IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 12TH DAY OF NOVEMBER 2021 / 21ST KARTHIKA, 1943

ARB.A NO. 21 OF 2012

AGAINST THE ORDER IN O.P.(ARBITRATION)NO. 125/2008 & 178/2008 OF I ADDITIONAL DISTRICT COURT, ERNAKULAM

APPELLANT/PETITIONER:

M/S.B.E.BILLIMORIA AND CO. LTD.,
SHIV SAGAR ESTATE, A BLOCK, 2ND FLOOR,
DR.A.B.ROAD, WORLI, MUMBAI-400 018, REPRESENTED BY THE ADVISER, N.C.PARAMESWARAN.

BY ADVS.
SRI.K.L.VARGHESE (SR.)
SRI.RANJITH VARGHESE
SRI.RAHUL VARGHESE
SMT.SANTHA VARGHESE

RESPONDENTS/RESPONDENTS:

1. **UNION OF INDIA**
   REPRESENTED BY THE CHIEF ENGINEER,
   NAVAC, NAVAL BASE.P.O., KOCHI-682 004.
2. **THE CHIEF ENGINEER,**
   NAVAC, EZHIMALA.P.O., ETTIKULAM, KANNUR-670 308.

SRI.THOMAS MATHEW NELLIMOOTTIL, SENIOR PANEL

P.VIJAYA KUMAR ASG,
K.THYAGARAJESWARAN CGC

THIS ARBITRATION APPEALS HAVING COME UP FOR ADMISSION ON 12.11.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Arbitration Appeal No.21 of 2012

Dated this the 12th day of November, 2021

J U D G M E N T

P.B.Suresh Kumar, J.

This Arbitration Appeal is directed against the common order dated 06.01.2012 in O.P. (Arbitration) Nos.125 of 2008 and 178 of 2008 on the files of the Court of the District Judge, Ernakulam. The appellant is the petitioner in O.P. (Arbitration) No.125 of 2008 and the respondent in O.P. (Arbitration) No.178 of 2008.

2. The appellant is a works contractor. In furtherance to a tender process initiated by the second respondent on behalf of the first respondent, the Union of India, the appellant was awarded, among others, a few electrification works for execution at Ezhimala. Pursuant to the award, the appellant has entered into the agreement

required in terms of the tender document with the respondents and executed the works. While drawing the final bills of the works, certain claims of the appellant were not accepted. The appellant has raised a demand for the same and sought a reference for arbitration, if the claims are disputed. The agreement provides for arbitration for resolution of disputes and consequently, the disputed claims were referred for arbitration. The arbitration clause in the agreement was to the effect that all disputes, other than those for which the decision of the Commander Works Engineer (CWE) or any other person is by the contract expressed to be final and binding, shall be referred to the sole arbitration of a serving officer. In the light of the aforesaid arbitration clause in the agreement, the disputed claims were referred to the sole arbitration of a serving officer.

3. Among the claims, the Arbitrator allowed a few and rejected the rest. O.P.(Arbitration) No.125 of 2008 was instituted by the appellant invoking Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) challenging the award insofar as it relates to the rejection of Claim Nos.1 and 2 and O.P. (Arbitration) No.178 of 2008 was instituted by the respondents invoking the same provision challenging the award, among others, insofar as it relates to Claim

Nos.9 to 13, and 13A to 13E, which were allowed by the Arbitrator.

4. One of the works awarded to the appellant was the work of laying of cables of 300 Sq. Mm and another was the work of laying of cables of 95 Sq. Mm. According to the appellant, on a wrong assumption that the cables to be laid would be provided by the respondents free of cost, they had quoted only for the labour cost involved in the works viz, Rs.122/- per running meter for laying cables of 300 Sq. Mm and Rs.111/- per running meter for laying cables of 95 Sq. Mm. It is stated by the appellant that they had to procure the cables to be laid from the respondents at the rates fixed by the respondents. Claim No.1 was for the cost of 300 Sq. Mm cable and Claim No.2 was for the cost of 95 Sq. Mm cable procured by the appellant from the respondents. Claim Nos.9 to 13 and 13A to 13E, among the remaining claims, pertain to the excavation works undertaken by the appellant on the premise that the strata of the soil met with during the execution of the excavation works were not as specified in the tender document.

5. Before the Arbitrator, the respondents raised a preliminary objection as to the arbitrability of Claim Nos.9 to 13 and 13A to 13E. According to the respondents, the dispute in the said

claims was with regard to the classification of the strata of the soil met with during the excavation works; that such disputes, in terms of Clause 3.1.10 of MES Standard Schedule of Rates (SSR) applicable to the contract, are required to be decided by the Garrison Engineer (GE) and that the same are therefore not arbitrable, for the arbitration clause in the agreement specifically excludes such disputes from its scope. The preliminary objection raised by the respondents as to the arbitrability of Claim Nos.9 to 13 and 13A to 13E was repelled by the Arbitrator, holding that the materials on record do not disclose that the GE has taken a decision with regard to the classification of the strata of the soil and therefore, the disputes relating to the said claims are arbitrable.

6. Coming to the merits of the matter, the case of the appellant as regards Claim Nos.1 and 2 is that the rates quoted by them for the cable laying works were far below the estimated cost of the said works and the issue rates of the cables to be laid; that they had quoted only the labour charges for the same on a wrong assumption that the cables would be provided to them by the respondents free of cost; that insofar as their tender would have been the lowest even with the cost of the cables, the respondents

ought to have permitted the appellant to correct the rates quoted by them for the said works in terms of paragraph 424 of the Regulations for the Military Engineer Services (the MES Regulations) which makes it obligatory for the respondents to permit the contractor to revise freak rates and that the appellant was not permitted to revise the rates for the said works despite a specific request made immediately on opening the tender. The contentions taken by the respondents as regards the said claims were mainly that it was specifically mentioned in the tender document itself that the cables will be issued only on payment; that while the rates quoted by the appellant for the subject works were freakishly low, they have quoted freakishly high rates for other works; that there was no item-wise consideration of the offers made by the appellant; that the respondents have considered only whether the aggregate rate quoted by the appellant for all the works together was fair, reasonable and workable and that consideration of the request made by the appellant for revision of the rates after obtaining communication regarding the acceptance of the tender is against the principles of competitive bidding. It was also contended by the respondents that rectification of errors, omissions or wrong

estimates in the prices quoted by the contractor is prohibited in terms of the tender and that the provisions in the MES Regulations do not apply to the subject contract. It was also contended by the respondents that tenderers would adopt different techniques and methodologies to become lowest in the tender processes, indicating that the omission to include the cost of the cables in the tender by the appellant in respect of the cable laying works need not be on account of inadvertence, and such omissions cannot therefore be a ground to raise a claim after the acceptance of the tender.

7. The Arbitrator, though found that there was an omission on the part of the appellant in including the cost of the cables in their rates for the cable laying works, took the view that insofar as the alleged mistake having been noticed by the appellant immediately on opening the tender, they ought to have revoked the offer and insofar as they have not adopted the said course, they cannot complain about the same later. Consequently, Claim Nos.1 and 2 were rejected. Further, in the light of the finding that the preliminary objection raised by the respondents as regards Claim Nos.9 to 13 and 13A to 13E was unsustainable, the Arbitrator proceeded to consider the said claims also on merits and upheld the

same in part.

8. The court below dismissed O.P.(Arbitration) No.125 of 2008 affirming the decision of the Arbitrator as regards Claim Nos.1 and 2 and allowed O.P.(Arbitration) No.178 of 2008 in part setting aside the award in respect of Claim Nos.9 to 13 and 13A to 13E. The view taken by the court below as far as O.P.(Arbitration) No.178 of 2008 is that there is a decision by the GE with regard to the classification of the strata of the soil met with during the course of the excavation works and even if there is no such decision, the disputes relating to Claim Nos.9 to 13 and 13A to 13E being disputes covered by Clause 3.1.10 of SSR are not arbitrable, being "excepted matters". The appellant is aggrieved by the decision of the court below.

9. The learned Senior Counsel for the appellant submitted that the tender process in the instant case was governed by the MES Regulations and in terms of Regulation 424 of the MES Regulations, if a tender which is being considered for acceptance contains freak rates namely, rates which in the opinion of the accepting officer are either abnormally high or abnormally low, the same shall be communicated to the tenderer and he shall be

afforded an opportunity to revise the rates. It was pointed out by the learned Senior Counsel that in the light of the said Regulation, the respondents ought to have afforded to the appellant an opportunity to correct the rates quoted by them for the cable laying works, especially when their tender even with the cost of the cables would have been the lowest with a difference of approximately Rs.47 lakhs. Placing reliance on a few passages from **Hudson's Building and Engineering Contracts, Eleventh Edition**, the learned Senior Counsel has also submitted that even dehors the provisions in the MES Regulations, the remedy of rectification is available in appropriate circumstances, if a unilateral mistake known to the other party could be shown. It was also submitted by the learned Senior Counsel, placing reliance on the passages from the text aforesaid that if a formal contract fails to express the common intention by reason of a mistake of one of the parties of which the other is aware, and if he keeps silent and seeks to rely on the formal contract, he will not be permitted to resist a claim for rectification by alleging the absence of common intent. It was also submitted by the learned Senior Counsel placing reliance on the passages from the very same text that for seeking rectification, it is not necessary to show any

element of fraud, misrepresentation or unfair dealing and it is sufficient to show that the contract would be otherwise inequitable. The learned Senior Counsel has also relied on a few passages from the texts on **Indian Contract and Specific Relief Acts by Pollock and Mulla (12th Edition)** and **Building and Engineering Contracts by P.C.Markanda (5th Edition),** in support of the said propositions. The learned Senior Counsel has also relied on the decision of the Bombay High Court in **Vinayakappa Suryabhanappa Dahenkar v. Dulichand Hariram Murarka**, AIR 1986 Bom 193, to contend that extreme inadequacy of consideration would affect the integrity of the contracts and the court would be justified in relieving the innocent party from the obligations under such contracts. The learned Senior Counsel has relied on the decision of this Court in **Union of India rep. by Chief Engineer v. M/s.Bharath Builders and Contractors,** 2012 KHC 367 to contend that the stand taken by the respondents that the MES Regulations do not apply to the subject contract is unsustainable in law. In short, the arguments of the learned Senior Counsel for the appellant as regards Claim Nos.1 and 2 was that the decision of the Arbitrator in rejecting Claim Nos.1 and 2 is patently illegal and the

court below ought to have, therefore, upheld the said claim, setting aside the decision of the Arbitrator. The learned Senior Counsel has relied on the decisions of the Apex Court in **Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)**, (2019) 15 SCC 131 and **Delhi Airport Metro Express Pvt. Limited v. Delhi Metro Rail Corporation Limited**, 2021 SCC OnLine SC 695, in support of the contention that cases of the instant nature would fall within the realm of 'patent illegality'. It was also argued by the learned Senior Counsel that at any rate, insofar as it was found by the Arbitrator that the tender was submitted by the appellant on the mistaken assumption that cables would be issued free of cost by the respondents, the decision to decline the claim is perverse and the court ought to have interfered with the same as one shocking to the conscience of the Court.

10. As regards Claim Nos.9 to 13 and 13A to 13E, it was submitted by the learned Senior Counsel for the appellant that in order to apply Clause 3.1.10 of SSR, there has to be a decision by the GE with regard to the classification of the strata of the soil met with during the course of the excavation works and their depth and

insofar as there was no decision as regards the various strata of the soil and their depth by the GE in the case on hand, the Arbitrator was justified in holding that the disputes relating to the said claims are arbitrable and the decision of the court below in reversing the award insofar as the same relates to the said claims, is unsustainable in law.

11. Per contra, the learned Central Government Counsel supported the impugned order on the various reasons mentioned by the Arbitrator in his award and the court in the order impugned in the appeal.

12. After the matter was reserved for orders, a notes of argument was submitted on behalf of the respondents, by the Central Government Counsel. In the said notes, among others, it was pointed out that the dispute as regards Claim Nos.9 to 13 and 13A to 13E being excepted matters, the Arbitrator ought not have dealt with the same, for he is bound by the terms of the agreement.

13. We have perused the materials on record and examined the elaborate submissions made by the learned Senior Counsel for the appellant as also the learned Central Government Counsel.

14. The question falls for consideration is whether there is any infirmity in the award of the Arbitrator insofar as it relates to Claim Nos.1, 2, 9 to 13 and 13A to 13E of the appellant which is liable to be corrected under Section 34 of the Act.

15. As far as a proceeding under Section 34 of the Act is concerned, the position of law is now settled that the court does not sit in appeal over the arbitral awards and would interfere with the awards only on the limited grounds provided therein. The impugned order of the court below being one rendered prior to Act 3 of 2016, in terms of which the Act has been amended substantially, for a better understanding of the scope of interference under Section 34 of the Act, it is apposite to refer to the judgment of the Apex Court in **MMTC Limited v. Vedanta Limited,** (2019) 4 SCC 163 dealing with the position before and after Act 3 of 2016. Paragraphs 11 to 14 of the said judgment read thus:

> **"11.** As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian

public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses* v. *Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(*b*)(*ii*), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see *ONGC Ltd.* v. *Saw Pipes Ltd.* [*ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] ; *Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation* [*Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation*, (2006) 4 SCC 445] ; and *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International*

Inc. v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

As evident from the extracted paragraphs, there was no substantial change in the position before and after Act 3 of 2016 that an award which is patently illegal is liable to be set aside under Section 34 of the Act.

16. As clarified by the Apex Court in **MMTC Limited**, a decision which is against the terms of the contract would fall under the head 'patent illegality'. While patent illegality was one among the grounds of challenge under Section 34 of the Act prior to Act 3 of 2016 under the head 'public policy of India', the said ground is brought, after the said amendment, under the newly inserted Section 34(2A) of the Act. Similarly, perversity which was one among the grounds of challenge under the head 'public policy of India' prior to the amendment now falls under the newly inserted head 'patent illegality' (See paragraph 41 of the decision of the Apex Court in **Ssangyong Engineering and Construction Co. Limited**). The scope of interference under Section 34 on the ground of perversity has been explained by the Apex Court in **Associate Builders v. Delhi Development Authority**, (2015) 3 SCC 49. Paragraphs 31 and 32 of the judgment in the said case read thus:

> "31. The third juristic principle is that a decision which is

perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

“7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act

> upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

17. As noted, the case of the appellant is that the award, insofar as it relates to Claim Nos.1 and 2, is patently illegal in as much as it is perverse and the case of the respondents is that the award, insofar as it relates to Claim Nos.9 to 13 and 13A to 13E, is patently illegal in as much as it contravenes the terms of the agreement.

18. Having thus understood the scope of interference under Section 34 of the Act, let us first examine the question whether there is any infirmity in the award of the Arbitrator insofar as it relates to Claim Nos.9 to 13 and 13A to 13E. As noted, the said claims of the appellant pertain to the excavation works undertaken by them on the premise that strata of the soil met with during execution of the excavation works were not as specified in the tender document. The stand of the respondents, insofar as the said claims are concerned, was that since the dispute in the said claims is with regard to the classification of the strata of the soil met with

during the excavation works, in terms of Clause 3.1.10 of SSR applicable to the agreement, such disputes are required to be decided by the GE and that the same are, therefore, not arbitrable, for the arbitration clause in the agreement specifically excludes such disputes from its scope. The stand of the appellant as regards the said preliminary objection was that in order to invoke clause 3.1.10 of SSR, there has to be a decision by the GE as regards the classification of the strata of the soil met with during the excavation works and their depths and there was no decision by the GE on those aspects in the case on hand. The preliminary objection was repelled by the Arbitrator, holding that the materials on record do not disclose that the GE has taken a decision in the matter as contemplated by the agreement and therefore, the disputes relating to the said claims are arbitrable. The relevant paragraphs of the award dealing with the rejection of the preliminary objection raised by the respondents concerning the said claims read thus:

> "8.10. Having considered the submissions of both the parties, my findings are as under:-
>
> **CLAIM Nos. 9 to 13 and 13A to 13E**
>
> 8.10.1 A decision of any authority must necessarily

contain what are the submissions of the opposing parties, the authority's own observations if any and the reasoned analysis of authority who is to give the decision.

8.10.2 In the present case, there is no decision of GE which states that he is giving any decision after invoking clause 3.1.10 of SSR. Nor is there any “final and binding” decision given by the GE.

8.10.3 There is no document of the Deptt which can be considered to be the opinion of UOI which GE would have considered to come to his decision.

8.10.4 In fact, there is no record of any observations or reasoned analysis of the GE to formulate his decision.

8.10.5 GE actually wrote a few letters on the issue. In one of them, dt 13 May 04, he stated that the matter is referred to CE which can also be construed to mean that he is seeking approval of CE for the DO. In another letter dt 22 Mar 05, he denied the claim to the Contractor. UOI emphasis in relying on letter dt 22 Mar 05 to be the final and binding decision has no basis. If every letter written by the GE is to be deemed as his final and binding decision, then why not consider GE's letter dt 13 May 04 it self to be the final and binding decision.

8.10.6 The GE in his letter dt 22 Mar 05 stated as under-

"Although the work involves excavation in wet soil/under water, the soil is not sticky, therefore cannot be regarded as mud.

The definition of mud as per SSR Part-I clause 3.2.1 (c) is as under-

"Mud: - A mixture of soil and water in fluid or weak solid state."

Thus, although stickiness is not a criterion in deciding excavation in mud, the GE considered it without any logic. On the other hand the GE agreed that condition of wet soil/under water existed. Thus, such statement made by GE is nothing but self-contradictory.

8.10.7 The fact that the GE's letter dt 22 Mar 05 is not a final and binding decision is borne by UOI's own action in referring the matter to a Geologist much later, i.e. even after completion of the entire work, on 23 Nov 05.

8.10.8 Thus, there is no final and binding decision of GE and hence claims 9 to 13 and 13A to 13E are not beyond jurisdiction of arbitration".

As evident from the extracted paragraphs, what was considered by the Arbitrator is the question whether there was a decision by the GE as regards the classification of the strata of the soil as provided for under Clause 3.1.10 of the SSR and since it was found that there was no decision by the GE on the said aspects as provided for in the said provision, the Arbitrator took the view that the disputes relating to Claim Nos.9 to 13 and 13A to 13E are arbitrable.

19. It is settled that a Court exercising power under Section 34 of the Act cannot reappraise the evidence and come to a different conclusion on a question of fact. Therefore, the finding rendered by the court below that the GE has given a decision in terms of Clause 3.1.10 of SSR as regards the classification of the strata of the soil, reversing the finding rendered by the Arbitrator to the contrary, is beyond the scope of Section 34 and hence unsustainable in law.

20. Be that as it may, the Court also found that even if there was no decision by the GE as regards the classification of the strata of the soil, dispute relating to Claim Nos.9 to 13 and 13A to 13E being a dispute covered by Clause 3.1.10 of SSR, it is not arbitrable, being an 'excepted matter', for such a dispute is one to

be decided in terms of the agreement by the GE. As held by the Apex Court in **General Manager, Northern Railway and Another v. Sarvesh Chopra**, (2002) 4 SCC 45, if a dispute is required to be adjudicated upon by an authority or person other than the Arbitrator in terms of the agreement and if the parties have agreed to accept the decision of that authority or person as final and binding, the same would be an excepted matter and will not be arbitrable. The specific stand taken by the Arbitrator in the award which is endorsed by the appellant is that insofar as a decision has not been taken by the GE on the dispute raised by the appellant as regards the classification of the strata of the soil as provided for by Clause 3.1.10 of SSR, the said dispute would also become arbitrable. In other words, according to the Arbitrator and the appellant, if a dispute is required to be adjudicated upon by an authority or person other than the Arbitrator in terms of the agreement, the same would cease to be an excepted matter, if no decision is taken by the authority or person concerned as provided for under the terms of the agreement.

21. As the question aforesaid is one to be considered in the context of the facts of the case, it is necessary to refer to

Clause 3.1.10 of SSR as also to the arbitration clause in the agreement. Clause 3.1.10 of SSR reads thus:

> "3.1.10 In case of any dispute with regards to the classification of various strata and their depth the decision of the GE will be final and binding."

The arbitration clause in the agreement reads thus:

> **"70.Arbitration**--All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a Serving Officer having degree in Engineering or equivalent or having passed final/direct final examination of Sub-division II of Institution of Surveyors (India) recognized by the Government of India.
>
> Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos.55, 56 and 57 hereof.
>
> Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos.52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.
>
> Provided always that commencement or

continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, ex parte, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and

binding on both parties to the Contract."

A close reading of Clause 3.1.10 of SSR would show that in terms of the said provision, the parties have agreed that they will abide by the decision of the GE as regards the classification of the strata of soil met with in the course of execution of the excavation works and their depth. The said clause neither precludes the appellant from raising a dispute as regards the classification of the strata of the soil, nor does it empower the GE to refrain from deciding such a dispute, if raised by the appellant. The clause aforesaid only provides that adverse decision by the GE in matters covered by the same will be final and binding on the appellant, in the sense that they cannot challenge the same. In other words, if the decision of the GE is favourable to the appellant, the terms of the agreement will be modified appropriately so as to enable the appellant to claim their legitimate dues consequent on the decision taken by the GE in their favour. It is thus evident that if the GE does not decide the dispute falling under Clause 3.1.10 of SSR, the appellant would be deprived of their legitimate dues which they would have been entitled to, had the decision of the GE been favourable to them. The materials on record do not indicate that the parties to the agreement have

intended that the appellant should suffer the loss, if any, on account of the failure or refusal on the part of the GE to take a decision as contemplated in Clause 3.1.10 of SSR. In other words, the contemplation of the parties at the time of entering into the agreement was that if a dispute falling within the scope of Clause 3.1.10 of SSR is raised, the same will be decided by the GE. Even otherwise, conditions in the agreement which would make the claim of a party an excepted matter for the purpose of the arbitration clause provided for in the agreement, are to be scrupulously followed. The said position has been clarified by the Apex Court in **Madnani Construction Corporation Private Limited v. Union of India,** (2020) 1 SCC 549. Paragraph 21 of the judgment in said case reads thus:

> "21. It goes without saying that in order to deny the claims of the contractor as covered under excepted matters, the procedure prescribed for bringing those claims under excepted matters must be scrupulously followed. The clear finding of the arbitrator is that it has not been followed and the High Court has not expressed any disagreement on that. Therefore, the finding of the High Court that those items are non-arbitrable cannot be sustained."

What remains to be considered is the question as to whether the

dispute which is required to be adjudicated by the GE in terms of the contract, if not adjudicated by the GE, would become arbitrable. As noted, insofar as Clause 3.1.10 of SSR does not foreclose the right of the appellant to make appropriate claims in the event of a favourable decision by the GE, if the provision is interpreted in such a manner that the matter covered therein would be an excepted matter even if there is no decision and consequently, not arbitrable, the party aggrieved would certainly be entitled to file a suit. The question is as to whether the parties have intended that the appellant should take recourse to the remedies available to them before a civil court in the event of failure or refusal on the part of the GE to take a decision in respect of a matter covered by Clause 3.1.10. As evident from the arbitration clause which is extracted in paragraph 21 above, the intention of the parties is that all disputes between them except the excepted matters shall be decided by recourse to arbitration. The parties have not contemplated a situation of resolution of some of the disputes by recourse to arbitration and some other by recourse to the remedy available to them before the civil court. If that be so, according to us, if there is failure or refusal on the part of the GE to take a decision as provided

for in Clause 3.1.10 of SSR, the dispute would cease to be an excepted matter. In other words, in the absence of a decision by the GE on a dispute covered by Clause 3.1.10 of SSR, the dispute would become arbitrable. There is, therefore, no infirmity in the decision of the Arbitrator as regards Claim Nos.9 to 13 and 13A to 13E.

22. We shall now proceed to consider the question whether there is any infirmity in the award of the Arbitrator insofar as it relates to Claim Nos.1 and 2. The materials on record indicate that in terms of the agreement, the appellant had to execute 216 works of different nature including water supply, electrification, sewage disposal, construction of roads etc. Though the participants of the tender were required to quote their rates for the different works separately, the award was made treating all the works together as a composite one, for the said works could not be awarded to different contractors. As noted, having regard to the rates quoted by them for all the works together, the appellant was the lowest among the contractors who have participated in the bid process and it is on that premise that they have been awarded the work. The cable laying works referred to in Claim Nos.1 and 2 were only two sub-items of one item out of the said 216 items of works

covered by the agreement. No doubt, the materials indicate that there was an omission on the part of the appellant in not including the cost of cables in the rate quoted by them for the cable laying works. As noted, the appellant contended that the respondents ought to have permitted them to correct the said mistake in the tender as provided for in MES Regulations, especially when the appellant would have been the lowest tenderer even with the cost of the cables and that they have not been permitted to correct the tender despite the specific request made by them on the day of opening of the tender itself. On the other hand, the respondents contended that while the rates quoted by the appellant for the subject works were freakishly low, they have quoted freakishly high rates for other works and what was considered for the purpose of awarding the works was the overall rate quoted by the appellant for all the works. They have also contended that the MES Regulations relied on by the appellant does not apply to the subject agreement and as far as the subject agreement is concerned, there is a clear provision in the tender document itself that the contractors will not be permitted to correct their quotes. It was also contended by the respondents that consideration of the request made by the appellant

for revision of the rates after obtaining communication regarding the acceptance of the tender would be against the principles of competitive bidding. The relevant portion of the finding rendered by the Arbitrator as regards Claim Nos.1 and 2 of the appellant reads thus:

> "20. Having considered the submissions of both the parties, my findings are as under:-
>
> 20.1 In the Appx 'A' to Notice of tender, UOl mentioned the estimated cost of the work to be Rs.1650 lakhs. The notice of tender also states the same to be a rough guide. By all instructions and commercial practices, the contractors are required to make their own assessment of the works involved and submit their tenders to the Deptt. As such, there is really no sanctity for the cost mentioned by UOI in the notice of tender.
>
> 20.2 It is undisputed that the rates inserted by the Contractor were freakishly low. This apparently happened because the contractor calculated on the mistaken assumption that cables would be issued free of cost. This mistake came to the knowledge of the Contractor Immediately on opening of the tender on 15 Jul 03. The Contractor had two options on such eventuality. One was to Immediately revoke the tender offer in which eventuality the Accepting Officer would not have been able to accept the tender to conclude the contract. The second option was to assess the

tender again and find out over all against all the items of tender and come to a conclusion on the likely loss or profit on the work as a whole. In case of loss, the contractor may still like to go ahead with the tender to gain good will and prevent bad name to the company.

20.3 Having chosen not to revoke his offer, the Contractor has to face the consequences of such action. The Contract is concluded on the date of acceptance of tender which was 19 Jul 03. Signing of contract agreement was only a formality. Strictly going as per normal procedure in tender offers, the tenderer is required to sign all the pages and submit the offer. Further correspondence, if any, and the acceptance letter will complete the contract agreement.

20.4 Contract is governed by the express provisions existing therein. The contractor is required to execute as per the description and UOI is required to pay the price inserted against the item. Either party stating that such provisions are not to be respected is violating the very foundation of the contract.

x x x x x x x x

20.6 Accordingly, the rates quoted can neither be stated to be unconscionably low nor can it be stated that there is unequal bargaining power between the parties. The express provisions of the contract and the rates forming part of the contract are to be respected.

> 20.7 The claim is not sustained. I award Rs.Nil to the claimant. UOI shall pay Rs.Nil to M/S Billimoria & Co Ltd on claim Nos.1 and 2."

As evident from the award, the Arbitrator though found that the tender was submitted by the appellant on the mistaken assumption that cables would be issued free of cost by the respondents, rejected the claims mainly on the ground that the appellant who knew the mistake on the date of opening of the tender itself had the option to revoke the offer and nevertheless, they proceeded to execute the work, that too, after entering into an agreement for the same with the respondents, agreeing to execute the works for the rates quoted in the tender. According to the Arbitrator, in such a case, the contractor cannot be permitted to claim a higher rate on the premise that the offer was one made by mistake.

23. Even assuming that it is on account of an inadvertent mistake that the cost of the cables were not included in the rates quoted by the appellant for the cable laying works, would they have taken up this issue had their rates for all the works together with the cost of cables would have gone above the rates offered by the second lowest tenderer. No, for in that event, they

would not be entitled to the work. In other words, the claim for revision of rates has been raised by the appellant taking note of the fact that their rates even with the cost of the cable would still be the lowest. It appears, it is in the said background that the Arbitrator has taken the view that despite the mistake, if at all the same is a mistake, the appellant did not revoke the offer and instead chose to enter into an agreement with the respondents to execute the works including the subject cable laying works for the rates offered by them and such a decision would only be a conscious decision on an overall appraisal of the rates quoted for other works and on consideration of the question as to whether the works would end up in loss to them. Even though the Arbitrator does not use the expression 'waiver' in the award, the award indicates that the view taken by the Arbitrator is that the appellant by their conduct has waived the right to claim the price of the cables and that therefore, they are not entitled to claim this amount. That apart, the materials indicate that even according to the appellant, had they revoked the offer, the consequence would have been only forfeiture of the earnest money deposit amounting to less than Rs.5.50 lakhs and if that be so, there is no explanation on the side of the appellant as to

the reason for agreeing to execute the work by taking upon themselves a liability of more than 1.5 crores. The circumstances aforesaid would also show that the appellant has taken a conscious decision not to insist upon the right, if any, for the cost of the cables. In other words, the aforesaid is a claim waived by the appellant. The pointed question is whether such a decision can be said to be patently illegal. Insofar as the said finding does not contravene any of the substantive laws of India and the terms of the agreement entered into between the parties and does not amount to a perverse decision as understood in paragraphs 31 and 32 of **Associate Builders**, we are of the view that the said decision cannot be said to be patently illegal.

24. Regulation 424 of MES Regulations relied on by the appellant reads thus:

> "**(424)** The tender, which is being considered for acceptance, will be further examined to see whether it contains any **freak rates, i.e.rates which, in the opinion of the Accepting Officer, are either abnormally high or abnormally low.**
>
> **If any freak rates are discovered, these will be communicated to the tenderer and he will be**

> **afforded an opportunity to revise them.** He will be informed that the lump sum amount quoted by him **will be corrected on the basis of any revision of rates thus made.** In case the tender as corrected **no longer remains acceptable, the foregoing procedure will be resorted to in respect of the next acceptable tender."**(emphasis supplied)

There is nothing on record to indicate that the MES Regulations apply to the agreement in question. The award indicates that it has been specifically contended by the respondents before the Arbitrator that the MES Regulations do not apply to the subject agreement. In the light of the said contention, it was obligatory on the part of the appellant to show either by some general order binding on the respondents or by a specific provision in the agreement concerning the application of the MES Regulations. The appellant does not have a case that there was any general order making MES Regulations applicable to similar works or that there exists any provision in the agreement concerning the application of the MES Regulations. Instead, the appellant relies on the decision of this Court in **M/s.Bharath Builders and Contractors** to contend that this Court would be justified in applying MES Regulations for the subject work. Be that as it may, even if it applies to the subject work, according to

us, it is only an enabling provision for the respondents to ensure that the rates quoted by a person for execution of work is viable and workable so that satisfactory execution of the same could be ensured. It does not confer any right on a person to claim a higher rate for a work on the premise that the rate quoted by him was freakish, in the sense not workable, after securing the work in a competitive bidding process. If the provision aforesaid is interpreted in that fashion, the same would defeat the very purpose of competitive bidding, inasmuch as after bagging a contract, the contractor would still be able to claim better rate for the work, which if he had quoted initially, he would not have been awarded the work.

25. The propositions put forward by the learned Senior Counsel for the appellant, placing reliance on the various text books also do not, according to us, apply to a case of competitive bidding, for if the same are accepted, as indicated in the preceding paragraph, one would be able to secure a contract by committing a few explicit mistakes as regards the rates in order to become the lowest and after bagging the contract, execute the same at a higher rate which, if quoted initially, he would not have been awarded the work. Similarly, **Vinayakappa Suryabhanappa** is a case where the

question arose for consideration was whether a document purported to be the sale deed of a property can be construed as a document executed by way of security in connection with a money lending transaction on account of the extremely inadequate consideration shown in the document. The said decision also, according to us, cannot have any application to the facts of the present case.

26. In the light of the foregoing discussion, we answer the question formulated in the negative insofar as it relates to Claim Nos.1 and 2, and in the affirmative, insofar as it relates to Claim Nos.9 to 13 and 13A to 13E. Needless to say, the arbitral award is liable to be restored.

In the result, the appeal is allowed in part and the impugned order, insofar it relates to Claim Nos.9 to 13 and 13A to 13E of the appellant is set aside, restoring the award of the Arbitrator.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

C.S.SUDHA, JUDGE.

YKB

APPENDIX

APPELLANT ANNEXURE

ANNEXURE 1	**STATEMENT OF APPELLANT'S CLAIM AMOUNTS DISALLOWED AND UPHELD BY THE COURT BELOW**
ANNEXURE A-1	**TRUE COPY OF LETTER DT.18.03.2004 FRM THE APPELLANT TO THE GARRISON ENGINEER**
ANNEXURE A-2	**TRUE COPY OF LETTER DT.08.05.2004 FROM THE APPELLANT TO THE GARRISON ENGINEER**
ANNEXURE A-3	**TRUE COPY OF LETTER DT.13.05.2004 FROM THE GARRISON ENGINEER TO THE APPELLANT**
ANNEXURE A-4	**TRUE COPY OF LETTER DT.05.07.2004 FROM THE APPELLANT TO THE GARRISON ENGINEER**
ANNEXURE A-5	**TRUE COPY OF LETTER DT.17.07.2004 FROM THE GARRISON ENGINEER TO THE APPELLANT**
ANNEXURE A-6	**TRUE COPY OF LETTER DT.026.07.2004 FROM THE APPELLANT TO THE GARRISON ENGINEER**
ANNEXURE A-7	**TRUE COPY OF LETTER DT.16.02.2005 FROM THE APPELLANT TO THE GARRISON ENGINEER**
ANNEXURE A-8	**TRUE COPY OF LETTER DT.22.03.2005 FROM THE GARRISON ENGINEER TO THE APPELLANT**
ANNEXURE A-9	**TRUE COPY OF LETTER DT.28.03.2005 FROM THE APPELLANT TO THE GARRISON ENGINEER**
ANNEXURE A-10	**TRUE COPY OF LETTER DT.23.11.2005 FROM THE GARRISON ENGINEER TO THE APPELLANT**
ANNEXURE A-11	**TRUE COPY OF LETTER DT.28.11.2005 FROM THE APPELLANT TO THE GARRISON ENGINEER**

RESPONDENT EXHIBITS

EXHIBIT-R(A)	**TRUE COPY OF CLAIMANT CONTRACTOR'S EXHIBIT ANNEXURE-B AT PAGE 96 OF THE PAPER BOOK OF EXHIBITS**

EXHIBIT-R(B)	**TRUE COPY OF COMMUNICATION DATED 17TH JULY 2004 ISSUED BY ENGINEER DESIGNATE**
EXHIBIT-R(C)	**TRUE COPY OF RELEVANT PAGE OF IAFW-2249 CONTAINING CLAUSE NO.6A (D) &(E)**