

**IN THE COURT OF THE LXXXIII ADDITIONAL CITY CIVIL
AND SESSIONS JUDGE AT BENGALURU CITY [CCH-84]**

:Present:

**Ravindra Hegde,
M.A., LL.M.,
LXXXIII Addl. City Civil & Sessions Judge,
Bengaluru**

Dated on this the 22nd day of October 2021

COM.A.S.No.233/2018

Plaintiff

M/s. Nitesh Residency Hotels Pvt. Ltd.,
Nitesh time Square,
7th Floor, No.8, M.G.Road,
Bengaluru-560001.
Represented by its
Authorized Representative
Mr. M.K.Swamy
S/o K. Veerabrahmam.
Aged about 54 years.

(By Sri.V.H, Advocate)

// versus //

Defendants

- 1.** M/s. Ani Marbles & Granites,
A-106, Sector -5,
Noida-201301 (UP)
Also at No.9, Austin Town Layout,
NorthStreet (East), Nerelasandra,
Bengaluru-560047.
- 2.** Hon'ble Mr. Justice R.Gururajan(Retd)
Former Judge,
High Court of Karnataka,
'Sri Hari Krupa',
No.504, 5th Floor, Chitrapura Appts,
15th Cross, Mallswaram,
Bengaluru-560003.

- 3.** Hon'ble Mr.Justice Jagannathan(Retd)
Former Judge,
High Court of Karnataka,
No.221, 7th Main,
2nd Cross, Judicial Layout,
Thalaghattapura, Kanakapura Road,
Bengaluru-560062.
- 4.** Hon'ble Mr.Justice Ajit J.Gunjal(Retd)
Former Judge,
High Court of Karnataka,
'Lakshmi Kunj', No.95,
7th Main, Vijayanagar,
Bengaluru-560040.

**(D.1 by Sri.M.G.S.K, Advocate
D.2 to D.4 – Arbitrators)**

Date of Institution of the suit	:	17/11/2018		
Nature of the suit	:	Arbitration Suit		
Date of commencement of recording of the evidence	:			
Date on which the Judgment was pronounced.	:	22/10/2021		
Total duration	:	Year /s	Month/s	Day/s
		02	11	05

JUDGMENT

This petition U/S.34 of the Arbitration & Conciliation Act is filed by the plaintiff praying to set aside the Arbitral

Award dated 17/8/2018 passed by the learned Arbitral Tribunal of defendants No.2 to 4.

2. The plaintiff was the claimant before the Arbitral Tribunal and defendant No.1 was the respondent. Defendants No.2 to 4 are the learned arbitrators. Parties are referred to by their respective ranks as appeared before the Arbitral Tribunal for the sake of convenience.

3. Brief facts of the case are as under;

Claimant is the company and has constructed huge building consisting of luxurious hotel with luxurious and world class ambiance. Claimant invited various tenders for different works and respondent shown interest in the said work and letter of acceptance dated 6/8/2011 was issued by accepting the final offer of the respondent dated 28/6/2011 for hard scape work. The respondent had agreed to complete the work within the time prescribed. Claimant made timely payments to facilitate the respondent No.1 to expedite and complete the works and on several occasions even made payment in advance. Though, claimant performed its part of contract by making payments from time to time after discussions with their surveyors and cost consultants, the internal audit report revealed several discrepancies on the part of the respondent and the respondent failed to adhere to the terms of the letter of acceptance and work orders issued. Despite irregularities and non performance on the part of the respondent, respondent was approaching claimant time and

again seeking payment which are not due and payable by the claimant and in fact as per the internal audit report, claimant issued notice to the respondent to compensate the claimant for the breach of agreement, damages and losses suffered by the claimant by its letter dated 14/5/2015. The claimant finally decided to initiate arbitration as provided in the hard scape work contract and by notice dated 28/4/2016 appointed his Arbitrator and respondent has also appointed his Arbitrator and the Arbitrators appointed the presiding Arbitrator and thereby learned Arbitral Tribunal consisting of defendants No.2 to 4 is formed. Before the learned Arbitrator, claimant filed claim petition and respondent filed his objection and also made a counter claim for which claimant filed objection. The Arbitral Tribunal framed issues and after recording evidence has passed the award on 17/8/2018 and rejected the claim of the claimant and partly allowed the claim of the respondent and directed the claimant to pay Rs.3,06,27,795/- with interest. Being aggrieved by this award the claimant has filed this arbitration suit praying to set aside the award.

4. The claimant/ plaintiff has mainly contended that the learned Arbitral Tribunal has erred in not appreciating the ratio of the judgment of Hon'ble Supreme Court and Hon'ble High Court and failed to appreciate that when the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the

jurisdiction to decide the disputes so referred and it is controlled by the specific reference and Tribunal cannot travel beyond the reference and cannot consider any additional claims or counter claims. It is contended that the claimant had made reference to arbitration, only the dispute between the parties with respect to hard scape works only, but though the tribunal has not come to the conclusion that 3 separate agreements regarding hardscape works and structural works and supply of stone for roof top bar are intrinsically connected with each other, has wrongly held that it was the intention of the parties to refer the dispute of all the three agreements to the arbitration. It is stated that when admittedly there was no arbitration clause in the agreement of structural work and roof top bar, award on those agreements is beyond jurisdiction. It is also contended that the tribunal has come to the finding that alleged dispute on structural work and roof top bar would also fall under the reference of arbitration wrongly when it was the contention of the claimant that there was only arbitration clause in the hardscape work and not in other two agreements. It is held that the finding of the tribunal that all the disputes between the parties would fall under the single reference is erroneous, as even the witness of the respondent has admitted that they are separate agreements and not related. It is also contended that the tribunal has failed to give any finding on the principle of 'composite performance' which would have to be gathered from the conjoint reading of the agreements and the

explicit intention of the parties and the attendant circumstances. It is also contended that the tribunal has gone beyond the scope of reference of arbitration as agreed by the parties. It is stated that the claimant has categorically invoked arbitration with regard to the disputes regarding hardscape work only. It is stated that the tribunal by including various other alleged disputes between the parties under the same arbitration reference have traversed the four corners of reference and given findings beyond the scope of reference. It is also contended that the tribunal has erred in coming to the conclusion that the parties agreed to accept the clause for arbitration in FIDIC contract to be applicable to the roof top and structural works. It is contended that if that was the intention of the parties, they would not have entered into separate agreements. It is contended that tribunal has erred in coming to the conclusion that all the disputes of 3 contracts are arbitrable under single reference. It is also contended that only because internal auditor has referred to all the three works and further that Ex.C.6 and Ex.C.7 refers to all the 3 items, tribunal has wrongly held that all the disputes are arbitrable under a single reference and this finding is contrary to the principle that parties to a dispute cannot confer jurisdiction which the court otherwise has. It is also contended that the tribunal has erred in holding that there was no pleading that an arbitration clause was not available while filing an application for amendment. It is stated that the finding of the tribunal that Ex.C.5 internal

audit report is not by application of mind is also erroneous and the tribunal has erroneously come to the finding that final recommendations of the internal audit report is based on non application of mind. It is stated that the principles of administrative law cannot be applied to the present facts. It is also contended that the tribunal has accepted the debit note for Rs.5,10,326/- and again the tribunal disputed the validity of the internal audit report. It is also stated that the tribunal has erred in awarding interest especially when the alleged claim of the respondent were not arbitrable. It is stated that the tribunal has gone beyond the four walls of the reference of arbitration and held that the respondent is entitle for interest. It is also stated that the tribunal has erred in awarding interest by not accepting internal audit report. Giving two months time to make payment with 9% interest and then charging 12% interest is also disputed by the claimant. It is also stated that the impugned award suffers from various other legal infirmities. On all these grounds arbitral award is prayed to be set aside.

5. Respondent has filed written statement and denied various averments made in the petition. It is stated that scope for challenging to an award is limited and shall be within the four corners of provisions of Section 34 of the Arbitration & Conciliation Act and none of the grounds urged by the claimant to challenge the award fall within the limits of provisions of Section 34. It is stated that the claimant itself

from the inception has been referring to 3 items of the contract namely Hardscape work, structural work and roof top bar in its all correspondence, notices, reply and the audit report and for the first time during final arguments the issue of maintainability on this ground has been raised. It is stated that this issue is raised without there being any plea or contention of any nature whatsoever in the pleadings. It is stated that the claim petition was preceded with innumerable notices, replies, correspondence, audit report, meetings in respect of 3 contracts and in response to the claim petition, respondent had filed statement of objections and counter claim and the claimant filed written statement to the counter claim of the respondent and even in this pleading claimant has never raised issue regarding maintainability or about separate nature of the contract. It is stated that the claimant has not raised the issue at the initial stage in the claim petition or objections to the counter claim and same cannot be permitted to be raised. It is also stated that the learned Arbitral Tribunal has dealt with an issue of maintainability of the counter claim which was belatedly raised by the claimant and by considering the over all facts and circumstances, intention and conduct of the parties, attendant and incidental circumstances, the Tribunal has rightly declined to accept the contention and the claimant cannot urge the same again. It is stated that the entire claim of the claimant was based on three contracts appearing in the pleading itself. The claimant has claimed Rs.1,88,81,977/- stating that it is arrived on the

basis of excess payment, in respect of all the three contracts and the claimant has nowhere stated that this claim is only in respect of hardscape work and not in respect of other two contracts. It is stated that the claimant has relied heavily on the audit report at Ex.C.5 which again pertains to all these contracts. It is also stated that even while amending the claim petition the claimant has not stated that it had sought amendment of the claim petition on the ground that in respect of other two contracts arbitrator has no jurisdiction. It is stated that in the affidavit accompanying the application for amendment, nothing is whispered and no reason is given for reduction of the said claim amount and it is only stated that there is an arithmetical error. It is also contended that the parties have always referred to the three contractors as integral part of the respective claimants and all the correspondences, notices and reply and rejoinders have been in respect of 3 contracts and entire audit report is in respect of 3 contracts and there is no pleading of any nature by the claimant that they are different and the maintainability issue is not raised and there is no clause excluding reference of structural work and roof top bar work to Arbitration. It is also stated that the claim made by the respondent do not fall in excepted matters. It is stated that the claimant is now estopped from raising issue of maintainability and the jurisdiction of the tribunal to adjudicate upon the claim in respect of the structural work and roof top bar work in view of provisions of Section 4 and 16 of the Arbitration &

Conciliation Act. The respondent has also stated that the arbitral Tribunal has considered these aspects and referred to the evidence and in paragraphs 93 to 101, it has given finding and the finding is based on reasons. On all these grounds the respondent has prayed to dismiss the petition with costs.

6. Heard both the counsels and perused the records.

7. Now the points that arise for consideration of this court are:

1) **Whether the plaintiff/claimant has made out any ground under Section 34 of the Arbitration & Conciliation Act to set aside the Arbitral Award dated 17/8/2018 passed by the Arbitral Tribunal consisting of defendants No.2 to 4 ?**

2) **What order?**

8. My answer to the above points are :

POINT No.1 : In the Negative.

POINT No.2 : As per final order for the following:

REASONS

9. **POINT No.1** : The admitted facts of the case are that the respondent had applied to the tender invited by the claimant for hardscape work and same was accepted. Subsequently the work order was also given to the respondent for the purpose of structural work on 25/1/2012. Similarly, respondent was also given work of supply of material to the roof top bar and purchase order was placed on 20/4/2013. According to the claimant, it has made payment as and when it was due to the respondent and at some time, even

payments are made in advance. According to the claimant, the respondent has, though completed the work has not done the work properly and internal audit of the claimant has found that excess payment has been made which is calculated as Rs.1,88,81,977/-. On the other hand, respondent after sending the RA bills and the final bill was insisting for payment of the amount. Since the claimant contended that as per the audit report there is excess payment, claimant initiated arbitration by sending notice and thereby arbitral tribunal consisting of defendants No.2 to 4 is constituted. Claimant filed claim petition for Rs.1,88,81,977/- and subsequently amended the same and reduced the claim to Rs.1,28,06,293/-. The respondent appeared before the tribunal and denied the claim and contended that it has already completed the work and taking over certificate in respect of all the three works is already issued by the claimant, but RA bills are not cleared and there is due of Rs.3,06,27,795/- from the claimant. The respondent has contended that as the RA bills are not cleared inspite of completion of the work, interest @18% per annum is to be paid by the claimant and calculated the same as Rs.1,60,71,872/-. It also contended that it has suffered loss of business opportunity and claimed Rs.1,25,00,000/- as compensation. For this total amount of Rs.5,91,99,667/- the respondent has made a counter claim before the Arbitral Tribunal. Counter claim was opposed by the claimant and the tribunal after recording the evidence has rejected the

claim of the claimant and allowed counter claim partly and directed the claimant to pay Rs.3,06,27,795/- with interest at 9% per annum and on failure to pay the same within two months, then to pay 12% interest per annum. Being aggrieved by this award, claimant has filed this petition under Section 34 of the Arbitration & Conciliation Act.

10. The jurisdiction of the court to set aside an arbitral award is limited to the grounds set out in Section 34 of the Arbitration & Conciliation Act 1996. Even if a contrary view based on the facts before the Arbitral Tribunal is possible, in the absence of any compelling reasons, court cannot interfere with the view taken by the learned Arbitral Tribunal, as if, it is sitting in appeal over the award of the Tribunal. Grounds on which the award of the Tribunal can be set aside by this court is clearly mentioned in Section 34(2) and 34(2A) of the Arbitration & Conciliation Act and these grounds are also elaborated by the Hon'ble Supreme Court in various decisions. Since any of the grounds mentioned in Section 34(2)(a) and 34(2)(b)(i) of the Act are not urged, challenge to the present award of the Arbitral Tribunal would be under Section 34(2)(b)(ii) and 34(2A) of the Act. Award could be set aside if it is against public policy of India or is patently illegal. Under the head of Public Policy of India, Fundamental Policy of Indian Law, Interest of India, justice or morality are included. It is also well established principle that the court sitting U/S.34 of the Act is not supposed to go for re-appreciation of evidence or impose its view as against

the view of learned Arbitral Tribunal and the power of the court is only to set aside the award, if it is coming under one of the grounds mentioned in the said section. In the presence of these basic principles, grounds urged by the claimant and the award of the learned Arbitral Tribunal are to be looked into.

11. On looking to the Arbitral Award and the contention of the claimant and also respondent, main ground on which award is challenged by claimant in this petition is that the structural work and roof top bar which was given by work order was not containing arbitration clause and therefore the Arbitral Tribunal had no jurisdiction to decide the dispute pertaining to structural work and roof top bar. The main contention of the claimant is that as agreement for hardscape work was alone having arbitration clause, dispute between the parties with regard to hardscape work could only be decided by the Arbitral Tribunal. According to the claimant, the Arbitral Tribunal has exceeded its jurisdiction and extended its jurisdiction even to structural work and roof top bar which was not provided. It argued for the claimant that as the arbitration is creation of agreement, unless there is an agreement regarding referring dispute to arbitration, Arbitral Tribunal do not get jurisdiction and as such there is jurisdictional error. The learned counsel for the claimant has even drawn the attention of this court to the admission given by RW.1 wherein he has stated that all these three

agreements are different contracts and are separate and it is also admitted by the witness that FIDIC contract do not apply to the roof top and structural work. On the other hand respondent contends that in all the correspondences, notice, reply, claim petition, objection and also the reply to the counter claim no such dispute raised regarding jurisdiction of the Arbitral Tribunal to decide on the dispute pertaining to structural work and roof top bar and this maintainability issue is raised for the first time in the course of arguments. It is also argued on behalf of the respondent that the Arbitral Tribunal has considered this issue and has held that arbitration clause in hardscape work covered even the structural work and also work of roof top bar.

12. Admittedly, hardscape work contract was the first contract that was given to claimant by accepting the final offer dated 18/7/2011 and the letter of acceptance was given on 6/8/2011. In the said contract for hardscape work there is an arbitration clause to resolve the dispute between the parties. Subsequent to this, when the work was going on, claimant entrusted Structural work by giving work order dated 25/1/2012 which is for Rs.86,98,082/-. Apart from hardscape work which was given earlier and structural work which was given later, claimant engaged the services of the respondent for supply of material to the roof top bar and placed purchase order dated 20/4/2013 for Rs.1,06,40,391/-. According to Respondent, it has

completed entire work and raised several RA bills in respect of hardscape work, structural work and also roof top bar. Respondent contended that after completion of the work, taking over certificate for hardscape work was given by the claimant on 20/1/2014 and in respect of structural work taking over certificate is issued on 20/1/2014 and for roof top bar on 5/5/2014. Therefore by 5/5/2014 all the 3 works were completed, but the respondent was still due and the RA bills were not cleared.

13. In the meantime, claimant/employer by considering that, in the Internal audit conducted by the claimant it was found that there was several breach of agreement by the respondent and also work carried out by the respondent was not as per the prevailing standard and there were several lapses in the work, there is delay in material supply and improper storage and supply of redundant, defective and surplus stones, irregularities in the RA bills raised etc has raised debit note and found that Respondent is liable to pay Rs.1,88,79,877/- and for recovery of this amount it has issued notice and then initiated arbitration and thereby Arbitral Tribunal came to be constituted and the matter is heard. In the claim petition itself claimant has referred to internal audit report which is marked as Ex.C.5. Internal audit report, which is basis for the alleged claim of the claimant for recovery of Rs.1,88,79,877/-, is in respect of all the 3 works i.e.

hardscape work, structural work and also roof top bar. In fact one of the ground is supply of redundant, defective and surplus stones which refers to roof top bar. Therefore, in this internal audit report itself all the 3 works are included. Rs.1,88,79,877/- originally claimed by the claimant includes the shortcoming and excess payment etc in respect of all the 3 works and they are not separate. Audit report relied by the claimant is not in respect of only hardscape work. Even in the notice for appointment of arbitration, claimant has not separated the hardscape work from structural and roof top bar, which according to the claimant do not contain arbitration clause.

14. Even after initiating arbitration, claimant filed claim petition before the Arbitral Tribunal claiming Rs.1,88,79,877/- along with interest and this claim is in respect of all the three works. It is interesting to note that, it is the claimant/employer who has raised the arbitration dispute in respect of all the three works. Though respondent had sent RA bills but not received payment, respondent has not initiated arbitration. The claimant itself has raised arbitration dispute and moved claim petition and in such claim petition claimant relied on internal audit report which is given in respect of all the 3 works i.e. hardscape work, structural work and roof top bar. Similarly in the claim petition also the claimant has claimed Rs.1,88,79,877/- which are in respect of all the 3 works. For this claim petition

respondent filed statement of objection along with counter claim. The respondent prayed for recovery of the pending RA bills amounting to Rs.3,06,27,795/- and claimed interest @18% per annum. Even the respondent's counter claim is for recovery of entire amount due to him in respect of all the 3 works. To this counter claim claimant filed objection wherein he has denied the claim.

15. In the entire correspondence, notice, reply, claim petition, objection and objection to counter claim, parties have raised dispute and answered the claims in respect of all the 3 contracts. During pendency of the petition before the Arbitral Tribunal, claimant filed an application for amendment and reduced the claim amount to Rs.1,28,06,239/-. In support of this application claimant filed an affidavit wherein he has stated that there is excess amount claimed by oversight which is an arithmetical error. This application is allowed and amendment carried out and the amended claim petition is filed even by the claimant in this petition.

16. On looking to the amended claim petition, except reducing claim amount in prayer column, no other amendment is made regarding basis for arriving at such reduced sum. It appears that claimant is now contending that this Rs.1,28,06,239/- which is mentioned in the claim petition is amount which is claimed by the claimant in respect of hardscape work. However, while seeking

amendment or thereafter, claimant appears to have not stated that he has bifurcated his claim and the present claim is only in respect of hardscape work and is not pressing the claim in respect of structural work and roof top bar. However in the course of arguments claimant appears to have raised the issue that the tribunal has no power to arbitrate on the dispute with regard to structural work and roof top bar, as there is no arbitration clause in those agreements. This contention is not accepted by the tribunal.

17. On looking to the award, it has considered this contention in para 93 onwards. Arbitral tribunal has considered the legal notice issued on 14/5/2015 Ex.C.6 reply notice and even the internal audit report. In all these documents all the works are taken together and calculations are made by considering all the 3 works together. The tribunal has noted that there is a specific clause of arbitration available in the hardscape work in terms of Ex.R.12 and there is no reference to condition of contract in Ex.R.4 work order. Tribunal has also noted that with regard to roof top bar and structural work there is no such condition of contract. The tribunal has held that on going through the relevant documents, it is clear that contention of the claimant cannot be accepted. The tribunal has noted based on material on record that, parties have considered roof top bar work and structural work as covered by FIDIC contract clause. Tribunal has noted the same by referring to different other

clauses provided in these contracts. The tribunal has also noted that in all the 3 contracts taking over certificate is available and identical words are being used in the documents of all the 3 works. Tribunal has noted that on considering 3 taking over certificates it is clear that claimant has considered other two items i.e. supply of stones for roof top bar and structural work as also covered by FIDIC condition for contract. The tribunal also noted that even internal audit has referred to all the 3 works and Ex.C6 respondent refers to all the 3 works and even the notice exchanged and the claim statement refers to all the 3 works. It is also stated by the arbitral Tribunal that there is no pleading that arbitration clause is not available in respect of roof top bar and structural work.

18. Arbitral Tribunal by considering all the materials has found that the conduct of the parties show that parties have sought arbitration in respect of all the 3 works and parties have acted on the same and therefore, at the fag end such contention cannot be raised. The tribunal has noted that though the jurisdiction point can be raised at any stage, jurisdiction has to be considered with reference to the facts of the case and has found that work of roof top bar and structural work are also covered by condition of contract of FIDIC. On going through the finding of the Arbitrator there appears to be no such error apparent on the face of the record. As stated above in the internal audit report which is the base

for claimant's claim, in notice of appointment of Arbitrator, in claim petition and in the counter claim and also objection to counter claim, parties have agitated and defended the case in respect of all the 3 works and this issue of Arbitrator not having jurisdiction and there is no arbitration agreement between the parties was never raised. As per Section 16 of the Arbitration & Conciliation Act the Arbitral Tribunal may rule on its own jurisdiction and the plea that Arbitral Tribunal does not have jurisdiction have to be raised not later than the submission of the statement of defence. In this case, the claimant has initiated arbitration and therefore, claimant cannot be permitted to raise the dispute about jurisdiction of the Arbitral Tribunal. In the claim petition and the supporting documents like internal audit report the claimant's claim itself is in respect of all the 3 works. Though subsequently claimant has reduced the claim, reason for such reducing the claim amount is stated to be correction of an arithmetical error and not for the reason that these two structural work and roof top bar cannot be included in the arbitration. Under such circumstances the claimant is now barred from raising jurisdiction point at the time of addressing the arguments before the Arbitral Tribunal or in the Arbitration Suit.

19. Contention of the claimant is that there is no arbitration agreement in respect of structural work and roof top bar. Section 7 of the Arbitration & Conciliation Act deals

with arbitration agreement and states that arbitration agreement shall be in writing. It states that, arbitration agreement is in writing, if it is contained in a document signed by the parties, in exchange of letters, telex, telegrams or other means of telecommunication or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Therefore, though there is no specific agreement containing arbitration clause in respect of structural work and roof top bar work, there are exchange of letters between the parties. Claimant has raised the dispute by appointing an Arbitrator to resolve the dispute with regard to all the 3 contracts for which respondent replied by appointing its Arbitrator and thereby arbitration agreement even if it is not there, has come into existence as per Section 7(4). Moreover, before the Arbitral Tribunal constituted at the instance of claimant, the claimant has filed statement of claim and respondent filed statement of objection, but not denied the existence of agreement to refer the parties to arbitration. Then also as per Section 7(4)(c) it could be considered that there is an arbitration agreement. Therefore, by exchange of letter and by exchange of claim and defence between the parties, even if there is no specific agreement to refer the parties to arbitration in respect of structural work and roof top bar work, arbitration agreement has come into existence by virtue of claim and defence and exchange of letters raising arbitration dispute, agreeing for referring dispute to

arbitration. Therefore, the claimant cannot contend that there is no arbitration agreement in respect of structural work and the roof top bar work. Moreover, Arbitral Tribunal has considered this point and has given clear finding.

20. Learned counsel for the plaintiff/claimant has relied on the decision reported in **(2020) 7 SCC 167 (Patel Engineering Limited v. North Eastern Electric Power Corporation Limited)** in which the Hon'ble Supreme Court has held that the award is liable to be set aside, if it is against public policy and is patently illegal. It is held in this decision that if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take the view of the Arbitrator, such an award can be set aside under Section 34 of Arbitration & Conciliation Act. In another decision reported in **(2020) 5 SCC 164 (South East Asia Marine Engineering and Constructions Limited v. Oil India Limited)** the Hon'ble Supreme Court has held that an award which is perverse and not reasonably possible is liable to be interfered with. It is also held in another judgment relied by the claimant reported in **(2019) 15 SCC 131 (Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India)** that a finding based on no evidence at all or an award which ignores vital evidence

in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. In another decision reported in **(2015) 3 SCC 49 (Associate Builders v. Delhi Development Authority)** the Hon'ble Supreme Court has considered as to what is fundamental policy of Indian Law and held that award against orders of the superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. It is also held that binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law. The learned counsel for the claimant has also relied on the decision reported in **(2019) 20 SCC 1 (Dyna Technologies Private Limited v. Crompton Greaves Limited)** in which the Hon'ble Supreme Court has considered the ground for interference in the award and held that an award which is confusing and is with inadequate reasoning cannot be stated to be appropriate and such award is unintelligible and cannot be sustained. The decision reported in **2021 SCC Online Bombay 65 (Damodhar Rokde v. Defence Estates Officer)** is also cited in which the Hon'ble High Court has held that arbitrator while allowing the counter claim in part, brought into existence a fresh contract and traveled beyond the contractual terms. In another judgment reported in **(2017) 9 SCC 729 (Duro Felguera v. Gangavaram Port Limited)** the Hon'ble Supreme Court on the facts of the case has held that there cannot be a single

arbitration for dispute arising out of different agreements. In the said case, there were five separate contracts, each having independent existence with separate arbitration clause and one of the contract was providing international commercial arbitration and on the said facts, Hon'ble Supreme Court has held that there cannot be a single Arbitral Tribunal for international commercial arbitration. The learned counsel has also relied on the decision reported **in (2007) 4 SCC 697 (Food Corporation of India v. Chandu Construction and another)** in which the Hon'ble Supreme Court by considering the decision in Continental Construction Company Limited has observed that an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable and it is held that it is bound to follow and apply the law and if he does not, he can be set right by the court provided error appears on the face of the award.

21. On going through all these decisions, they are on different facts and cannot be applied to the present case. As discussed above, Section 7 itself provides that the arbitration agreement can be inferred even by looking to the correspondence, claim petition, objection, notice, reply etc and as such it cannot be said that the work of roof top bar and structural work cannot be resolved through arbitration. Even the claimant made claim in respect of all the 3 contracts and admittedly one of the contract i.e. hardscape work is having arbitration clause. By act and omission the parties

have admitted consented and applied the arbitration clause to all the 3 contracts. Though the RW.1 in his cross examination has stated that they are different separate contracts, by filing a common claim petition and making a common claim for recovery of the amount of more than Rs.1,88,00,000/-, the claimant himself has admitted the arbitration as the available dispute resolution mechanism for which the respondent has also agreed and filed counter claim which is considered by the Arbitral Tribunal. On considering all these, this award cannot be considered as beyond the terms of the contract and the arbitrator cannot be said to have traveled beyond the scope of contract or has no jurisdiction to decide the matter pertaining to structural work and roof top bar. There are absolutely no material to show that this finding of the Arbitral Tribunal is patently illegal or that it is against the public policy.

22. Apart from this, claimant has disputed the award for rejection of the claim on the ground that internal audit is not established etc. Tribunal has given clear finding on the same and noted that on the internal audit report alleged to have been prepared by the claimant, no opportunity was given to the respondent to answer the same. As such the audit report was found not acceptable. Tribunal has given reason for not accepting the audit report and has noted that taking over certificate in respect of all the 3 works were given by the claimant itself and after issuing taking over certificate

in 2014 itself, claimant cannot now contend that work is not proper or that there is excess payment etc. The finding of the tribunal for rejection of the claim of the claimant is just and proper and cannot be said to be against the public policy or is patently illegal.

23. Similarly, tribunal has awarded interest @9% per annum that too from the date of counter claim which is very reasonable. Though respondent has not paid RA bill amount for long time, tribunal by considering that the respondent has not raised arbitration dispute and the claim is made only as a counter claim has awarded interest only from the date of counter claim and this finding also cannot be said to be against the public policy. On considering all these aspects, there are no grounds to interfere with the award passed by the learned Arbitral Tribunal. Accordingly, this petition filed under Section 34 of the Arbitration & Conciliation Act deserves to be dismissed. Accordingly, point No.1 is answered **in the negative**.

24. POINT No.2 : For the discussion made on above point, following order is passed:

ORDER

**Petition filed under Section 34 of
the Arbitration & Conciliation Act**

**challenging the award dated 17/8/2018 is
dismissed.**

**In the circumstances of the case,
there is no order as to costs.**

*[Dictated to the Judgment Writer; transcript thereof corrected,
signed and then pronounced by me, in the Open Court on this
the **22nd day of October 2021]***

**[Ravindra Hegde]
LXXXIII Additional City Civil Judge.
BENGALURU.**
