cannot rely on Clause",,,,,
23.1 and 23.2 to oppose the claim No.10 of the claimant.,,,,,

The findings / clauses of the learned Arbitrator on Claim No.10 are recorded in paragraph No.294 of the award, which is as follows :",,,,,

â??294) Claim No.10 is in relation to loss of profit and loss suffered during the

time limit of the contract on account of providing of short business to,,,,

the Claimant. Everybody is aware in the cases of contracts like the one present in hand that while floating the tenders itself, invariably the approximate",,,,,

quantity of the work is given in the contract itself with some margin plus or minus. On the basis of such quantity provided, the tenderers make",,,,,

calculations and thereafter submit the tenders. In the present case also, Clause 3 of the Contract provides for schedule of quantity under ChapterÂV",,,,,

(Scope of Work) and Clause 10 gives volume of work under ChapterÂV. The documents in relation to these are on the record filed along with the,,,,

Statement of Claim, which are not denied. However, the evidence on the record has amply cleared that the Claimant was not provided with the",,,,,

expected quantity of work reasons apart. The Claimant has demonstrated in the instant matter that there was a considerable reduction in the work,,,,

provided to the Claimant than was either expected or was provided for in the tender. The Claimant further demonstrated that during 2002 to 2003,,,,

there was a shortÂfall of business approximately 50.77%. During the year 2003Â2004, there was shortÂfall of 41.46%. In the subsequent year i.e.",,,,,

2004Â 2005, it was 37.46% whereas, in 2005Â2006 it was 49.87%. This shortage of percentages could not be said to be negligible on the other hand,",,,,

this percentage shows huge shortÂfall in the work provided to the Claimant. This naturally resulted in substantial monetary loss to the Claimant,,,,

adversely affecting his profit. In fact, as could be gathered from the record and evidence, this could have hardly enabled the Claimant to meet even",,,,,

the expenses required to be done by him for rest of the work. It has come on record that providing the work of transportation to the Shippers as also,,,,

to other Contractors, has definitely added to such shortÂfall. In addition to this, unnecessary levying penalties and reduction in rates also were the",,,,,

causes for shortÂfall for causing the financial loss to the Claimant. This fact is also admitted by the Respondents' witness DWÂ1 at many places in,,,,

his deposition which I need not repeat. In the circumstances, definitely financial loss is caused to the Claimant and there can be no doubt about the",,,,,

same. However, though the calculations in this respect are not given by either of the parties itemÂwise, that by itself would not disentitle the Claimant",,,,,

for getting compensated for such loss. I have, therefore, no hesitation in granting some claim of the Claimant in this respect though not granting the",,,,,

complete claim made in this respect. I feel that it would be appropriate in the present case, taking into consideration the shortage in work provided to",,,,

the Claimant, this loss reasonably could be taken to be Rs.8,00,00,000/Â (Rupees Eight Crore) which the Respondents are liable to pay to the",,,,

Claimant.â???,,,,

We find that the learned Arbitrator has completely failed to assign reasons in support of the award of Claim No.10 in favour of the claimant. The,,,,

requirements of Section 31(3) of the Act of 1996 are not satisfied at all. The learned Senior Advocate appearing for CONCOR has rightly argued that,,,,

the violation on the part of the learned Arbitrator, to discharge the statutory obligations and record reasons in consonance with the requirement of",,,,

Section 31(3) of the Act of 1996, vitiates the impugned award on Claim No.10.",,,,

18. Apart from this, we are of the view that the learned arbitrator has not given due weightage to Clause 23.1 and Clause 23.2 of Chapter IV of the",,,,

Agreement/Tender (Bid) Document. It is up to the arbitrator to interpret the various clauses of the agreement, but it does not mean that interpretation",,,,

can be of such nature that it will render the clause itself otiose. Every clause of the agreement between the parties should be given due weightage.,,,,

The claimant has badly failed to explain why the claim for loss of business was not made at any point of time till March 2006 i.e. till CONCOR,,,,

imposed penalties amounting to about Rs.78,00,000/Â and sought to deduct this amount from the bills payable to the claimant. The initial agreement",,,,

was from 1st April 2002 to 31st July 2005, then it was extended till 31st January 2006 and again it was extended till 15th March 2006 and the claimant",,,,

sought to make claim No.10 in March 2006. The evidence brought on record by the claimant is on the point, that CONCOR was illegally providing",,,,

work to Shipper and other contractors during the period from 1st April 2002 till 15th March 2006. The claimant has not been able to show that it,,,,

objected to award of work to Shippers and other contractors and had made a grievance about loss of business during that period and had given notice,,,,

for recovery of alleged loss of claim. In these facts, clause 23.1 and clause 23.2 cannot be overlooked.",,,,

19. Section 28(b) of the Contract Act will not be relevant in the facts of the case as the point is not as to whether claim No.10 as made by the,,,,

claimant before the Arbitrator is within limitation or not. The point is whether raising of claim No.10 directly before the Arbitrator without raising it,,,,

before CONCOR within time as contemplated by Clause 23.1 and Clause 23.2 and without there being any explanation for such lapse, should be" ,,,,

considered. We find that the learned Arbitrator has given a goÂbye to Clause 23.1 and clause 23.2 and has awarded Rs.8 Crores for claim No.10,,,,

arbitrarily. Hence, we are of the view that the award of Rs.8 Crores for claim No.10 under the head â??Loss of Businessâ?? is unjustified." ,,,,

20. Though various submissions are made on behalf of CONCOR to point out the illegalities in the conclusions of the learned Arbitrator and the,,,,

findings of the learned Principal District Judge while awarding the claim of the claimant under the other heads, and various submissions are made on" ,,,,

behalf of the claimant to support the conclusions of the learned Arbitrator and the findings recorded by the learned Principal District Judge for granting,,,,

the claim under other heads, in our view, our findings recorded above relying on Clause 23.1 and Clause 23.2 of the agreement, will govern the" ,,,,

adjudication on the other points also. We hold that the award of claim of the claimant under the other heads is also not sustainable as the claimant,,,,

failed to raise the bills within three months of providing the service, as laid down in Clause 23.1 and Clause 23.2 of the agreement. At this stage, it is" ,,,,

relevant to take note of the submission made on behalf of CONCOR that as per the mechanism which was followed by CONCOR, the amount of the" ,,,,

bills raised by the claimant for the services provided by the claimant to the customer was recovered from the customers on receipt of the bills from the,,,,

claimant and as per this mechanism followed by CONCOR regarding recovery of the charges from the customers, as the claimant failed to raise the" ,,,,

bills within three months and the bills are submitted at the expiry of the contract, the recovery of the amount of those bills from the customers is" ,,,,

impossible. The claimant has not been able to counter the submission made on behalf of CONCOR.,,,,

The submission made on behalf of the claimant that the CONCOR failed to discharge the burden of showing that the claims were not raised within,,,,

three months of providing service, also is misdirected. The burden to prove that the claims were raised within three months of providing service was" ,,,,

on the claimant.,,,,

21. Keeping in mind the principles laid down in the judgments referred earlier on the point of limited scope of interference while exercising jurisdiction,,,,,

under Section 37 of the Act of 1996, and after examining the material on record and going through the impugned award and the judgment passed by",,,,,

the Principal District Judge, we are of the view that the impugned award is unsustainable and has to be set aside. We find that the impugned award",,,,,

suffers from patent illegality as the conclusions for granting the claim as made by the claimant are without any basis. The learned Senior Advocate,,,,,

appearing for CONCOR has rightly relied on the judgment given in the case of HRD Corporation Vs. GALE India Ltd., reported in 2018(12) SCC",,,,,

471 (paragraph 19). We further find that the learned Arbitrator has failed to record reasons satisfying the requirements of Section 31(3) of the Act of,,,,,

1996 as laid down in the judgment given in the case of McDermott International Inc. Vs. Burn Standard Co. Ltd., reported in (2006) 11 SCC 181",,,,,

(Paragraph Nos. 51 to 56). Though the award declared by the learned Arbitrator is voluminous and runs into about 336 pages, the conclusions",,,,,

recorded by the learned Arbitrator while granting claims under the different heads, according to us, are not supported by the evidence and reasons.",,,,

22. Hence, the following order:",,,,

i) The award made by the learned Arbitrator in Arbitration Case No. ARB/RGD/7/2006 on 19th April 2015 and the judgment passed by the learned,,,,,

Principal District Judge in Civil M.A. No. 593 of 2015 on 30th November, 2018 are set aside and the Statement of Claim submitted by the",,,,,

respondentÂ?M/s. Kandla Cargo Handlers is dismissed with costs, throughout.",,,,,

ii) The appeal is allowed accordingly.,,,,,

(VINAY JOSHI, J) (Z.A.HAQ, J.)",,,,,

L.O. :,,,,,

At this stage, Advocate for the respondentÂ?M/s. Kandla Cargo Handlers requested that the amount which is lying in deposit before the District Court",,,,,

may not be permitted to be withdrawn by the appellantÂ? CONCOR.,,,,,

In view of the findings recorded by us in the judgment and as the appellantÂ? CONCOR is Government Undertaking, we pass the following order:",,,,

On furnishing undertaking on affidavit by Chief General Manager of appellantÂ?CONCOR that in case the appellant is required to pay/ deposit the,,,,,

amount it will be paid/deposited within one month from such order, the amount deposited by the appellantÂCONCOR before District Court, along with" ,,, , interest if any, be given back to the appellantÂ?CONCOR." ,,, ,