
(2016) 02 KL CK 0005
In the High Court Of Kerala
Case No : Arb. A. No. 3 of 2007 (D)

Kochi Refineries Limited

APPELLANT

Vs

Reva Enviro Systems (P) Ltd.

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, Section 34(2), Section 37(1)(b),
Section 37(2)
Contract Act, 1872 — Section 4, Section 7

Citation : (2016) 1 KerLJ 774 : (2016) 2 KHC 232 : (2016) 1 KLT 125

Hon'ble Judges : P.R. Ramachandra Menon and Anil K. Narendran, JJ.

Bench : Division Bench

Advocate : E.K. Nandakumar and Nithin George, Advocates, for the Appellant;
Vinod Bhat, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Narendran, J.—1. The appellant is respondent in O.P.(Arb.) No. 51 of 2005 on the file of the First Additional District Court, Ernakulam, an Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking an order to set aside the award passed by the Arbitrator dated 23.11.2004. The Court below by order dated 31.1.2006 allowed the Original Petition, setting aside the award passed by the Arbitrator. Aggrieved by the said order, the appellant is before this Court in this appeal, under section 37(1)(b) of the Act.

2. We heard the arguments of the learned counsel for the appellant and also the learned counsel appearing for the respondent.

3. The appellant, the claimant before the Arbitrator and respondent before the court below, floated global tenders on 18.10.1999 for the work of Effluent Treatment Plants I and III. The respondent herein, the petitioner before the court below and respondent before the Arbitrator, submitted the tender on 3.12.99. There were three tenderers including the respondent. Highest bid was for Rs.

1,08,00,000/-; the second bid was for Rs. 75,30,000/-; and the third bid by the respondent was for Rs. 49,80,000/-. The bid submitted by the respondent being the lowest, the appellant sent a fax of acceptance on 5.5.2000 stating that they are pleased to award the work to the respondent at a lump sum value of Rs. 49,80,000/- inclusive of all taxes and dues, based on the lump sum price quoted in the bid. The time for completion of the work was stipulated as 10 months from 5.5.2000 and the respondent was requested to call on the appellant for a kick off meeting on 12.5.2000 at 10.00 hours.

4. In continuation of the fax of acceptance dated 5.5.2000, the appellant sent a letter of acceptance to the respondent dated 18.5.2000, for the above mentioned work. However, on 20.5.2000, the respondent intimated the appellant that it will not be possible for them to take up the work due to their commitments to other works and requested the appellant to return the earnest money deposit. On receipt of that letter, the appellant sent a reply dated 30.5.2000, pointing out that, by the issuance of fax of acceptance on 5.5.2000 the contract is concluded. The appellant has also pointed out that, by letter dated 20.5.2000, the respondent has committed breach of the contract and as such, there is no question of returning the earnest money deposit and that, the appellant will be proceeding against them claiming compensation for the breach of contract.

5. By letter dated 6.8.2000, the appellant informed the respondent that, the work in question has been awarded to M/s. Shriram Engineering Construction Company Ltd., Chennai, for Rs. 74,00,000/- and that, the appellant sustained damages amounting to Rs. 26,46,975/- for rearranging the work, which has to be compensated by the respondent. The respondent sent a reply dated 26.8.2000, disputing and refuting the claim made by the appellant, pointing out that no formal agreement was executed for the work in question and they are entitled for interest on the earnest money deposit. Thereafter, the appellant sent a notice dated 7.10.02 informing that in case the respondent does not pay Rs. 26,46,975/- as demanded, they will be appointing an independent Arbitrator to resolve the dispute through arbitration. Then the respondent sent a reply disputing the existence of an arbitration agreement. The appellant in turn sent another letter dated 14.11.02 informing the respondent that, they have appointed a Retired District Judge as the Arbitrator to resolve the disputes and differences between the parties.

6. Before the Arbitrator, the appellant filed claim statement dated 18.12.2002 with supporting documents. The respondent entered appearance through lawyer and filed their objections. They raised a preliminary objection regarding maintainability of the arbitration proceedings, contending that, no contract was concluded between the parties. No formal agreement was also executed in between the parties, as such the question of there being a concluded contract does not arise. The respondent contended further that, as per Clause 3.12 of the General Conditions of Contract, in the event of failure of the tenderer to execute agreement within a period of 10 days of receipt of the notification of acceptance

of tender, the tender shall be considered as cancelled. The notification of acceptance of tender was sent by fax to the respondent on 5.5.2000. On the expiry of 10 days from 5.5.2000, the acceptance stood cancelled since no agreement was signed. As such, there is no concluded contract between the parties. If the appellant was interested in getting the work done, they should have invited fresh tenders, or should have called all the tenderers for negotiation. Therefore, the procedure adopted for awarding the work to M/s. Shriram Engineering Construction Company was illegal and against equity and good conscience, and the maximum that could be done is to appropriate the earnest money deposit of Rs. 1,00,000/-.

7. The Arbitrator by order dated 5.5.2003 overruled the preliminary objections raised by the respondent, holding that there is a valid contract binding on the parties and that, the disputes concerning the work involved have arisen and the same is validly referred to arbitration. Therefore, the Arbitrator has the jurisdiction to proceed with the matter.

8. Thereafter, the appellant filed a detailed claim statement and the respondent filed written statement of defence. The appellant has also filed a reply statement. The documents produced along with the claim statement were marked as Exts. C1 to C11 and those produced along with the reply statement were marked as Exts. C12 to C19 on the side of the appellant. The only document produced by the respondent along with the preliminary objection was not separately marked, since the same has already been marked as Ext. C6 on the side of the appellant. CW.1 was examined on the side of the appellant and the respondent has not chosen to adduce any oral evidence.

9. After considering the pleadings and the materials on record, the Arbitrator passed an award dated 23.11.2004, holding that the respondent committed breach of contract and that, the respondent who broke the contract is liable to compensate the loss sustained to the appellant and awarded Rs. 24,20,000/- as damages. The earnest money deposit of Rs. 1,00,000/- forfeited by the appellant was ordered to be deducted from the amount so awarded. Since there is no contract for payment of interest on damages, the Arbitrator declined interest till the date of claim and also during the pendency of the arbitration proceedings. The Arbitrator awarded interest at the rate of 8% per annum from the date of award. The Arbitrator had directed the parties to pay Rs. 15,000/- each towards his fee and expenses for the arbitration. Since the respondent paid only Rs. 5,000/-, the balance amount was paid by the appellant. Hence, it was ordered that, Rs. 10,000/- towards cost is liable to be charged on the respondent.

10. Aggrieved by the award passed by the Arbitrator, the respondent filed O.P. (Arb.) No. 51 of 2005 before the court below, under Section 34 of the Act, seeking an order to set aside the award passed by the Arbitrator and also the findings of the Arbitrator on the preliminary issue. It was contended that, Clause 3.12 of the General Conditions of Contract required the tenderer to execute a formal agreement within the specified date. As such, execution of agreement was

a condition precedent to the contract. The preparation of contract document was the responsibility of the appellant. Having failed to do so, within the stipulated time limit, the appellant cannot contend that the respondent committed breach of a non-existent contract. The respondent contended further that, even if there was any failure on its part in executing the agreement, the maximum that could be claimed by the appellant is forfeiture of the earnest money deposit.

11. The appellant resisted the Original Petition, contending that, the bid submitted by the respondent being the lowest bid was accepted vide fax of acceptance dated 5.5.2000, which was followed by a letter of acceptance dated 18.5.2000. However, on 20.5.2000 the respondent informed the appellant that it would not be possible for them to take up the work as they had entered into other commitments that had cropped up in the last two months and requested for return of the earnest money deposit. Since the work was of an urgent nature, the next lowest tenderer M/s. Shriram Engineering Construction Company, Chennai, was invited for negotiation and the work was awarded to them, on the same terms and conditions, except on the price. The price quoted by M/s. Shriram Engineering Construction Company was Rs. 74,00,000/-. On completion of the work it was found that the difference in price for completion of the work was Rs. 26,46,975/-. Since the respondent disputed the claim, the matter was referred for arbitration and the Arbitrator passed the award dated 23.11.2004.

12. After considering the rival contentions, the court below allowed the Original Petition holding that, there was no concluded contract between the parties and that, in the absence of a concluded contract the appellant has no right to refer any dispute to the Arbitrator and the Arbitrator has no jurisdiction to decide the matter. Accordingly, the court below set aside the award of the Arbitrator dated 23.11.2004.

13. The issues that arise for consideration in this appeal is as to whether the court below was justified in setting aside the award dated 23.11.2004 of the Arbitrator holding that there was no concluded contract between the parties and as such the appellant has no right to refer any dispute to the Arbitrator and the Arbitrator has no jurisdiction to decide the matter; and whether the court below exceeded its powers under Section 34(2) of the Act while setting aside the Award of the Arbitrator.

14. The pleadings and the materials on record would show that the appellant invited tenders for the work in question vide its letter dated 18.10.1999, pursuant to which the respondent and two others submitted their tenders. Exts. C1 is the relevant extract of the tender document submitted by the respondent, which is the offer made by the respondent. The appellant accepted the same vide Ext. C2 fax of acceptance dated 5.5.2000, which reads as follows;

"Please refer your letter dated 3rd December, 1999 and all subsequent correspondences including minutes of meetings for the subject tender. We are pleased to award the subject work to you at a lump sum contract value of Rs.

49,80,000/- (Rupees Forty Nine Lakhs and Eighty Thousand only), inclusive of all taxes and duties based on the lump sum price quoted by you.

Payment shall be made as per payment terms of the tender document.

Time of completion shall be 10 (ten) months from the date of this fax of acceptance, i.e., from 5th May, 2000.

Authorised representative of M/s. Kochi Refineries Ltd. will be the Engineer-in-Charge of this work.

Please acknowledge receipt of this message by return fax and commence the work immediately.

Please call on us for a kick off meeting on 12th May 2000 at 10.00 hrs."

15. The fact that the respondent received Ext. C2 fax of acceptance on 5.5.2000 is not in dispute. Ext. C2 fax of acceptance was followed by Ext. C3 letter of acceptance dated 18.5.2000. A perusal of Ext. C2 and Ext. C3 would show that, Ext. C3 letter of acceptance is a verbatim re-production of Ext. C2 fax of acceptance. Ext. C3 letter of acceptance contains the terms and conditions of the tender document and further terms and conditions.

16. Relying on Clause 3.5 of the General Conditions of Contract, the respondent contended that the acceptance of bid was beyond the validity of the offer. Clause 3.5 referred to above states that the tender shall be valid for acceptance for 4 (four) months from the date of opening of the sale. It is not in dispute that Ext. C2 fax of acceptance is not sent within the aforesaid period of 4 (four) months. However, as per Clause 8.0 of the Instructions to Bidders contained in Ext. C1 General Conditions of Contract, which deals with "validity of offer", the bid submitted by bidders shall remain valid for acceptance for a minimum period of 6 (six) months from the date of opening of the techno-commercial part of bids. The said clause provides further that, the bidders shall not be entitled during the said period of 6 (six) months, without the consent in writing of the owner (the appellant herein), to revoke or cancel their bid or vary the bid given or any term thereof. In case of bidders revoking or cancelling their bids or varying any terms in regard thereof without the consent of the owner in writing, owner shall forfeit the earnest money paid by them along with their offers.

17. Clause 1.4 the Letter Inviting Bid, which forms part of Ext. C1 would show that, there was a Pre-bid Conference on 18.11.1999 at 10.00 hrs. at the Cochin Refineries Ltd., Ambalamughal, which was attended by the Deputy General Manager (Projects) and also the tenderers. Clause 3.0 of the Check List for Submission of Bid, which forms part of Ext. C1 make it explicitly clear that the validity of the offer made by the respondent is upto 6 (six) months from the date of submission of techno-commercial part, i.e., upto 6.6.2000. Therefore, the materials on record make it explicitly clear that the respondent has agreed to keep the offer alive upto 6.6.2000. In such circumstances, Ext. C2 fax of acceptance dated 5.5.2000 and Ext. C3 letter of acceptance dated 18.5.2000 are

well within the validity period of Ext. C1 offer made by the respondent. Further, the respondent has no case that they made any request in terms of Clause 8.0 of the Instructions to Bidders for revoking or cancelling Ext. C1 bid, before the appellant accepting the offer made by them.

18. As per Section 4 of the Indian Contract Act, 1872 communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. Similarly, the communication of an acceptance is complete as against the proposer, when it is put in the course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. It is well settled that the submission of tender or bid being in the nature of proposal or offer, unless the highest bid or tender is accepted by the competent authority, and acceptance is communicated to the tenderer or bidder, the contract cannot be said to be concluded between the parties. A tender can be withdrawn at any time before it is accepted and if accepted by post or telegram, till such time the acceptance is posted or handed over for delivery. A tenderer cannot revoke the tender after the letter of acceptance was posted by the competent authority.

19. However, in case where there is only a conditional acceptance of tender or bid, namely, acceptance of tender or bid subject to confirmation of higher authorities, the contract is concluded only after that condition is fulfilled. In such cases the acceptance of tender or bid by the authorised officer can only be termed as provisional or conditional acceptance, since such acceptance is subject to confirmation by the higher authority. In such cases the question of conclusion of contract between the parties arises only on such confirmation being given by the higher authority and as such there is no concluded contract till such confirmation or approval by the higher authority.

20. As per Section 7 of the Indian Contract Act, 1872 in order to convert a proposal into a promise the acceptance must be absolute and unqualified; be express in the some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. Therefore the acceptance must be absolute, unqualified and without condition; and the acceptance must match with the terms of the offer. When there is variation between the offer and acceptance in respect of any material terms, acceptance cannot be said to be absolute and it does not result in the formation of a legal contract. In order to decide whether there is absolute and unqualified agreement between the parties to the contract, the entire negotiations and correspondence should be considered.

21. Where it is contemplated that a formal document shall follow the offer and acceptance, the effect of such stipulation depends on whether the parties regard the offer and the acceptance as sufficient to conclude the contract and intend the document to be a record of the contract, or they regard it as incomplete and do not intend it to be legally binding until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the agreement. In deciding whether a contract is a concluded contract or not, the

essential question is to find out whether the formal document is of such a nature that it was the very condition of the contract or whether it was commemorative of the evidence on the point. In order to decide this matter, the entire negotiations and the correspondence on which the contract depends must be considered. It is a matter of construction whether the execution of a further contract is a condition of the contract or a mere expression of a desire of the parties as to the manner in which the transaction already agreed to will go through. Therefore the fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape, does not prevent the existence of a binding contract.

22. In the case on hand, Clause 1.11 of Article 1 of the General Conditions of Contract define "Contract" to mean the agreement between the owner (appellant herein) and contractor for the execution of the work including therein all documents such as the Invitation to Tender, Instruction to Tenderers, General Conditions of Contract, Special Conditions of Contract, Specifications, General Requirements, Time Schedule, Prices, Letter of Acceptance of Tender, Agreed Variations, if any, etc. Similarly Clause 1.12 of Article 1 define "Contract Document" to mean collectively the Tender Document, Design, Specifications, Schedule of Rates/Prices, Letter of Acceptance of Tender, Agreed Variation, if any and other documents constituting the tender and acceptance thereof. Clause 1.24 of Article 1 defines "Letter of Acceptance" to mean an indication by a letter to the tenderer that the tender has been accepted in accordance with the provisions contained therein.

23. Clause 49.0 of the Special Conditions of Contract deals with "Contract Agreement". Clause 49.0 provides that the contract document for agreement shall be prepared after award of works, which is intimated to the successful bidder by fax/telegram/telex/detailed letter of indent. The said Clause provides further that, until the final contract documents are prepared and executed the bidding document together with the annexed document, modifications, deletions agreed upon by the company and the bidders acceptance thereof shall constitute a binding contract between the successful bidder and the company based on the terms contained in the above said documents and the finally submitted and accepted price schedule. Clause 49.0 also states that, the contract document shall consists of (i) fax/telex/telegram of indent, (ii) detailed letter of acceptance along with its enclosures, (iii) original bid document with its enclosures, and (iv) agreement on stamp paper. It also provides that the statement of agreed deviations shall be prepared based on the final terms and conditions and shall be enclosed along with the Letter of Acceptance and all correspondence and minutes of the meeting held between the owner and the bidder prior to the issue of fax/telegram of indent shall be treated as null and void. Any deviations of stipulations made as accepted by the owner after the award of jobs shall be treated as amendments to the contract document.

24. Clause 3.12 of Article 3 of the General Conditions of Contract deals with

"Signing of Contract", which provides that, the successful tenderer shall be required to execute an agreement in the proforma attached to the tender document within ten (10) days of receipt by him of the notification of acceptance of tender. In the event of failure on the part of the successful tenderer to sign the agreement within the stipulated period, the earnest money or his initial deposit will be forfeited and the acceptance of the tender shall be considered as cancelled. On cancellation of the acceptance of the tender by the owner as stated above, the contractor (that is the successful tenderer) shall be liable to make good the damage that may be caused to the owner.

25. In *Von Hatzfeldt-Wildenburg v. Alexander* [(1912) 1 Ch 284 at p.288] it was stated by Parker, J. as follows; It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the mere formal document may be ignored. In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract.

26. In *Kollipara Sriramulu v. T. Aswathanarayana* (, AIR 1968 SC 1028) the Apex Court held that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case.

27. In the case on hand, going by Clause 49.0 of the Special Conditions of Contract, till the execution of a formal contract in terms of Clause 3.12 of Article 3 of the General Conditions of Contract, Ext. C1 bidding document together with the annexed documents, modifications, deletion agreed upon by the appellant and the respondent, the acceptance thereof shall constitute a binding contract between both parties based on the terms contained in the above said documents and the finally submitted and accepted price schedule. Therefore, merely for the reason that after Ext. C2 fax of acceptance dated 5.5.2000 the appellant sent Ext. C3 letter of acceptance only on 18.10.2000, requiring the respondent to execute a formal agreement, which was sent beyond 10 (ten) days of notification of acceptance, it cannot be contended that the contract stood automatically

cancelled on 15.5.2000. In view of the provisions contained in Clause 49.0 of the Special Conditions of Contract, till execution of a formal agreement in terms of Clause 3.12 to Article 3 of the general conditions of contract, Ext. C1 bidding document together with the documents annexed thereto shall constitute a binding contract between the parties, based on the terms and conditions contained therein. Therefore mere absence of a formal contract in terms of Clause 3.12 of Article 3 of the General Conditions of Contract will not absolve the respondent from the liabilities arising out of a deemed contract of agreement in terms of Clause 49.0 of the Special Conditions of Contract.

28. Article 10 of the General Conditions of Contract deals with Arbitration, as per which all disputes or differences whatsoever which shall at any time arise between the parties to the contract touching or concerning the work or the execution or the maintenance thereof, or the rights touching or concerning the work or the execution or the maintenance thereof, covered by the contract, or the construction, meaning, operation or effect thereof, or to the rights or liabilities of the parties arising out of or in relation thereto, whether during or after completion of contract or whether before or after determination, for closure or breach of contract (other than those in respect of which the decision of any person is by contract expressed to be final and binding) shall on written notice by either party to the contract to the other of them be referred to arbitration to a sole Arbitrator who shall be nominated by the Managing Director of the appellant. Though by Ext. C2 fax of acceptance the respondent was called upon for a kick off meeting on 12th May, 2000 at 10.00 hrs., they failed to attend the meeting. It was thereafter Ext. C3 letter of acceptance was issued to the respondent on 18.5.2000, in continuation of Ext. C2 fax of acceptance. Then the respondent sent Ext. C4 reply dated 20.5.2000 to Ext. C2 fax of acceptance dated 5.5.2000 informing that they are unable to take up the work in question due to their commitments to other works which has cropped up in the last two months. Accordingly the appellant was requested to return the earnest money deposit which was submitted along with Ext. C1 tender.

29. A reading of Ext. C4 reply would make it explicitly clear that the respondent has absolutely no case in the said reply that Ext. C2 fax of acceptance is only a conditional acceptance. On receipt of Ext. C4 reply the appellant sent Ext. C5 letter dated 30.5.2000 informing the respondent that, in case the respondent is not taking up the work in question it would amount to patent and wilful violation of the contract and the respondent will be liable for all costs and consequences as per the terms and conditions of the contract. The appellant has also made it clear that there is no question of returning the earnest money deposit as the same is forfeited as per the contract conditions. Apart from that, the appellant will be proceeding further to award the work to any other concern/party at the risk and cost of the respondent for the breach committed by them and the actual loss suffered by the appellant will be quantified for raising a claim for compensation against the respondent in terms of the conditions of contract.

30. The respondent has not chosen to send any reply to Ext. C5 letter. In view of the breach of contract committed by the respondent the appellant awarded the work in question to M/s. Shriram Engineering Construction Company Ltd. for Rs. 74,00,000/-, as against Rs. 49,80,000/- quoted by the respondent. On completing the work in all respects the appellant incurred an additional cost of Rs. 26,46,975/- and therefore by Ext. C6 letter dated 6.8.2002 the appellant raised a claim for the aforesaid amount and the respondent was requested to settle the same within 21 days from the date of receipt of that letter. The details of the additional cost incurred for completing the work in question was also provided in Annexure-I to Ext. C6.

31. On receipt of Ext. C6 letter the respondent sent Ext. C7 reply dated 26.8.2002 requesting the appellant to review the decision since no formal contract agreement has been executed between the parties. A reading of Ext. C7 reply would make it explicitly clear that, the only objection raised by the respondent to the claim for damages made by the appellant in Ext. C6 is the absence of a formal agreement executed between the parties in terms of Ext. C2 fax of acceptance dated 5.5.2000.

32. After receipt of Ext. C7 reply the appellant caused to issue Ext. C8 lawyer notice invoking the arbitration clause in order to resolve the dispute, to which the respondent caused to issue Ext. C9 reply dated 23.10.2002. In Ext. C9 reply the respondent pointed out the absence of a formal agreement between the parties and contended that Ext. C3 letter of acceptance dated 18.5.2000 being a conditional acceptance was never accepted by the respondent and that on receipt of the said letter dated 18.5.2000 the respondent vide Ext. C4 reply dated 20.5.2000 communicated its inability to take up the work in question and requested the appellant to refund the earnest money deposit. A reading of Ext. C9 reply would show that the said reply is silent as to the alleged conditions imposed by the appellant in Ext. C3 letter of approval, in deviation or addition to the original conditions. On receipt of Ext. C9 reply the appellant sent Ext. C10 notice intimating the nomination and appointment of the Arbitrator to resolve the disputes and differences between the parties and the said notice was followed by Ext. C11 notice dated 21.11.2002.

33. A reading of the written statement filed by the respondent would not indicate as to how Ext. C3 letter of acceptance could be treated as a conditional acceptance of the offer made by the respondent in Ext. C1 bid. When the respondent committed breach of contract the appellant negotiated with the second lowest tenderer, who quoted Rs. 74,00,000/-, and after execution of the works in all respects a claim for Rs. 26,46,975/- was made against the respondent, the particulars of which were also provided to them vide Annexure-I to Ext. C6. As noticed by the Arbitrator, the work in question was intended for pollution control measures and there was urgency in completing the said work. It was after considering the facts and circumstances of the case the Arbitrator came to the conclusion that the entrustment of the work to M/s. Shriram

Construction Company Ltd. is in no way illegal. The said finding of the Arbitrator is neither perverse nor patently illegal.

34. The respondent raised a contention before the Arbitrator that, there is no evidence to show that the work was awarded to M/s. Shriram Construction Company Ltd. The appellant produced Exts. C17, C18 and C19 in order to show that the said work was awarded to M/s. Shriram Construction Company Ltd. The appellant has also examined its Manager (Projects) as CW1 in order to prove the said documents. Though the said documents were not properly proved in the strict sense, since CW1 was not a party to it, the Arbitrator, after referring to the aforesaid documents rejected the contention raised by the respondent that the work in question was never entrusted to M/s. Shriram Construction Company Ltd.

35. It is pertinent to note that the respondent has absolutely no case that Exts. C17 to C19 documents are either bogus or fabricated. Therefore, the finding of the Arbitrator that due to the breach of contract committed by the respondent the appellant sustained a loss to the tune of Rs. 24,20,000/- and after deducting the earnest money deposit of Rs. 1,00,000/- forfeited, the respondent has to compensate Rs. 23,20,000/- to the appellant cannot be termed either perverse or patently illegal, warranting an interference under Section 34(2) of the Act. Since there is no contract for payment of interest for damages, the Arbitrator has declined interest till the date of claim and also interest pending arbitration proceedings and awarded 8% interest on the compensation awarded only from the date of award.

36. In *P.R. Shah, Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd.* (, 2012 (1) SCC 594) the Apex Court held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Arbitration and Conciliation Act. In the absence of any ground under Section 34(2) of the Act, it is not possible to the Court to re-examine the facts to find out whether a different decision can be arrived at.

37. In *National Highways Authority of India v. M/s. ITD Cementation India Ltd.* (, 2015 (5) SCALE 554) the Apex Court held that, the construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.

38. Therefore, it is well settled that a Court cannot reappreciate the findings of facts in the award passed by the Arbitrator unless the same are perverse. When none of the findings rendered by the Arbitrator in the impugned award are perverse, the court below ought not to have interfered with the same under Section 34(2) of the Act. The Arbitrator is legitimately entitled to take the view

which he holds to be correct one after considering the materials before him and after interpreting the provisions of the contract and if the Arbitrator does so, his decision has to be accepted as final and binding. An interpretation placed on the contract is a matter within the jurisdiction of the Arbitrator and even if an error exists, it is an error of fact within jurisdiction, which cannot be reappreciated by a Court under Section 34 of the Act. The Arbitrator having been made the final arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion.

39. The findings rendered by the Arbitrator in the award dated 23.11.2004 are neither perverse nor patently illegal and in such circumstances the court below ought not to have interfered with the said award, in exercise of its powers under Section 37(2) of the Act. Further the finding of the court below that there was no concluded contract between the parties and as such the appellant has no right to refer any dispute to the Arbitrator and the Arbitrator has no jurisdiction to decide the matter is perverse and patently illegal. Therefore we find absolutely no grounds to sustain the order of the court below dated 31.1.2006 in O.P. (Arb.) No. 51 of 2005.

In the result, this appeal is allowed setting aside the order dated 31.1.2006 of the 1st Additional District Judge, Ernakulam in O.P.(Arb.) No. 51 of 2005, thereby upholding the award passed by the Arbitrator dated 23.11.2004.

No order as to costs.