

(2022) 01 KL CK 0114
In the High Court Of Kerala
Case No : ARB.A NO. 36 Of 2020

Southern Railway, Head Quarters Office, Park Town, Chennai,
Pin 600003

APPELLANT

Vs

Santhosh Babu, S/o Late Velayudhan

RESPONDENT

Date of Decision : 17-01-2022

Acts Referred:

Constitution of India, 1950 — Article 14
Arbitration and Conciliation Act, 1996 — Section 28(3), 31(7)(b), 31(8), 34, 34(2A)
Indian Contract Act, 1872 — Section 16(1), 19A, 23, 55

Citation : (2022) 01 KL CK 0114

Hon'ble Judges : P.B.Suresh Kumar, J;C.S.Sudha, J

Bench : Division Bench

Advocate : A.Dinesh Rao, K.S.Babu, N.Sudha, Babu Shankar

Final Decision : Allowed

Judgement

P.B.Suresh Kumar, J.

1. This arbitration appeal is directed against the order dated 10.12.2019 in O.P. (Arb) No.214 of 2017 on the file of the II Additional District Judge,

Ernakulam. The appellants, who are collectively referred to in this judgment as Railway, were the petitioners in the said proceedings. The subject

matter of the proceedings was an arbitral award obtained by the respondent in connection with a works contract awarded to him by the Railway.

2. The Railway awarded to the respondent for execution a work, consisting of different components, in connection with the gauge conversion between

two railway stations. As per the terms of the agreement, the work had to be executed within six months. Though the work was commenced by the

respondent as agreed, he could not complete the same within the time stipulated. As such, on specific requests made by the respondent, the term fixed

for completion of the work was extended from time to time upto 27.09.2010 for a total period of 923 days, subject to the condition that the respondent would complete the work on the agreed terms and conditions. The work was completed by the respondent within the extended time limit.

3. After executing the work, the respondent raised a claim for Rs.2,75,59,730/- under different heads and the said claim was referred for adjudication

by the arbitral tribunal. Out of the said claim, Claim No.1 was for a sum of Rs.48,30,352/-. The basis of the claim was that the delay occurred in

completing the work was due to reasons attributable to the Railway and the respondent is therefore entitled to the said amount by way of

compensation for cost escalation. Claim No.4 was for a sum of Rs.53,89,739/-. The basis of the said claim again was that since the delay occurred in

completing the work within the time stipulated was due to reasons not attributable to the respondent, he is entitled to the said amount by way of

compensation for additional expenses incurred by way of supervision and establishment charges. Claim No.9(a) was for a sum of Rs.3,76,880/-. The

basis of the said claim was that the respondent was not paid for the additional expenditure he incurred in the course of execution of the work for

cutting rails using gas cutters for transporting the same as per the requirements of the contract.

4. The arbitral tribunal rejected in toto all the claims other than the claims referred to in paragraph 3 above. As regards Claim No.1, the arbitral

tribunal found that the respondent is entitled to a sum of Rs.47,19,666/- and as regards Claim No.4, the arbitral tribunal found that the respondent is

entitled to a sum of Rs.30,86,395/-. The arbitral tribunal also found that the respondent is entitled to the amount covered by Claim No.9(a), namely,

Rs.3,76,880/-. Accordingly, the arbitral tribunal passed an award directing the Railway to pay the said amounts namely Rs.81,82,941/- along with the

costs of the proceedings namely Rs.2,00,000/- within one month, failing which it was directed that the respondent would be entitled to realise the same

with interest at the rate of 18% per annum.

5. The Railway challenged the arbitral award in O.P.(Arb) No.214 of 2017 under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act)

mainly on the ground that the arbitral award being one against the terms of the contract, in the light of Section 28(3) of the Act, the same is liable to be

set aside on the ground of patent illegality appearing on the face of the award. The court below found that in the light of the amendment introduced to Section 28(3) in terms of Act 3 of 2016, contravention of the terms of the contract does not ipso facto result in rendering the award capable of being set aside. The court below also found that in the light of the various findings rendered by the arbitral tribunal, the view taken by the arbitral tribunal that the respondent is entitled to the amounts covered by the award cannot be said to be arbitrary and capricious, warranting interference in a proceedings under Section 34. Despite the said findings, the court below proceeded to consider the contentions raised by the Railway that the award is contrary to the terms of the contract and rejected the same. Accordingly, the court below dismissed the original petition. The Railway is aggrieved by the said decision and hence this appeal.

6. Heard the learned counsel for the Railway as also the learned counsel for the respondent.

7. The learned counsel for the Railway made elaborate submissions in the matter as if he was arguing a first appeal. The first and foremost

submission was that in terms of Exts.R12, R15 and R22 rider agreements executed by the respondent for extension of the term of the contract, the

respondent agreed voluntarily to execute the work on the same terms and conditions agreed upon by him initially and therefore, he is precluded from

raising any claim in respect of the work on the basis of the delay in completing the work. It was also submitted by the learned counsel that the

provisions in the Regulations for Tenders and Contracts and Instructions to Tenderers, Additional Instructions and Special Conditions of Contract and

the Indian Railways Standard General Conditions of Contract also would preclude the respondent from raising claims in respect of the work on the

basis of the delay, irrespective of the reason for the delay. It was also submitted by the learned counsel that, at any rate, in the light of the declaration

made by the respondent in Ext.R24 that he has no claim in respect of the work executed by him under the agreement, the respondent cannot be heard

to contend that he is entitled to any additional amount in respect of the work. According to the learned counsel, in the light of Section 28(3) of the Act,

the arbitral tribunal ought to have considered the terms of the agreements and documents referred to above in the matter of considering the claims of

the respondent and in so far as the impugned arbitral award was rendered ignoring the provisions in the said agreements and documents which are binding on the respondent, the arbitral award is liable to be set aside. The learned counsel relied on the decisions of the Apex Court in *State of Chhattisgarh v Sal Udyog Private Limited*, 2021 SCC OnLine SC 1027 and *PSA Sical Terminals Pvt. Ltd. v. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin*, 2021 SCC OnLine SC 508, in support of the contention that failure on the part of the arbitral tribunal to adjudicate the dispute in accordance with the terms of the contract governing the parties would attract the ground of patent illegality to set aside the arbitral award. It was also argued by the learned counsel that even otherwise, in the light of Section 55 of the Indian Contract Act, insofar as the respondent executed the work voluntarily despite the delay allegedly caused by the Railway, without raising any claim for compensation at the appropriate time, he is precluded from raising any claim in respect of the work executed during the extended period of time. The learned counsel has relied on the decision of the Apex Court in *General Manager, Northern Railway v. Sarvesh Chopra*, (2002) 4 SCC 45 and the decision of this Court in *State of Kerala v. Mohammed Kunju*, 2008 (3) KLT 424, in support of the said contention. According to the learned counsel, the arbitral tribunal failed to take note of the said legal provision while rendering the award. It was also argued by the learned counsel that the amount claimed by the respondent towards compensation for cost escalation was without any basis. Similarly, it was argued that at any rate, the arbitral tribunal having awarded compensation to the respondent for cost escalation for the work executed during the extended period, it ought not have granted compensation to the respondent again for the additional expenditure incurred for supervision charges and maintenance of establishment during the extended period of the contract. It was also argued by the learned counsel that at any rate, there was absolutely no justification for the arbitral tribunal to award post-award interest on the amount found due to the respondent at the rate of 18% per annum, for the same would work out to be penal in nature, rather than compensatory.

8. Per contra, the learned counsel for the respondent submitted that insofar as it is found by the arbitral tribunal that the delay occurred in completing

the work was due to reasons attributable to the Railway, the arbitral tribunal is competent and empowered to award compensation for cost escalation

for the work executed during the extended period and compensation for the additional expenditure incurred by way of supervision charges and

maintenance of the establishment during the extended period. The decision of this Court in *Union of India v. Haji C.M.Abdul Khader*, 2020 (1) KLJ

502 was cited by the learned counsel in support of the said contention. Placing reliance on the decision of the Apex Court in *K.N.Sathyapalan v. State*

of Kerala (2007) 13 SCC 43, the learned counsel has also argued that although parties would be bound by the terms agreed upon in the contract, in the

event when one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed

by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra cost incurred by him as a result of the

failure of the first party to live upto its obligations. According to the learned counsel, the arbitral award is, therefore, in order and no interference is

called for in the award or in the decision of the court below.

9. In reply to the submissions made by the learned counsel for the respondent, the learned counsel for the Railway submitted that the decision of the

Apex Court in *K.N.Sathyapalan* cannot have any application to the facts of the present case, for in the said case the contractor had signed the

supplementary agreement for extension of the term of the contract under protest. Similarly, it was submitted by the learned counsel for the Railway

that the decision of this Court in *C.M.Abdul Khader* also cannot have any application to the facts of the present case, for in that case the party has

claimed higher rates to cover the escalation of the costs in the course of the the execution of the work itself.

10. We have given a thoughtful consideration to the arguments advanced by the learned counsel for the parties on either side.

11. Having regard to the submissions made by the learned counsel for the Railway, it is necessary to examine the scope of Section 28(3) of the Act

and we shall do the same before proceeding further in the matter. The law applicable to the case on hand is the Act as amended in terms of Act 3 of

2016 which came into effect with effect from 23.10.2015. There is no dispute between the parties on this point. Section 28(3), as it stood prior to Act

3 of 2016, was as follows:

“In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

In terms of Act 3 of 2016, the provision has been amended as follows:

“While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.”

The aforesaid amendment was brought into force in the light of the 246th report of the Law Commission of India. Before Act 3 of 2016, in *ONGC Ltd. v. Saw Pipes Ltd.*

(2003) 5 SCC 705, it was held by the Apex Court that if an arbitral award is against the terms of the contract, it would be patently illegal, which could be interfered

under Section 34 of the Act. Later, in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Apex Court has interpreted Section 28(3) holding that

construction of the terms of a contract is primarily a matter for the arbitral tribunal to decide, unless the arbitral tribunal construes the contract in such a way that it

could be said to be something that no fair minded or reasonable person could do. Paragraphs 42.3 to 45 of the said judgment read thus:

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

28. Rules applicable to substance of dispute. (1)-(2) * * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator

construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is

primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable

person could do.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, this Court held as under: (SCC pp. 225-26, paras 112-13)

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

contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration

agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that

correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a

matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission and*

D.D. Sharma v. Union of India.

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

that there exists any bar on the face of the award.

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, the Court held: (SCC pp. 581-82, para 17)

17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises

under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such

cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and

independent of what appears in the award. Such a jurisdictional error needs to

be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram,

Thawardas Pherumal v. Union of India, Union of India v. Kishorilal Gupta & Bros., Alopi Parshad & Sons Ltd. v. Union of India, Jivarajbhai Ujamshi Sheth v.

Chintamanrao Balaji and Renusagar Power Co. Ltd. v. General Electric Co.)

45. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran , the Court held: (SCC pp. 320-21, paras 43-45)

43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not

possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the

High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. and which has been

referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. to which one of us (Gokhale, J.) was a party. The observations in

para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case, SCC p. 313)

43. The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One

may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one

substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg.

Corpn. v. Central Warehousing Corpn. the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator,

which is what the High Court has practically done in this matter. The umpire is legitimately 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 agreement. If he does so, the decision of the umpire has to be accepted as final and binding.

It is seen that Section 28(3) has been amended after the decision of the Apex Court in Associate Builders solely in order to remove the basis of the

decision in Saw Pipes Ltd. and in order to ensure that any contravention of a term of the contract by the arbitral tribunal should not ipso jure result in

rendering the award becoming capable of being set aside. Paragraph 35 of the 246th report of the Law Commission of India dealing with the

circumstances which necessitated the amendment to Section 28(3) reads thus:

35. It is for this reason that the Commission has recommended the addition of section 34 (2A) to deal with purely domestic awards, which may also be set aside by

the Court if the Court finds that such award is vitiated by "patent illegality appearing on the face of the award." In order to provide a balance and to avoid excessive

intervention, it is clarified in the proposed proviso to the proposed section 34 (2A) that such an award shall not be set aside merely on the ground of an

erroneous application of the law or by re-appreciating evidence. The Commission believes that this will go a long way to assuage the fears of the judiciary as well

as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic

awards. This would also do away with the unintended consequences of the decision of the Supreme Court in ONGC Vs. Saw Pipes Ltd, (2003) 5 SCC 705, which,

although in the context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international

commercial arbitrations as well as foreign awards, given the statutory language of the Act. The amendment to section 28(3) has similarly been proposed solely in

order to remove the basis for the decision of the Supreme Court in ONGC Vs. Saw Pipes Ltd, (2003) 5 SCC 705 - and in order that any contravention of a term of the

contract by the tribunal should not ipso jure result in rendering the award becoming capable of being set aside. The Commission believes no similar amendment is

necessary to section 28 (1) given the express restriction of the public policy ground (as set out below).â??

The aforesaid fact has been taken note of by the Apex Court in *HRD Corpn. v. GAIL (India Ltd.)*, (2018) 12 SCC 471 and it was clarified that the

view taken by the Apex Court in *Saw Pipes Ltd.* as regards the application of Section 28(3) has been expressly done away with. In *Ssangyong Engg.*

& Construction Co. Ltd. v. NHA, (2019) 15 SCC 131, it was held that the change made in Section 28(3) really follows what is stated in paragraphs

42.3 to 45 in *Associate Builders* and that only if the arbitral tribunal construes the terms of the contract in a manner that no fair minded or reasonable

person would do, the arbitral award is liable to be interfered with, not as an award in conflict with the public policy of India but as an award vitiated by

patent illegality appearing on its face. Paragraph 40 of the judgment of the Apex Court in *Ssangyong* reads thus:

â??40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders* namely, that the construction

of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person

would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to

him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).â??

In the light of what is stated above, the position now is that construction of the terms of a contract is primarily a matter for the arbitral tribunal to decide and the

arbitral award is not liable to be interfered with unless the arbitral tribunal construes the contract in such a way that it could be said to be something that no fair

minded or reasonable person would do and in that event, the award would be liable to be set aside as vitiated by patent illegality appearing on the face of the award

as provided for under Section 34(2A) of the Act. Of course, in *Sal Udyog Private Limited* and in *PSA Sical Terminals Pvt. Ltd.* there are a few observations to the

effect that the arbitral tribunals have to decide the dispute in accordance with the terms of the contract; that the arbitral tribunals cannot rewrite the contract

etc.

According to us, the said judgments cannot have any application to a case to be decided in accordance with the Act as amended in terms of Act 3 of 2016. In other

words, contravention of a term of the contract by the arbitral tribunal by itself would not ipso jure result in rendering the award capable of being set aside after Act 3

of 2016.

12. Having thus understood the scope of Section 28(3) of the Act, let us examine the question whether the arbitral award in the case on hand is one

which is liable to be set aside on the ground of patent illegality appearing on the face of the award.

13. As noted, other than seeking compensation for the cost escalation for the work executed during the extended period of the contract and

compensation for the additional expenditure incurred for supervision charges and maintenance of establishment during the extended period of contract,

the only other claim of the respondent that was upheld by the arbitral tribunal was that the respondent was not paid for the additional expenditure he

incurred in the course of execution of the work for cutting rails using gas cutters for transporting the same as per the requirements of the contract. No

arguments were advanced in respect of the said part of the award by the Railway and we are therefore examining only the sustainability of the

arbitral award insofar as it relates to the compensation granted to the respondent under the two heads referred to above.

14. The arbitral tribunal raised altogether 25 issues of which issues (i) to (iii) and (v) to (vii) were the following :-

i. Whether there is any delay on the part of the respondents in handing over the site, if so, how much?

ii. Whether there were obstructions in the site handed over?

iii. Whether there was any delay on the part of other agencies/other contractors in completing their works and whether that delay had caused any obstruction to the

claimant in executing the work?

x x x x x x

v. Whether the claimant suffered any loss due to such delay and whether the

claimant is entitled to any compensation?

vi. Whether there was any delay in sanctioning and approval of new items of works?

vii. Whether the claimant is entitled to any compensation on that count? If so, what amount?

On the above issues, on an elaborate consideration of the facts and circumstances, the arbitral tribunal found that the delay occurred in completing the

work was due to the hindrances caused by Railway and on account of execution of new and extra works by the respondent as directed by the

Railway. The relevant portion of the finding rendered by the arbitral tribunal in this regard reads thus:

“23. From what is discussed above, it is evident that either the respondents had not anticipated all the items of work for facilitating the claimant to execute the work

awarded to him or there was omission to make any provision for certain new items of works to be completed before the work awarded to the claimant is to be

completed, It is also evident that certain bridge works, culverts, drains, cuttings, etc were awarded to some other contractors and there was delay on the side of the

other contractors to complete the work. Claimant is helpless. As regards the new items and extra items of works to be executed the claimant had made request to the

respondents to entrust those works to him. It is evident that while making such request the claimant had quoted his own rates and there was negotiation regarding

the rates for the works to be executed as extra or new items of works and there was even delay on the side of respondents for according sanction for the extra and

new items of works and also for negotiating and settling the rates for those extra and new items of works. No material was brought on record to show that the

claimant could complete the work entrusted to him as per Exhibits C1 and C2 without the execution of extra and new items of works as well as other works entrusted to

other agencies. The claimant had in unambiguous terms intimated the respondents the reasons for delay in execution of the work as evidenced by Ext.C5, C6, C8, C9,

C13, C14, C15 and C18. So also, it is specifically mentioned in Ext.C15 and C18 that the other agencies to whom certain works were awarded had been delaying their

works and that full reaches were not handed over to the claimant. There is nothing on record to show that the full reaches were handed over to the claimant within the

time stipulated in the agreement. Of course, the claimant had canvassed for awarding extra and new items of works as is evidenced by Ext.C8, C9, C14, R5 and R6. But

that is not a reason to conclude that the claimant had caused delay in execution of the work.

24. The request for awarding extra and new items of work to the claimant was only to facilitate the claimant for the complete execution of the work covered by the

agreement. Of course, the claimant would have been benefited by the execution of the new and extra items of work. But that is not a reason to conclude that there was

fault on the side of the claimant. Whereas from the discussions made above it is crystal clear that there was much fault on the side of the respondents in making

arrangements for the execution of all other works which were to be completed before the execution of the work awarded to the claimant as per Exts.C1 and C2. There

was delay on the part of the respondents in handing over the site and removing the obstructions. So also, there was delay on the side of the other agencies/other

contractors for completing the work awarded to them. That delay also had caused hindrance to the claimant for execution of the work as per Ext.C1 and C2. Delay is

also evident on the side of the respondents for sanctioning and approving extra and new items of works. It is not disputed that the cost of "labour and value of

consumables are shooting up day by day. Since the work under agreement has been prolonged, the claimant had to incur loss due to price variation. So also, he had

to maintain the overhead expenses. The claimant is entitled to be compensated for the delay on the side of the respondents. Issues are found accordingly.â??

It is on the basis of the said finding that the arbitral tribunal awarded compensation to the respondent under two different heads.

15. Clause 4.2 in the Regulations for Tenders and Contracts and Instructions to

Tenderers reads thus:

4.2 Every possible fluctuation, in the rate of labour, material and general commodities and other possibilities of each and every kind which may affect the rates, should be considered and kept in view before quoting the rates and no claim on this account shall be entertained by the Railway under any circumstances except the price escalation payable as per price variation clause, if any, provided separately in the tender documents.

Clauses 15.1, 16.3, 44.0 and 44.1 of the Additional Instructions and Special Conditions of Contract read thus:

15.1 The drawings for the works can be seen in the office of the Chief Administrative Officer, Construction, Southern Railway, Chennai-8 and in the office of Field

Deputy Engineers Office. It should be noted that these drawings are meant for general guidance only and the Railway may suitably modify them during the execution

of work according to the circumstances without making the Railways liable for any claims on account of such charges.

x x x x x

16.3 No claim whatsoever will be entertained by Railway on account of any delay or hold up of the works arising out of delay in approval of drawings changes,

modifications, alterations, additions, omission and the site layout plans or detailed drawings and designed and/or late supply of such material as are required to be

arranged by the Railway or due to any other factor on Railway accounts.

x x x x x

44.0 PRICE VARIATION CLAUSE Applicable for advertised tender value exceeding 25 Lakhs and period of completion more than 12 months.

44.1 The rates quoted by the tenderer and accepted by Railway Administration shall hold good till the completion of work and no additional individual claim will be

admissible (unless otherwise expressly stated elsewhere in the tender conditions) on account of fluctuation in market rates, increase in taxes/any other levies/tolls

etc., except that payment/recovery for overall market situation shall be made as per price variation clause given in para below

Similarly, Clauses 17-A(ii), 39(i) and 42(i) of the Indian Railways Standard General Conditions of Contract read thus:

17-A(ii)- Extension for delay not due to Railway or Contractor: If in the opinion of the Engineer, the progress of work has any time been delayed by any act or neglect

of Railway's employees or by other contractor employed by the Railway under sub-clause (4) of clause 20 of these Conditions or in executing the work not forming

part of the contract but on which the contractors performance necessarily depends on or by reason of proceeding taken or threatened by or dispute with adjoining or

to neighbouring owners or public authority arising otherwise through contractor's own default etc. or by the delay authorized by the Engineer pending arbitration or

in consequences of the contractor not having received in due time necessary instructions from the Railway for which he shall have specially applied in writing to the

Engineer or his authorized representative then upon happening of any such event causing delay, the contractor shall immediately give notice thereof in writing to the

Engineer within 15 days of such happening, but shall nevertheless make constantly his best endeavours to bring down or make good the delay and shall do all that

may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The contractor may also indicate the period for which the work is

likely to be delayed and shall be bound to ask for necessary extension of time. The Engineer on receipt of such request from the contractor shall consider the same

and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and quantum of work affected

thereby. No other compensation shall be payable for works so carried forward to the extended period of time, same rates, terms and conditions of contract being

applicable as if such extended period of time was originally provided in the original contract itself.

x x x x x

39(i) Rates for Extra Items of Works: Any item of work carried out by the Contractor on the Instructions of the Engineer which is not included in the accepted

schedules of rates shall be executed at the rates set forth in the ""Scheduled of

rates of railwayâ? modified by the tender percentage and such items are not contained

in the latter, at the rate agreed upon between the Engineer and the Contractor, in as short a period as possible after the need for the special item has come to the

notice. In case the contractor fails to attend the meeting after being notified to do so or in the event of no settlement being arrived at, the Railway shall be entitled to

execute the extra works by other means and the contractor shall have no claim for loss or damage that may result from such procedure.

x x x x x

42.(i) Powers of modification to contract: The Engineer on behalf of the railway shall be entitled by order in writing to enlarge or extend, diminish or reduce the works

or make any alterations in their design, character position, site, quantities, dimensions or in the method of their execution or in the combination and use of materials

for the execution thereof or to order any additional work to be done or any works not to be done and the contractor will not be entitled, to any compensation for any

increase/reduction in the quantities of work but will be paid only for the actual amount of work done and for approved materials supplied against a specific order.

One of the arguments advanced by the learned counsel for the Railway is that the aforesaid provisions are part of the contract and the arbitral award

was passed without taking into account of the said provisions in the contract which bind the respondent.

16. True, there is no reference to the provisions extracted above in the arbitral award or in the order passed by the court below. But, there is nothing

on record to indicate that the extracted provisions have been brought to the notice of the arbitral tribunal or to the court. The Railway does not also

have a case that although the extracted provisions were brought to the notice of the arbitral tribunal and to the court, the same were not taken into

account while passing the arbitral award and the order impugned in the appeal. Be that as it may, we have perused the provisions referred to in the

preceding paragraph meticulously. As regards the provisions contained in the Regulations for Tenders and Contracts and Instructions to Tenderers

and Additional Instructions and Special Conditions of Contract, Clause 4.2 therein

does not cover a situation of the instant nature where a contractor had to execute the work beyond the time stipulated in the contract for reasons not attributable to him. Clause 15.1 only deals with the authority of the Railway to modify the design of the work during the execution without incurring any liability for any claims on account of such modification. Clause 16.3 provides that the Railway may not entertain any claim on account of the delay on their part in performing the obligations under the contract.

Clause 44.0 provides that price variation clause would apply only to contracts, the period of completion of which is more than 12 months. Clause 44.1 provides that the rate quoted by the tenderer and accepted by the Railway shall hold good till the completion of the work and no additional individual claim will be admissible on account of fluctuation of market rates, increase in taxes/any other levies/tolls etc. None of the said clauses, according to us, prevent the respondent from claiming compensation for the loss caused to him on account of escalation of costs for that part of the work executed during the extended term of the contract and compensation for the loss caused by way of additional expenditure incurred for supervision of the work and maintenance of the establishment. Similarly we have meticulously perused Clauses 17-A(ii), 39(1) and 42(1) of the Indian Railways Standard General Conditions of Contract. Clause 17-A(ii) of course provides that if the work assigned to a contractor is delayed on account of any act or neglect on the part of employees of the Railway or other contractors engaged by the Railway or in executing the work not forming part of the contract but on which the performance of the contract is depended upon, the contractor will be entitled only for extension of time and that no compensation would be payable for the work carried out during the extended period of time. The said clause also, according to us, does not preclude an adjudicating authority like the arbitral tribunal in granting compensation to a person who suffered loss on account of the same, if he is otherwise entitled to it.

Similarly, Clause 39(1) only deals with the authority of the Railway to instruct the contractor to execute the work which is not covered by the contract on mutually agreed rates and to get such works executed through other means without incurring any liability and Clause 42(1) deals with the authority of the Railway to alter the quantities of the work assigned to a contractor during execution without incurring any additional liability. The aforesaid are

only general provisions and none of the same, according to us, prevent the respondent from claiming compensation for the loss caused to him on account of the delay in completing the work for reasons not attributable to him.

17. It is seen from Exts.R12, R15 and R22 rider agreements that the respondent has undertaken to execute the part of the work which was not completed during the extended term of the contract on the same terms and conditions. The said undertaking reads thus:

“As varied and/or added to as aforesaid the annexed agreement and every rate clause and condition shall continue of full effect and be binding on the respective

parties thereto.”

Similarly, it is seen that the respondent has given Ext.R24 statement after completing the work, declaring that he has no claim against the Railway in respect of any item of work executed under the agreement. The relevant portion of the said statement reads thus:

“I hereby solemnly declare that all the items of works carried out by me under this agreement had been fully and finally measured to my satisfaction. I have no claim against any item of work executed by me under this agreement against the Railways.”

The main argument advanced by the learned counsel for the Railway is that the arbitral award is one rendered without taking into account the terms

of the contract referred to above. In an identical case where the terms in the supplementary agreement similar to the rider agreements in the case on

hand debarred a contractor from pursuing his claims before the arbitrator, in a proceedings arising under the Arbitration Act, 1940, the claim of the

contractor was upheld by the arbitrator holding that the supplementary agreement has been executed by the party without prejudice to his claim.

Though the arbitral award was interfered with by this Court, the decision of this Court was reversed by the Apex Court holding that this Court was not

justified in substituting the view of the arbitrator as it could not be said that the view taken is unreasonable or one which cannot be arrived at by a

reasonable person [See T.P.George v. State of Kerala and Another, (2001) 2 SCC 758]. Paragraphs 8 and 9 of the judgment of the Apex Court in

T.P.George read thus:

“8. We have considered the rival submissions. It is to be seen that the

question, whether the supplemental agreement dated 20-10-1983 debarred the appellant

from pursuing his claims, was before the arbitrator. Such a question having been referred to the arbitrator, the view of the arbitrator would be binding if it is one which

is possible. The arbitrator has taken note of the appellant's letters dated 6-10-1983 and 24-11-1983 and come to a conclusion that the supplemental agreement had

been got executed and that the same was executed without prejudice to the claims which had already been made. This is a possible view.

9. We have seen the impugned judgment delivered by the High Court. The High Court has not at all considered the letter dated 6-10-1983 and 24-11-1983 nor dealt

with the question as to whether or not the supplemental agreement was got executed. The High Court has not even considered the effect of the supplemental agreement having been executed without prejudice to the claims which had already been made. Even if the High Court had considered these aspects it could not have

substituted its views for those of the arbitrator as it could not be said that the view taken by the arbitrator is unreasonable or one which cannot be arrived at by a

reasonable person. In this view of the matter the impugned judgment cannot be sustained and is set aside in respect of claims under Items 12(i) and (k).â??

The dictum in T.P.George was followed by the Apex Court in K.N.Sathyapalan in the context of considering the question whether in the absence of

any cost escalation clause in the agreement and the specific prohibition to the contrary in the supplementary agreement, whether a contractor would

be entitled to raise a claim for cost escalation and also whether the arbitrator would exceed its jurisdiction in allowing the same. The Apex Court has

held in the said case that ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one among the parties to the

contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is

vested with the authority to compensate the second party for the extra cost incurred by him as a result of the failure of the first party to live upto the

obligations. Paragraphs 31 and 32 of the judgment in K.N.Sathyapalan read thus:

31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original agreement and a

specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the

arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations

under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second

party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature

and Alopri Parshad case [(1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case [(2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was

recognised by this Court in P.M. Paul [1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in

construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount

awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the

absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case.â??

In C.M.Abdul Khader, this Court held that in the event when one of the parties to a contract is prevented from fulfilling the obligations which has a

direct bearing on the work to be executed by other party, the arbitral tribunal can very well compensate the latter. True, unlike in T.P.George and

K.N.Sathyapalan, there is nothing on record in the case on hand to indicate as to whether the execution of the rider agreements by the respondent is

without prejudice to his claims. But according to us, the same shall not be an impediment in following the view taken by the Apex Court in the said

cases, for the materials on record do not indicate that the Railway has taken this contention before the arbitral tribunal and thereby prevented the

respondent from bringing to the notice of the arbitral tribunal the communications, if any, indicating that the execution of the rider agreements was without prejudice to the right of the respondent to claim compensation for the loss caused on account of the delay in completing the work attributable

to the Railway. We take this view also for the reason that although the contract in the case on hand was one contemplated to be completed within six

months, due to the reasons attributable to the Railway, it could Â

be completed only after about three years after the expiry of the initial period stipulated. There is no dispute to the fact that the rider agreements

signed by the respondent are agreements in the prescribed or standard forms. We have no doubt that the undertaking made by the respondent in the

rider agreements that he would execute the remaining part of the work on the same terms and conditions in a case of this nature, is unfair. That apart,

the same is a provision in the agreements executed between parties who are not equal in bargaining power. It is now trite that the courts shall not

enforce such unfair terms. It is apposite in this context to refer to paragraphs 89 and 91 of the judgment of the Apex Court in *Central Inland Water*

Transport Corporation v. Brojo Nath Ganguly, (1986) 3 SCC 156.

â??89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust

our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories?

Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch

supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to â??uphold the

Constitution and the lawsâ?. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution

guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is

in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This

principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause

in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can

visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply

where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the

result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods

or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no

meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract,

however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial

transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies

entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties

possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on

its own facts and circumstances.

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91. Is a contract of the type mentioned above to be adjudged voidable or void? If

it was induced by undue influence, then under Section 19-A of the Indian Contract

Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as

defined by Section 16(1) of the Indian Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In

the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in

inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the

majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for

those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior

bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of

persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only

voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable.

This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute,

namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The

only relevant provision in the Indian Contract Act which can apply is Section 23 when it states that "The consideration or object of an agreement is lawful, unless

... the court regards it as ... opposed to public policy.â??â??

The principles aforesaid have been reiterated by the Apex Court in *Balmer Lawrie & Co. Ltd. v. Partha Sarathi Sen Roy*, (2013) 8 SCC 345,

clarifying that since the actions of public bodies bear public character and contain an element of public interest, it is necessary to strike down

unconscionable, unfair and unreasonable clauses in contract that has been entered into by the parties who do not enjoy equal bargaining power, as

violative of Article 14 of the Constitution. It was also held in the said case that such clauses would be hit by Section 23 of the Contract Act, for it goes

against public policy. Paragraph 30 of the said judgment reads thus:

â??30. Where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and

conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute,

without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to

judicial review. The Constitution provides for achieving social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law

and equal protection of the law. Thus, it is necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract, that has

been entered into by parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such a condition or provision

becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the

economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the

basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule.

Consent or consensus ad idem as regards the weaker party may therefore, be

entirely absent. Thus, the existence of equal bargaining power between parties becomes

largely an illusion. The State itself, or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees in

order to terminate the services of its permanent employees in accordance with such terms and conditions. (Vide Central Inland Water Transport Corpn. Ltd. v. Brojo

Nath Ganguly, DTC v. Mazdoor Congress, LIC v. Consumer Education and Research Centre, K.C. Sharma v. Delhi Stock Exchange and Punjab National Bank v.

Astamija Dash.)

Ext.R24 is also a similar document obtained from the respondent by the Railway. The fact that the Railway would not have processed the final bill in

respect of the work executed by the respondent without such a document was not disputed by the counsel for the Railway. We have no doubt that the

same shall not also therefore be an impediment for the respondent in claiming the compensation legitimately due to him in accordance with law. If the

terms in Exts.R12, R15 and R22 relied on by the Railway are held to be enforceable, contractors who are eager to complete the works undertaken by

them to avoid unpleasantness with the employer and to save their reputation would be compelled to execute the works on the same terms even after

several years and enforcement of agreements in the nature of Exts.R12, R15 and R22 would compel the contractors to abandon the works and claim

compensation instead of completing the work.

18. The learned counsel for the Railway argued vehemently, placing reliance on Section 55 of the Contract Act that insofar as the respondent

executed the works voluntarily despite the delay allegedly caused by the Railway without raising any claim for compensation at the appropriate time,

he is precluded from raising any claim in respect of the work executed during the extended period of time. No doubt, Section 55 provides that if in a

case of contract voidable on account of promisor's failure to perform his promise at the time agreed, the promisee accepts the performance of such

promise at any time other than that agreed, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at

the time agreed, unless, at the time of such acceptance, he gives notice to the

promisor of his intention to do so. The argument is that at no point of time, the respondent conveyed to the Railway his intention to claim compensation for the loss caused to him on account of the delay on the part of the Railway in the matter of discharging their obligations under the contract and instead, he was performing his part of the obligations under the contract despite the failure on the part of the Railway to perform their promise at the time agreed and that therefore, the respondent is not entitled to compensation for the loss caused to him on account of the delay in completing the work. As noted, the specific case of the respondent as accepted by the arbitral tribunal is that the work assigned to him could not be completed because of the hindrances caused by the Railway and on account of the instructions given by the Railway to execute new works and extra quantities in the assigned works. This is not a case where the work was delayed solely due to the non-performance of obligations under the contract by the Railway at the time agreed upon. It was only one among the reasons found by the arbitral tribunal for the delay. Again, insofar as the arbitral award and the order of the court do not indicate that a contention based on Section 55 has been taken by the Railway before the arbitral tribunal or the court below, in the light of the finding rendered by us that the respondent has been deprived of an opportunity to establish whether any claim for compensation has been raised by him during the course of execution of the work, we are of the view that it is inappropriate for this court to consider the contention raised by the Railway under Section 55 at this stage of the proceedings. Even assuming that Section 55 has any application, the fact that Section 55 has not been taken note of by the arbitral tribunal or has not applied it to the facts of the case by itself is not a reason to interfere with the arbitral award on the ground of patent illegality appearing on the face of the award in the light of the proviso to Section 34(2A) of the Act which provides that an award shall not be set aside merely on the ground of an erroneous application of the law.

19. Another argument advanced by the learned counsel for the Railway is that there was no basis for the arbitral tribunal to arrive at the conclusion that the respondent is entitled to a sum of Rs.47,19,666/- by way of compensation for the cost escalation. The arbitral award shows that the said

amount has been arrived at, based on a calculation statement filed by the respondent on 07.03.2016. The said statement would show that the respondent has worked out cost escalation at a particular rate for labour, material and fuel components of the work at 30%, 25% and 15% respectively, having regard to the various part payments effected from time to time. The total claim in the said statement was Rs.48,30,352/-. The arbitral tribunal accepted the said statement insofar as it relates to the part payments effected during the extended period. The discretion exercised by the arbitral tribunal in this regard cannot be said to be arbitrary or perverse especially having regard to the fact that there was a delay of almost 923 days in executing the work. We do not, therefore, find any merit in the contention of the Railway that the fixation of compensation for the cost escalation was without any basis.

20. Yet another argument advanced by the learned counsel for the Railway was that the arbitral tribunal, having granted compensation for cost escalation for the work executed during the extended period, ought not have granted compensation for the loss caused to the respondent by way of expenditure incurred for supervision of the work and maintenance of the establishment during the extended period of contract. We do not find any merit in this contention as well, for we find that there is no duplication in the two different heads under which the compensation has been granted by the arbitral tribunal.

21. The question remaining to be considered is as to the justifiability of the arbitral award insofar as it relates to the interest awarded for the post-award period. As noted, the arbitral tribunal awarded interest for the post-award period at the rate of 18% per annum and the contention of the Railway is that the same would work out to be penal in nature, rather than compensatory. Section 31(7)(b) of the Act deals with the right of a party for interest for the post-award period. The said provision reads thus:

31 (7)(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.âThe expression âcurrent rate of interestâ shall have the same

meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).

Prior to Act 3 of 2016, Section 31(7)(b) read as follows:

“A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date

of the award to the date of payment.”

It is common knowledge that post-award interest is granted to compensate the award holder in the event of delay in satisfying the award. As far as

the post-award interest is concerned, the provision is that if the award provides for the post-award interest at a rate decided by the arbitral tribunal, the

party who suffers the award shall pay the amount covered by the award with the interest at such rate directed to be paid in terms of the arbitral

award. The statutory provision referred to above also provides that even if the award does not provide for the post-award interest, the party who

suffers the award shall pay the amount covered by the award at a rate 2% above the current rate of interest from the date of the award till the date of

payment [See *Hyder Consulting (UK) Ltd. v. State of Orissa*, (2015) 2 SCC 189]. In other words, the scheme of the Act is that it is for the arbitral

tribunal to fix the rate of post-award interest, and if the arbitral tribunal does not fix the rate of interest, the party who secures the award will still be

entitled to claim the same, but only at the rate as provided for under Section 31(7)(b). When the statute confers discretion on the arbitral tribunal to

prescribe the rate of post-award interest, unless it is shown to be arbitrary or unreasonable, the court may not interfere with such rate fixed by the

arbitral tribunal. In *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, (2019) 11 SCC 465, the Apex Court has held that the

rate of interest must be compensatory as it is a form of reparation granted to the award holder; while on the other hand it must not be punitive,

unconscionable or usurious in nature. It was also held by the Apex court in the said case that the courts may reduce the interest rate awarded by the

arbitral tribunal where such interest rate does not reflect the prevailing economic condition or where it is not found reasonable or where it does not

promote interests of justice. Paragraphs 10 and 11 of the judgment in the said

case read thus:

10. On the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award holder; while on the other it must not be punitive,

unconscionable or usurious in nature.

11. Courts may reduce the interest rate awarded by an Arbitral Tribunal where such interest rate does not reflect the prevailing economic conditions or where it is not

found reasonable, or promotes the interests of justice.

The arbitral award in the case on hand was one rendered on 04.05.2016 and the post-award interest ordered is 18% per annum. As noted, the Act

provided for post-award interest at the rate of 18% per annum when it was introduced in the year 1996, during which period since Banks were

charging interest on their commercial loans at or about 18% per annum, it was necessary to grant post-award interest at least at the said rate or

otherwise, the interest would not have been compensatory. Of late, it is a fact that the rates of interest came down heavily and it is having taken note

of the said fact that Section 31(7)(b) has been amended to its present form for the rate of interest for the post-award period to match with commercial

realities. The said fact is evident from the relevant passage of the 246th report of the Law Commission of India on the basis of which Section 31(7)(b)

was amended. The said passage reads thus:

It is in this context that the Commission has recommended amendments to section 31 to clarify the scope of powers of the arbitral tribunal to award compound

interest, as well as to rationalize the rate at which default interest ought to be awarded and move away from the existing rate of 18% to a market based determination in

line with commercial realities.

Having regard to the rate of interest charged by the Public Sector Banks for the last few years on their commercial advances which are available in

public domain, we have no doubt that the post-award interest ordered by the arbitral tribunal in the case on hand cannot be said to be compensatory in

nature, for the same does not reflect the prevailing economic conditions. Needless to say, the rate of interest is unreasonable and it does not promote

the interests of justice.

22. In *NHAI v. M.Hakeem*, (2021) 9 SCC 1, the Apex court has now held that the power of the court under Section 34 of the Act to set aside an

arbitral award does not include a power to modify such an award. The next question therefore is as to whether this court would be justified in

modifying the award insofar as it relates to the rate of interest to be applied for the post-award period. We do not think that the decision of the Apex

Court in the said case would be an impediment for this court to modify the award insofar as it relates to the rate of interest to be applied for the post-

award period for more reasons than one. First of all, as indicated, a co-ordinate Bench of the Apex court in *Vedanta Ltd.* has categorically held that

the courts may reduce the interest rate awarded by an arbitral tribunal where such interest rate does not reflect the prevailing economic conditions or

where it is not found reasonable or where it does not promote the interests of justice. There is no reference in *M.Hakeem* as to the proposition of law

laid down in *Vedanta Ltd.*. That apart, a reading of the decision of the Apex Court in *M.Hakeem* and the various other decisions which are referred to

therein would show that the very premise on which the Apex Court has held that the power of the court under Section 34 of the Act to set aside an

arbitral award does not include the power to modify the award is that, having regard to the concept of arbitration and the scheme of the Act governing

the same, there shall be only minimal judicial interference with arbitral awards, that too on the limited grounds provided for in Section 34 and therefore

modification of an arbitral award on merits by the court would go against the concept of arbitration and the scheme of the Act. The provision for

interest under Section 31(7) of the Act is an ancillary matter to be provided in the award, when the arbitral tribunal decides the substantive dispute

between the parties and it has nothing to do with the substantive dispute. As such, according to us, the principle on which aforesaid judgment is

rendered cannot have any application as regards the interest payable for the post-award period, especially when the right of the award holder to claim

the post-award interest is one conferred by the Act and not by the contract between the parties. It is all the more so since the award holder is entitled

to the interest for post-award period, even if the arbitral tribunal does not provide for the same in the arbitral award. The fact that the provision for

interest under Section 31(7) of the Act is an ancillary matter to be provided by the award has been taken note of by the Apex Court in State of

Haryana v. S.L. Arora & Co., (2010) 3 SCC 690. The relevant passage of the judgment reads thus :

“The legislature has thus made it clear that award of interest under sub-section (7) of Section 31 [and award of costs under sub-section (8) of Section 31 of the

Act] are ancillary matters to be provided for by the award, when the Arbitral Tribunal decides the substantive disputes between the parties.”

We take this view also for the reason that a contrary view would compel the court either to set aside the arbitral award insofar as it relates to the

grant of post-award interest or to ignore the unreasonable and arbitrary rate at which post-award interest is granted and both the said options would be

against the notions of justice.

23. Having regard to the rate of interest granted by the Apex Court in Vedanta Ltd. for the post-award period in respect of an arbitral award passed

on 09.11.2017 and having regard to the fact that the arbitral award in the case on hand was one rendered on 04.05.2016, we are of the view that

appropriate rate of interest for the post-award period in the case on hand will be 9% per annum.

In the result, the arbitral award and the order passed by the court below are affirmed, subject to the modification that the post-award interest to which

the respondent is entitled would be only at the rate of 9% per annum.