(2012) 11 MAD CK 0117

In the Madras High Court

Case No : O.P. No. 214 of 2009

Thiru Arooran Sugars Ltd. — APPELLANT

Vs

National Agricultural Coop Marketing — RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2013) 2 ARBLR 297 : (2012) 8 MLJ 588

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Judgement

S. Rajeswaran, J.—This Original Petition has been filed by the petitioner u/s 34 of the Arbitration and Conciliation Act, 1996 to set aside

the Award dated 29.12.2008 passed by the second respondent/Arbitrator. The case of the first respondent as claimant before the second

respondent Arbitrator is as follows:

The petitioner herein is a Public Limited Company incorporated under the Companies Act. The petitioner is carrying on business in the line of

manufacturing and marketing of Sugar. The first respondent is a Nodal Agency of Government of India for procuring and supply of agricultural

commodities all over India. It is registered under the Multi State Co-operative Societies Act and it is essentially a Farmers Co-operative Society

carrying on business of procuring and arranging for exports, imports and distribution of agricultural and allied products in India.

2. In August 2004, the petitioner approached the first respondent to facilitate the import of 40,000 M. Tons of Raw Sugar from Australia, South

Africa, Brazil and the said proposal was accepted by the first respondent. A Memorandum of Understanding was entered into between the petitioner and the first respondent on 11.08.2004. As per the Memorandum of Understanding, the petitioner agreed to identify the suppliers

through the first respondent for import of Raw Sugar from one of the foreign countries and agreed to finalize the contract with a foreign supplier

who was identified by the first respondent. In terms of the Memorandum of Understanding, the first respondent also agreed to furnish an

Irrevocable Letter of Credit in favour of the foreign supplier identified by the petitioner for the value of the import. The usuance period for the

Letter of Credit would be 360 days. It was further agreed that after finalisation of the contract, the first respondent in turn, would enter into High

Seas Sale Agreement for the imported goods with the petitioner to enable him to take delivery of the goods, to process and sell and to realise the

sale proceeds. As per the Memorandum of Understanding dated 11.08.2004, to the services rendered by the first respondent, the petitioner

agreed to pay service charges of 1% of the import value of the goods.

3. In terms of the Memorandum of Understanding, the supplier for import of Raw Sugar was identified as M/s. Cargil International S.A.,

Switzerland. As per the Memorandum of Understanding, the petitioner furnished a Bank Guarantee for 10% of the Letter of Credit dated

02.09.2004 for US Dollars 87,14,000 for the import of 40,000 M. Tons of Sugar. The usuance period for the said Letter of Credit though agreed

to be 360 days under the Memorandum of Understanding, due to the reluctance of the Bank to furnish a Letter of Credit for the said period, the

usuance period was restricted to 180 days in consultation with the petitioner. This is the claim of the first respondent that the usuance period was

restricted to 180 days which was also agreed to by the petitioner. However, as per the petitioner, it was not at all agreed to and therefore, the

usuance period continued to be 360 days as per the original Memorandum of Understanding. Therefore, the High Seas Sale Agreement dated

23.09.2004 was entered into between the petitioner and the first respondent. The first respondent furnished a Letter of Credit for the value of the

consignment, through its bankers, namely the Allahabad Bank and the bank agreed for the usuance period of 180 days only instead of 360 days.

The goods were duly imported and delivered to the petitioner and as per the Memorandum of Understanding, it was the obligation on the part of the petitioner to arrange for storage of goods in the Godowns owned by the CWC/ SWC. Thereafter, the petitioner had to take delivery, process

and to sell the cargo and realise the proceeds within 180 days to meet the Letter of Credit''s commitments on the 180th day. After taking delivery,

the petitioner requested the first respondent to role over the Letter of Credit to 360 days. The first respondent took up the issue of role over of the

Letter of Credit through its bankers and in spite of the best efforts put in by the first respondent, the bankers declined the petitioner''s request for

role over. Thereafter, the petitioner requested the first respondent to make an investment for the amount of short fall in the payment of the Letter of

Credit and the said short fall would carry an interest @ 6% per annum. The petitioner however requested the first respondent to reduce the service

charges from 1% to 0.5% in view of the reduced usuance period of the Letter of Credit. The said proposal was accepted by the petitioner and the

petitioner invested a sum of Rs. 37,44,12,685/- at the time of retirement of the Letter of Credit on the expiry of the 180th day to make good the

total value of the Letter of Credit. At the request of the petitioner, the first respondent arranged for foreign exchange covered to meet the shortfall

for retirement of the Letter of Credit of 180 days. The petitioner instead of paying Rs. 1,07,05,000/- towards the 6% interest for the amount

funded by the first respondent and a sum of Rs. 18,71,000/- towards the 0.5% service charges, totalling a sum of Rs. 1,25,76,000/-, paid only a

sum of Rs. 37,42,000/- towards the 1% service charge as per the earlier agreement which was subsequently modified in view of the change in the

circumstances of the contract.

4. The first respondent further incurred a sum of Rs. 1,78,670/- towards the Stock Management Charges on account of the petitioner not

providing storage of stocks in CWC/SWC Godowns and further incurred a sum of Rs. 27,842/- towards the Tax Deducted at Source (TDS) by

the State Bank of India on account of the Fixed Deposits on the Sale Proceeds made by the first respondent on behalf of the petitioner. Therefore,

according to the first respondent as claimant, the petitioner is liable to pay a sum of Rs. 92,48,403/- towards the amount invested, service charges

and the tax incurred over and above the sums already paid by the petitioner. The first respondent demanded the said amount by issuing a Notice dated 29.06.2006, to which, the petitioner sent a reply on 02.08.2006, denying the first respondent''s claim. Therefore, the arbitration clause was

invoked by the first respondent and the second respondent was appointed as the Arbitrator.

5. The case of the petitioner before the second respondent/Arbitrator is as follows:

The petitioner accepted the Memorandum of Understanding entered into between the parties on 11.08.2004. As per the MOU, the petitioner had

to furnish a Bank Guarantee to the first respondent for the amount equivalent to the 10% of the Letter of Credit value of the Raw Sugar to be

imported. It is further stated by the petitioner that, they would not dispute the quality, quantity, etc., and all the terms and conditions of the import

shall be binding upon the petitioner and opening up an Irrevocable Letter of Credit of 360 days of usuance period in favour of the overseas

suppliers. According to the petitioner, the agreed period for the payment of the sale value is 360 days from the date of invoice. As per the MOU,

the petitioner gave a Bank Guarantee to the first respondent in respect of the sale consideration and the term of the Bank Guarantee was for one

year. The MOU clearly established that the relationship between the petitioner and the first respondent was that of the Seller-buyer and not that of

lender and Borrower. The MOU did not contemplate any financing and the status of the parties is that of Seller-Buyer only. After the execution of

the MOU, the first respondent contacted the petitioner and informed that the bank was reluctant to open an Irrevocable Letter of Credit for 360

days at one go and they could open a Letter of Credit initially for a period of 180 days and would renew the same for a like period thereafter. The

petitioner did not want to leave a room for doubt and therefore, sent a letter dated 25.08.2004 to the first respondent inviting their attention to the

assurances on the usuance period of Letter of Credit wherein the petitioner stated they would be careful, if instructions are issued for opening the

Letter of Credit for 180 days with the understanding that the same could be rolled over for another 180 days. The petitioner secured a Bank

Guarantee and forwarded the same to the first respondent. The first respondent opened a Letter of Credit for a period of 180 days and the

petitioner was not at all comfortable with the said Letter of Credit. The petitioner therefore sent a letter dated 14.09.2004 to the first respondent wherein they have referred to the specific term of the contract providing 360 days usuance period of Letter of Credit in favour of the Overseas

suppliers and also referred to exchange of letters over the issue among them. The petitioner insisted that 360 days was required for payment of

money on import of raw sugar, as such a period could be consumed in discharging and transporting the consignment to the factory, process the

sugar and then to sell the stocks both in India and abroad. The petitioner also pointed out the disbursement in the said letter, wherein it is stated

that the Letter of Credit is for 180 days. The petitioner in the very same letter gave a different proposal stating that the first respondent could

finance any shortfall not exceeding Rs. 30 Crores and such financing would be repaid in the next 180 days together with interest @ 6% and that

the first respondent should reduce their service charges from 1% to 0.5%. In case, it is not agreeable to the first respondent for the above said

proposal of the petitioner, the first respondent should take up the responsibility for role over of the Letter of Credit. The petitioner requested the

first respondent to express their willingness or otherwise to the alternative proposal suggested by them. According to the petitioner, the first

respondent did not agree for the alternative proposal and thus the MOU stood unmodified.

6. The petitioner stated that as the offer made in the letter dated 14.09.2004 was not accepted by the first respondent and therefore, the entire

claim of the first respondent before the second respondent Arbitrator on the basis of such a letter is clearly unsustainable. Further, the High Seas

Sale Agreement dated 23.09.2004 makes it clear that the jural relationship between the petitioner and the first respondent is that of the Seller and

Buyer. The said agreement also prescribes 360 days of the date of the Bill of Lading as the time for payment. The agreement contemplates passing

off the total and High Seas and all payments and clearances of cargo, central excise taxes are all on the account of the petitioner''s buyer.

According to the petitioner they honoured all their commitments in accordance with the agreement, but, the first respondent made a claim which is

unsustainable and therefore, a suitable reply was sent to their notice.

7. Before the arbitrator, the following two issues were framed:

1. Whether the first respondent herein/the petitioner before the Arbitrator is

entitled to the claim amount? and

2. Whether the parties have mutually agreed for reduction of the usuance period from 360 days to 180 days and what would be the

consequences?

8. By a consent of both the parties, Exs. P1 to P.34 were marked on the side of the first respondent/claimant and Exs. R1 to R5 were marked on

the side of the petitioner herein/respondent. Both the parties agreed that they are not letting in any oral evidence and only argued the matter.

9. The learned Arbitrator after adducing the entire documentary evidence, came to the conclusion that the petitioner agreed to an altered condition.

However, the petitioner requested the first respondent to finance the shortfall, if any, which shall not be more than Rs. 30 crores. The Arbitrator

held that the petitioner undertook to repay the amount so funded by the first respondent over the remaining six months period along with 6%

interest. Therefore, according to the second respondent/Arbitrator, the petitioner is liable to pay as demanded by the first respondent.

10. Aggrieved by the award dated 29.12.08, the above petition has been filed by the petitioner under Sec. 34 of the Arbitration and Conciliation

Act, 1996.

11. Heard the learned counsel for the petitioner and the learned counsel for the first respondent. I have also gone through the entire documents

available on record including the impugned award. The above Original Petition was reserved for orders earlier. But due to want of time, the

judgment could not be delivered. Therefore the Original Petition was posted again before the Court for further arguments and after hearing both the

learned counsel appearing on either side in detail, the orders are being passed to dispose of this O.P.

12. The learned counsel for the petitioner vehemently contended that the award passed by the second respondent Arbitrator is contrary to the

contract entered into between the parties, as the learned Arbitrator based on no evidence at all came to the conclusion that the contract originally

entered into between the parties was altered and amended, which, according to the learned counsel for the petitioner is absolutely incorrect and

therefore, the award passed by the second respondent/Arbitrator is liable to be set aside.

13. The learned counsel further pointed out that if relevant documents are considered carefully and together, it would obviously establish that the

first respondent did not come forward to accept the alternative proposal submitted by the petitioner and as such the original contract stood un-

amended and unaltered and in such circumstances, the learned Arbitrators finding that there was an offer and acceptance in so far as the alternative

proposal was concerned, is perverse and that too based on no evidence at all.

14. Per contra, the learned counsel for the first respondent contends that a reasoned award has been passed by the second respondent/Arbitrator

after going through the entire documents filed before him. She further submits that it is not for the High Court under Sec. 34 of the A & C Act to

re-evaluate the evidence and come to a different conclusion even if the same is possible. Hence, she prays for dismissing the O.P. And in support

of her submissions, she relies on the following decisions:

1. 2007 (4) MLJ 872 (Vinitha Associates Limited rep. By its Director, Chennai and another vs. Lakshna Holdings Pvt. Ltd., rep. By its Director,

Chennai and others)

2. Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager/ Works, Palghat Division, Southern Railway, Mr. Pancham

[Presiding Arbitrator], Chief Engineer, Construction III, Southern Railway, Mr. T.P.R. Narayana Rao [Arbitrator], Financial Advisor and Chief

Accounts Officer, Metropolitan Transport Project, Southern Railway and Mr. M. Jayachandran [Arbitrator], Financial Advisor and Chief

Accounts Officer, Metropolitan Transport Project, Southern Railway,

3. Brick Steel Enterprises Vs. The Superintending Engineer, Public Works Department,

15. I have considered the rival submissions carefully with regard to facts and citations.

16. It is not in dispute that the parties entered into a MOU on 11.8.2004 which was marked as Ex. P1. Ex. P1 makes it very clear that the parties

agreed to establish a 360 days usuance period, but, the same was sought to be modified to 180 days only by the first respondent as the bankers

did not agree to. The first respondent informed the same to the petitioner and on coming to know about that, the petitioner wrote a letter to the first

respondent on 14.09.2004 which was marked as Ex. P2. In Ex. P2, the petitioner expressed their dismay for the reduction of the period from 360

days to 180 days, but, they proposed an alternative arrangement.

17. It is the case of the first respondent that the alternative proposal was accepted and acted upon and in such circumstances, it is not open to the

petitioner to go back on this issue and to contend that the initiated proposal was not accepted and therefore, the contract was unamended.

Therefore, the main issue before the learned Arbitrator was whether the parties have mutually agreed for reduction of the usuance period from 360

days to 180 days and what would be the consequences.

18. The learned Arbitrator after going through the MOU dated 11.8.2004 i.e. Ex. P1, found that it provides for establishment of 360 days usuance

period. Before the Arbitrator, it was submitted that the first respondent accepted the proposal made by the petitioner in the letter dated

14.09.2004 i.e. Ex. P2 and therefore, their claim is legal and the same is as per the modified contract. However, the petitioner was consistent in

their stand by stating that in Ex. P2 they made only an offer which was never accepted by the first respondent and therefore, the original MOU i.e.

Ex. P1 stood unaltered and unamended. In such circumstances, the petitioner meticulously followed the clauses and conditions contained in the

MOU and therefore, the claim of the first respondent which was based on the so-called modified and amended contract is illegal and therefore, the

same could not be maintained before the Arbitrator. After hearing both the arguments and after going through the documents filed before him, the

learned Arbitrator held that a perusal of the Ex. P2 would disclose that the petitioner had agreed for 180 days usuance period and in case they are

not able to pay the amount within the said period, they have requested the first respondent to finance the shortfall, if any and agreed and undertook

to repay the said amount so funded by the first respondent for the remaining six months period along with interest @ 6%. That apart, it was held by

the learned Arbitrator that the petitioner also requested the first respondent to reduce their fee from 1% to 0.5% of the Letter of Credit value.

Thus, the learned Arbitrator was of the view that according to the letter of the petitioner dated 14.09.2004 i.e. Ex. P2, the first respondent sent

their acceptance by letter dated 11.10.2005 i.e. Ex. P9 wherein in part 3, it is stated that with the concurrence of the petitioner the above revised contract was finalised and the Letter of Credit opened for 180 days was also accepted by the petitioner vide letter dated 06.09.2004 which is not

in dispute. So according to the learned Arbitrator, it is made clear in Ex. P9 about the modified contract and also the liability of the petitioner.

Therefore, the learned Arbitrator came to the conclusion that the contract originally entered into between the parties stood modified and as per the

altered condition, the petitioner is liable to pay the amount as claimed by the first respondent.

19. I am aware of the fact that this Court cannot re-appreciate the evidence to come to a different conclusion even if the same is possible u/s 34 of

the Arbitration and Conciliation Act. At the same time, if an award is passed contrary to the provisions contained in the contract, then, this court

can definitely interfere with the award as the same is not in consonance with the contract entered into between the parties. The main dispute

involved in this case is that according to the petitioner the contract was not at all modified and altered and therefore, the petitioner followed the

original contract and its clauses and in such circumstance, they are not liable as claimed by the first respondent. However, the first respondent

contended that the contract was later on modified and amended and as per the altered clauses, the petitioner is liable to pay the amount as claimed

by them. If that being so, it is necessary to go through Ex. P1, P2 and Ex. P9 which were relied on by the learned arbitrator to conclude that the

contract was modified with mutual consent.

20. In so far as the original contract is concerned, i.e. Ex. P1, there is no controversy with regard to its clauses and conditions. Even according to

the first respondent, the original MOU Ex. P1 stipulates a period of 360 days usuance period. Now, let me consider Ex. P2 which is strongly

relied on by the learned arbitrator to conclude that by Ex. P2, Ex. P1 was modified and the usuance period was reduced to 180 days from 360

days.

21. Ex. P2 is the letter written by the Chairman and Managing Director of the petitioner Company to the Branch Manager of the first respondent.

For better appreciation and clarity, Ex. P2 letter is extracted below:

1. As per the Memorandum of Understanding cited above, NAFED has agreed to establish a 360 days usance Letter of Credit in favour of the

Overseas supplier identified by us to enable import of 40,000 MTs of Raw Sugar. Accordingly, we approached NAFED vide our letters/faxes

dated 20.08.2004, 23.08.2004, 24.08.2004 and 25.08.2004 to open Letter of Credit in favour of Cargill International SA, Geneva for a value of

US $ 87,14,000 for a period of 360 days.

2. However, to our surprise, the L/C was established for a tenor of 180 days only. In this connection, we would like to state the following for your

attention and action.

a. We had negotiated, agreed for a tenor of 360 days considering the time involved for the import of 40,000 MTs of Raw Sugar, discharging and

transporting the consignment to our factories, processing the sugar and then selling the entire stock in both domestic/exports markets and realizing

the proceeds for meeting the L/C commitment. Since the cycle time involved in the various activities mentioned would be around 12 months, we

were very particular to get the tenor of 360 days and accordingly, the same was agreed to by NAFED. It is only on the strength of the sanction of

360 days usance L/C facility, that we entered into a contract with Cargill for import of 40,000 MTs.

b. The opening of the L/C for a period of 180 days has completely upset the calculations and it will not be possible to complete the processing of

the entire 40,000 MTs, sell the stock and realize the proceeds within 180 days, to meet the L/C dues on the due date.

c. Under these circumstances, we request you to consider the following:

i. We would on a best efforts basis take steps to process and sell the cargo and realize the proceeds to meet the L/C dues on the 180th day.

However, we request NAFED to finance the shortfall, if any, which shall not be more than Rs. 30 crores. We undertake to repay the amount so

funded by NAFED over the remaining six months period (between 7th and 12th month) along with interest @ 6%.

ii. Since the fee of 1% was agreed to for 360 days usance, we request you to kindly revise the fee pro-rata to 0.5% of the L/C value.

iii. If the above are not agreeable, you may take steps for extending the L/C for a further period of 180 days on the day of expiry of the present

L/C, thus taking the total tenor to 360 days.

22. If Ex. P2 is carefully perused and considered, the petitioner only suggested

an alternative proposal for reducing the period of usuance from 360

days to 180 days and made it very clear that if the alternative proposal was not agreeable to the first respondent, then, the first respondent should

take steps for extending the Letter of Credit for a further period of 180 days on the date of expiry of the present Letter of Credit and thus taking

the total tenor to 360 days. If at all Ex. P2 establishes something, it is the offer made by the petitioner to the first respondent for amending the

contract in so far as the usuance period is concerned and it is needless to mention here that unless the same is accepted by the first respondent

either explicitly or impliedly, then, it cannot be said that Ex. P1 has been modified and altered by Ex. P2.

23. Now, let me consider Ex. P9 which was very much relied on by the learned Arbitrator to come to the conclusion that the proposals were

accepted and the contract was modified. Ex. P9 is a letter dated 11.10.2005 written by the Branch Manager of the first respondent to the

Chairman and Managing Director of the petitioner Company. As this letter i.e., Ex. P9 which is very much relied on by the learned Arbitrator to

confirm that the conditions contained in Ex. P1 were modified with regard to the usuance period, the entire letter dated 11.10.2005 is also re-

produced here for better re-appreciation.

Kindly refer to your letter dated 15.09.2005 in reply to our letter dated 13.09.2005 for the settlement of dues on the up sugar. We are surprised

to note that every letter from M/s. Thiru Arooran Sugars Limited reiterates that all terms of the contract have been met. Our observations are

submitted for your perusal:

1. Vide your letter dated 19.08.2004 it was informed that a contract for 40,000 MTs for import of Raw Sugar was finalised from a supplier

located at Geneva/Switzerland at the rate of USD 223 PMT CIF Tuticorin and it was also confirmed by your subsequent letter dated 20th August

2004 that the supplier is Cargill International, Switzerland.

2. When we have informed that Bankers are reluctant to open 360 days LC you have sent us a revised Contract from the same Supplier M/s.

Cargill International at the rate of USD 217.85 with a payment condition of 180 days LC which was duly signed by us for execution.

3. With your concurrence the above revised contract was finalised and LC opened

for 180 days was also accepted by you vide your letter

September 6, 2004.

4. However, when our LC was to be established for 180 days we have received a letter dated September 14, 2004 revising the conditions for

payment in the event of opening a 180 days L.C. instead of 360 days indicated in MOU. After opening the L.C. you also agreed vide your letter

dated September 14, 2004 that interest @ 6% shall be payable between 7th and 12th month with the reduced Service Charge of 0.5% on L.C.

value.

5. A high-sea sales agreement was made in line with the MOU vide Clause No. IV-1 of MOU which describes only the value of Invoice to be

raised on M/s. Thiru Arooran Sugars Limited while the interest payable by TASL to NAFED on NAFED''s investment is clearly spelt out in Para

7 & 8 of the MOU.

6. When a claim was made for interest vide our letter dated 13.09.2005, you have settled us only the amount payable to the Bank + 1% Service

Charges without considering the interest payable to NAFED investment for six months.

7. When the payment was made after 360th day it was informed by M/s. Thiru Arooran Sugars Limited that the Interest due for the belated period

of six months was included in the Purchase Bill of M/s. Cargill and M/s. Thiru Arooran Sugars Limited are not liable to pay interest. We may like

to inform you here that had we opened LC for 360 days the contracted rate would have been at USD 223 PMT. On your advice, we have

entered into a revised Purchase Contract @ USD 217.85 PMT with a payment condition of 180 days LC which has resulted in the benefit of INR

87.80 Lakhs to TASL at reduced Purchase Cost of USD 201880/-.

8. Vide Clause No. 4 of the MOU, raw sugar imported was to be stored in CWC/ CWC managed under hypothecation of NAFED with a tri-

party agreement between CWC, NAFED and TASL and vide Clause 10 of MOU, stocks shall be released on payment of cost plus service

charges plus interest and any other expenses incurred by NAFED. Since the stocks were not stored in CWC or CWC managed godown we had

to incur survey charges of Rs. 1,78,670/- for engaging M/s. Quality Services and Solutions (QSS) for the purpose.

9. The high-sea sale agreement dated 23.09.2004 is supplementary to the Invoice and its value and it does not cover anything about the interest on

the investment and expenses incurred by NAFED. Merely sticking to the high sea sales agreement for settlement of payment after 360 days is

simply ignoring vital clauses of the MOU governing the interest payment and expenses of NAFED. When the high sea sales agreement indicates

about the payment in dollars after 360 days and TASL should have paid us the dollar rate prevailing as on the payment due date. Instead M/s.

TASL conveniently booked Forex covers for payment at 180th day enjoying the benefits of exchange rates at reduced rates.

Adding oil to the fire you have insisted us to deposit the payments made by you before the due dates in FDs and interest received from the Banks

on FDs were also adjusted against the receivables towards the Invoice value. While we have adjusted the FD interest received towards cost of

goods UCO Bank has deducted Rs. 27,842/- towards TDS on the interest which has resulted in loss to NAFED.

From the above it may be seen that M/s. Thiru Arooran Sugars Limited has not fulfilled any contractual obligations as per MOU either in execution

or repaying the amount due to NAFED, a farmers'' cooperative.

Hence we request you to honour your commitment made by you letter dated September 14, 2004 to pay interest to NAFED @ 6% for the period

7-12 months and revising the service charges to =% and also pay the survey expenses (Rs. 1,78,670/-) incurred due to your non-fulfillment of the

storage of Stocks in CWC managed godowns and TDS (Rs. 27,842/-) deducted by UCO Bank on FDs made on your insistence.

24. In the above letter, paragraph No. 4 was very much relied on by the learned Arbitrator to come to the conclusion that both the parties

consented and agreed for the modified condition with regard to the usuance period. However, a careful perusal and consideration of the entire Ex.

P9 would not support the case of the first respondent nor the findings of the learned Arbitrator that Ex. P9 confirms the modified condition with

regard to the usuance period. As rightly pointed out by the learned counsel for the petitioner only these two exhibits i.e., Ex. P2 and Ex. P9 were

very much relied on by the learned Arbitrator to come to the conclusion that both the parties have consented for the modified condition with regard to the usuance period. But neither Ex. P2 or Ex. P9 would establish that there was consensus adidem between the parties in so far as the

proposals submitted by the petitioner in Ex. P2. Therefore, I have no hesitation in holding that the findings of the arbitrator is quite contrary to the

contents of Ex. P2 and Ex. P9 are perverse and in fact there was no material whatsoever that was produced before the learned Arbitrator to

establish the case of the first respondent that the petitioner and the first respondent consented for the modification of Ex. P1 in so far as the

usuance period is concerned and therefore, in so far as the claim made by the first respondent in this regard, that too, on the basis of the so-called

modified condition, is liable to be set aside by this Court u/s 34 of the Arbitration and Conciliation Act, 1996.

25. The judgments relied on by the learned counsel for the first respondent stipulates the circumstances under which this Court can interfere with an

award passed by the Arbitrator u/s 34 of the Act. The law laid down in those judgments are very established and I am also aware of the narrow

scope of Section 34 of the Act. However, when an award is passed, which is quite contrary to the Clauses contained in the contract, then,

certainly this Court can interfere with the same. As already narrated by me, Ex. P1, the original MOU was not at all amended or altered as

contended by the first respondent and as held by the learned Arbitrator. Once it is established that Ex. P1 is unaltered and unamended, then Ex.

P1 will hold the field and if any award is passed by the arbitrator which is not in consonance with EX. P1, then that award is illegal and the same is

liable to be set aside.

26. In the result, the award of the second respondent Arbitrator is set aside in so far as the claim of the first respondent which is based on the

modified condition.

27. In so far as the storage of stocks in CWC is concerned, the first respondent claimed a sum of Rs. 1,78,670/- for engaging M/s. Quality

Services and Sales (QSS) for the purpose. This Claim is not at all repudiated by the petitioner and therefore, the award of the second respondent

Arbitrator in so far as this amount is concerned is upheld. In the result, the Original Petition is partly allowed in the above terms. No costs.