* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment pronounced on: June 9, 2014*

\+ **O.M.P. 719/2012**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner
Through Mr.Abhishek Kumar, Adv.

versus

M/S AFCONS-APIL (JV) ..... Respondent
Through Mr.Sandeep Sethi, Sr.Adv. with Mr.Manu Seshadri & Mr.Tanmay Nandi, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. In the present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") the petitioner has assailed award dated 18th March, 2012 and modified award dated 2nd May, 2012.

2. Brief facts as set out by the petitioner are as follows:

(i) The petitioner invited bids for the work of "four laning and strengthening" of Km. 404 Hubli-Haveri section on NH-4 in Karnataka. The respondent among others, submitted its Bid on 7th March, 2001, and the petitioner awarded the work in respect of the project to the respondent vide Agreement dated 28th March, 2001. The contract price for the project was fixed at ₹1,83,65,82,676/-.

(ii) The contract was a unit rate contract that contained detailed documents – "bills of quantity" mentioning the items of work alongwith the estimated quantities of each item and their respective rates. The terms and conditions of the contract were contained in General conditions of Contract, Conditions of Particular Applications and Technical Specifications.

(iii) The works to be carried out involved the work of clearing and grubbing followed by construction of earthwork embankment in accordance with the Technical Specifications.

3. It is the case of the petitioner that during the course of construction, it was decided by the Engineer, who was appointed for the project that the respondent was not entitled to payment of earthwork for embankment below the original ground level. The respondent raised a dispute towards the decision taken by the Engineer.

4. The Engineer by his letter dated 10th October, 2003 notified his intention to the respondent that for the purposes of making payment for the work of embankment, the original ground level will be the level which was given to the respondent before commencement of the work of cleaning and grubbing. The respondent opposed the same and expressed its intention to refer the dispute to the Dispute Review Expert (DRE) vide its letter dated 21st October, 2003. However the DRE was not in existence at that point of time. The same was appointed in the month of March, 2004.

5. It has been stated by the petitioner that the respondent ought to have referred that said decision of the engineer to the DRE within

14 days of such decision or 14 days from the date when the respondent became aware about the appointment of DRE as per clause 25.1 of the Contract being a mandatory provision for adjudication of any dispute between the parties under the contract. However, respondent vide letter dated 5th October, 2005 made a claim before the DRE, which according to the petitioner was time barred.

6. By recommendation dated 18th October, 2006, DRE allowed the claim of the respondent. Being aggrieved thereof the petitioner invoked arbitration clause vide letter dated 14th November, 2006 and filed its statement of claim before the arbitrators.

7. The Arbitral Tribunal after conducting various hearings passed the Award dated 18th March, 2012 rejecting the claim of the petitioner, and decided the matter in favour of the respondent by allowing their claim for payment of embankment. The total amount of award and interest is ₹6,19,22,434/- alongwith future interest @14% .

8. The petitioner thereafter filed an application seeking modification of the award to the extent of alleged discrepancy in the calculations done by the Arbitral Tribunal in para 12.12 of the award. It was the case of the petitioner that the admissible indices on the amount awarded by the Arbitral Tribunal has been considered as 57.844% of the R-value and accordingly has applied the same percentage on the total amount of the award i.e. ₹3,07,76,185/- which was not correct. Further, the amount which has been awarded in favour of the respondent was alleged to be due since the beginning of the contract only and therefore the price adjustment applicable to the amount due to the respondent had to be calculated on the basis of

the indices pertaining to each particular interim payment certificates (IPC).

Similarly, the respondent also made the request before the learned Arbitral Tribunal on 13th April, 2012 by way of letter requesting correction of computational error in the Award dated 18th March, 2012. It was requested to the Arbitral Tribunal to correct the value of price adjustment to ₹1,78,02,176/- in para 14.1 (b) of the Award and allow further correction in the value of interest as applicable. The Arbitral Tribunal while considering both the applications filed by the petitioner as well as the respondent passed the amendment of Award dated 2nd May, 2012. The same is reproduced here below:-

> "AMENDMENT TO THE AWARD – ORDER DATED 02.05.2012
>
> 1.1 The AT received letter No.3018/PJ/31726 dated 13.04.2012 from M/s AFCONS-APIL-JV, the Respondent on the above subject. The Claimant raised certain objections to the above vide their letter No.NHAI/PIU/DWD/11011/2012/ 223 dated 23.04.2012. Later, the AT also received the response of the Respondent vide their letter No.3018/PJ/31741 dated 2nd May, 2012 to the objections raised by the Claimant in their letter dated 23.04.2012.
>
> 1.2 During an internal meeting held on 2.05.2012, the AT perused the references made by the Respondent and the Claimant mentioned above and also the subsequent response from the Respondent.
>
> 1.3 The AT finds that, right up to IPC 77, the work executed by the Respondent and the price

escalation thereon was paid correctly and the amount for the same was included in each IPC. During the processing of the final IPC-78, the total amount of work measured (after IPC-77 and up to IPC-78) as well as escalation thereon, was required to be paid to the Respondent on the basis of the cost indices applicable at the time of IPC-78. Due to incorrect deduction of Rs.3,07,76,185/- from IPC-78, this amount and the corresponding escalation amount on Rs.3,07,76,185/- @ 57.844% stood deducted from IPC-78 which has now been allowed by the AT.

1.4 In view of above, the AT does not agree with the contention of the Claimant/NHAI and holds that the escalation amount on Rs.3,07,76,185/- based on the indices applicable at the time of IPC-78, is admissible for payment to the Respondent.

2.1 The AT has re-examined the details of calculations given on Page 122 of Document XXA of the Final Bill. The amount of escalation of Rs.2,96,62,320/- is calculated for the gross amount of Rs.5,12,79,520/- after the application of R-value factor of 0.85 and using the applicable cost indices at that stage. Thus, the escalation amount already has the in-built element of R-value factor (0.85) applied to value of work.

2.2 When the price adjustment/escalation amount of Rs.2,96,62,320/- is correlated to the total amount of Rs.5,12,79,520/-, i.e., the work executed, it works out to 57.844% of the amount of Rs.5,12,79,520/-.

2.3 While calculating the escalation payable @ 57.844% on the amount of Rs.3,07,76,185/-, it was erroneous to again multiply the amount by the R-value factor of 0.85. Accordingly, the correct

amount of escalation payable works out to Rs.3,07,76,185/- x 0.57844 = Rs.1,78,02,176.45, or say Rs.1,78,02,176/-. The AWARD is amended as under.

3.1 The corrected Para 12.12 of the AWARD dated 18.03.2012, is amended and will read as under:-

"*12.12 The AT finds that the escalation on the gross amount of Rs.5,12,79,520/- of the Final Bill, based on its R-value (0.85) and as per the admissible indices at that stage works out to Rs.2,96,62,320/- in the Final Bill as per Page 122 of Document XXA. That bears a ratio of 57.844% to the gross amount of Rs.5,12,79,520/- of the work.*

Accordingly, the amount of escalation @ 57.844% payable on gross amount of Rs.3,07,76,185/-, which is due to payment under this claim, works to Rs.3,07,76,185/- x 0.57844 = Rs.1,78,02,176.45, or say, Rs.1,78,02,176/-.

The total price adjustment admissible as per terms of the Contract works out to Rs.1,78,02,176/- and is payable to the Respondent."

3.2 In view of above Para "14.0 AWARD" of the Award dated 18.03.2012, is hereby amended under Section 33 (1) (a) of the Arbitration and Conciliation Act, 1996), to read as given below:-

"14.0 AWARD

14.1 Keeping in view the findings of the AT as above, we the members of the AT unanimously make and publish the Award as under:-

(a) *We award a sum of Rs.3,07,76,186.83, say Rs.3,07,76,185/- (Rs. Three crores, seven lakhs, seventy six thousand, one hundred and eighty five only) in favour of the Respondent (M/s Afcon – Apil Joint Venture).*

(b) *The Respondent is also entitled to the price adjustment on the amount of Rs.3,07,76,185/-, as admissible under the provisions of the Contract which works out to Rs.1,78,02,176/- and we award accordingly.*

(c) *In December 2003, an amount of Rs.61,34,289 was withheld from the dues of the Respondent. This amount was adjusted/released in IPC-78 dated 10.12.2009. The Respondent is entitled to payment of simple interest @ 12.00% p.a. from 01.01.2004 up to date of IPC-78 (10.12.2009) on this amount, which works out to Rs.61,34,289/- x 0.12 x 59/12 = Rs.36,19,230/-. On this account, the AT awards Rs.36,19,230/- to the respondent.*

(d) *The amount of award shown at (a) and (b) above amounting to Rs.4,85,78,361/- (Rs.3,07,76,185/- + Rs.1,78,02,176/-) shall carry simple interest @ 12% p.a. with effect from 11.12.2009 (the date of the Final Bill-IPC-78), up to the date of Award i.e. 18.03.2012 and it works out to Rs.1,31,16,157/-. The AT awards Rs.1,31,16,157/- to the Respondent on this account.*

(e) *The total awarded amount thus works out to Rs.3,07,76,185/- + Rs.1,78,02,176/- +*

Rs.36,19,230/- + Rs.1,31,16,157/- i.e. Rs.6,53,13,748/- (Rupees Six crores, fifty three lakhs, thirteen thousands, seven hundred and forty eight only).

We direct that the Claimant/NHAI shall make payment of the Award amount, i.e. Rs.6,53,13,748/- (Rupees Six crores, fifty three lakhs, thirteen thousands, seven hundred and forty eight only) to the Respondent, M/s. Afcons – Apil Joint Venture, by 30.06.2012 (Thirtieth day of June Two Thousand and Twelve), failing which the Respondent shall also be paid future interest on awarded amount of Rs.6,53,13,748/- (Rupees Six crores, fifty three lakhs, thirteen thousands, seven hundred and forty eight only), @ 14% p.a. with effect from 19th March, 2012 till the date of actual payment to them.

(The rate of future interest is normally considered reasonable in the range of PLR + 1 to 2%. It is a matter of common knowledge that now a days PLR is definitely more than 13% (Thirteen percent). So accordingly, 14% p.a., as the rate of future interest has been considered as reasonable by AT)."

9. It appears from the said Award dated 2nd May, 2012 that the application of the petitioner was rejected and the amended award was passed. Aggrieved thereof, the petitioner has filed the present petition.

10. When the petition was listed for hearing before Court, by order dated 24th August, 2012, this Court had issued limited notice in the petition only confined to the issue of uniform price index for allowing

price escalation payable to the respondent on account of the illegal retention of the amounts due to be paid to the respondent for carrying out earthwork in embankment as per the contract. The said order has not been challenged by the petitioner. The reply, therefore, is also filed to confine to the said issue only.

11. The challenge to the award on the aspect of price adjustment is on the allegation that price adjustment has been awarded on the complete amount of the claim on the basis of price indices prevailing at the time of the final bill and that could not have been awarded as the price indices were different for each IPC. Learned counsel for the petitioner has submitted that the Arbitral Tribunal failed to appreciate that the meaning of "work" in Clause 305 was synonymous to "Work" as defined in Clause 1.1 of the Contract. The 'work' means the entire work for which the contract was entered into between the parties and not any particular work as held by the Arbitral Tribunal. The work of embankment was the first work of construction in the contract, hence, the word 'work' means the entire construction work and not any particular work, hence, the award being contrary to the only interpretation of the contractual clauses is liable to be set-aside by this Court.

12. It is also submitted by the petitioner that by awarding price escalation as per the indices prevailing at the stage of final bill which could not have been awarded in any manner. In para 12.12 of the Award, the Arbitral Tribunal has considered the admissible indices as 57.844% of the R-value and accordingly has applied the same percentage on the total amount of the award, i.e. ₹ 3,07,76,185/-, which is absolutely incorrect. The amount which has been awarded

in favour of the respondent was alleged to be due since the beginning of the contract period and, therefore, the price adjustment applicable to the amount allegedly due to the respondent had to be calculated on the basis of the indices pertaining to each particular IPC. The price adjustment for the amount due under each IPC had to be paid on the basis of the price indices at the time of issuance of such IPCs and not current price indices existing at the time of the final bill.

13. Having heard the learned counsel for the parties, it is the admitted position that by order dated 24th August, 2012, the limited notice was issued only confined to the issue of uniform price index for allowing price escalation payable to the respondent on account of the illegal retention of the amounts due to be paid to the respondent for carrying out earthwork in embankment as per the Contract. At that time it was also recorded that the issues of clearing and grubbing and earthwork in embankment have already been held against the petitioner in similar cases decided by this Court. The further contention, that the respondent approached the Dispute Review Expert (DRE) with delay, has also been rightly rejected by this Court. Therefore, the issues of clearing and grubbing, earthwork in embankment, the decision of DRE have been rightly adjudicated by the Arbitral Tribunal in accordance with the contract between the parties and the evidence on record. The said determination by the Arbitral Tribunal has been upheld by this Court by order dated 24th August, 2012 whereby the *lis* between the parties in the present petition is reduced to a very narrow compass, viz. relevant applicable

index for price escalation. No appeals against the said order appears to have been filed by the petitioner.

14. In the reply to the petition, the respondent has stated that payments along with the price adjustment were paid by the petitioner to the respondent all the way upto IPC-77. As the sum of ₹3,07,76,186/- was wrongly withheld from IPC-78 (final bill) by the petitioner, the Arbitral Tribunal rightly applied the cost indices applicable at the time of IPC-78 for making an award towards price adjustment.

15. It is not disputed that the petitioner has paid the earthwork quantity alongwith applicable price adjustment in terms of contract up to the penultimate bill (IPC 77) which was accepted by the petitioner and respondent. In final bill (IPC 78), the petitioner withheld an amount of ₹3,07,76,186/- on account of the change in method of measurement. As the amount was withheld in the final bill (IPC 78), the corresponding price adjustment payment applicable at the stage of the final bill was also withheld. The Arbitral Tribunal had determined the corresponding price adjustment amount to the withheld amount by applying the cost indices applied by the petitioner in IPC 78. Thus, the issue of price adjustment does not arise with respect to the other IPC's as alleged by the petitioner.

16. The price adjustment/escalation under the contract are paid on various components namely other materials (all commodities), labour, cement, steel (bar & rods), plant and machinery, spares, POL, and bitumen. In IPC 78 the petitioner has certified the total escalation amount on the above components as ₹2,96,62,320/- for a certified work done value of ₹5,12,79,520/-. The learned Arbitral Tribunal has

determined the percentage of escalation amount paid in IPC 78 (final bill) by dividing the certified escalation amount of ₹2,96,62,320/- (paid by petitioner using escalation formula as per contract) with certified value of work done of ₹5,12,79,520/- (R value) which is 2,96,62,320/ 5,12,79,520 x 100 = 57.844%. The sum of the individual escalation components added as per the contract formula is 57.844% as well. As the withheld work value of ₹3,07,76,185/- was made in IPC 78 (final bill) the corresponding escalation amount applicable to IPC 78 was withheld at the rate of 57.844%. The Tribunal while determining the price adjustment, determined the same as ₹1,78,02,176/- (i.e. ₹3,07,76,185 x 57.844%). Therefore, no interference is called for in the application of the price index by the Tribunal which is apparently done as per the contract and evidence on record available.

17. While deciding the price escalation, the Arbitral Tribunal has applied the same cost indices as applied by the petitioner at that stage (i.e., stage of IPC 78 which is the Final Bill). The allegation that separate price indices have to be applied at different stages, whereas the Tribunal adopted a uniform price index in determining the escalation permissible is devoid of merit. In this regard, reference is made to the following paragraphs 12.5 to 12.12 of the Award :

> "12.5 We find that the Engineer had correctly recommended vide his letter No.RNM/as/10.1.863 dated 19.07.2003 (RD-1 page 41) to the Claimant to consider ground levels (NGL) following the removal of organic soil as the payment criteria for the embankment volume in accordance with the Technical Specifications Clause 305.8. Accordingly, the Respondent was paid for all the IPCs right up to IPC No.-77 on the basis of these recommendations of the Engineer.

12.7 On a query by the AT through the minutes of internal Meeting dated 18.10.2010, the Respondent submitted a compilation of documents under letter No.31248 dated 28.10.2010 (RD-20). The compilation contained a copy of the IPC 77, the last bill paid to it and also a copy of the Final Account Statement marked IPC-78. It also sent the calculation sheets of earthwork for various IPCs, marked as RD-21.

12.8 IPC-78 was duly checked by the Engineer and a note dated 10.12.2009 by the Engineer on the final bill was placed at page 89 of Document (RD-XX-A) that the bill was drawn by adopting the OGL before C & G as the base level for computation of earthwork in embankment. The Claimant also submitted its comments on this submission vide letter dated 4.11.2010 (CD-XXVI).

12.9 From IPC – 77, as submitted by the claimant, it is evident that earth work in embankment was recorded under BOQ Item No.2.02, as 28,23,483.000 Cum as limited to BOQ quantity and balance quantity of 39,451.653 Cum was recorded under Variation Order No.10 dated 27.09.2003.

12.10 In IPC-78, the quantity of earthwork in embankment was measured and recorded under BOQ Item No.2.02, as 23,58,407.30 Cum and the quantity of 39,451.653 under variation order No.10 was deleted and adjusted. The reduction came about as the 'base line' for measurement was changed to 'ground level' (before C & G) instead of NGL. This resulted in reduction in the quantity of earthwork executed in embankment by 5,04,527.653 cum. However, both parties confirmed that base levels at OGL as well as NGL adopted in two methods, were both jointly recorded and verified at the appropriate stage of execution of work.

12.11 The reduction in value of earthwork of 5,04,527.653 cum at the BOQ rate of Rs.61.00/ cum worked out to

Rs.3,07,76,186.83 which was paid less in the Final Bill (IPC-78) and consequently the amount of escalation payable against this amount also got paid less/not paid whereas, the contractor is entitled to escalation on this amount of Rs.3,07,76,186.83 also under contract provisions.

12.12 We find that the escalation on the amount of Rs.5,12,79,520/- (R-Value) of Final Bill, as per admissible indices at this stage has been worked out as Rs.2,96,62,320/- in the Final Bill as per sheet page 122 of Document XXA, which is 57.844% of Rs.5,12,79,520/- (R-Value)

The amount of escalation @ of 57.844% payable on amount of Rs.3,07,76,185/- which is due for payment under this claim, thus works out = 0.85 x Rs.3,07,76,185/- x 0.57844 = Rs.1,51,31,849.98 say Rs.1,51,31,850/-.

So this total price adjustment admissible as per terms of the Contract as worked out to Rs.151,31,850/- is payable to the Respondent."

Scope of interference in Section 34

18. i) In the case of ***Sudarsan Trading Co. vs. Govt. of Kerala & Anr.***, AIR 1989 SC 890, it was held as under:

"The next question on this aspect which requires consideration is that only in a speaking award the court can look into the reasoning of the award. It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in Hindustan Steel Works Construction Ltd. v. C. Rajassekhar Rao, [1987] 4 SCC 93. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount.

> He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In absence of any reasons for making the award, it is not open to the court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator. See the observations of this Court in Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar & Anr., [1987] 4 SCC 497.
>
> Once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the arbitrator and on which court cannot substitute its own decision. The court cannot, however, substitute the decision of the arbitrator as to what was meant by the contract once that dispute is conceded to the arbitrator.
>
> The High Court, in our opinion, had no jurisdiction to examine the different items awarded clause by clause by the arbitrator and to hold that under the contract these were not sustainable in the facts found by the arbitrator."

ii) In the case of ***Jivarajbhai Ujamshi Sheth and Ors. vs. Chintamanrao Balaji and Others***, AIR 1965 SC 214, it was held as under:

> "18. An award made by an arbitrator is conclusive as a judgment between the parties and the Court is entitled to set aside an award if the arbitrator has misconducted himself in the proceedings or when the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration

proceedings have become invalid under Section 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid (S 30 of the Arbitration Act). An award may be set aside by the Court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. As observed in Chempsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd. 50 Ind App 324 at p. 331 (AIR 1923 PC 66 at P. 69):

> "An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the "arbitrator stating the reasons for his judgment, same legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in S.30. It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it

is not disclosed by the terms of his award. But the arbitrator has in the present case expressly stated in his award that in arriving at his valuation, he has included the depreciation and appreciation of the property, outstandings and dead-stock, and in so doing in our judgment the arbitrator has travelled outside his jurisdiction and the award is on that account liable to be set aside. The question is not one of interpretation of paragraph 13 of the partnership agreement but of ascertaining the limits of his jurisdiction. The primary duty of the arbitrator under the deed of reference in which was incorporated the partnership agreement, was to value the net assets of the firm and to award to the retiring partners a share therein. In making the "valuation of the firm", his jurisdiction was restricted in the manner provided by paragraph 13 of the partnership agreement."

iii) In the case of ***Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd.***, (2009) 10 SCC 63, it was held as under:

> "29. The legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with regard to construction of a contract, if it is a possible view of the matter. The words "no award shall be set aside" in Section 30 mandate the courts not to set aside the award on the ground other than those specified in Section 30. In a case such as this, where the arbitrator has given elaborate reasons that compensation Clause 7.2 is not attracted for the breaches for which the compensation has been claimed by the respondent and such view of the arbitrator is a possible view, we are afraid in the circumstances, award is not amendable to correction by the Court."

iv) The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. In the present case the parties

by themselves have agreed in the contract to accept the Award as final and conclusive. The Supreme Court has expounded on the principle as to the sanctity of the decision of the arbitrator in the case of ***Markfed Vanaspati and Allied Industries vs. Union of India***, (2007) 7 SCC 679 = 2007 (3) Arb. LR 437 (SC), where in paragraph 17 of the said judgment it was observed as under:

> "17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honor and support the award as far as possible."

19. The scope of Section 34 of the Arbitration and Conciliation Act, 1996 is limited to the stipulations contained in Section 34(2) of the Act. The jurisdiction of the Court to interfere with an Award of the Arbitrator is always statutory. Section 34 is of mandatory nature, and an Award can be set aside only on the Court finding the existence of the grounds enumerated therein and in no other way. The words in Section 34(2) that "*An Arbitral Award may be set aside by the Court only if*" are imperative and take away the jurisdiction of the Court to set aside an Award on any ground other than those specified in the Section. The Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. A recent observation of the Supreme Court in the case of ***P.R. Shah, Shares and Stock Brokers Private Limited vs. B.H.H. Securities Private Limited And Others***, (2012) 1 SCC 594 = 2011 SCACTC 604 (SC) = 2011 (4) Arb. LR 128 (SC) is apposite in this

regard and the relevant portion, contained in paragraph 21 of the said judgment is, reproduced as under :

> "21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

20. Even if the additional grounds under Section 34, as laid down by the Supreme Court in the case of ***ONGC vs. Saw Pipes Ltd.***, AIR 2003 SC 2629 = 2003 (2) Arb. LR 5 (SC), are considered, which are patent illegality arising from statutory provisions or contract provisions or that the Award shocks the conscience of the Court, no such facts are narrated in the Petition. The endeavor of the petitioner is thus to convert the challenge to the Arbitral award into an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and which endeavor as per the consistent dicta of the Supreme Court is impermissible in law.

It is settled law that the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct. The entire objections of the petitioner, as contained in the grounds, are contrary to the scheme of Section 34 of the Arbitration and Conciliation Act, 1996. There is no averment in the petition as to the existence of any illegality that is apparent on the face of the Arbitral award.

21. In the present case, there is no error in the interpretation of the contract clauses by the Arbitral Tribunal. However even if it were to be assumed, without admitting, that the contention of the petitioner is correct even then this Court would not interfere with the Arbitral award for the reason that it is settled law that an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction. The Supreme Court in the case of ***Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd.***, (2009) 10 SCC 63 = 2009 SCACTC 467 (SC) = 2009 (3) Arb. LR 466 (SC) has summarized the law on this point, in paragraph 26 of the said judgment, as follows:

> "26. (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award."

22. The findings of the learned Arbitral Tribunal to the issue of awarding price escalation as per the indices prevailing at the stage of final bill are correct findings of fact that are in consonance with the contract between the parties. The objections of the petitioner are thus without any merit.

23. In view of the above said circumstances, there is no infirmity in the application of the price index by the Arbitral Tribunal which is as per the Contract and the evidence on record, the price index having been correctly dealt with by the Tribunal. Notice was not issued with regard to other issues raised by the petitioner in the present petition, who has also not challenged the order dated 24th August, 2012. Thus, it is not necessary to discuss other issues.

24. The petition is accordingly dismissed.

25. No costs.

(MANMOHAN SINGH)
JUDGE

JUNE 9, 2014