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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
S. RAVINDRA BHAT; J., ARAVIND KUMAR; J.
CIVIL APPEAL NO(S). 4658 OF 2023; AUGUST 24, 2023

M/S HINDUSTAN CONSTRUCTION COMPANY LIMITED
versus
M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

Arbitration and Conciliation Act, 1996; Section 34 - A dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings - When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to challenge the soundness, plausibility, illegality or perversity in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level and standard of scrutiny which the majority award (which is under challenge) is subjected to. *(Para 27)*

Arbitration and Conciliation Act, 1996; Section 34, 37 - Awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly - Appellate review is unavailable when exercising jurisdiction under Section 34 of the Act - Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. *(Para 22-23)*

WITH CIVIL APPEAL NO(S). 4659 OF 2023, CIVIL APPEAL NO(S). 4660 OF 2023, CIVIL APPEAL NO(S). 4661 OF 2023, CIVIL APPEAL NO(S). 4662 OF 2023

For Appellant(s) Mr. Mohit D. Ram, AOR Mr. Sameer Parekh, Adv. Mr. Sumit Goel, Adv. Ms. Sreeparna Basak, Adv. Mr. Prateek Khandelwar, Adv. Mr. Jayant Bajaj, Adv. For M/s. Parekh & Co., AOR Mr. Mahesh Agarwal, Adv. Mr. Rishi Agrawala, Adv. Ms. Shruti Arora, Adv. Mr. Anirudh Bhatia, Adv. Mr. Devansh Srivastava, Adv. Ms. Vidisha Swarup, Adv. Mr. E. C. Agrawala, AOR Mr. George Thomas, Adv. Dr. Swaroop George, Adv. Mr. R. Sathish, AOR Mr. Mohan Das KK, Adv. Mr. Rajesh Kumar, Adv. Mr. Mathen Joseph, Adv. Mrs. S. Geetha, Adv.

For Respondent(s) Ms. Neetica Sharma, Adv. Mr. Tavinder Sidhu, Adv. Ms. Manisha Chava, Adv. For M/s. M. V. Kini & Associates, AOR Mr. Sameer Parekh, Adv. Mr. Sumit Goel, Adv. Ms. Sreeparna Basak, Adv. Mr. Prateek Khandelwar, Adv. Mr. Jayant Bajaj, Adv. For M/s. Parekh & Co., AOR

J U D G M E N T

S. RAVINDRA BHAT, J.

1. All these appeals involve decision on a common question, with respect to the interpretation of a contract condition, which required the measurement of quantities used for payment for embankment construction with soil or with pond ash. The claimants (hereafter “the contractors”) contended that the measure is one and the same, which is by taking a composite cross section as a whole of the embankment and determining the volume by the average end area method. However, the supervising engineer (hereafter “EE”) adopted a method, whereby the area of the cross section was bifurcated to account for the area occupied by soil and pond ash for the determination of quantum of the

embankment in two different items. The contractor urged that this was contrary to the technical specification (hereafter "TS") clause 305.8; the National Highways Authority of India (hereafter "NHAI") justified the EE's interpretation. Since there have been different outcomes in all these appeals, and the impugned judgments in some of them have relied upon the judgment of the Division Bench of the Delhi High Court, in CA 4658/2023[1] (hereafter referred to as "the main judgment") the facts and decisions, in that appeal would be alluded to.

2. NHAI awarded, to the contractor the work of construction of the Allahabad by-pass project in U.P. by agreement dated 02.06.2004. The project was completed. However, certain disputes arose inter se the parties with reference to different areas of the contract; these were referred to arbitration. NHAI has an inbuilt resolution mechanism, i.e., a Dispute Resolution Board ("DRB") consisting of technical experts in the field, to which matters are first referred to. Since the contractor was not satisfied with the opinion of the DRB, in terms of the agreement, it could and, did invoke the arbitration. The disputes in the present case culminated in a reference to the arbitration of three technical persons, who after considering the rival viewpoints and the materials before them, made the award[2]. The award was unanimous on most questions while, on others, there was a dissenting view of one of the arbitrators.

3. The contractor, aggrieved by both the unanimous view and the majority view preferred objections under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act"). A learned single judge rejected the petition[3]. The single judge was of the considered opinion that as far as measurement aspects were concerned, the tribunal's majority opinion reflected a plausible and reasonable view that did not call for interference:

"26. As regards non-payment for, executed work of embankment which forms the subject matter of Disputes 2 and 4, this is purely a question of fact based on the measurement. There is no dispute in relation to the construction of the embankment that is covered under item 2. 02 (a) of the BOQ. In fact, NHAI has already paid HCC for the said construction. Clause 305.8 of the MORTHTS provides for measurement of the cross section of the embankment as one whole composite section and paid under item No.2.02(b). The decision of the majority members of the Arbitral Tribunal based on an analysis of the material before them was a possible view to take. Merely because another view as evidenced by the dissenting opinion is possible interference by this Court under Section 34 of the Act is not warranted. "

4. NHAI appealed to the Division Bench, which set aside the decision of the learned single judge, and held that the tribunal's majority view, and award, were based on an implausible interpretation of the contract. It was held, in the impugned order that:

"[..] On a conjoint reading of BOQ item No.2.02 and clause 305.8 of the technical specification, to us, it is clear that the cross sections have to be taken in respect of the different materials used, i.e. soil and pond ash. Pertinently, it is not the case of the respondents that the two are mixed into a mixture and then used. Soil and pond ash are used separately. Thus, the cross sections are to be taken at intervals. We cannot permit the respondent to contend that it is not possible to compute the volumes of the two materials in the cross section, when for 30 months both the appellant and the respondent were actually making measurements accordingly. The respondent itself made the IPCs and submitted for payments which were duly paid by the appellant. Such measurements

[1] Arising out of SLP No. 38162/2012, which was directed against the judgment of the Division Bench of the Delhi High Court dated 08.11.2012 in FAO (OS) No. 48/ 2012.
[2] Award dated 30.03.2010
[3] By the order dated 30.11.2011

were made on the basis of actual utilization of the two materials. We fail to appreciate how the arbitral tribunal could have come to a conclusion that the mode of measurement of the two items separately was not in accordance with the contract. The majority view, after having noticed the principles of consensus ad idem, seems to have failed to appreciate this vital issue.[..]"

Contentions of parties

5. On behalf of the appellant/contractors, Dr. Abhishek Manu Singhvi, Mr. V. Giri, and Mr. Anil Airi, learned senior counsels, Mr. Sameer Parekh and Mr. George Thomas learned counsel made submissions. It was argued that the impugned judgment goes far beyond the scope of the jurisdiction under Section 34 /Section 37 of the Act. The Division Bench while interfering with the award on the grounds that it did, transgressed the extremely narrow scope of interference under Section 37 of the Act. It was argued that this court in a plethora of cases has held that the intent of the Act is to restrict the grounds of challenge to an arbitral award to the barest minimum. It is submitted that this court has time and again held that the general approach of the courts should be to uphold the award and the arbitral award and not to sit with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in the award.

6. It was argued that contractual conditions relating to a method of measurement are dependent heavily on technical understanding and cannot be read and interpreted like the general provision of a contract. They have meanings developed over time based on the views and the courts should defer to the finding by the technical experts. It was argued that the specific point of dispute was whether any outstanding amount *"on account of 'construction of embankment' with pond ash in accordance with BOQ Item No. 2.02 (b) read with clause 305.2.2.3 of the Technical Specifications"* was payable to the contractor. This was a pure question of fact, over which the findings in the award had to be left alone. Counsel also highlighted that in many appeals, the DRB constituted an internal mechanism by NHAI, comprised entirely of technical personnel, nominated by it (NHAI) had also endorsed the opinion, which favoured the contractors' interpretation. Given this background and the further like interpretation given in arbitration, by the tribunal, which again comprised of experts, there was no scope for interference.

7. Learned counsel submitted that the impugned judgment failed to or overlooked that there are two kinds of embankments- one with soil and the other, with fly ash and soil. Therefore, the contractor had quoted rates for these two kinds of embankment.

8. It was highlighted that Clause 305 of MoRTH[4] technical specifications read together with the project specific amendments contained in additional technical specifications provides the formation of embankment with two types, viz. embankment with soil and embankment with pond ash, the material requirements for each of the above two types have been specified in clauses 305.2.2.2 (for soil) and 305.2.2.3 (for pond ash) of additional technical specifications.

9. Counsel submitted, that furthermore, the impugned judgment overlooked that the TS clause 305 of MoRTH dealt only with embankment with soil; therefore a project specific sub-clause 305.2.2.3.2 of the construction operations, was included in the contract which specifies the various operations (viz., setting out, stripping and storing of top soil, compacting ground supporting embankment, spreading material, compaction, finishing, quality control, a measurement for payment etc) to be followed by the contractor for

[4] Ministry of Road Transport and Highways

embankment with pond ash. It was submitted that clause 305.2.2.3.2 further provides, *"the work shall conform to clause 4.7.I of IRC SP:58 - 2001".* It was highlighted that the contract contemplated payment for 'construction of earth embankment with soil' in BOQ[5] item 2.02(a) and 'construction of Pond ash embankment with pond ash' in BOQ item No. 2.02. It was also contended that BOQ pertains to the execution and completion of the entire item of work in compliance with the contract requirements and does not relate only to any individual material/ consumables used in the execution of the work.

10. It was argued that the contract conditions and stipulations are to be read as a whole; thus, technical specifications, drawings and other documents form part of the contract which cannot be considered in isolation. The counsel also emphasized that the preamble to the BOQ and the technical specifications read together also mandate that the rates given in BOQ item 2.02 (a) and (b) are for the construction of embankment i.e., soil embankment and pond ash embankment and not for the usage of materials in an embankment. It was highlighted that the applicable test for interference with awards was clearly enunciated in *Associate Builders v Delhi Development Corporation ("hereafter, "Associate Builders")*[6] and was ignored by the impugned judgment. Counsel also relied on *BOC India Ltd. vs. Bhagwati Oxygen Ltd*[7] and urged that since the tribunal had relied on a plausible view on interpretation of the contract, it was not open to the court to set aside the award.

11. Ms. Aishwarya Bhati learned Additional Solicitor General (ASG) appeared for NHAI and urged the court not to interfere with the impugned judgment of the High Court and other decisions which followed it, which are the subject matter of all these appeals. She contended that the Division Bench's interference with the award was justified and warranted. Learned counsel highlighted the difference in the stipulations as they existed in the contract as opposed to what was cited in the majority award which is the subject matter of appeal in the impugned judgment. It was contended that the clause was wrongly reproduced and consequently, not only vitiated by incorrect interpretation but rather a case of rewriting the terms of the contract by the tribunal. This meant that the tribunal acted beyond the terms of the contract. Learned counsel, emphasized that such rewriting was sufficient justification for the Division Bench to interfere with the award. This aspect had been lost sight of – even overlooked by the learned Single Judge.

12. It was argued next that the interpretation by the contractors and the tribunal, if accepted, will lead to absurd results so far as the ratio of soil and pond ash used in an embankment is concerned. These components or materials vary from case to case. Therefore, it would be illogical and rather unfair to cast a liability upon the NHAI to pay at one rate regardless of the soil and pond ash used for the work. Learned counsel highlighted that embankment construction can involve varied ratios of such materials – ranging from 9:1 to 3:2 at different locations. Therefore, the Division Bench correctly held that it would not be justified to cast this liability upon the NHAI.

13. It was also highlighted that the tribunal and the learned Single Judge erred in improperly analyzing the stipulations and conditions in the contract. Clauses 2.02(a) and (b) reveal that there is only BOQ Item, i.e., embankment. The separate treatment in the stipulation only meant that the embankment could be constructed one way, where the soil was used and second, where both soil and pond ash was used. Learned counsel

[5] Bill of Quantities
[6] 2014 [13] SCR 895
[7] 2007 [3] SCR 915

submitted that in terms of clause 305.8 of the technical specifications, cross-sections had to be quantified proportionately. The ASG further highlighted that for two years, separate measurements were taken and consequently it was incorrect to contend that separate measurements for both the materials were not possible. It was further argued that embankment work with pond ash and soil is completed by layering wherever concerned materials are necessary and easily capable of measurement. Further, she argued that separate quantities were expressly notified and mentioned in the concerned conditions which the parties at the relevant time intended to give meaning to. This aspect was highlighted by the dissenting award of one member of the tribunal, who upheld the EE's decision to reject the claim based on such interpretation. Therefore, wherever soil was used it had to be paid as per Clause 2.02(a) and wherever pond ash was used, payment had to be as per Clause 2.02 (b) read with TS 305.2.2.3. Lastly, it was contended that the intention of the draftsman was clear as any reference to technical specification was avoided but a mention was made of IRC:SP:58.201 and instead it was only TS 305 and TS 305.2.2.3 were used. These did not deal with or describe embankments to be constructed with fly ash or even they ought to be designed in a composite manner.

14. The ASG relied on *Indian Oil Corporation v Shree Ganesh Petroleum Rajgurunagar*[8]*; PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust*[9]*; South East Asia Marine Engineering and Constructions Limited (SEAMEC Ltd) v Oil India Ltd* [10] and other decisions, in support of NHAI's argument that if the interpretation adopted by a tribunal is unsupported by law, or wholly incorrect, in the given facts of a case, the award can be interfered with. It was submitted that so long as the interpretation of contractual terms is reasonable and possible, awards should not be interfered with. However, if awards do not adopt such an interpretation, and adopt one, which results in unreasonable expansion of any express contractual term, they can and should be interfered with. Learned counsel submitted that the occasion for exercise of such discretion was exercised rightly, by the impugned judgment.

Analysis and Conclusions

15. Before dealing with the merits, it is essential to extract the relevant contract stipulations. The main judgment which involved the contract for works Allahabad Bypass Project of a road from KM 158 to KM 198 (except Ganga Bridge) was concerned with the following clauses:

Item	Description	Unit	Est. Qty.	Units Rate (INR)		Amount INR	
				In words	In figures	In words	In figures
2.02	Construction of embankment With approved material complete as per Technical Specifications Clause 305 with all leads and lifts						

[8] 2022 (16) SCR 450
[9] 2021 (5) SCR. 408
[10] 2020 (4) SCR 254

	a)	With Soil	CuM	1198000	Rs. One hundred and two only.	102	Rupees twelve crore, twenty one lakhs ninety six thousand only	122,196,000
	b)	With Pond Ash	CuM	3252000	Rs. Two hundred and fifty two only	252	Rupees eighty one crore ninety five lakhs four thousand only	819,504,000

16. For pond ash embankment under BOQ item No. 2.02(b), the relevant stipulation for measurement and payment are Clause 305.8 and Clause 305.2.2.3.3 of additional technical specifications, respectively. The said clauses are extracted below. The MoRTH specification reads as follows:

"305.8 Measurements of Payment

Earth embankment/subgrade construction shall be measured separately by taking cross sections at intervals in the original position before the work starts and after its completion and computing the volumes of earthworks in cubic metres by the method of average end areas……."

Clause 305.2.2.3.3- relatable to Item No. 2.02(b) reads as under:

"Measurement for payment: Same as Clause 305.8 of MoRTH specifications."

The relevant stipulation for contract rate units for different items in rate contracts is clause 114.1; it reads as follows:

" 114.1. - For item rate contracts, the contract unit rates for different items of work shall be payment in full for completing the work to the requirements of the specifications including full compensation for all the operations detailed in the relevant sections of these specifications under "Rates". In the absence of any directions to the contrary, the rates are to be considered as full inclusive rate for finished work covering all labour, materials, wastage.... Arising out of General Conditions of Contract.".

17. The majority award, in the main judgment (from which CA 4658/2023 arises) listed why the members in the majority found for the contractor:

"i) It is contemplated in the contract to construct two types of embankments. One with the soil alone, and the second one with the combination of soil pond ash.

ii) The embankment with pond ash alone cannot be constructed, as the pond ash is susceptible for erosion. Hence, the soil cover is provided for protection of the embankment.

iii) The composite cross section of the embankment comprising of soil and pond ash together is as the collectively termed embankment construction with pond ash under BOQ item No. 2.02(b) iv) The method of measurement to be adopted for payment for the embankment construction with soil or with pond ash is one and the same, which is by taking composite cross section as a whole of the embankment and determining the volume by average end area method.

v) The method of measurement adopted by the Engineer, where in, the area of the cross section has been bifurcated to account for area occupied by the soil and pond ash for determination of quantum of the embankment in two different items if contrary to the technical specification Clause 305.8.

vi) Clause 114.1 of MORTH specification specifically states that the rates are for the finished work in all respects. The pond ash embankment comprising of soil and pond ash is composite and complete finished item of work. It cannot be separated into two different items as having been done by the Engineer.

vii) The contention of the claimant that the whole cross section of the pond ash embankment shall be measured as one cross section for determination of the work under Item No. 2.02 (b) is fully supported by the contract conditions."

The member of the tribunal, who dissented, *inter alia,* recorded that a reading of the specifications:

"clearly shows that wherever soil is used it will be measured 2.02 (a) with whenever pond ash is used it will be measured under 2.02(b) with TS 305.2.2.3.

13.3.7 I agree with the view taken by the Engineer while rejecting claim, as the view of the Engineer is strictly as per contract/BOQ provision as in this particular Contract embankment with soil and pond ash appear under one item and are · very conspicuously bifurcated for different materials.

13.3.8 · I analyse that claimant has flawed under and after thought to claim even soil as fly ash under item No.2.02 (b). of BOQ. 13.3.9 Thus I draw firm conclusion that the provision made in the BOQ item 2.02 (a) and 2.02 (b) are for different material i.e. 2.02 (a) is for soil and 2.02 (b)is for pond ash and is for type of material to be used in the respective items."

18. A reasoning similar to the majority award, which was in issue in the main judgment, was adopted in awards, rendered by tribunals of other contractors, such as CEC - HCC(JV)[11]; Sunway Construction[12]; Patel KNR JV[13]; and Oriental Structural Engineers (P) Ltd (hereafter, "*Oriental Structures*")[14]. In some cases, the stipulation was for the construction of an *"embankment with approved materials from borrow areas"* in terms of TS clause 305, and also the construction of an embankment *"with fly ash obtained from coal or lignite burning thermal power station"* (CA 4659/2023); likewise, fly ash or lignite burning thermal station as waste material (CA 4660/2020); *"all types of soil"* and *"with fly ash obtained from coal or lignite burning thermal power station"* (CA 4661/2023) and pond ash (CA 4662/2023).

19. In some cases, the DRP (or DRB) set up departmentally, with three experts (in CA 4659/2023) expressed its view in the following terms:

*"4.1.5...The above contract stipulation clearly means that the Embankment 6 or Subgrade, as the case may be, shall be measured separately by taking cross sections at intervals before the Embankment work starts and after its completion. The use of phrase 'taking cross sections ..... before the Embankment work starts and after its completion' means nothing but measurement of embankment as o whole. In other words what is to be measured is an embankment and such measurement shall be by taking cross sections at suitable intervals before the start of Embankment work and after completion of Embankment of work. **In other words the volume of the entire embankment formed by flyash and Soil as per Additional Technical Specifications Clause A-14 is to be measured.** Had the intention of the contract been measuring soil separately then it would be necessary to take cross sections repeatedly of every intermediate layer at the junction of the core fly ash with soil side cover and also at top of fly ash layer before covering it with 1m soil layer, which is not stipulated so in the mode of measurement for payment in the Contract.*

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[11] The appellant in CA 4659/2023;
[12] Appellant in CA 4660/2023
[13] Appellant in CA 4661/2023
[14] Appellant in CA 4662/2023

[…]

4.1.8 The item is for construction of embankment with fly ash. The words "with Fly Ash" are the adjective qualifying the type of Embankment. ***Thus, if is necessary to measure embankment as a whole and not the individual materials comprising embankment. Had the item been described as "Providing fly ash for embankment" then it would have been appropriate to measure fly ash material only. The intention of contract is to measure the embankment.*** *This is also corroborated from the description of BoQ item no.2.02(a), which is only in one type of material i.e. approved material; the phrase used in description is "construction of embankment with approved materials". Here too embankment as an item and the words approved material is the adjective qualifying the type of embankment."*

In other appeals too, the DRP gave similar directions and instructions. In *Oriental Structure*s' (supra) appeal (CA 4662/2023), the DRB's decision, *inter alia,* was that:

"The decision of DRB is to measure the soil cover & Pond Ash together for Pond Ash embankment& be paid under BOQ item 2.02 (b). The final quantity under BOQ item 2.02(b) are with Engineer & shall be submitted to Employer & to be paid at the rates approved after the Arbitration in vogue as on the days after allowing the rebate provided by Contractor in his offer."

20. It is quite evident that in most cases, the view of DRPs and tribunals, and in two cases, majority awards of tribunals, favoured the arguments of contractors, that composite embankment construction took place, as a result of which measurement was to be done in a composite, or unified manner. Dissenting or minority views, wherever expressed, were premised on separate measurements. This opinion was of technical experts constituted as arbitrators, who were versed in contractual interpretation of the type of work involved; they also had first hand experience as engineers who supervised such contracts. When the predominant view of these experts pointed to one direction, i.e., a composite measurement, the question is what really is the role of the court under Section 34 the Act.

21. This court, in M/s. *Voestalpine Schienen GmbH v DMRC*[15] commenting on the value of having expert personnel as arbitrators, emphasized that *"technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators."* Such an approach was commended also in *Delhi Airport Metro Express (P) Ltd v DMRC*[16] wherein this court held that:

"The members of the Arbitral Tribunal, nominated in accordance with the agreed procedure between the parties, are engineers and their award is not meant to be scrutinized in the same manner as one prepared by legally trained minds. In any event, it cannot be said that the view of the Tribunal is perverse. Therefore, we do not concur with the High Court's opinion that the award of the Tribunal on the legality of the termination notice is vitiated due to the vice of perversity."

22. The prevailing view about the standard of scrutiny- *not judicial review,* of an award, by persons of the disputants' choice being that of their decisions to stand- and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, *perverse,* as to qualify for interference, courts have to necessarily chose the path of *least interference, except when absolutely necessary*]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts *cannot, through process of primary contract interpretation,* thus, *create pathways to the kind of review which is forbidden under Section 34.* So viewed, the Division Bench's approach, of

[15] 2017 (1) SCR 798
[16] 2021 (5) SCR 984

appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, *and substitution of another view.* As long as the view adopted by the majority was plausible- and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, *compacted* matter, comprising both soil and fly ash), such a substitution was impermissible.

23. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in *State of UP v Allied Constructions*[17]*:*

"[..] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof.

Interpretation of a contract, it is trite, is a matter for arbitrator to [18]*determine (see M/s. Sudarsan Trading Co. v. The Government of Kerala, AIR (1989) SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the. interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law"*

24. This enunciation has been endorsed in several cases (Ref *McDermott International Inc. v. Burn Standard Co. Ltd*[18]). In *MSK Projects (I) (JV) Ltd v State of Rajasthan*[19] it was held that an error in interpretation of a contract by an arbitrator is *"an error within his jurisdiction".* The position was spelt out even more clearly in *Associate Builders (supra),* where the court said that:

"[..] if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do."

25. Before ending the discussion, it would be also necessary to highlight one aspect which is likely to arise in some arbitration proceedings, especially when it involves adjudication by multi-member tribunals. This aspect was highlighted in *Russel on Arbitration*, where the relevance of a dissenting opinion was explained as follows [as quoted in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd (hereafter, "Dakshin Haryana Bijli Vitran Nigam Ltd")* [20]]:

"6-058. Dissenting opinions.—Any member of the Tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate "dissenting opinion". The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award. This is for the parties' information only and does not form part of the award, but it may

[17] 2003 Supp (2) SCR 55
[18] Suppl. (2) SCR 409
[19] 2011 (9) SCR 402
[20] 2021 (1) SCR 1135

be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award.".[21]

This court also quoted Gary B. Born's commentary on *International Commercial Arbitration*[22] opinion:

"Even absent express authorization in national law or applicable institutional rules (or otherwise), the right to provide a dissenting or separate opinion is an appropriate concomitant of the arbitrator's adjudicative function and the Tribunal's related obligation to make a reasoned award. Although there are legal systems where dissenting or separate opinions are either not permitted, or not customary, these domestic rules have little application in the context of party-nominated co-arbitrators, and diverse Tribunals. Indeed, the right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his/her adjudicative mandate, particularly in circumstances where a reasoned award is required. Only clear an explicit prohibition should preclude the making and publication to the parties of a dissenting opinion, which serves an important role in the deliberative process, and can provide a valuable check on arbitrary or indefensible decision making. [.]

[…]

There is nothing objectionable at all about an arbitrator "systematically drawing up a dissenting opinion, and insisting that it be communicated to the parties". If an arbitrator believes that the Tribunal is making a seriously wrong decision, which cannot fairly be reconciled with the law and the evidentiary record, then he/she may express that view. There is nothing wrong — and on the contrary, much that is right — with such a course as part of the adjudicatory process in which the Tribunal's conclusion is expressed in a reasoned manner. And, if the arbitrator considers that the award's conclusions require a "systematic" discussion, that is also entirely appropriate; indeed, it is implied in the adjudicative process, and the requirement of a reasoned award."

[…]

… the very concept of a reasoned award by a multi-member Tribunal permits a statement of different reasons — if different members of the Tribunal in fact hold different views. This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process."

26. In *Dakshin Haryana Bijli Vitran Nigam Ltd,* the court recollected the previous holding in *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI (hereafter, "Ssangyong Engg. & Construction Co. Ltd.")*[23], wherein the court had set aside the majority award, but issued consequential directions in the peculiar facts of the case:

"In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 7 SCR 522], this Court upheld the view taken by the dissenting arbitrator in exercise of its powers under Article 142 of the Constitution, in order to do complete justice between the parties. The reason for doing so is mentioned in para 77 i.e. the considerable delay which would be caused if another arbitration was to be held. This Court exercised its extraordinary power in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI,] keeping in mind the facts of the case, and the object of expeditious resolution of disputes under the Arbitration Act."

However, the court did not, in *Dakshin Haryana Bijli Vitran Nigam Ltd (supra)* direct the dissenting opinion to be treated as an award. In the opinion of this court, that approach is correct, because there appears to be a slight divergence in thinking between *Russel* and *Gary Born.* The former, *Russel* is careful to point out that a dissenting opinion is not *per*

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[21] David St. John Sutton, Judith Gill and Matthew Gearing QC, Russel on Arbitration, 24th Edn. (Sweet & Maxwell), p. 313.
[22] Gary Born, *International Commercial Arbitration*, Wolters Kluwer, Edn. 2009, Vol. II, p. 2466 & 2469.
[23] 2019 [7] SCR 522

se an award, but *"is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge."* However, *Gary Born* does not expressly say that the opinion is not a part of the award. That author yet clarifies that *"This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process."*

27. It is, therefore, evident that a dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings. This court is of the opinion that there is another dimension to the matter. When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the *majority award.* The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to *challenge the soundness, plausibility, illegality or perversity* in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level and standard of scrutiny which the majority award (which is under challenge) is subjected to. Therefore, the so-called *conversion of the dissenting opinion,* into a tribunal's findings, [in the event a majority award is set aside] and elevation of that opinion as an award, would, with respect, be inappropriate and improper.

28. In view of the findings recorded earlier, this court is of the opinion that all the appeals have to succeed. Therefore, C. A. No. 4658/2023, C. A. No. 4659/2023; C. A. No. 4660/2023; C. A. No. 4661/2023 and C. A. No. 4662/2023 are allowed; all judgments of the Delhi High Court, which were the subject matter of challenge in those appeals are set aside. The awards, which were the subject matter of challenge, and to the extent they were set aside, are hereby upheld and restored. The direction in the awards, to the extent they required compounded monthly interest payments, are modified. Instead, the NHAI shall pay uniform interest on the amounts due, on the head concerned, i.e., construction of embankment, to the extent of 12% from the date of award to the date of payment, within eight weeks from today. All the above appeals are allowed in these terms.

There shall be no direction to pay costs.