

**IN THE COURT OF JUDGE, COMMERCIAL COURT
(DISTRICT JUDGE CADRE), COIMBATORE**

Present: **Thiru. A.S.Ravi, B.Sc., M.L.,**
Judge,
Commercial Court (District Judge Cadre),
Coimbatore

Tuesday, the 27th day of February, 2024

Arbo.O.P. No.54 of 2023

[Coimbatore, P.D.J, Court Old Arbo.O.P.No.77 of 2017]
(CNR No.TNCB01-000393-2017)

Arbo.O.P. No.55 of 2023

[Coimbatore, P.D.J, Court Old Arbo.O.P.No.100 of 2017]
(CNR No.TNCB01-000591-2017)

Arbo.O.P. No.56 of 2023

[Coimbatore, P.D.J, Court Old Arbo.O.P.No.199 of 2017]
(CNR No.TNCB01-001232-2017)

&

Arbo.O.P. No.57 of 2023

[Coimbatore, P.D.J, Court Old Arbo.O.P.No.200 of 2017]
(CNR No.TNCB01-001231-2017)

Arbo.O.P. No.54 of 2023

M/s. HNB Engineers Pvt. Ltd.,
rep. by its Managing Director Aditya Bhat,
office at HENABH Center,
No.1326, Shukrawar Peth,
off. Bajirao road, Pune

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Vs

Petitioner

1. Coimbatore City Municipal Corporation,
rep. by its Commissioner, Coimbatore.

2. M/s. TVRCPL-HNBEPL (JV)
Rohini Apartments, No.7-1-32/A, G1,
Leela Nagar, Ammerpet, Hyderabad.

3. M/s. TVR Constructions Pvt. Ltd.,
Office at Rohini Apartments,
No.7-1-32/A, G1, Leela Nagar,
Ammerpet, Hyderabad.

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Respondents

Arbo.O.P. No.55 of 2023

1. Coimbatore City Municipal Corporation,
rep. by its Commissioner,
Town Hall, Coimbatore – 1.

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Petitioner

Vs

1. M/s. TVRCPL-HNBEPL (JV)
Rohini Apartments, No.7-1-32/A, G1,
Leela Nagar, Ammerpet, Hyderabad.

2. M/s. TVR Constructions Pvt. Ltd.,
Office at Rohini Apartments,
No.7-1-32/A, G1, Leela Nagar,
Ammerpet, Hyderabad.

3. M/s. HNB Engineers Pvt. Ltd.,
rep. by its Managing Director Aditya Bhat,
office at HENABH Center,
No.1326, Shukrawar Peth,
off. Bajirao road, Pune

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Respondents

Arbo.O.P. No.56 of 2023

1. M/s. TVRCPL-HNBEPL (JV)
rep. by its Authority signatory KSN Sathish
Rohini Apartments, No.7-1-32/A, G1,
Leela Nagar, Ammerpet, Hyderabad

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Petitioner

Vs

1. Coimbatore City Municipal Corporation,
rep. by its Commissioner, Coimbatore.

2. M/s. HNB Engineers Pvt. Ltd.,
rep. by its Managing Director Aditya Bhat,
office at HENABH Center,
No.1326, Shukrawar Peth,

off. Bajirao road, Pune
3. M/s. TVR Constructions Pvt. Ltd.,
rep. by its Managing Director KSN Sathish
Office at Rohini Apartments,
No.7-1-32/A, G1, Leela Nagar,
Ammerpet, Hyderabad.

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Respondents

Arbo.O.P. No.57 of 2023

M/s. TVR Constructions Pvt. Ltd.,
rep. by its Managing Director KSN Sathish
Office at Rohini Apartments,
No.7-1-32/A, G1, Leela Nagar,
Ammerpet, Hyderabad.

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Petitioner

Vs

1. Coimbatore City Municipal Corporation,
rep. by its Commissioner, Coimbatore.

2. M/s. HNB Engineers Pvt. Ltd.,
rep. by its Managing Director Aditya Bhat,
office at HENABH Center,
No.1326, Shukrawar Peth,
off. Bajirao road, Pune

3. M/s. TVRCPL-HNBEPL (JV)
rep. by its Authority signatory KSN Sathish
Rohini Apartments, No.7-1-32/A, G1,
Leela Nagar, Ammerpet, Hyderabad

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Respondents

These petitions came up for final hearing before me on 08.02.2024 in the presence of Thiru. M.V.Shankar, Advocate for the petitioner and 2nd respondent, Thiru. S.Chandran, Advocate for the 1st Respondent Corporation and M/s. Ramani & Shankar, Advocates for the 3rd respondent and upon perusing the records, and having stood over for consideration till this date, this court doth pass the following:-

COMMON ORDER

The consortium company M/s. TVRCPL-HNBEPL (JV) formed by consortium partners of M/s. HNB Engineers Pvt. Ltd., and M/s. TVR Constructions Pvt. Ltd., has preferred the petition in Arbo.O.P.No.54 of 2023; Coimbatore City Municipal Corporation preferred the petition in Arbo.O.P.No.55 of 2023; one of the partners of consortium company M/s.TVRCPL-HNBEPL (JV) preferred the petition in Arbo.O.P.No.56 of 2023; and another consortium partner M/s. TVR Constructions Pvt. Ltd., preferred the petition in Arbo.O.P.No.57 of 2023 under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award dated 07.12.2016 passed by the Arbitral Tribunal. For the sake of brevity, M/s.TVRCPL-HNBEPL (JV), who is the consortium company, is hereinafter referred to as “**Petitioner Consortium Company**” and Coimbatore City Municipal Corporation is hereinafter referred to as “**1st Respondent Corporation**” and M/s. TVR Construction Pvt. Ltd., is hereinafter referred to as “**2nd Respondent**” and M/s. HNB Engineers Pvt. Ltd., who is the another partner of consortium company, is hereinafter referred to as “**3rd Respondent**”.

2. **Case of the petitioner Consortium M/s.TVRCPL-HNBEPL (JV) and adopted by the 2nd respondent M/s. TVR Construction Pvt. Ltd.,:-**

2(a). The 1st respondent corporation floated a tender for providing underground sewerage network with trunk sewers, laterals, rider mains, inspection chambers and connecting inspection chambers and sewers with service connection etc., at Zone IV and VIII (Package III) in Coimbatore City Municipal Corporation. The petitioner consortium company was formed comprising the 2nd and 3rd respondents for the purpose of participating in Tender and a consortium agreement dated 15.04.2009 was executed between them. A power of attorney dated 15.04.2009 was also executed authorizing Mr. K.S.N.Sathish, who is the Managing Director of the 2nd respondent to perform all actions pursuant to the tender. The petitioner consortium company applied for the bids, which consisted of technical bid and financial bid. Along with the bid, a deposit EMD of Rs.48,00,098/- was also made. Since the petitioner consortium company satisfied the qualification criteria, the 1st respondent corporation sent the letter of acceptance on 14.07.2009 fixing the cost of contract at Rs.122,05,46,256/- and they entered into an agreement dated 24.08.2009 and accordingly 2% of contract value of Rs.2,44,11,000/- was furnished by the petitioner consortium company in favour of the 1st respondent corporation towards performance of bank guarantee. Prior to the receipt of mobilization advance amount of Rs.5 crores, the petitioner consortium company infused their own money to satisfactory performance of the contract. A delay in grant of funds delayed the project and started creating a financial crunch for the

petitioner consortium company. The petitioner consortium company sent their letter dated 05.10.2010 to the 1st respondent corporation stating several hurdles in the execution of the project. This petitioner consortium company has taken several efforts to show progress in the work despite the hurdles faced by them and despite the steep increase in the cost of construction materials. The 1st respondent corporation is responsible for the delay. The 1st respondent corporation had unilaterally terminated the contract by their letter dated 16.12.2011 and violated the terms of the contract. Since, no response was received from the 1st respondent corporation, the petitioner consortium company preferred a petition before the Hon'ble High Court of Madras in O.P.No.68 of 2012 seeking appointment of an arbitrator. The said O.P. is still pending. The 1st respondent corporation went on to wrongfully and to the petitioner consortium company's disadvantage issue another work tender for the contract value of Rs.110.84 crores and one SEW-AIPPL (JV) was awarded the contract. Against which, the petitioner consortium company also filed the petition under Sec.9 of Arbitration and Conciliation Act in O.P.No.26 of 2012 before the Hon'ble High Court of Madras and the same was dismissed on 27.04.2012. Subsequently the petitioner consortium company filed writ petition in W.P.No.24773 of 2012 seeking a direction to re-entrust the contract to the petitioner consortium company and the same was also disposed-off on 25.09.2012 with a direction to consider the request of the petitioner consortium company. The lapses on the

part of the 1st respondent corporation had only led to slow progress and loss to the petitioner consortium company. The petitioner consortium company had raised a claim on 24.12.2012. Pending the said Arbitration proceedings on 06.11.2012, the 1st respondent corporation filed a petition seeking to implead the 2nd and 3rd respondents; and on 17.01.2013, the 1st respondent corporation filed a counter claim claiming Rs.7,51,45,270/- as amounts already spent by the Corporation and Rs.33.65 crores for completion and balance of work. Subsequently, the Arbitral Tribunal allowed the impleading petition. As per the clause 28 of General Condition of Contract, the 1st respondent corporation had the authority to extend the time frame for completion of work. The 1st respondent corporation has blamed the respondents for the delay in the project and also invoked the bank guarantee to the tune of Rs.2,77,24,273/- However, the Arbitral Tribunal passed the award on 07.12.2016 dismissing the claim statement of the petitioner consortium company and allowed the counter claim of the 1st respondent corporation. Aggrieved over the said award, the petitioner consortium company preferred a petition under Sec.34 of the Act in Arbo.O.P.No.56 of 2023 (old Arbo.O.P.No.199 of 2017) to set aside the said award on the following grounds and to allow the claim of the petitioner consortium company:-

- a) The award of the Arbitral Tribunal conflicts with the Public and Fundamental Policy of India.

- b) The petitioner consortium company being the dominus litus, the impleading application filed by the 1st respondent corporation was not maintainable.
- c) The Arbitral Tribunal conflicts with Sec.74 of the Indian Contracts Act.
- d) The Arbitral Tribunal has failed to appreciate that the 1st respondent corporation has not suffered any legal injury or loss and hence ought not to have awarded any compensation.
- e) The 1st respondent corporation mischievously issued a show cause notice in November 2009, just four months after the signing of the agreement to show cause why liquidated damages should not be levied.
- f) The Arbitral Tribunal has erred in observing that the termination of contract by the 1st respondent corporation was valid when the 1st respondent was the one responsible for breach of contract.
- g) The Arbitral Tribunal has failed to note that the act of handing over possession of site was distinct from the act of issuance of notice to commence work, even according to the contract.
- h) The Arbitral Tribunal has failed to make a recording on the letter dated 23.10.2009 and 09.11.2009 sent by the petitioner consortium company seeking for documents to work on the designs.

- i) The 1st respondent corporation stood in violation of Clause 24 and 25 of the Contract by not having appointed an adjudicator as per the Contract to resolve the disputes between the parties.
- j) The Arbitral Tribunal has failed to consider that the pending bills have not been paid and in fact by the 1st respondent's corporation own admittance had been adjusted against their unsustainable claim of penalty.
- k) The Arbitral Tribunal has also failed to consider the loss faced by the petitioner even due to delayed payments by the 1st respondent.
- l) The petitioner consortium company suffered a loss of Rs.2,94,00,000/- towards payment withheld and Rs.80,00,000/- towards loss out of non-adjustment of price adjustment mechanism, and the petitioner consortium company also suffered a loss of Rs.39,63,658/-
- m) The award prima facie fails to take into consideration the loss suffered by the 3rd respondent towards loss of profit margin upto Rs.22,64,29,185/- had the 1st respondent abided by the terms of the contract and acted duly.
- n) The award is patently illegal and deserves to be set aside.

2(b). The petitioner consortium company further contended in their counter in Arbo.O.P.No.54 and 55 of 2023, which is adopted by the 2nd respondent that the 3rd respondent being partner of the Joint Venture cannot take a stand contra to the joint venture floated by the 2nd and 3rd respondents jointly.

There were no material irregularities or glaring discrepancies in the tender document submitted by the petitioner consortium company as claimed by the 3rd respondent. The petitioner consortium company prays to discard the allegations made by the 3rd respondent against the petitioner and the 2nd respondent as false. Hence, the petitions in Arbo.O.P.No.54 and 55 of 2023 are liable to be dismissed with costs.

3. Case of the 1st Respondent Corporation:-

3(a). The petitioner consortium company was the successful bidder for the said contract at Coimbatore and entered into contract agreement dated 24.08.2009. The petitioner consortium company is a consortium company consisting of 2nd and 3rd respondents by way of Consortium agreement dated 15.04.2009. The work was entrusted to the petitioner consortium company at the cost of Rs.122.05 crores and the work order was issued by the 1st respondent corporation vide its office proceeding dated 24.08.2009. As per the clause 5 of the Consortium agreement dated 15.04.2009, the 2nd and 3rd respondent shall be jointly and severally responsible to the 1st respondent corporation. From the beginning the petitioner consortium company did not show proper interest to execute the work as per the terms of the contract. The petitioner consortium company was interested only in getting the mobilization advance of Rs.5 crores. But, the petitioner consortium did not utilize the said money to purchase the

tools and materials. Without adequate labour force and technical persons the petitioner consortium could not able to perform the work in accordance with the terms of contract. As per the terms of the contract the entire work must be completed within a period of 30 months i.e., on or before 23.01.2012. But on the said date even 25% of the work could not be completed by the petitioner consortium company. On inspection it was noticed that the sewer lines were not executed with proper alignment and the construction of man-holes were not in conformity with agreement specifications. The 1st respondent corporation issued show cause notice dated 22.08.2011 asking to come for a discussion, but the same did not complied by the petitioner consortium company and so the matter was placed before the Council of the 1st respondent corporation. There were number of complaints from the general public. Thereafter by an order dated 16.12.2011 of the 1st respondent corporation the agreement dated 24.08.2009 was terminated. After following the due tender process the work was assigned to a third party contractor for the contract value of Rs.143.65 crores. The petitioner consortium company raised the arbitration proceeding by challenging the termination of contract. In the said arbitral proceeding, the 1st respondent corporation filed a counter claim After elaborate trial, the Arbitral Tribunal passed the award dated 07.12.2016. Aggrieved by that portion of the award dated 07.12.2016, the 1st respondent corporation filed the petition in Arbo.O.P.No.55 of 2023 (old Arbo.O.P.No.100 of 2017) on the following

grounds and prays to allow the entire counter claim amount of Rs.9.19 crores without any restriction:-

- a) The Arbitral Tribunal has erred in holding the counter claim of the 1st respondent corporation as far as the street and road restoration works. The actual expenses of the said work was Rs.9,19,00,000/- but it was restricted to 20%.
- b) As per the Article 54 of the General Conditionals and Contract agreement dated 24.08.2009, any defective work will be remedied by engaging other contractor at any cost and that cost will be recovered from the contractor's money and so, the 1st respondent corporation is entitled for the entire cost of Rs.9,19,00,000/-
- c) In view of breach of contract committed, the Arbitral Tribunal should have granted interest at the rate of 18% per annum on the sums due for the period prior and during pendency of the Arbitration.

3(b). The 1st respondent corporation further contended in their counter in Arbo.O.P.No.54, 56, and 57 of 2023 that the various averments of the petitioner consortium company, the respondents 2 & 3 are unsustainable. The Hon'ble High Court of Madras already held that the amendments to be retrospective. Therefore, the contention of the 2nd and 3rd respondents would not apply to the facts of the present case. No prima facie case was made out by the 2nd and 3rd respondents. The Arbitral Tribunal after referring to Ex.R9, R13 and R18 had

held that the alleged delay could not have caused any delay in the progress of the contracted work and further the Arbitral Tribunal after referring to Ex.R30, R31, R35, R36 and R37 and also oral evidence had clearly held that the petitioner consortium company did not use the mobilization advance for the purpose subject contract work. Further, the 3rd respondent has failed to prove that experience certificate issued by the Pimper, Chinchwad Municipal Corporation has been tampered with. The 3rd respondent continues to be the partner of the petitioner consortium company even during the course of this Arbitral proceeding. There was an inordinate delay in the progress of the work and the petitioner consortium company had also committed breach of contract. The various grounds raised by the petitioner consortium company, 2nd and 3rd respondents are unsustainable. Hence, the petitions in Arbo.O.P.No.54, 56 and 57 of 2023 are liable to be dismissed with costs.

4. Case of the 3rd Respondent M/s. HNB Engineers Pvt. Ltd.,

4(a). The 3rd respondent is engaged in the business of designing, construction, commissioning and operation and maintenance of sewage treatment plants (STPs). The 1st respondent corporation invited tender for providing underground drainage in Zonal IV and VIII vide package III, contract No.3/2009/UGSS. The 3rd respondent and the 2nd respondent entered into a consortium agreement dated 15.04.2009 to form a Joint Venture, i.e., petitioner

consortium company (TVRCPL-HNBEPL) with the object of pooling their resources for submitting a joint tender. The profit/loss and liabilities sharing ratio was that the 2nd respondent TVRCPL – 95% and the 3rd respondent HNBEPL - 5%. The petitioner consortium company did not fulfill the said experience criterion at the time of submission of bids. The 3rd respondent sent a letter dated 04.05.2009 enclosing laminated certificate. At that time the 3rd respondent was not aware as to which certificates were being tampered with. The petitioner consortium company did not have sufficient experience to be eligible for award of contract, but the 1st respondent corporation finally awarded the contract to the petitioner consortium company and issued a letter of acceptance on 14.07.2009. The contract price after final negotiation was Rs.122,05,46,256/- and accordingly the security deposit of Rs.2,44,11,000/- is to be furnished within 15 days of the receipt of the letter of acceptance. After the security was furnished, the 1st respondent corporation entered into a contract agreement dated 24.08.2009 with the petitioner consortium company and thereafter the 1st respondent corporation issued a work order dated 24.08.2009 and stipulated that the time period for completion of the project was 30 months. Due to various reasons and disputes, the 1st respondent corporation terminated the contract by its letter dated 16.12.2011 citing that the work abruptly stopped from August 2011 onwards. The 3rd respondent's involvement in the entire execution was minuscule i.e., only 5%. Even though the 1st respondent

corporation has asked the various representative of the petitioner consortium company to attend the meeting along with the 3rd respondent vide its letters dated 25.11.2010 and 17.07.2011, neither the petitioner consortium company nor the 1st respondent corporation had bothered to forward those communications to the 3rd respondent. Thereafter, the dispute between the petitioner consortium company and the 1st respondent corporation was referred to the Arbitral Tribunal. The 3rd respondent did not authorize the 2nd respondent or the petitioner consortium company to file any proceedings as against the 1st respondent corporation. The 2nd respondent as lead partner has the right to enter into the bid and execute the contract and does not have any right to initiate any proceedings on behalf of the 3rd respondent. The 3rd respondent has not participated in the process of appointment of the arbitrator. The 1st respondent corporation sought to enlarge the scope of the Arbitral proceedings by impleading the 2nd and 3rd respondents. Despite objections by the 3rd respondent, the Arbitral Tribunal impleaded the 3rd respondent as a party by its order dated 13.03.2014. The documents obtained under RTI by the 3rd respondent establish that the experience certificate of the 3rd respondent had been tampered and forged purportedly by both the 2nd and 1st respondent corporation. Three conditions mentioned in the tender document have to be complied for being eligible for award mandatory. The deadline for submission of bids in the present tender was to be on 15.04.2009 and the same was later extended to 29.04.2009

by the 1st respondent corporation. The 1st respondent corporation had ensured that the petitioner consortium company had submitted the bid security in compliance with the tender requirement. The 1st respondent corporation did not check compliance with the pre-qualification criteria the prospective bidder of having a net worth of Rs.48.83 crores. The 2nd respondent did not have the financial qualification to be eligible for awarding tender. This has been also admitted by the Rw1 in his cross examination. The evaluation report was formulated on 20.05.2009. Prior to this report, this 3rd respondent had forwarded the correct Navi Mumbai Municipal Corporation certificate to the 1st respondent corporation. The 1st respondent corporation has purposefully ignored glaring discrepancies in the bid of the petitioner consortium company, which was prepared and submitted by the 2nd respondent. The Arbitral Tribunal by way of an award dated 07.12.2016 has dismissed the claim of the petitioner consortium company and the allowed the counter claim of the 1st respondent corporation. Aggrieved over this award, the 3rd respondent has filed the petition in Arbo.O.P.No.54 of 2023 (Old Arbo.O.P.No.77 of 2017) on the following grounds to set aside the same.

- a) The Arbitral Award is against the principal of natural justice and is trite law.
- b) The Arbitral Tribunal has failed to consider that the 3rd respondent did not authorize the 2nd respondent to file any proceedings as against the 1st respondent corporation.

c) The Arbitral Tribunal has failed to appreciate that after receiving the notice in the impleading petition, the 3rd respondent was aware that the arbitral proceedings was initiated by the 2nd respondent under the name and style of petitioner consortium company ‘TVRCPL-HNBEPL JV’.

d) The Arbitral Tribunal has failed to appreciate that any counter claim filed by the 1st respondent corporation can be only with reference to the ‘particular dispute’ and the scope of the counter claim cannot be beyond the scope of the claim petition.

e) In view of provisions of Sec.17 to Sec.22 of the Contract Act, the initiation of the arbitral proceedings by the petitioner consortium company is bad in law and the petitioner consortium company did not have the authority in terms of the Consortium company Agreement dated 15.04.2009 to initiate the present arbitral proceedings.

f) The Arbitral Tribunal has failed to appreciate the dictum laid down in Sanganer Dal and Flour Mill Vs FCI and others – 1992 (1) SCC 145, National Small Industries Corporation Ltd., Vs Punjab Tin Printing and Metal Industries and others – ILR 1979 (1) Del 381, Bhagvan Manaji Marwadi and others Vs Hiraji Premaji Marwadi – AIR 1932 (Bom) 516 and Alagappa Cotton Mills Vs Indo Burmah Trading Corporation and others, AIR 1976 (Mad) 79.

g) The Arbitral Tribunal has failed to consider that when the claim petition was originally filed, the 3rd respondent was not impleaded and they impleaded

only consequent to the Counterclaim made by the 1st respondent corporation vide the Arbitral Tribunal order dated 13.03.2014 in the impleading application.

h) The Arbitral Tribunal has held that consortium company agreement gets bodily lifted and gets incorporated in Ex.R1 in which at page No.90 (Ex.R85) contains an arbitration clause to resolve the dispute between the 2nd respondent and the 3rd respondent. While consortium agreement is bodily lifted, this arbitration clause cannot be segregated and left alone.

i) The Arbitral Tribunal has failed to consider that the words 'Laying of Pipeline' were never contained in the experience certificate issued by Navi Mumbai Municipal Corporation.

j) The Arbitral Tribunal has erred in holding that the petitioner consortium company possessed the eligibility criteria for being awarded the tender in package No.3, Contract No.3/2009/UGSS.

k) The documents based on which tender was awarded were forged and tampered, the very substratum for awarding the tender does not exist. The 1st respondent corporation was fully aware of the forgery prior to the award of contract.

l) The Arbitral Tribunal has failed to appreciate that the proprietor of M/s. TVR Construction namely K.S.N.Satish has not produced any documentary evidence to substantiate his Income tax returns for a substantial period prior to the year 2005-2006 to show how opening account balance is claimed to be

Rs.43,32,74,403/- as claimed at the time of submission of bids and not considering the discrepancy in the balance sheet of M/s. TVR Constructions as on 31.03.2008.

m) The petitioner consortium company did not have the requisite access to credit facilities of Rs.19.53 crores as required in the Tender Clause 4.5 (b and c).

n) The Arbitral Tribunal has failed to consider the collusion between the 1st respondent corporation and the 2nd respondent which has been proven by RTI application of Ex.R85 to Ex.R87.

o) The 1st respondent corporation has not denied the receipt of email or fax or letter dated 04.05.2009a and 06.05.2008 from the 3rd respondent.

p) The Arbitral Tribunal has erred in allowing the counter claim of the 1st respondent.

q) The proof of loss has not been established by the petitioner consortium company in order to maintain a claim for damages as per Sec.72 and 73 of the Contract Act.

r) The Arbitral Tribunal has awarded the counter claim of the 1st respondent corporation for a sum of Rs.13,08,65,385/- without attributing any reason for the same. Hence, the Arbitral award is liable to be set aside.

4(b) The 3rd respondent further contended in their counter in Arbo.O.P.No.55, 56 and 57 of 2023 that the 3rd respondent was nowhere involved in the completion of the project and day-to-day activities of the

petitioner consortium company and according to the consortium agreement, the 2nd respondent was the lead partner. The power contained in the Consortium agreement dated 15.04.2009 were limited and specific in nature and did not permit the 2nd respondent to espouse their cause by filing claims or initiating proceedings as against the 1st respondent corporation. The 2nd respondent was responsible for execution of the project and the 3rd respondent did not participate at all in the activities of the project. Further the letters sent by the 1st respondent corporation to the petitioner consortium company has not been forwarded to this 3rd respondent at any point of time. The reference of dispute and the claim petition before the Arbitral Tribunal was preferred by the petitioner consortium company unilaterally and there was no specific authorization by this 3rd respondent to file any proceedings as against the 1st respondent corporation. The Arbitral Tribunal has failed to take into account various factors such as the non-participation of this 3rd respondent in the appointment of Arbitral Tribunal and the lack of consent of before initiation of the proceedings and wrongfully allowed this 3rd respondent to be impleaded as a party therefore enlarging the scope of the Arbitral Tribunal. The Arbitral Tribunal has erred in overlooking the proven fact that the experience certificate of this 3rd respondent allegedly issued by Navi Mumbai Municipal Corporation had been tampered and forged purportedly by the 2nd respondent in connivance with the 1st respondent corporation. The document received under RTI Act from the 1st respondent

corporation show that a letter was merely written to Navi Mumbai Corporation and the same was never sent to them. No reply was received from Navi Mumbai Corporation confirming the genuineness of the certificate. The Arbitral Tribunal overlooked the material irregularities and tampering of experience certificate and discrepancies and misrepresentation of financial worthiness of the 2nd respondent while passing the award dated 07.12.2016 in favour of the 1st respondent corporation. The counter claim of Rs.9,19,00,000/- is fanciful, exaggerated and without any basis. The Arbitral Tribunal ought not to have awarded even a part of counter claim i.e., Rs.1,83,80,000/- as no record or evidence pertaining to the street and road restoration work done by the new contractor and no proof of payment for such work done were submitted by the 1st respondent corporation. The cost of Rs.9,19,00,000/- was incurred towards the cost of carrying out remedial work has failed to substantiate the same with proof and evidence. The 1st respondent corporation is not entitled to any interest at the rate of 18% per annum. Hence, the petitions in Arbo.O.P.No.55, 56 and 57 of 2023 are liable to be dismissed with exemplary costs.

5. The 2nd respondent has no counter in Arbo.O.P.No.56 of 2023, which is filed by the petitioner consortium company and the petitioner consortium company has also no counter in Arbo.O.P.No.57 of 2023, which is filed by the 2nd respondent.

6. Point for consideration:-

1. Whether the Award dated 07.12.2016 passed by the Arbitral Tribunal, is liable to be set aside?
2. To what other relief the parties are entitled to?

7. Admittedly,

- The 1st respondent corporation floated a tender for providing underground sewerage network at Zone IV and VIII (Package III) in Coimbatore City Municipal Corporation.
- The petitioner consortium company was formed comprising the 2nd and 3rd respondents for the purpose of participating in Tender.
- A consortium agreement dated 15.04.2009 was executed between them.
- A power of attorney dated 15.04.2009 was also executed by the 2nd respondent.
- The profit/loss and liabilities sharing ratio was that the 2nd respondent TVRCPL – 95% and the 3rd respondent HNBEPL - 5%.
- The petitioner consortium company applied for the bids, which consisted of technical bid and financial bid and deposited EMD of Rs.48,00,098/-.
- The petitioner consortium company was the successful bidder for the said contract at Coimbatore.

- The 1st respondent corporation sent the letter of acceptance on 14.07.2009 fixing the cost of contract at Rs.122,05,46,256/- and they entered into an agreement dated 24.08.2009.
- Accordingly 2% of contract value of Rs.2,44,11,000/- was furnished by the petitioner consortium company in favour of the 1st respondent corporation towards performance of bank guarantee.
- The 1st respondent corporation issued show cause notice dated 22.08.2011 asking to come for a discussion, but the same did not comply by the petitioner consortium company and so the matter was placed before the Council of the 1st respondent corporation.
- Thereafter by an order dated 16.12.2011 of the 1st respondent corporation the agreement dated 24.08.2009 was terminated.
- Thereafter, the work was assigned to a third party contractor for the contract value of Rs.143.65 crores.
- The petitioner consortium company preferred a petition before the Hon'ble High Court of Madras in O.P.No.68 of 2012 seeking appointment of an arbitrator, which is still pending.
- The petitioner consortium also filed the petition under Sec.9 of Arbitration and Conciliation Act in O.P.No.26 of 2012 before the Hon'ble High Court of Madras and the same was dismissed on 27.04.2012.

- Subsequently, the petitioner consortium filed writ petition in W.P.No.24773 of 2012 seeking a direction to re-entrust the contract to the petitioner consortium company and the same was also disposed-off on 25.09.2012 with a direction to consider the request of the petitioner consortium company.
- The petitioner consortium company initiated the arbitration proceeding by challenging the termination of contract.
- On 06.11.2012. the 1st respondent corporation filed a petition seeking to implead the 2nd and 3rd respondents and on 17.01.2013, the 1st respondent corporation filed a counter claim.
- The Arbitral Tribunal passed the award dated 07.12.2016.
- Aggrieved by that portion of the award dated 07.12.2016, all the parties have filed applications under Sec.34 of Arbitration and Conciliation Act.

8. According to the petitioner consortium and the 2nd respondent that the 1st respondent corporation had unilaterally terminated the contract by their letter dated 16.12.2011 and violated the terms of the contract; the 1st respondent corporation has blamed the respondents for the delay in the project and also invoked the bank guarantee to the tune of Rs.2,77,24,273/-; the 1st respondent corporation is responsible for the delay; and the 2nd respondent cannot be impleaded as party as not a party to the agreement. The learned counsel for the

petitioner consortium company and 2nd respondent has placed the reliance on the following judgment to their case.

- **Nathulal Vs Phoolchand, 1969 (3) SCC 120**
- **Maula Bux Vs Union of India, 1969 (2) SCC 554**
- **M/s. Hind Construction Contractors Vs State of Maharashtra, 1979 (2) SCC 70**
- **Sir Chunilal V.Mehta and Sons Ltd., Vs Century Spinning and Manufacturing Co. Ltd., 1962 SCC 57**
- **Fateh Chand Vs Balkishan Dass, 1963 SCC 49**
- **M.Chinnaiyan Vs Kasthuri Radhakrishnan and others, 2020 (3) LW 351**
- **M/s. Deepam Constructions Vs The Government of Tamilnadu, 2022 (3) LW 734**
- **ONGC, Cauvery Asset, Vs M/s. Steel and Grip, 2021 (4) LW 825.**
- **Patel Engineering Ltd., Vs North Eastern Electric Power Corporation Ltd., 2020 (7) SCC 167.**
- **Ssangyong Engineering and Construction Company Ltd., Vs National Highways Authority of India (NHAI), 2019 (15) SCC 131**
- **Associate Builders Vs Delhi Development Authority, 2015 (3) SCC 49**
- **Kailash Nath Associates Vs Delhi Development Authority and another, 2015 (4) SCC 136.**

9. The 1st respondent corporation contended that the petitioner consortium consisting of 2nd and 3rd respondents by way of Consortium agreement dated 15.04.2009; as per the clause 5 of the Consortium agreement dated 15.04.2009, the 2nd and 3rd respondent shall be jointly and severally

responsible to the 1st respondent corporation; from the beginning, the petitioner consortium company did not show proper interest to execute the work as per the terms of the contract; without adequate labour force and technical persons, the petitioner consortium could not able to perform the work in accordance with the terms of contract; as per the terms of the contract the entire work must be completed within a period of 30 months i.e., on or before 23.01.2012, but on the said date even 25% of the work could not be completed by the petitioner consortium company; on inspection, it was noticed that the sewer lines were not executed with proper alignment and the construction of man-holes were not in conformity with agreement specifications; and hence, the agreement was terminated. The learned counsel for the 1st respondent corporation has placed the reliance on the following judgment to support their case.

- **Project Director, Tamil Nadu Road Sector Project II Vs RNS Infrastructure Ltd., 2018 (2) CTC 593**
- **National Highway Authority of India Vs Transstory (India) Ltd., dated 11.07.2022**
- **SEI Adhavan Power Pvt. Ltd., Vs Jinneng Clean Energy Technology Ltd., 2018 (4) CTC 464**
- **Union of India Vs M/s. Chaturbhai M.Patel and Company, 1976 (1) SCC 747**
- **South Eastern Coalfields Ltd., and others Vs M/s. S.Kumar's Associates AKM (JV), 2021 SAR (Civil) 883**
- **K.Chellamuthu and Company Vs Union of India, Coimbatore Central Division, 2019 (1) CTC 533**

10. The 3rd respondent contended that the 3rd respondent and the 2nd respondent entered into a consortium agreement dated 15.04.2009; the profit/loss and liabilities sharing ratio was that the 2nd respondent TVRCPL – 95% and the 3rd respondent HNBEPL - 5%; the petitioner consortium company did not fulfill the said experience criterion at the time of submission of bids; the 3rd respondent sent a letter dated 04.05.2009 enclosing laminated certificate; at that time, the 3rd respondent was not aware as to which certificates were being tampered with; the petitioner consortium company did not have sufficient experience to be eligible for award of contract; due to various reasons and disputes, the 1st respondent corporation terminated the contract by its letter dated 16.12.2011 citing that the work abruptly stopped from August 2011 onwards; neither the petitioner consortium company nor the 1st respondent corporation had bothered to forward the communications of meetings to the 3rd respondent; the 3rd respondent did not authorize the 2nd respondent or the petitioner consortium company to file any proceedings as against the 1st respondent corporation; the 3rd respondent has not participated in the process of appointment of the arbitrator; despite objections by the 3rd respondent, the Arbitral Tribunal impleaded the 3rd respondent as a party by its order dated 13.03.2014; the documents obtained under RTI by the 3rd respondent establish that the experience certificate of the 3rd respondent had been tampered and forged purportedly by both the 2nd and 1st

respondent corporation; the 1st respondent corporation did not check compliance with the pre-qualification criteria; the 2nd respondent did not have the financial qualification to be eligible for awarding tender; prior to this report, this 3rd respondent had forwarded the correct Navi Mumbai Municipal Corporation certificate to the 1st respondent corporation; and the 1st respondent corporation has purposefully ignored glaring discrepancies in the bid of the petitioner consortium company, which was prepared and submitted by the 2nd respondent. The learned counsel for the 3rd respondent has placed the reliance on the following judgment to support their case.

- **Sanganer Dal and Flour Mills Vs FCI and others, 1992 (1) SCC 145**
- **National Small Industries Corporation Ltd., Vs Punjab Tin Printing and Metal Industries and others, ILR 1979 (1) Del. 281**
- **Bhagvan Manaji Marwadi and others Vs Hiraji Premaji Marwadi, AIR 1932 (Bom) 516**
- **Alagappa Cotton Mills Vs Indo Burmah Trading Corporation and others, AIR 1976 (Mad) 79**
- **Maharashtra State Electricity Distribution Company Ltd., Vs Godrej and Boyce Manufacturing Company Ltd., 2020 (1) AIR (Bom) R 211**
- **VG Santhosam and others Vs Shanthi Gnanasekaran and others, 2020 (1) LW 892**
- **Malavika Rajnikant Mehta and others Vs JESS Construction, 2022 SCC online (Bom) 920**
- **Deutsche Post Bank Home Dinnace Ltd., Vs Taduri Sridhar and another, dated 29.03.2011, AIR 2011 (SC) 1899**
- **Ukravel Vs Senthil Murugan and others, 2015 (1) MWN (Civil) 503**

- **P.R. Shah Shares and Stock Brokers Pvt. Ltd., Vs BHH Securities Pvt. Ltd., and others, 2012 (1) SCC 594.**
- **Kehar Singh Vs Hukam Singh and others, dated 25.10.2013**
- **Abhibus Services India Pvt. Ltd., and others Vs Pallavan Transport consultancies Services Ltd., and others, dated 04.02.2022**
- **Arupri Logistics Pvt. Ltd., Vs Vilas Gupta and others, 2003 SCC online (Del) 4297**
- **Satyendra and others Vs Saroj and others, 2022 SCC online (SC) 1026**
- **Ssangyong Engineering Vs NHAI, 2019 (15) SCC 131**
- **Delhi Airport Metro Express Pvt. Ltd., Vs Delhi Metro Rail Corporation Ltd., 2022 (1) SCC 131.**
- **M.Mythrai Vs. T.Ramesh, dated 02.02.2021**
- **Daimler India Commercial Vehicles Pvt. Ltd., Vs Sea Land Infrastructures Pvt. Ltd., and others, dated 08.08.2022.**
- **A.Ayyasamy Vs. A.Paramasivam and others, AIR 2016 (SC) 4675.**

11. Before considering the points that have been raised by Section 34 petition, this court deems it appropriate to set out the scope of a legal drill under Section 34 of the said Act. A legal drill under Section 34 has to perambulate within the statutory perimeter sketched by the said Act which has been elucidatively explained in a long line of authorities, more particularly in **Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49**, which was further explained by Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Limited Vs. National Highways**

Authority of India reported in (2019) 15 SCC 131. The principle qua a legal drill under Section 34, set out in a nutshell is, it is neither an appeal nor a revision. It is not even a full-fledged judicial review. It is a mere challenge to an award within the pigeon holes adumbrated under Section 34. If a protagonist of a Section 34 is able to demonstrate to the Court that his claim fits into, nay fits snugly into one or more of the pigeon holes, the protagonist will be entitled to have the arbitral award dislodged. If that not be so, the court will not venture into disturbing the arbitral award by judicial intervention. This in effect is a fine and delicate balance between minimum judicial intervention principle ingrained in Section 5 read with sanctity of finality of arbitral award ingrained in Section 35 on one side and default provision i.e., Section 34 predicated on judicial review which is an essential ingredient of Rule of Law on the other. To put it differently, this court is not sitting in appeal qua the impugned award. This court reminds itself that it is a Section 34 Court and the legal drill has to perambulate within the statutory perimeter sketched by the said Act as elucidatively explained by Hon'ble Supreme Court in the aforementioned case laws which are instructive.

12. The law is settled that a Sec.34 legal drill is a summary procedure. This principle was laid down by Hon'ble Supreme Court in **Fiza Developers and Inter-Trade Private Limited Vs AMCI (India) Private Limited reported in (2009) 17 SCC 796.** Fiza Developers principle was held to be a step in the

right direction by Hon'ble Supreme Court in **Emkay Global case being Emkay Global Financial Services Ltd., Vs Girdhar Sondhi reported in (2018) 9 SCC 49**. Drawing inspiration from Fiza Developers and Emkay Global principles, the Hon'ble High Court in exercise of powers under Section 82 of the said Act has made Rules 'The Madras High Court (Arbitration) Rules, 2020' and most relevant clause is clause 8.5 of Practice Directions thereat, which reads as follows: "Proceedings under Section 34 of the Act shall be disposed of by a summary procedure." The Court while exercising jurisdiction under Section 34 of Arbitration & Conciliation Act is precluded from finding fault with every finding of the Arbitral Tribunal without there being substantial materials.

13. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract. (**Indian Oil Corporation Ltd., Vs Shree Ganesh Petroleum Rajgurunagar (2022 LiveLaw (SC) 121 : (2022) 4 SCC 463 (Para 44)**). The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral

award, only because the Court is of the opinion that another possible interpretation would have been a better one. **(Indian Oil Corporation Ltd., Vs Shree Ganesh Petroleum Rajgurunagar, 2022 LiveLaw (SC) 121 : (2022) 4 SCC 463 (Para 46))**. The jurisdiction conferred on Courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. If there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. **(UHL Power Company Ltd., Vs State of Himachal Pradesh, 2022 LiveLaw (SC) 18 : (2022) 4 SCC 116 (Para 15-21))**.

14. The petitioner consortium and 2nd respondent contended that

1. Sec.31(2) of Arbitration and Conciliation Act not complied with.
2. Non signatory to arbitration agreement cannot be added as party and made liable.
3. Award against fundamental policy of India under Sec.74 of Contract Act.
4. Award in violation of Sec.28 of Contract Act
5. Time not essence of the contract
6. Award ignored vital evidence

15. The 3rd respondent cannot contend that

1. The petitioner consortium company did not have sufficient experience to be eligible for award of contract.
2. The 2nd respondent as lead partner has the right to enter into the bid and execute the contract and does not have any right to initiate any proceedings on behalf of the 3rd respondent.
3. The 3rd respondent has not participated in the process of appointment of the arbitrator.
4. Despite objections by the 3rd respondent, the Arbitral Tribunal impleaded the 3rd respondent as a party by its order dated 13.03.2014.
5. The documents obtained under RTI by the 3rd respondent establish that the experience certificate of the 3rd respondent had been tampered and forged purportedly by both the 2nd and 1st respondent corporation.
6. Three conditions mentioned in the tender document have to be complied for being eligible for award mandatory.
7. The 1st respondent corporation did not check the pre-qualification and the 2nd respondent did not have the financial qualification to be eligible for awarding tender.
8. The 1st respondent corporation has purposefully ignored the fraud and forgery committed by the 2nd respondent.

16. On scanning of the said award, it is clear that all the arbitrators have put their signatures and copy was served on the petitioner consortium and the 2nd respondent and as such, the question of non compliance of Sec.31(2) and Sec.31(5) does not arise. Admittedly, the 3rd respondent and the 2nd respondent entered into a consortium agreement dated 15.04.2009 to form a Joint Venture, i.e., petitioner consortium company (TVRCPL-HNBEPL) for submitting a joint tender. The profit/loss and liabilities sharing ratio was that the 2nd respondent TVRCPL – 95% and the 3rd respondent HNBEPL - 5%. Subsequently, the petitioner consortium and the 1st respondent corporation entered to a contract dated 24.08.2009. The petitioner consortium received advance of Rs.5 Crores, but did not purchase any materials and did not complete the contract within the time stipulated in the agreement. Due to various reasons and disputes, the 1st respondent corporation terminated the contract by its letter dated 16.12.2011 citing that the work abruptly stopped from August 2011 onwards.

17. The Hon’ble Madras High Court, while discussing the pigeon-hole theory, in **M/s.Color Home Developers Private Limited Vs Messrs Color Castle Owners Society, decided on April 5, 2022** has held that, “Section 34 legal drill is neither an appeal nor a revision. It is not even a full-fledged judicial review. It is a limited challenge to an arbitral award under specific legal slots adumbrated in sub-sections(1) and (2) besides standalone (2A) of Section 34 of

A and C Act which have been described as 'pigeon holes'. The test is whether a challenge to an arbitral award fit nay snugly fits into any one or more of the 'legal slots' described by this Court as 'pigeon holes', if the answer is in the affirmative, arbitral award will be dislodged. If that not be so, there will be no judicial intervention.” The Arbitral Tribunal framed 17 issues, namely entitlement of notice to the 3rd respondent, valid reference of dispute to arbitration, the petitioner consortium satisfies pre-qualification conditions, appointment of adjudicator is necessary before termination of contract, extension of contract period is necessary, breach of contract, termination of contract is valid, counter claim is maintainable, amount claimed by both parties, compensation and interest. Issue No.3 and 9 are one and the same, discussed the evidence in detail and passed an award. The applicability of Sec.28 and 74 of Contract was well considered by the Arbitral Tribunal.

18. Breach of Contract and Time is essence:- The 1st respondent corporation called upon the petitioner consortium to proceed with the work by Ex.R2 Letter dated 24.08.2009. After 45 days, the petitioner consortium sent Ex.R3 Letter dated 09.10.2009 to hand over the site. The 1st respondent corporation sent Ex.R4 Reply dated 19.10.2009, it was two zones and 18 wards and no formal handing over is necessary and advised to commence the work. On 11.01.2010, the petitioner consortium submitted drawings and designs for six

out of 17 wards. Further drawings and designs were submitted only on 23.03.2010. First mile stone was not achieved, which was informed through Ex.R20 dated 07.04.2010. The petitioner consortium sent reply on 17.11.2010 as if the drawings and designs were not approved. First inspection by third party letter was sent on 16.11.2009. The advance amount was not utilised for procurement of equipments, which can be seen in Ex.R30, Ex.R31, Ex.R33, Ex.R56, Ex.R35 to Ex.R38, Ex.R45, Ex.R48 and Ex.R54. Ex.R1 - page 59 says that the work has to be completed by the intended completion date as defined in clause 1.3. The same also mentioned in Ex.R1 - page 79 and 80 clause 49 as time is the essence of the contract.

19. Failure, Inadequate and Damages:- The 1st respondent corporation also informed the failure of adequate materials and equipments at the work site through Ex.R30, Ex.R31, Ex.R35, Ex.R37, Ex.R39, Ex.R42 and Ex.R42. The defects in the work also explained in Ex.R7, Ex.R11, Ex.R12, Ex.R15, Ex.R22, Ex.R25 and Ex.R26. Cw1 also admitted that the work was not completed and only 26% was completed. The said documents would prove that the petitioner consortium breached the contract. For each and every's delay in completion by the intended completion date, the liquidated damages payable as per contract data. Thus, the petitioner consortium cannot contend that the time is not the essence off the contract. The absence of adequate work force also duly

informed by the 1st respondent corporation through Ex.R22, Ex.R23, Ex.R30, Ex.R34, Ex.R35 and Ex.R48, but no response from the petitioner consortium. The maximum amount of liquidated damages for the whole value of the works is 10% of final contract price. As total value was Rs.122,05,46,256/-, the 1st respondent corporation claimed Rs.1,20,54,625/- towards liquidated damages. The expenses spent for incomplete work after termination of notice and damages were also discussed at paragraph 79 to 83 of the award in detail. Even though, the 1st respondent corporation claimed Rs.31,56,58,192/-, the Arbitral Tribunal has also taken note of damages and also expenses incurred at Rs.23,97,55,388/- and after deducting Rs.10,88,90,003/- and granted the award of Rs.13,08,65,385/- in favour of the 1st respondent corporation, which is reasonable.

20. The reason for delay alleged by the petitioner consortium namely political out fit and Chemmozhi Maanadu also rightly rejected by the Arbitral Tribunal. The Arbitral Tribunal also rejected the other claims of the 1st respondent corporation and pre award period interest. Having participated in the bid and became a successful bidder and received the advance amount of Rs.5 cores and failed to complete the contract in time, now, the petitioner consortium and 2nd and 3rd respondent disputed the termination notice. When the arbitral tribunal decided all the factual issues in detail and accepted one view, this court

cannot choose another view under Sec.34 of Arbitration and Conciliation Act. This court cannot re-appreciate the evidence as appellate court. The 1st respondent corporation has also not established that the arbitral tribunal failed to consider their evidence regarding other damages and pre award period interest.

21. **3rd Respondent is not a Third Party:-** Admittedly, the 2nd and 3rd respondents entered into a Partnership deed and registered their petitioner consortium firm under Registrar of Firm and both are parties to the agreement. In Contract Agreement dated 24.08.2009, the petitioner consortium agreed that the Consortium Agreement is also part of this agreement dated 24.08.2009. In Consortium Agreement dated 15.09.2009, the 2nd and 3rd respondent signed as parties. In the said contract, clause 14 reveals the arbitration clause. Paragraph 3 of the counter also, the 3rd respondent admitted the said same. No reply was sent to the termination notice issued by the 1st respondent corporation. No oral evidence has been adduced by the 3rd respondent. Cw1 admitted all the said facts. Further, the 3rd respondent issued authorization letter dated 15.04.2009 to the 1st respondent corporation. The petitioner consortium and 3rd respondent also admitted the consortium agreement and arbitration clause at page 61 Conditions of the Contract. In page 4 paragraph 12 of consortium agreement also, the bank account clause are specifically mentioned. As per the said clause, the 2nd and 3rd received 5 Corers in their joint account. Having received the said huge amount,

the 3rd respondent cannot contend that they should not have been impleaded as party to the arbitration tribunal.

22. Admittedly, the 3rd respondent is a partner and having 5% share in the partnership firm. The Arbitral Tribunal has rightly held that the 3rd respondent is a necessary party. It is true that no partner has an implied authority to submit a dispute to arbitration and notice of commencement of arbitration is a sine qua non for commencement of arbitration. It is the case of the 3rd respondent that their application under Sec.11 is pending before the Hon'ble High Court and as such, the impleading of the 3rd respondent on the application of the 1st respondent corporation is a jurisdictional error. If the 3rd respondent is not a party to the Consortium Agreement and Partnership deed, then they can claim that no proper notice was served on them and as per Sec.19(2) of Partnership Act and Sec.21 of Arbitration and Conciliation Act, they should not have been impleaded as parties to the arbitral proceedings and the arbitral tribunal did not satisfy the mandatory requirement of Sec.17 to 22 of Partnership Act.

23. It is further argued by the 3rd respondent that impleading a 3rd party to the counter claim is not permissible by submitting the aforesaid citations. However, this court also feels that when the 3rd respondent is a party to the partnership deed and consortium agreement, in which, arbitration clause is

clearly mentioned, the question of impleading a 3rd party to the counter claim does not arise. If the 3rd respondent is not a partner of the petitioner consortium and not a party to the consortium agreement, then, they can claim that they are only a 3rd party to the arbitral proceedings. As per Sec.25 of Partnership Act, every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done, while he is a partner. As rightly held by the Arbitral Tribunal, the 3rd respondent is not a 3rd party, but is a proper and necessary party to the said proceedings as partner of the petitioner consortium and as such, they have been rightly added as party and also held liable along with the 2nd respondent in respect of the breach of contract and loss or other acts committed by the petitioner consortium. Admittedly, three party agreement is admitted. The 3rd petitioner consortium cannot contend that the 2nd respondent as lead partner has the right to enter into the bid and execute the contract and does not have any right to initiate any proceedings on behalf of the 3rd respondent. This court also feels that the principle of Group of Companies referred by the Arbitral Tribunal also cannot be found fault and the citations submitted by the 3rd respondent, though good law on principle, not applicable to this case on hand on all four as the 3rd respondent is a party and submitted to the jurisdiction of the Arbitral Tribunal.

24. **Forgery and Fraud not affected:-** Similarly, the qualification of the 2nd respondent, capacity in completing the contract, experience certificate of the 3rd respondent had been tampered and forged and three conditions mentioned in the tender document have to be complied for being eligible for award mandatory are also clearly answered by the Arbitral Tribunal, which is a factual issues and not covered under Sec.34 of Arbitration and Conciliation Act. The parties agreement cannot be declared invalid based on the charge of fraud simpliciter alone. Accordingly, the disputes arising out of allegations of fraud can be duly resolved through arbitration if and only if the allegation does not include serious allegations. In the present case also, there is no allegation of fraud in the consortium agreement, but it is alleged only in respect of the certificate of the 2nd respondent submitted for tender. Both parties admitted that the petitioner consortium company did not fulfill the said experience criterion at the time of submission of bids.

25. The 3rd respondent contended that they sent a letter dated 04.05.2009 enclosing laminated certificate and at that time, the 3rd respondent was not aware as to which certificates were being tampered with. Having joined with the 2nd respondent, entered into the partnership deed and participated in the bid as joint venture company, after failing to complete the contract, now the 3rd respondent cannot say that the 2nd respondent committed fraud in submitting the

tender. It is true the liability of partners shall be limited except in case of unauthorized Acts, fraud and negligence and the partners shall not be personally liable for the wrongful acts or omission of any other partner. Even assuming that it is a fraud, forgery and collusion, this court feels that it will not go into the root of the consortium agreement. It is between the 2nd respondent and the 1st respondent corporation. Thus, this court rejected all the grounds raised by the 3rd respondent as it would not cover under Sec.34 of the Act.

26. **Conclusion:-** When the Arbitral Tribunal has already analyzed all issues, the proviso to Section 34(2A) forbids this court to re-appreciate the evidence. It also forbids examination of the matter on merits. In any event, post *Ssangyong*, it is well settled that a review of an award on merits is impermissible in a Section 34 legal drill. This takes us to as to the question as to whether the view taken by Arbitral Tribunal is an implausible view. As regards preponderance of probabilities, after all that is the degree of proof in all civil cases. Even in this perspective, in and by Section 19 of the said Act, both Evidence Act and 'The Code of Civil Procedure, 1908 (5 of 1908)' do not apply to the proceedings before Arbitral Tribunal and therefore, this Court finds that there is no ground for judicial intervention under Section 34. This Court hastens to add that if the legal drill was under Section 96 of C.P.C., the scenario may well have been a little different but that is a completely forbidden area and

therefore, this Section 34 Court refrains itself from going into that aspect of the matter. Suffice to stop the discussion on this aspect of the matter on hand here. This takes this Court to the argument of impugned award being contrary to the covenants of said contract. To put it in legal parlance, it is a Section 28(3) plea. Section 28(3) of the Act was amended from 23.10.2015. Amended Section 28(3) reads as follows:- '28(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.

27. Admittedly, the 2nd and 3rd respondents are partners of the petitioner consortium and entered into the contract with the 1st respondent corporation, but failed and neglected to fulfill their part of the contract. When they breach the terms of the contract, they are liable to compensate the 1st respondent corporation. Thus, the question of impleading the 3rd party in the counter claim, fraud, forgery and collusion does not arise. The other arguments are relating to appreciation of oral and documentary evidence by the Arbitral Tribunal. The Arbitral Tribunal has properly assessed and appreciated the materials available before it in a proper perspective. The Tribunal has assigned proper and convincing reasons while answering claims put forth by the petitioner consortium and counter claim of the 1st respondent corporation. The materials available on record justify the reasoning adopted and findings given on the claim

of the petitioner consortium and counter claims of the 1st respondent corporation by the Arbitral Tribunal. There are no grounds to interfere with the impugned award. No question of bias, perverse, fraud, against public policy of india and patent illegality arose in passing an award.

28. In view of the discussion made above, this Arbitral O.P. filed by the 3rd respondent in Arbo.O.P.No.54 of 2023; the 1st respondent Corporation in Arbo.O.P.No.55 of 2023; the petitioner consortium in Arbo.O.P.No.56 of 2023; and the 2nd respondent in Arbo.O.P.No.57 of 2023 under Sec.34 of Arbitration & Conciliation Act 1996 to set aside the impugned award dated 07.12.2016 passed by the Arbitral Tribunal are hereby dismissed and the said award is confirmed. No costs.

Directly to the Steno-Typist, directly Computerized by him, Corrected and Pronounced by me, on the 27th day of February, 2024.

Judge,
Commercial Court,
(District Judge Cadre)
Coimbatore

List of Witnesses and Documents:- Nil

Judge,
Commercial Court,
(District Judge Cadre)
Coimbatore