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**(2013) 03 KL CK 0026**  
**In the High Court Of Kerala**  
**Case No : Arbitration A. No. 1 of 2006**

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|---------------------------------|----|------------|
| Hindustan Construction Co. Ltd. | Vs | APPELLANT  |
| State of Kerala and Another     |    | RESPONDENT |

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**Date of Decision :** 06-03-2013

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 34

**Citation :** (2013) 2 KHC 738

**Hon'ble Judges :** K. Hema, J;A. Hariprasad, J

**Bench :** Division Bench

**Advocate :** E.K. Nandakumar and Dr. Thushara James, for the Appellant; K.A. Jaleel, Additional Advocate General and T.P. Sajid Senior Government Pleader, for the Respondent

**Final Decision :** Allowed

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## Judgement

K. Hema, J.—An arbitral award was passed in favour of appellant. But, the said award was set aside by the Additional District Court, on a petition filed by respondents herein (State) and another u/s 34 of the Arbitration and Conciliation Act, 1966 (for short, "the Act"). Aggrieved by the said order, this appeal is filed. Facts briefly: An agreement (dated 22/12/1992) was entered into between appellants and respondents, regarding work of construction of link road NH-47 connecting Wellington Island and Cochin By-pass. As per Clause 67 of the agreement, if a dispute of any kind whatsoever arises between the employer and contractor in connection with or arising out of the contract or the execution of work, whether during the execution of the work or after completion etc., such dispute shall be finally settled, unless otherwise specified in the contract, etc. by one or more Arbitrators appointed under such Rules.

2. Accordingly, when a dispute arose, an Arbitration Committee was constituted consisting of three members, for the settlement of the dispute. One among the three is considered the Chairman-Arbitrator ("the Chairman", for short) and the other two are the members. The Arbitration Committee commenced the arbitral

proceedings and on conclusion of proceedings, an award was passed and signed only by two members of the Committee.

3. As per the award, all the claims referred for arbitration were considered and certain claims were allowed and others were rejected. The Chairman, however, passed a separate award and rejected some of the claims which were allowed by the other members of Arbitral Tribunal. Respondents herein (State and Another), being aggrieved by the award signed by two of the arbitrators, challenged the award by filing an application before District Court u/s 34 of the Act on various grounds.

4. In the petition u/s 34 of the Act, the respondents herein contended that i) the award is illegal and without jurisdiction, ii) it is beyond the scope of agreement and hence, falls out of the arbitration agreement, iii) the arbitration is hit by Clause 67.1 of the relevant contract and hence, it is without jurisdiction, iv) the impugned award is bad due to procedural irregularity which goes to the root of adjudicatory, proceedings, v) there was no consensus among the Arbitrators, vi) there is infringement of public policy of India, in passing the award, as there is an allegation of offer of bribe by the adjudicatory authority and a finding in favour of the person who is said to have offered bribe which has affected the decision making process and vii) the award in respect of the various claims are not correct, especially in respect of the claim made for launching girder and cost of erection of girder too excessive, etc.

5. A written objection was filed by the appellant herein to the petition u/s 34 of the Act, contending that the petition is not maintainable on various grounds. The grounds stated in the petition u/s 34 of the Act do not constitute grounds under the said provision and hence, petition is liable to be dismissed. Additional District Court considered the said petition and considered rival contentions but rejected all contentions raised by appellants. The award was set aside and petition was allowed.

6. Heard Dr. Thushara James for appellants and Sri. T.P. Sajid, learned Senior Government Pleader for respondents. Perused the records. The points for consideration in this appeal are:

1. Whether the Court below is right in setting aside the impugned award, on the finding that the award is in conflict with the public policy of India?

2. Can the Court set aside an arbitration award on the sole ground that the award "is so unfair and unreasonable that it shocks the conscience of the Court", in the light of the dictum in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

3. Can the Court set aside an award passed by two of the members of Arbitral Committee, on the ground that the allegation of corruption made against them by the other co-arbitrators is well founded, especially in the absence of any material to support such allegation?

7. Points 1 to 3: Dr. Thushara James, learned counsel for appellants vehemently argued that the impugned order is illegal and unsustainable on various grounds: (1) the Court below ought not to have re-appraised the evidence, since it is not permissible in the light of the various decision of the Supreme Court and other Courts, (2) the object of the Act does not permit such re-appreciation of evidence on factual disputes, the parties having subjected to arbitration, (3) role of Court in Section 34 of the Act is very limited, there is no ground u/s 34 to interfere with the impugned award, (4) the Court below ought not to have set aside the award on the ground of public policy, (5) the impugned order is against the dictum laid down in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

8. Learned counsel for appellant also argued that (6) Court can set aside the award only if one of the grounds mentioned in Section 34 are made out but no such ground arises in this case, (7) misconduct of the arbitrators or the alleged corruption are not at all ground to set aside the majority award and the lower Court has found wrong in placing reliance upon the allegations made in the "minority award" relating to corruption and (8) award passed cannot be said to be illegal or against the procedure to be adopted either in accordance with the agreement or in the light of the various provisions in the Act.

9. Sri. Sajid, learned Senior Government Pleader strongly refuted all the above points raised. He strongly contended that a reading of Paragraphs 32, 37, 45 and 46 of the impugned order will clearly depict that the impugned award passed by the arbitrators is so unreasonable and unfair. If the award in the case of a girder is examined, it will be clear that it is shocking to the conscience of any Court and hence, impugned order is only sustainable, it is argued.

10. The learned Senior Government Pleader also strongly argued that though the Court cannot normally consider correctness of the reasons given in the award on the factual matters, there is nothing wrong in re-appreciating the materials on record in the light of the strong allegations made about the arbitrators who passed the impugned award.

11. According to him, Court below was justified in making re-appraisal in the various paragraphs in the impugned order. Since on the peculiar facts of this case there is ample evidence to show that the arbitrators were persuaded by corruption, as rightly held by the learned Additional District Judge, it is submitted. It is also argued that from the letter dated 04/05/2001 and the various acknowledgment cards it will be clear that the arbitrators had set a procedure for passing the award but, that was patently violated in passing the impugned award.

12. The understanding was to pass a separate awards by each of the arbitrators but, persuaded by the offer bribe or acceptance of the same, the two arbitrators joined hands and passed a joint award which is contrary to the procedure sought to be followed. In the light of the allegations of corruption the Court below has only rightly accepted the contentions raised by the respondent in setting aside

the impugned award. Various facts are considered in detail and there is nothing to interfere in the findings. The impugned order speaks for itself, it is submitted.

13. On hearing both sides and on going through the impugned order, it is crystal clear that what was embedded in the mind of the Court below, while considering the petition for setting aside the award were allegations of corruption made by the Chairman against the other two arbitrators who passed the arbitral award. On a reading of the impugned order of learned Additional District Judge, it is clear that learned Judge was swayed by the allegations of corruption and bribe made and such allegations rendered the Court below totally blind to many relevant factors, both on law and facts.

14. Though mainly two grounds are stated in the impugned order for setting aside the award, the reasons given in the order (procedural illegality, unreasonableness and unfairness of the award) will clearly show that every finding of the Court below is blended with some or other observations and findings relating to corruption of the two arbitrators, even though corruption itself has not been made a ground to set aside the award. It is curious to note that even while entering a finding on the illegality of "practice and procedure" adopted by the arbitrators and even while making a re-appraisal of the factual disputes, the Court below entered into certain findings, the foundation of which is allegation of corruption and bribe of the two arbitrators.

15. Learned Additional District Judge held that allegation of corruption against two arbitrators is well founded and it is reasonably possible also. According to him, the Court cannot re-appraise evidence as in an appellate forum. Still, the Court was justified in doing so, in the peculiar facts of this case. The only peculiarity in this case is the allegation of corruption made against the two members of the Arbitral Tribunal.

16. It is also observed in the impugned order that acceptance of appellants' claim by the arbitrators, when viewed in the back ground of allegation of corruption, it cannot be said that the award so made cannot be questioned at all by the opposite party. In various contexts, learned Additional District Judge was speaking only about corruption, the offer of bribe and such other allegations made against the arbitrators who passed the impugned award.

17. The entire allegations made by the Chairman in his award are continuously quoted by learned Additional District Judge in three pages of the impugned order, which relate to corruption. It is evident that what shook the mind of the learned District Judge is the allegation of bribe made against the two arbitrators, as per the award passed by the Chairman. Since the entire findings of the Court below are founded on alleged corruption of the arbitrators who passed the impugned award, we find it better to consider such allegations of corruption first, before we proceed with any other matter.

18. A perusal of the entire records will reveal that certain allegations were made by the Chairman against the two co-arbitrators in the separate award passed by

him and those are intended to give an impression that they were corrupt. Though law does not require the Chairman to pass any separate award, when the award is passed by a majority of co-arbitrators, he passed the award indicating that co-arbitrators were corrupt (where an award is passed by two members of the Arbitral Tribunal, which consists of three members, including the Chairman, award passed and signed by two members will constitute an award, as per law).

19. It is also curious to note that even in the so-called award passed by the Chairman, he had not specifically mentioned whether co-arbitrators actually took bribe from any body. His award does not disclose that he had any personal knowledge about corruption of co-arbitrators. The Chairman does not have any direct knowledge about bribe being offered to two arbitrators or accepted by them. He only mentioned in his award what one person, Sri. Bhaskaran, told him about the offers or the proposal to offer bribe to the two arbitrators by him.

20. What is revealed from the Chairman's award is that Sri. T.H. Bhaskaran approached the Chairman on behalf of the claimant "a number of times" at his residence in Delhi and also his place of stay in Ernakulam, where the hearings were held and he offered him bribe/commission apart from the fees payable to the arbitrator. Sri. Bhaskaran is authorised to represent the claimant company in the arbitration proceedings before the arbitration committee and he represented the company throughout the proceedings.

21. The Chairman, in his award observed that Sri. Bhaskaran first offered bribe as commission, which he said, was to be shared between Chairman and Sri. M.K. Parameswaran Nair, who is the other member arbitrator nominated by the claimant. It is also stated in the award passed by the Chairman that as per the statement made by Sri. Bhaskaran, Sri. Parameswaran Nair agreed to 1% of the claim and that the Chairman would get other 1%. Further allegations are to the effect that Sri. Bhaskaran, on a subsequent occasion, told the Chairman that offer of 2% of the claim amount was actually for the Chairman only and that it is in addition to the 1% which Sri. Parameswaran Nair would get.

22. It is also stated in paragraph 20.2 of the award of the Chairman that Sri. Bhaskaran mentioned that he would approach Sri. Sankaranarayanan Pillai, the 3rd Arbitrator and offer some amount to him also. The Chairman also stated in paragraph 20.2 of his award that on "many occasions" Sri. Bhaskaran offered that his company was willing to pay secretly all his expenses during the hearings in addition to what he would be getting officially reimbursed from the party who have nominated him.

23. First of all it is interesting to note that as per the allegations in Chairman's award, it was to the Chairman that bribe was offered. That too, not only once, but, on "several occasions". The person who offered bribe met the Chairman more than once and on a subsequent day, he offered more bribe to the Chairman. It may appear from paragraph 20.1 of the award itself that, may be, there was a bargain for increasing the amount, percentage, commission etc., or

else, there is no reason why the Chairman entertained the person who offered bribe and why offers were made increasing percentage of bribe from 1% to 2%.

24. It is also relevant to note that as per the allegations made in paragraph 20.1, the person who offered bribe had not even met the other arbitrator with offer of bribe. In paragraphs 20.4 and 20.5 of the award, the Chairman also stated that Sri. Bhaskaran approached him on "several times" in his hotels where he used to stay during hearings with wrapped gifts and mentioned that such gifts had been given to other arbitrators as well and they also accepted such gifts.

25. But, there is nothing in the Chairman's award to show whether other arbitrators accepted bribe, which the claimant offered through Sri. Bhaskaran. It is also stated that Sri. Bhaskaran told the Chairman that if the Chairman was helpful to claimant's case and signed the award along with two other arbitrators in claimants favour, they would consider him for appointment as arbitrator, as the nominee in other cases of arbitration also.

26. The above is the state of affair revealed from the Chairman's award. In fact, we are at a shock by the candid confessions made by the Chairman in the separate award passed by him. We are at a loss to understand how the Court below was persuaded by such confessions and those were acted upon to set aside the award passed by other co-arbitrators. It appears from Chairman's award that he was too lenient in lending his ears to the offers of bribe made to him by Sri. Bhaskaran, not once, but, on several occasions.

27. We fail to understand why the Chairman should entertain a person who offered bribe to him several times, whenever he approached him in the hotels where he stayed with wrapped gifts. It is most relevant to note that nowhere in his award, it is stated by the Chairman that he had mentioned to other Arbitrators about the alleged offer of bribe made to them. There is also nothing in his award to show that the Chairman brought to the notice of two arbitrators, in any manner, about the allegations of bribe made by Sri. Bhaskaran against them.

28. Even though serious allegations are seen made against the two arbitrators and it is even alleged that one of them agreed to accept bribe, there is no reason why the Chairman did not divulge it to the two arbitrators. Had he been genuine in making such allegations, we expect the Chairman to directly convey to the two arbitrators of what Sri. Bhaskaran told him about them. The Chairman did not even, seem to be bothered to verify with the two arbitrators whether allegations made against them regarding bribe was correct or not.

29. It is also relevant to note that all the allegations were made against the two co-arbitrators only a few days prior to passing of the impugned award by them and such allegations were made only by the Chairman. If the version of the Chairman is correct, it is not understood why he kept everything a secret, until the award was passed by him, separately. It is not understood why bribe-offer-episodes were not brought to the notice of at least the respondents.

30. The Chairman's conduct, as revealed from what he stated in his own award does not appear to be up to the mark. It is not comprehensible how a person who offered bribe to the Chairman could visit him again and again, offering bribe, unless such visits are encouraged. It is very unfortunate that learned Additional District Judge acted upon the allegations made by the Chairman behind the back of the two arbitrators, even without bringing to their notice, the allegations made against them. According to us, no worth can be attached to the allegations made by the Chairman, since a doubt arises whether conduct of the Chairman itself, as revealed from his award, hits his own integrity.

31. The words of an arbitrator, who entertained a person, who offered him bribe on several occasions, ought not have been heard or acted upon without ascertaining whether such words are true. There is nothing on record to show that other two arbitrators came to know about allegations of corruption made against them. They were also not heard by the Court below, before making serious observations and findings against them, that too, regarding corruption. They were not even afforded any opportunity to state whatever they had to say about what Chairman stated in his award. In fact, even now, except Chairman's award, there is absolutely no materials before the Court to conclude that the two arbitrators could be bribed.

32. In such circumstances, the observations made by learned Additional District Judge that the two arbitrators who passed the impugned award were corrupt and that the allegations of corruption made against them is well founded and reasonably possible etc. cannot be sustained, especially in the absence of any acceptable materials to support such findings. The Court below proceeded on the basis of an unilateral opinion expressed by the Chairman, even without verifying whether it could be true.

33. Even if the reasons given by the two arbitrators in the impugned award are totally unacceptable, those alone will be no ground to say that authors of the award were bribed, in the absence of evidence to establish such fact. In this context, Dr. Thushara James, learned counsel for appellant pointed out that the claim made by the appellant was for a much more higher amount, but several claims were turned down as per the impugned award. Only less than 20% of the claim made was awarded by the two arbitrators as per the impugned award. Certain claims were not allowed in full.

34. If the award was passed persuaded by any bribe or corruption, it is unlikely that the majority of the claims made by the appellant were turned down, it is argued. According to learned counsel for appellant, the above fact will rule out the possibility of acceptance of bribe by co-arbitrators. We are satisfied of the submissions made. The Court below did not consider any of the above facts before speaking against the two arbitrators.

35. From the statements made by the Chairman in his award, all what could be said is that the Chairman was offered bribe on several occasions and also that

certain allegations were made to him by the person who offered him bribe that other two co-arbitrators were also offered bribe. The allegation made by an arbitrator (Chairman), who entertained the person, who offered bribe to him, ought not to have been acted upon to enter a finding against the two co-arbitrators that they were corrupt or that their award was affected by corruption, etc., especially in the absence of any other material on record to support such findings.

36. If at all learned Additional District Judge was persuaded by the statements made by the Chairman in his award against co-arbitrators, he ought to have given an opportunity of hearing to the co-arbitrators about the allegation of corruption. The Court below has seriously gone wrong in entering a finding behind the back of the co-arbitrators that they were corrupt and that they were influenced by corruption etc., without even giving them an opportunity to state whatever they had to say about the allegations made against them.

37. The findings of the Court below against the co-arbitrators relating to corruption, bribe etc. are totally unsustainable and we cannot confirm those findings on any count. Though the impugned award was passed on 30/06/2001, the Chairman passed his so-called award only two months later, on 02/08/2001. Evidently, this must be, after going through the former award of the two arbitrators. It is pertinent to note that neither in the course of the proceedings nor before passing of the award, the Chairman raised any allegations against co-arbitrators. Respondents also did not raise any such allegation.

38. The two arbitrators seem to be still in the dark about the serious allegations made against them. The Chairman has no case that he sent even the copy of his award to the other arbitrators. Even the Court below did not bring to the notice of the two arbitrators, anything about the allegations of corruption made in Chairman's award nor were any remarks called for from them. The Court below wholly buried the golden rule of natural justice and it did not afford even an opportunity to the co-arbitrators to express their views on the allegations of corruption. The two arbitrators were condemned, unheard. This is clearly illegal.

39. Learned Additional District Judge also held that the procedure adopted by the arbitrators is illegal and it goes to the very root of the matter. It is held that the award passed by them is vitiated by procedural irregularity which goes to the very root of the adjudicating process and hence the award is liable to be set aside on this ground also. It is not mentioned by learned Additional District Judge as to which provision of law was violated by the arbitrators in passing the impugned award or during the arbitral proceedings.

40. The procedure adopted by an authority can be said to be illegal, if it is in violation of any of the provisions of law. But, there is none, as per the impugned order. Section 19 of the Act deals with rules of procedure by the Arbitral Tribunal. Section 19 of the Act reads as follows:

19. Determination of rules of procedure.--(1) The Arbitral Tribunal shall not be



bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the Arbitral Tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the Arbitral Tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

41. A reading of Section 19 of the Act shows that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872 but the parties are free to agree on the procedure to be followed by the Arbitral Tribunal, in conducting its proceedings. In this case, both sides would admit that there was no such agreement between the parties regarding the procedure to be followed by the Arbitral Tribunal.

42. Sub-section (3) of Section 19 lays down that failing any agreement referred to in sub-section (2) of Section 19, the Arbitral Tribunal may conduct the proceedings in the manner it considers appropriate, subject to Part I of the Act. It is not reflected from the records whether any specific procedure was laid by the Arbitral Tribunal regarding the conduct of the proceedings, in the absence of any agreement between the parties regarding the procedure.

43. It is also evident from the records that there was no difference of opinion among the arbitrators about the conduct of the proceedings. In the absence of anything on record to reveal that any procedure was set by the Arbitral Tribunal or by the parties it has to be inferred that no specific procedure was set either by the parties or by the arbitrators and hence, there could be no violation of the procedure. Hence, it will not be proper to say that there is any procedural violation in this case. It appears that the objection was only in not passing three separate awards by the three arbitrators.

44. The Court below appears to have considered the circumstances under which the award was passed jointly by two arbitrators and separately by the Chairman. Before going into the said controversy which was highlighted by learned Senior Government Pleader, we will consider the provision relating to passing of the award. Section 29 of the Act is relevant in this context and it reads as follows:

29. Decision making by panel of arbitrators.--(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the Arbitral Tribunal shall be made by a majority of all its members.

(2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the Arbitral Tribunal, questions of procedure may be decided by the presiding arbitrator.

45. Section 29(1) of the Act shows that in the absence of an agreement by the parties, in arbitral proceedings with more than one arbitrator, any decision of the Arbitral Tribunal shall be made by a majority of all its members. In this case, there were three arbitrators constituting the Arbitral Tribunal and the decision is made by the majority of its members, being two in number. It is the said award which was challenged before the Court below u/s 34 of the Act. Going by Section 29(1) of the Act, such an award passed by the two arbitrators is perfectly legal, since in a case where there are more than one arbitrator, the decision shall be made by a majority of its members.

46. It is the mandate u/s 29(1) of the Act that a decision shall be by a majority of all the members of the Arbitral Tribunal, when there are more than one arbitrator unless otherwise agreed by the parties. There is nothing on record to show that parties had agreed anything contrary to what is stated in Section 29 about passing of the award. Therefore, the award passed in this case by the two arbitrators is only consistent with the provisions contained in Section 29(1) of the Act and it cannot be said to be illegal.

47. It is laid down in sub-section (2) of Section 29 of the Act that notwithstanding the provision contained in Section 29(1), if authorised by the parties or all the members of the Arbitral Tribunal, questions of procedure may be decided by the presiding arbitrator. But, there is nothing on record to show that there was any such authorisation by the parties or all the members of the Arbitral Tribunal allowing the Presiding Arbitrator (Chairman) to decide the question of procedure.

48. Of course, learned Senior Government Pleader strongly argued that the records in this case will reveal that the chairman wanted all the arbitrators to write separate awards but the two arbitrators violated the said procedure set by the Chairman. In this context, it is relevant to go through Section 31 of the Act. Section 31 (excluding the provision which may not be relevant for the purpose of disposal of this case) can be extracted hereunder

31. Form and contents of arbitral award.--(1) An arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal.

(2) For the purpose of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) xxxx xxxx xxxx

(a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(4) xxxx xxxx xxxx

(5) xxxx xxxx xxxx

(6) xxxx xxxx xxxx

(7) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(8) xxxx xxxx xxxx

(a) xxxx xxxx xxxx

(b) xxxx xxxx xxxx

(i) xxxx xxxx xxxx

(ii) xxxx xxxx xxxx

49. Section 31 speaks about the form and contents of the arbitral award. Section 31(2) provides that in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the Arbitral Tribunal shall be sufficient, so long as the reason for any omitted signature is stated. As per Section 31(1), an arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. A joint reading of sub-clauses (1) and (2) of Section 31 of the Act reveals that the arbitral award signed by the majority of the members of the Arbitral Tribunal will be perfectly legal, provided that reason is stated for the omitted signature in such award.

50. In this case, impugned award has been passed by the two arbitrators out of the three and they constitute the majority. They have also made the award in writing and signed in the award and shown reasons why there is omission of the signature of the Chairman in the impugned award. It is stated in the last page of the award that during joint deliberations of three arbitrators, they were unable to agree with the Chairman arbitrator on most of the issues. On the conclusion of the discussion, it was decided to issue separate awards. Therefore, they signed the award and forwarded the same to the Chairman for delivery to the parties and arbitrators.

51. It is quite evident from what is stated in the impugned award that the two arbitrators were proceeding only in accordance with law as stated in Sections 31 and 29 of the Act. The fact that Chairman could not agree with the co-arbitrators is clear from the Chairman's award itself. The two arbitrators acted only in accordance with law in making an award in writing under their signatures and making it clear in the last page of the impugned award, under what circumstances there was omission of the signature of the Chairman in the award. Therefore, the form and contents of the impugned award by the two arbitrators is only in-accordance with law.

52. No where in the Act, it is stated that separate awards shall be passed by each of the arbitrators. If such a procedure were to be followed and three separate awards were to be passed, it would not have been legal. The co-arbitrators seem to be aware of this. They knew well that they need only state in

the award the reasons for the omission of the signature of the third arbitrator and that they could pass a joint award, as per law.

53. It is also relevant to note that the co-arbitrators treated the award signed by them to be the actual award which could be passed in accordance with the provisions contained in the Act. They were also aware that the signature of the third arbitrator was unnecessary for making it an "award" legal and in accordance with law. In the above circumstances, it cannot be said that the award passed is illegal because of any violation of the provisions contained in the Act. It is also to be noted that after signing the award, the two arbitrators wanted the Chairman to deliver the signed copies of the award to the party, as well as to the arbitrators.

54. In spite of all these, an allegation was made by the Chairman that co-arbitrators acted in violation of the "understanding" among the three arbitrators in passing three separate awards. At the very outset, we would say that any understanding among the arbitrators contrary to the provisions contained in the Act will not have any legal sanction. Even if for argument sake it is admitted that the three arbitrators had decided to write separate awards as stated by the Chairman and there was such an understanding among them, we cannot place our stamp on any such understanding, since it is not supported by the provisions of the Act.

55. It is, therefore, unnecessary to go into the dispute whether there was any consent among the three arbitrators that three separate awards should be prepared by each one of them and signed separately by them etc. in their meeting in Kovalam. If at all there was any such understanding as alleged by the Chairman, it is contrary to law and hence, the Court need not consider whether there was any such understanding. So long as the impugned award is only consistent with the provisions contained in Sections 29 and 31, we need not go into the merits of the controversy whether there was an understanding that each of the arbitrators would pass separate awards.

56. If at all such separate awards were passed, it would have been illegal and contrary to the provisions contained in Sections 29 and 31 of the Act. However, learned Additional District Judge considered at length the controversy whether the arbitrators agreed for writing three separate awards and they failed to write three awards separately, etc. According to us, it was unnecessary to go into such a controversy, especially since an award, which is consistent with Section 31, is placed before the Court, which is signed by the two arbitrators and in which, reason is also stated for omission of the signature of the third arbitrator.

57. It is relevant to note that, even though two separate awards are available in the matter, the challenge is only on the award which is passed by the co-arbitrators and not the one passed by the Chairman. So, the parties themselves treated the impugned award to be consistent in the form and contents under Sections 29 and 31 of the Act. In fact, the Chairman's award is not an "award"

at all, going by the relevant provisions of the Act.

58. In such circumstances, we cannot justify the findings of the Court below that the award is illegal and unreasonable for want of three separate award by each of the arbitrators, etc. We also cannot endorse the view that impugned award is against the agreement or against Part I of the Act. On the other hand, it is only consistent with the provisions contained in Sections 29 and 31 of the Act.

59. We also find from the impugned order that the Court below considered at length, the controversy between the parties regarding the certain claims made by the appellant before the Arbitral Tribunal. It seems from the several paragraphs that the Court below itself was aware that such re-appraisal of factual disputes is legal. Learned Additional District Judge observed thus:

Apex Court has taken a consistent view that even if based on the evidence it may be possible for the Court to take a different view, still that is not a ground to set aside the award passed by the arbitrator since the arbitrator is a Judge of choice of the party by large, the Court has disfavoured interference with arbitration award on account of error of law and fact on the score of mis-appreciation and misreading of the material on record and have shown definite incarnation to preserve the award as far as possible.

60. The above observations contained in paragraph 26 of the impugned order make it clear that Court below itself was quite aware as to what are the principles of law to be applied in a case of this nature. However, contrary to such principles, the Court below considered the merit of the factual disputes which the arbitrators dealt with, by re-appreciating the matters. This seems to be done, on the belief that such re-appraisal is possible, if allegations of corruption are made. The Court below observed, "viewed in the background of allegations of corruption, it cannot be said that the awards so made by the arbitrators cannot be questioned at all by the petitioners".

61. The above observations are made to justify re-appraisal of the factual controversy regarding the claim. There can be no doubt that the view expressed by learned Additional Sessions Judge is absolutely unjustifiable and improper and it does not gain any support from any judicial precedents. As learned counsel for appellants submitted, interference by the Court on factual dispute is very limited, as per the various decisions of the Supreme Court cited by her.

62. Apart from this, we have already referred to the nature of allegations of corruption made in this case. Such allegations should not have been made a foundation for passing the impugned order. Such allegations of corruption should not have been made a reason for interfering with the award passed in relation to the separate claims. We have also found that there is no reason to uphold allegations of corruption against co-arbitrators and hence, the very foundation of the various findings of the Court below relating to the factual dispute, procedural illegality, etc., collapses.

63. Of course, as learned Senior Government Pleader submits and we agree, the award relating to a girder appears to be highly excessive. But, in the light of the very decisions of the Supreme Court, the Court cannot sit in appeal over the factual findings of the Arbitral Tribunal. Even if any mistake is committed by the Arbitral Tribunal in respect of the factual dispute, it cannot be made a ground to set aside the award. As per Section 34 of the Act, the award can be set aside only on the grounds stated in Section 34(2). An arbitral award can be set aside by the Court only if the challenge falls u/s 34(2). But, none of the grounds stated in Section 34(2) allows the Court to do a re-appraisal of evidence to resolve a factual dispute.

64. Last, but not the least, as rightly pointed out by the learned counsel for the appellant, learned Additional Sessions Judge went wrong in applying the principles laid down in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, The Court below proceeded as if the Court would be justified in setting aside an award as "unfair and unreasonable and it shocks the conscience of the Court", if the award passed on re-appreciation of evidence is found to shock its conscience.

65. The Court below re-considered the merit of the various claims made by the claimant and correctness of the same and found that in certain items, the amount awarded shocks its conscience. The question to be considered is not whether the amount awarded is unreasonable or unfair. Even if, there is some unreasonableness or unfairness in allowing a claim, it cannot be made a ground to interfere with the impugned award is the settled legal position. The dictum laid down in the various decisions cited by learned counsel for appellants does not permit any such interference.

66. The Supreme Court made it very clear in paragraph 31 of the judgment in *SAW Pipe's* case, under what circumstances, award could be set aside, if it is contrary to the fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. According to the Supreme Court, the award can be set aside, if it is contrary to the above four factors. While considering the scope of the expression "public policy" the Supreme Court also held that an award could be set aside, if it is patently illegal, but, illegality must go to the root of the matter. It is also made clear that if illegality is of trivial nature, it cannot be held that the award is against "public policy",

67. The Supreme Court also held in *SAW Pipe's* case that award can be set aside, if it is so unfair and unreasonable that it shocks the conscience of the Court, since such award is purported to be against public policy and it is required to be adjudged void. The observation in paragraph 31 of the above decision cannot be read detached from other portions. In fact, as rightly pointed out by the learned counsel for appellants, Section 34, strictly speaking, does not ordinarily permit any interference of the award on the ground of unreasonableness, unfairness etc.

68. The Supreme Court was only stretching the law so as to include certain

aspects by bringing them under the concept of "public policy" of India, which is referred to in Section 34(2)(b)(ii) of the Act, it is pointed out. The Supreme Court itself made it clear that even in a case of illegality, the Court cannot interfere in the award, if the illegality is only of trivial nature, but, to call for an interference, the illegality must go to the root of the matter, it is argued. In this case, the Court below commented upon the excessive nature of the amount awarded for a girder which according to Court below is "unfair and unreasonable and it shocks the conscience of the Court".

69. The above approach is not consistent with the dictum laid down in SAW Pipe's case, we do agree with learned Senior Government Pleader and we also appreciate the effort taken by him in convincing us that the amount awarded in respect of girder is highly excessive. But unfortunately, the parties having agreed upon for an arbitration and on consideration of the very object of the Act itself and in the light of Section 34 of the Act, it is not permissible for the Court to go into the "unreasonableness or unfairness" in computing any amount payable for girder or in respect of similar claims in an arbitral proceedings.

70. In this context, it is also relevant to note that the Court below raised four points for consideration. The points for consideration clearly reveal that Court has not sought to consider whether Arbitral Award was wrong, on the basis of factual errors made, or regarding excessive nature of the amount awarded by the Arbitral Tribunal etc. No such point is raised for consideration and non could be raised also. It is also relevant to note that neither of the parties raised a dispute that Arbitral Award dealt with a dispute not contemplated by it, etc., a point to such effect is seen raised. Yet it is not answered. The above facts will make it clear that the Court below had no idea as to what exactly was to be considered in the matter. The allegations of corruption baffled the learned Additional District Judge and all his decisions revolved upon the pivot of such allegations. Any way, for the various reasons discussed, the impugned award cannot be sustained and hence, it is set aside. This appeal is allowed. The parties will bear the costs.