

**(2011) 09 MAD CK 0255**  
**In the Madras High Court**  
**Case No : O.S.A. No. 265 of 2007**

Great Offshore Limited

APPELLANT

Vs

Chennai Port Trust, Mr. Justice G. Ramanujam Presiding  
Arbitrator, Mr. Justice M.N. Chandurkar Arbitrator and Mr.  
Justice K. Swamidurai Arbitrator

RESPONDENT

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**Date of Decision :** 28-09-2011

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 16, 28(3), 31(3), 34, 34(2)

**Citation :** (2011) 09 MAD CK 0255

**Hon'ble Judges :** R. Banumathi, J;B. Rajendran, J

**Bench :** Division Bench

**Advocate :** Sriram Panchu, for Mr. N.L. Rajah, for the Appellant; A. Arumugam for M/s. Aiyar and Dolia for R1, for the Respondent

**Final Decision :** Dismissed

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## Judgement

B. Rajendran, J

1. This Original Side Appeal is filed by the appellant aggrieved by the order dated 02.09.2006 passed by the learned single Judge, dismissing the O.P. No. 47 of 2003 filed by the appellant.

2. The first respondent port is an artificial port, the Western side is land and other three sides are artificial walls and small opening in the Eastern wall for the passage of ships. In view of that, the ships cannot straight away enter the harbour to berth or unberth for loading or unloading of cargoes. The ships will be anchored some miles away in the sea. Two tugs will go from the harbour berth for loading and unloading. After loading and unloading, again two tugs will tow and move the ships from the harbour berth and leave the ship in the Sea.

3. According to the appellant, they are the owner of the harbour tug named "Rishabh". In the year 1994, the first respondent floated a tender for taking on charter one harbour Tug to assist the ships maneuvering within the port. On

14.09.1994, the appellant submitted their tender offer to the first respondent. The appellant emerged as the highest bidder and they were awarded the contract and as per the contract, the tug named "Rishabh" belonged to the appellant entered into the service of the port from 10.11.1994. On 14.11.1994, the appellant also issued a performance guarantee in favour of the first respondent for a sum of Rs. 16,42,500/- . The contract itself was executed on 09.01.1995 between the appellant and the first respondent and the contract comes to an end on 9th November 1995. On 18.08.1995, since the contract comes to an end on 9th November 1995, the appellant requested the first respondent for extending the contract beyond 9th November 1995. Pursuant to this, the first respondent, by letter dated 03.11.1995, extended the contract for a further period of six months. Thereafter, the appellant sent letters to the first respondent on 14.11.1995, 21.12.1995 and 02.02.1996 complaining about the fouling of propellers and thereby they are unable to operate the tug. Later on, by letter dated 08.04.1996, the appellant demanded reimbursement of the down time payment. On 09.04.1996, the appellant sent a letter to the first respondent to extend the contract for further period. Subsequently, on 01.05.1996, the appellant also extended the bank guarantee, pursuant to the letter of the first respondent dated 23.04.1996. On 06.05.1996, the first respondent sent a letter to the appellant stating that the request made for extension of bank guarantee is a routine request and they have no intention to extend the contract. Ultimately, by the letter dated 10.05.1996, the tug was de-hired by the first respondent with effect from 9th May 1996. This was opposed by the appellant on the ground that they have exercised their option for extension of contract by extending the bank guarantee and therefore, it is not open for the first respondent to cancel the contract. Though the bank guarantee was returned by the first respondent, as per the clauses contained in the agreement, the appellant approached the arbitral Tribunal on the ground that (a) the first respondent is not justified in cancelling the contract and sought for extension of the contract from 09.05.1996 for a further period of six months, or, in the alternative, demanded compensation of Rs. 1,25,41,976/- for wrongful repudiation of charter agreement by the first respondent (b) for payment of Rs. 18,72,875/- being the hire charges wrongfully deducted or as indemnity for propeller fouling of the tug due to the uncleanness of the port waters which the first respondent is bound to keep clean (c) for payment of Rs. 1,27,00,000/- for expenses incurred/to be incurred for carrying out repairs to the tug and (d) for payment of interest on the amounts to be awarded.

4. According to the appellant, they could not run the tug during the subsistence of the contract due to the non-maintenance of the port area by the first respondent and because of this, the fishing nets and other tyre materials, which were found in that area entangled with the propeller of the tug which caused heavy damages to the tug, therefore, the tug was made to be kept idle. On the contrary, the first respondent contended that the rental for the tug during the period it was kept idle will not be paid as it was only due to the fault of the

appellant. Further, because of the impurities in the water, which was not maintained properly by the first respondent, the appellant was made to incur and therefore, for past as well as future repairs required to be carried out to the tug, they have claimed a sum of Rs. 1,27,00,000/- . Though the arbitral Tribunal rejected the claim of the appellant in respect of claim No.1 for Rs. 1,25,41,976/- towards wrongful repudiation of charter agreement by the first respondent, the arbitral Tribunal awarded (i) Rs. 18,72,875/- under claim No.2 (ii) Rs. 14,00,182/- on account of expenses already incurred by the claimant for repairs already carried out (iii) a lumpsum compensation of Rs. 25,00,000/- towards future repair charges for the tug with interest in favour of the appellant. As against this grant of award, the first respondent filed O.P. No. 47 of 2003 before the learned single Judge u/s 34 of the Arbitration and Conciliation Act, 1996 to set aside the award by mainly contending that the arbitral Tribunal passed the award without application of mind and ignoring the terms and conditions of the contract. The learned single Judge, by the impugned order dated 02.09.2006 allowed the original Petition filed by the first respondent in toto. According to the appellant, they have not preferred any appeal against the order of the learned single Judge in so far as it relates to cancellation of the agreement or damages towards cancellation of the contract, however, this appeal is filed on the other amounts reasonably awarded by the arbitral Tribunal.

5. The case of the first respondent/Port Trust is that there are no major industries near the harbour area, the sea water is almost clean barring a few instances where the fisherman, who had ventured into the sea for fishing near the harbour, throw some waste materials into the sea. Otherwise, the port water is maintained properly and always kept clean by the authorities concerned. In fact, in the harbour, dredging operation is being carried on to maintain the depth. While dredging the harbour, water is cleaned by removing all the waste materials and therefore the harbour water is maintained clean and not as alleged by the appellant. In fact, for towing and moving ships, the tugs of the first respondent are also being used. In the year 1994, due to increase in business and increase in the arrival of ships, in order to augment one more tug, the first respondent called for tenders and awarded the contract in favour of the appellant to use their tug "Rishabh" for a period of one year from 10.11.1994 to 08.11.1995 and then the contract was extended for another period of six months from 09.11.1995 to 08.05.1996, totally for a period of 18 months. The appellant has categorically admitted that their tug was not in operation for certain period for some reasons, whatsoever, for which the first respondent is not liable to pay down time payment. Further, the clauses contained in the agreement entered into between the parties mutually exempts each other from all liability arising from the acts of God and all other damages of the sea and navigation. The agreement further clearly stipulates that the insurance for both the hull and indemnity shall be done only to the contractors account. As regards repairs, it is the contractor to keep the tug operational and the first respondent will not be responsible for any damages. Therefore, the above said terms and conditions in the agreement

between the parties clearly shows that the parties are clear in respect of their mutual obligations, liabilities and payments, however, the arbitral Tribunal went beyond the scope of the terms and conditions of the contract and passed the award.

6. Even though the contract period commenced from 10.11.1994 and expired on 08.11.1995, the appellant did not make any demand for any waiver of down time payment even though the tug was out of operation during July 1995 and again in August 1995 and in respect of the said period, the first respondent made deductions, but at that time, the appellant did not object to it. Further, even as late as 09.04.1996 when the appellant sought for extension of the contract for a further period, they never made any demand for waiver of down time payment due to the alleged contamination of the port water or repairs to the propeller fouling.

7. According to the first respondent, even as early as on 19.10.1995, the appellant himself wrote a letter informing about the non-operation of the propeller fouling by stating that it is an act of God and only requested the first respondent for waiver of down time. Further, on 01.11.1995, when the first respondent paid the amount as per the contract, after deducting 65 hours down time, the appellant did not make any protest and received the amount without any objection. Only thereafter, when the contract was extended for a further period, the appellant came out with a new theory by contending that the contamination of water has resulted in the repairs to the propeller fouling. In fact, the demand made by the appellant for waiver was rejected by the first respondent as per their letter dated 01.12.1995 and thereafter, the first respondent also deducted further amount on 31.01.1996 and 29.02.1996. Even thereafter, the appellant tacitly received whatever amount paid by the first respondent without any protest.

8. According to the first respondent, they are also using their own tug but they did not face any problem to their propeller fouling and if at all anything has happened to the propeller fouling of the appellant, it is due to the fact that the appellant failed to put the guard for their propeller fouling which would have caused damages to their tug. When that being so, the appellant cannot be blamed or they can be made responsible for the damages caused to the tug of the appellant. Moreover, the appellant has not pleaded any negligence or breach of duty on the part of the first respondent and therefore, the award passed by the arbitral Tribunal is unsustainable, which was rightly set aside by the learned single Judge.

9. We have heard the learned Senior counsel for the appellant, the learned standing counsel for the first respondent and perused the materials placed on record. Before the arbitral Tribunal, the issue raised by the appellant revolved around the question of payment for compensation during the period of non-operation of their tug. According to the appellant, the non-operation of their tug was due to impure water or uncleanness of the port water. In this connection, it

is pertinent to point out that though initially the appellant sought for damages for cancellation of the contract itself or for non-grant of the extension of the contract, the arbitral Tribunal dealt with that aspect and rejected the claim of the appellant. However, the arbitral Tribunal awarded amount on other claims, which was challenged by the first respondent before the learned single Judge. The appellant has not challenged the rejection of their claim by the arbitral Tribunal in so far as cancellation of the contract or non-grant of the extension of the contract and it became final.

10. As far as the claim made by the appellant for deduction made by the first respondent for the period during which the tug was not in operation, according to the appellant, the tug was not in operation only due to impurities in the sea water namely fishing net or tyre and other materials thrown out by the fishermen or others, which was not properly cleared by the first respondent. On several occasion, the appellant duly notified the impurities in the water to the authorities of the first respondent and complained that non-operation of the tug was only due to the fault of the authorities of the first respondent.

11. As per the records placed for our perusal, it is seen that the appellant did not make any objection till the close of the contract. In fact, the appellant even sought for extension of the contract, after the contract over for the first spell. Even at the time of extension, the appellant never pointed out that only because of the mistake of the authorities of the first respondent in not getting port water cleaned, the tug could not be operated. The appellant also not raised any objection when the first respondent deducted amount for the period when the tug was not in operation. The appellant has also received the amount paid by the first respondent without any objection. For the first time after extension of the contract, the appellant has come forward to claim down time payment. The arbitral Tribunal have allowed the claim made by the appellant under this head without taking into consideration the conduct of the appellant as well as the clauses contained in the agreement entered into between the parties. The agreement clearly stipulated that for any reason whatsoever if the tug is not working, the appellant will not be paid the amount. Therefore, inasmuch as the tug was not in operation for a considerable period, the first respondent deducted amount payable to the appellant and the appellant also received the amount without any protest. Furthermore, the agreement also clearly states that in so far as maintenance of the tug, it is the duty of the appellant to maintain it on their own costs and no expenses or damages, whatsoever arising out of the running of the tug will not be paid or reimbursed by the first respondent. In the agreement, we find that no where it is stated that if for any reason any damage is caused to the tug, the first respondent is liable or responsible to pay damages to the appellant. In fact, even in the clause for insurance also, it is clearly stated that the insurance for the tug has to be taken only by the appellant and he has to maintain the tug.

12. When the very agreement entered into between the parties itself does not

provide for payment of any compensation or damages by the first respondent to the appellant in the event of any repairs caused to the tug, the arbitral Tribunal is not justified in awarding compensation in favour of the appellant, which is against the tenor of the agreement, especially, there is no specific reason pointed out by the appellant for fastening the liability on the first respondent. Furthermore, it is not the case of the appellant that the appellant alone used the tug in the port waters to take the ship. Admittedly, the tug of the first respondent was also in operation during the relevant period and the tug used by the first respondent was not subjected to any repair in the propeller fouling. It is the case of the first respondent that if the appellant kept a guard in the tug for protection of the propeller fouling, even if there is any impurity in the sea water, it would not have affected the tug. In this case, admittedly, the appellant has not provided a guard for the tug and therefore, the repairs caused to the tug is purely due to the negligence attributable on the part of the appellant. Above all, the first respondent also taken a stand that the first respondent regularly carried out dredging operations in the port area in order to maintain the depth and during the dredging, the harbour water is cleaned by removing the waste materials in the water and the water was cleaned regularly. Under those circumstances, the learned single Judge is right in accepting the contention of the first respondent that the arbitrators have exceeded their jurisdiction and travelled beyond the scope of the agreement in awarding the claim of the appellant.

13. As rightly pointed out by the learned single Judge, as per clause 1 (p) of the contract, if the tug is absent for a period of more than 7 days, it would result in loss of hire on pro-rata basis and therefore, the first respondent have rightly deducted the hire charges from the appellant. Even in the letter dated 08.04.1996 of the appellant, the appellant admitted that the recovery made by the first respondent, though contractually valid, warrant re-consideration as the same was not due to their fault. When the appellant admits that the deductions made by the first respondent is contractually valid, it is not open to the arbitral Tribunal to pass the award. This was also pointed out by the learned single Judge to set aside the award passed by the arbitral Tribunal in relation to deduction of hire charges or claim made by the appellant for payment during the period when the tug was not in operation. For better appreciation, clause 1 (p) is extracted hereunder:

p) In the event that the said Tug is out of operation for any reason whatsoever for a period longer than seven (7) days then the contractor shall provide the Board with a Tug just as suitable for the said period. The absence of the said Tug from duty for any period will result in loss of hire on pro-rata basis. If the contractor is unable to provide a replacement tug, as stated above, the Port may provide a suitable tug, the mobilisation charges for which shall be borne by the contractor to the extent of the mobilisation charges claimed by the contractor.

14. In view of the above, we hold that the award passed by the arbitral Tribunal

at Rs. 18,72,875/- towards hire charges wrongfully deducted was rightly rejected by the learned single Judge.

15. The next point for consideration is whether the arbitral Tribunal is justified in granting a lumpsum amount of Rs. 25 lakhs towards future repairing charges for the tug. The appellant claimed a sum of Rs. Rs. 1,27,00,000/- for expenses incurred/to be incurred for carrying out repairs to the tug together with interest. The Arbitral Tribunal awarded a sum of Rs. 14,00,182/- on account of expenses already incurred by the claimant for repairs already carried out to the tug and a lumpsum compensation of Rs. 25,00,000/- towards future repair charges for the tug. The learned Senior counsel for the appellant justified the award passed by the arbitral Tribunal by contending that it is in accordance with clause 2 of the agreement dated 09.01.1995 entered into between the parties. In this context, it is relevant to look into Clause 2.3 and 2.8 of the agreement, which reads as follows:-

Clause 2.3. Repairs, survey and other requirements to keep the tug operational shall be to Contractor's account and during any absence of the tug from duty or inability of tug to perform for these or any other reasons, will result in loss of hire charges for the period at prorata basis. In the event of inability to perform for a minimum period of (7) days and above, a replacement tug shall be provided. Absence from duty resulting from instructions of the Deputy Port Conservator and/or C.M.E. or their representatives shall not require such replacement.

2.8. On-hire and off-hire survey charges, if any shall be borne equally between Trust and Contractor. Madras Port Trust will not be responsible for any damage suffered by the tug due to failure of the tug or errors of the tug Master and crew. Any damages suffered whilst assisting ships and/or carrying out other duties/ instructions should be brought to the notice of the Deputy Port Conservator and/ or Chief Mechanical Engineer within 24 hours of occurrence in order to claim reimbursement for the repairs from the concerned ship. Any damage suffered by the Tug whilst assisting ships should be immediately brought to the notice of the concerned pilot so that he may bring it to the notice of the Master of the Vessel.

16. The arbitral Tribunal, though taken into consideration clause 2 of the agreement, erroneously concluded that the maintenance of the port area was the duty of the first respondent and the damage caused to the propeller fouling to the tug was only due to non-maintenance of the water area in the port. Even though there is no clause to show that the first respondent is responsible for the repair or damages, the arbitral Tribunal, restricted the claim of the appellant to actuals as per the bills received by them and in so far as future maintenance is concerned, though the quantum was not furnished by the appellant, yet a sum of Rs. 25 lakhs was awarded by the arbitral Tribunal. The learned single Judge, correctly pointed out that the claim for damages or repairs suffered by the tug does not arise and such a claim is not arbitrable or ought not to have been considered by the arbitral Tribunal. The learned single Judge also pointed out

that if the party making the claim which are not contemplated or not falling within the scope and ambit of the contract, the arbitral Tribunal is not justified in granting any amount. In this context, the first respondent also raised an objection in the additional counter statement before the learned single Judge as well as the arbitral Tribunal. In spite of such objection, the arbitral Tribunal erroneously passed the award.

17. Even otherwise, if we consider the terms of the contract, in clause 2.8, it was clearly stated that repairs, survey and other requirements to keep the tug operational shall be to Contractor's account and during any absence of the tug from duty or inability of tug to perform for these or any other reasons, will result in loss of hire charges for the period at prorata basis. Therefore, as per the terms of the contract, when the appellant was prohibited from making any claim against the first respondent for repairs, if any, caused to the tug, the arbitral Tribunal, in our considered opinion, has travelled beyond the scope of the contract or agreement and granted the award. In this connection, the learned single Judge relied on the decision of the Honourable Supreme Court reported in *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, which was also followed by a Division Bench of this Court in the decision reported in *(Union of India vs. Ramnath International Construction Private Limited (2003) (1) RAJ (Mad) 52*, wherein it was held by the Honourable Supreme Court that the award passed by the arbitrator is liable to be set aside if it is against the stipulations and prohibitions contained in the agreement between the parties. It was further held that the arbitrator cannot act arbitrarily, irrationally or independent of the contract. Deliberate departure or constant disregard of the contract not only manifest disregard of the authority, but it can be tantamount to even mala fide action. In this case, as rightly pointed out by the learned single Judge, inasmuch as the arbitral Tribunal had travelled beyond their jurisdiction, the entire award passed is liable to be set aside.

18. It is to be noted that even after the extension of the contract, the appellant did not seek for any variation in the agreement in respect of the downtime deduction. This is vital because, prior to the extension, the first respondent deducted certain amount payable to the appellant for which the appellant has not made any objection. If really the appellant is aggrieved by such deduction at that point of time, at least, at the time of extension of the contract, the appellant ought to have sought for modification of the terms of the contract. The appellant, having agreed for the extension of the contract on the same terms and conditions of the contract, it is not open for them to seek for any payment. In fact, it was pointed out by the learned single Judge that by the letters dated 21.12.1995 and 02.02.1996, the appellant himself pointed out that the non-operation of the tug was only due to acts of Vis Major. The appellant has never pointed out that it was only due to the fault or failure attributable on the part of the first respondent. Therefore, the conduct of the appellant has also to be considered in this case. If really the appellant is aggrieved by the terms of the contract or any failure on the part of the first respondent in not keeping the port

water clean, he ought not to have sought for extension. Only in the letter dated 08.01.1996, which was sent after few months after the contract was renewed on 09.11.1995, for the first time, the appellant sought for reimbursement of the down time payment. The appellant did not also attribute any negligence or breach of duty on the part of the first respondent. Therefore also, the learned single Judge is justified in setting aside the award passed by the arbitral Tribunal.

19. The learned counsel for the appellant relied on the decision reported in (Oil & Natural Gas Corporation Limited vs. Saw Pipes Limited 2003 (2) RAJ 1 (SC) for the proposition that the meaning of the phrase public policy of India to be given a wider meaning and also for the proposition that the Court has no jurisdiction to set aside an award passed by the arbitral Tribunal u/s 44 of the. In fact, this decision was referred by us in the latter paragraphs, wherein the Honourable Supreme Court, categorically held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with u/s 34. Therefore, it cannot be said that when the arbitral Tribunal travelled beyond the scope of the terms of the Contract, this Court has no powers to interfere.

20. The learned Senior counsel for the appellant also relied on the decision reported in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, for the proposition that u/s 16 of the Arbitration and Conciliation Act, the party questioning the jurisdiction of the arbitrator has an obligation to raise such question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof and the Court has only supervisory jurisdiction of review to ensure fairness. This plea raised by the appellant was discussed by us in detail in the preceding paragraphs, besides, the decision relied on by the learned senior counsel for the appellant relates to general proposition of law. Moreover this decision is not applicable to the facts and circumstance of the case on hand.

21. The learned Senior counsel for the appellant further relied on the decision of the Honourable Supreme Court reported in Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd., for the proposition that the Courts should not ordinarily substitute their views for that of the arbitral Tribunal. In the said judgment, the Honourable Supreme Court also held that if the arbitral Tribunal acted without jurisdiction and given an interpretation of clause of agreement, which is totally contrary, then this Court, u/s 34 of the Act can set things right.

22. The learned Senior counsel for the appellant lastly relied on the decision reported in BOC India Ltd. Vs. Bhagwati Oxygen Ltd., for the proposition that when the arbitral Tribunal had taken a plausible view on interpretation of the clauses contained in the contract, the Court cannot set aside the award on the ground of misconduct of arbitral proceedings. In that case, it was also pointed out by the Honourable Supreme Court that if the arbitrator travelled beyond the terms of the contract the Court can interfere. Indeed, in the fact and

circumstance of that case, the Honourable Supreme Court held that the award could not be interfered as it was neither based upon unsound legal principles nor had an erroneous legal proposition. In this case on hand, as per the factual as well as legal position, we find that the arbitral Tribunal had travelled beyond the scope of the contract between the parties and therefore, we are inclined to interfere with the award passed by the arbitral Tribunal. The learned single Judge also after considering the rival contentions and the terms and conditions of the contract, has set aside the award passed by the arbitral Tribunal and we do not find any reason to interfere with the same.

23. On the contrary, the learned counsel for the first respondent also relied on the decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , which was relied on by the learned Senior counsel for the appellant as well, for the proposition that the award should be in accordance with the terms of the contract. In that decision, it was held by the Honourable Supreme Court that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with u/s 34. However, such failure of procedure should be patent affecting the rights of the parties. It was further held that if the arbitral Tribunal ignored the terms of the contract or usage of the trade applicable to the transactions, such award could be interfered with. It was further held that "Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside u/s 34 of the Act." In Para-15 of this judgment, it was held as follows:

15. The result is - if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with u/s 34. However, such failure of procedure should be patent affecting the rights of the parties.

24. The learned counsel for the first respondent also relied on the decision of the Honourable Supreme Court reported in (Food Corporation of India vs. Chandu Construction and another (2007) 4 MLJ (SC) 73 for the proposition that the arbitral Tribunal committed legal misconduct in that the terms of the contract are unambiguous, in utter disregard of the contract, the arbitral Tribunal acted without jurisdiction. The appellant, having accepted the terms of the contract are bound by it and it is not open for the arbitral Tribunal to travel beyond the scope of the terms of the contract. In that decision, it was held by the Honourable Supreme Court in para No.19 as follows:

19.....The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated September 19, 1989, they were bound by its terms and so was the arbitrator. It was thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for....

25. The learned counsel for the first respondent also relied on the decision of the Honourable Supreme Court reported in Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, to contend that when the award is contrary to terms of contract, such award is open for interference by this Court u/s 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 on the ground that it is patently illegal and opposed to public policy of India.

26. We are aware that u/s 34 of the Arbitration and Conciliation Act, 1996, the powers of interference with the award passed by the arbitral Tribunal is limited as we are not sitting on appeal over the decision of the arbitral Tribunal. However, when the award is passed against the terms of the contract, we are empowered to interfere and set aside the award. In this context, we are fortified by the decision of the Honourable Supreme Court reported in (M/s. J.G. Engineers Pvt Ltd., vs. Union of India and another 2011 4 LW 1 wherein it was held by the Honourable Supreme Court that if the contract, in clear terms, bars a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Arbitration and Conciliation Act, 1996. In Para Nos. 18 and 20, it was held as follows:-

18....It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the Court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent....

20. It is well settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside u/s 34(2)(b) of the Act....

27. Therefore, the conclusion of the learned single Judge that the arbitral Tribunal, without there being any material on the side of the appellant, on their own, have come to a perverse conclusion is well founded. We are also of the view that the arbitral Tribunal travelled beyond the scope of the agreement or terms of the contract which are very clear and unambiguous providing the duties, liabilities and responsibilities of the parties to the agreement. However, the arbitral Tribunal, in utter disregard to the terms of the contract, passed the award and the learned single Judge is right in setting aside the said.

28. In the result, the order dated 02.09.2006 passed by the learned single Judge in O.P. No. 47 of 2003 is confirmed. The original side appeal is dismissed. No costs.