Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 646 OF 2021

WITH

INTERIM APPLICATION (L) NO. 4926 OF 2020

IN

COMMERCIAL ARBITRATION PETITION NO. 646 OF 2021

ALONG WITH

COMMERCIAL ARBITRATION PETITION NO. 641 OF 2021

WITH

INTERIM APPLICATION (L) NO. 4949 OF 2020

IN

COMMERCIAL ARBITRATION PETITION NO. 641 OF 2021

Konkan Railway Corporation Ltd. …Petitioner

Versus

M/s. SRC Company Infra Private Ltd. …Respondent

Mr. Simil Purohit, Senior Counsel a/w Mr. Subit Chakrabarti, Ms. Srushti Thorat and Ms. Aashka Vora i/b Vidhii Partners for the Petitioner.

Mr. Anil Anturkar, Senior Counsel a/w Mr. Kunal Kumbhat, Mr. Karthik Pillai, Ms. Kashish N. Chelani, Mr. Atharva Date & Mr. Harshvardhan Suravanshi i/b Ms. Sunanda R. Kumbhat for the Respondent.

CORAM : R.I. CHAGLA J.

Reserved on : 12 June 2025

Pronounced on : 14 November 2025

JUDGMENT :

1. By the Commercial Arbitration Petition No. 646 of 2021, the Petitioner- Respondent in the arbitral proceedings has impugned the majority Award dated 22nd May 2020 ("**the said Award**") under Section 34 of the Arbitration and Conciliation Act, 1996 ("**the Arbitration Act**").

2. In the companion Commercial Arbitration Petition No. 641 of 2021, an identical Award has been challenged. In view of the parties having referred to the pleadings and records of the Commercial Arbitration Petition No. 646 of 2021 during the oral arguments and the written submissions filed therein, the facts in that Arbitration Petition is being adverted to.

3. The brief background of facts are as under:-

(i) The National Thermal Power Corporation ("**NTPC**") had proposed setting up the Super Thermal Power Plan ("**STPP**") in Tehsil Gadarwara, District Narsinghpur, Madhya Pradesh. Accordingly, NTPC

invited tenders for the work of "*DPR & Detailed Engineering, Project Management and Construction of Coal Transportation System including Associated Electricals Package for Gadarwara Super Thermal Power Plant, Stage-I"*.

(ii) NTPC issued a Letter of Award on 25th June 2014 appointing the Petitioner- Respondent as the Project Management Consultant / Project Executing Agency for the work.

(iii) The Petitioner- Respondent in turn published a Notice dated 23rd November 2016 inviting tenders for the subject work described in the Notice at (Exh.B to the Petition).

(iv) Technical bids of the bidders were opened on 26th December 2016.

(v) The financial bids of the bidders were opened on 31st March 2017.

(vi) The Respondent-Claimant was found to be the 'L1'

bidder.

(vii) The Petitioner-Respondent issued a Letter of Acceptance ("**LoA**") on 16th May 2017 in favour of the Respondent-Claimant in respect of the subject work for the total cost of Rs. 122,32,98,483/- with the completion period of 15 months (which period was subsequently duly extended from time to time), which was countersigned and accepted unconditionally by the Respondent-Claimant.

(viii) The Respondent-Claimant commenced the subject work in July 2017.

(ix) The Petitioner-Respondent and the Respondent-Claimant executed Contract Agreement on 5th December 2017.

(x) The Collector's office (Mineral Branch), Madhya Pradesh addressed a demand letter dated 27th December 2018 directing the Respondent-Claimant to make payment of Royalty charges at the rate of Rs. 100/- per cubic meter (cum) for the earth used in

making the embankment for the subject work (aggregating approximately Rs. 22,00,00,000/-).

(xi) The Respondent-Claimant issued a Notice invoking Arbitration on 13th June 2019.

(xii) The Three Members Arbitral Tribunal comprising Mr. A.K. Mittal (Presiding Arbitrator), Mr. Atul Mohan (Co-Arbitrator) and Mr. P.S. Rao (Co-Arbitrator), entered into reference on 20th August 2019.

(xiii) The Arbitral Tribunal passed the said Award. The Presiding Arbitrator passed a separate Dissent Note on 22nd May 2020.

(xiv) By the said Award, the Arbitral Tribunal held that the liability to pay royalty on ordinary earth used in the subject work lies with the Petitioner-Respondent and directed the Petitioner-Respondent to make payment of the same. Further, the Arbitral Tribunal directed the Petitioner-Respondent to modify / amend the Contract with the Respondent-Claimant to that extent by invoking Section 26 of the Specific Relief Act,

1963 and Section 20 of the Indian Contract Act, 1872 so as to purportedly correctly reflect the *consensus ad idem* (between the parties). By the Dissent Note, the Presiding Arbitrator directed the Respondent-Claimant to make payment of the royalty as per the extant Rules on ordinary earth used in the subject work and submit the receipts thereof to the Petitioner-Respondent to facilitate preparation of the final bill.

4. Mr. Simil Purohit, the learned Senior Counsel for the Petitioner has submitted that in determining the limited issue, which arose before the Arbitral Tribunal as to whether the royalty levied by the State Government of Madhya Pradesh towards earthwork in filing in embankment used in the subject work was payable by the Petitioner-Respondent or the Respondent-Claimant in the Arbitration, the terms of Contract between the parties are to be construed by the Tribunal. The Tribunal being a creature of Contract cannot traverse beyond and is bound to act within the terms of the Contract. He has placed reliance upon the judgment of the Supreme Court in **Union of**

India Vs. Bharat Enterprise[1].

5. Mr. Purohit has submitted that in the present case the terms of the Contract between the parties unequivocally confirm on its plain reading that the Royalty payable towards earthwork in filling in embankment used in the subject work was to be borne by the Respondent-Claimant.

6. Mr. Purohit has referred to the relevant clause of the Contract between the parties. He has referred to Clause 10.1 of the Instructions to Bidders (part of the Tender documents) under the heading 'Contents of Bidding Documents'. He has referred to Clause 14.2 of the Instructions to Bidders under the heading 'Preparation of Bid' and sub-heading 'Bid Prices', which includes royalty and other levies payable by the Contractors under the Contract. He has also referred to Clause 22.4 of the Instructions to Bidders under the heading 'Submission of Bids', which provides that offers shall not be qualified with any conditions and that conditional offers shall be summarily rejected without giving any reasons. He has referred to Clause 37 of the Konkan Railways Standard General Conditions of

1 **2023 SCC OnLine SC 369**

Contract 2014 ("**GCC**"), which provides rates for items of works and which includes all fees, duties, royalties, etc. for which the Contractor may become liable or may be put to under any provision of law for the purposes of or in connection with the execution of the Contract. He has referred to Clause 41 of the GCC, which provides for modification of Contract to be in writing.

7. Mr. Purohit has referred to the definition of "**Approval or Approved**" in Clause 1.1 of the Special Conditions of Contract ("**SCC**") – Part A, which means approval in writing of the Competent Authority. He has referred to Clause 1.11 of the SCC - Part A which defines Contract to include the Agreement or Letter of Acceptance ("**LoA**"), the accepted schedule of items, rates and quantities, the GCC, along with latest corrections slips, the SCC Part-A and Part-B, the drawings, the specifications and special specifications if any, tender forms, instructions to tenderers, notice inviting tender, Addendum(s), Corrigendum(s) and other conditions / specifications of Tender documents.

8. Mr. Purohit has also referred to Clause 5 of the SCC - Part A, which provides for royalties and patent rights and that the

Contractor shall defray the cost of all royalties, fees. It is further provided that in case of any breach (whether willfully or inadvertently) by the Contractor of this provision, the Contractor shall indemnify the Konkan Railway Corporation Limited ("**KRCL**") against all claims, proceedings, damages, costs, charges, pecuniary loss and liabilities and which they or any of them sustain, incur or be put by reason or in consequence directly or indirectly for any such breach, and against payment of any royalties, damages and other type of payment in which the KRCL may have to make / pay / reimburse to any person for any machine, instruments, process, articles, matters, or thing constructed, manufactured, supplied or delivered by the Contractor to his order under this Contract. He has also referred to Clause 55.4 of the SCC – Part A, which provides for the Contractor to pay all storage, royalty and other incidental charges that may be involved.

9. Mr. Purohit has then referred to Clause 57 of SCC – Part A, which provides for payment of royalty charges and it is provided therein that all payments of royalty charges, etc. to the State Government in connection with extraction and supply of rubble stone / ballast / sand earth have to be borne and paid by the tenderer /

Contractor. The Corporation is entitled to deduct from the tenderers / Contractors and keep in deposit such amount equal to the proportionate royalty charges from each on account bills and the same will be released as and when the tenderer / Contractor submits a receipt / documents / Clearance Certificate that royalty charges have been paid by the tenderers / Contractors relating to the Contract (Clause 57.2 of SCC – Part A). He has also referred to Clause 57.3 of SCC – Part A, which provides that the tenderer / Contractor will be required to obtain a final Royalty Charge, Clearance Certificate from the concerned State / Revenue Authorities / Collector and produce the same to the Engineer-in-charge, after completion of supply, but before the release of final bill. If in any case, the tenderer / Contractor fails to produce the Clearance Certificate, the Royalty amount equal to the amount of unpaid Royalty Charges as intimated by the Revenue Authorities / Collector or as calculated on the basis of the relevant rules, such payment of royalty charges applicable to the area will be withheld by KRCL.

10. Mr. Purohit has referred to the scope of work under Clause 1.2 of the SCC – Part B which includes earthwork in cutting and embankment, construction of minor bridges / RUB and

protective work. The earthwork in embankment is with Contractor's own earth. This is also provided in Clause 6.1 of the SCC Part B, under the heading "Specifications for Earthwork", and Formation works. He has also referred to Clause 6.4 of the SCC – Part B, which similarly provides for earthwork in embankments with Contractors earth and supplying and spreading of blanketing material in addition to the above, the rate will be inclusive of the cost of acquisition of the earth or blanketing material by purchase of land or payment of royalty charges or in any other manner, transportation and all other incidental works, complete, for bringing the earth or blanketing material from outside the Railway Land. He has also to refer to Item 1 of Schedule B titled 'Filling Items' of Schedule of Items, Rates and Quantities, which include earthwork in filling in embankment. The earth excavated from outside railway boundary entirely arranged by the Contractor at his own cost and special conditions of Contract including *inter alias* royalty. The rate also includes royalty.

11. Mr. Purohit has referred to the Certificate of Familiarisation at Appendix 18 of the Contract that was duly signed and submitted by the Respondent-Claimant, which reads that the Respondent-Claimant has declared and certified that it has fully

familiarised themselves with all aspects of construction features including all local taxes, royalties, etc. It is further mentioned that the Respondent-Claimant keeps it fully informed with the provisions of the Tender documents and has quoted the percentage rate by taking into account all the factors given above and elsewhere in the Tender document.

12. Mr. Purohit has also referred to Clauses 2 and 3 of the LoA, which provides for the total Contract value and the Contract to be governed by GCC. He has also referred to the 3rd unnumbered recital in the Contract Agreement, which provides the Contractor has agreed and confirmed his unconditional acceptance to the Corporation's said Letter of Acceptance. Further, it is provided in unnumbered Clauses of the Contract Agreement that the Contract will observe and fulfill and keep all the conditions contained (which shall be deemed and taken as to be integral part of the agreement). The Corporation will pay at the rates given for various items in the schedule of items, rates and quantities and percentage rate tendered by Contractor and as accepted by the Corporation as set forth in Annexure – II, Schedule of Items, Rates and Quantities (bill of Quantities). It is further agreed that all the provisions of the said

conditions, specifications have been carefully read and understood by the Contractor and bills of quantities shall be binding upon the Contractor and upon the Corporation and shall be read as part of these presence. The entire document including Annexures annexed to the Contract Agreement shall form and be construed as part of the Contact Agreement.

13. Mr. Purohit has submitted that upon reading of the aforementioned Clauses, including the confirmation given by the Respondent-Claimant of adhering to the terms of the Contract and the tender conditions, shows that the Respondent-Claimant has consciously and unequivocally accepted the terms of the Contract and is bound by the same.

14. Mr. Purohit has submitted that the Arbitral Tribunal has arrived at the findings and observations while construing the terms of the Contract. He has submitted that the finding of the Arbitral Tribunal is that the royalty payments are to be borne by the Respondent-Claimant and it remains undisputed that the terms of the Contract envisage that all royalties of materials used in the project are to be borne by the Respondent-Claimant. It is further held by the

Arbitral Tribunal that both the parties have admitted that the Respondent-Claimant had not specified in its quote that it did not include royalty in its quoted rates. Both the parties had admitted that the Contract provided for costs of royalty to be included in the quoted and accepted rates. There is a finding that when the Respondent-Claimant did not include royalty payable on earth used in filing in embankment in its rate, it should have made a mention that its rates for earthwork are excluding the royalty costs. No such mention has been made by the Respondent-Claimant. It was only after starting the work that the Respondent-Claimant had considered the NIL royalty on ordinary earth. There are further findings of the Arbitral Tribunal that the contention of the Petitioner-Respondent that the Contract puts burden of all royalty payments on the Respondent-Claimant is correct. The Respondent-Claimant has not disputed this provision *per se*. The Respondent-Claimant admits its responsibility to pay royalty on the material used for the project. The Arbitral Tribunal agreed with the Petitioner-Respondent's arguments that there is no scope available to interpret the clauses of the Contract.

15. Mr. Purohit has submitted that the aforementioned

findings of the Arbitral Tribunal show that the Arbitral Tribunal affirms the terms of the Contract, which unequivocally holds that the Respondent-Claimant is to bear the royalty payable towards earthwork in filing in embankment as per the terms of the Contract between the parties. Despite the same, the said Award seeks to make the Petitioner-Respondent liable to pay such royalty amount.

16. Mr. Purohit has submitted that although it is the case of the Respondent-Claimant that it did not factor in the royalty payable towards the earth used in filing in embankment while submitting its bid, the same cannot be a ground of the Respondent-Claimant to claim such royalty amount from the Petitioner-Respondent. He has submitted that the defence raised by the Respondent-Claimant is that it considered the royalty payable towards the earth used in filing in embankment as NIL. This would be at the risk and costs of the Respondent-Claimant itself. He has submitted that the Arbitral Tribunal has erroneously held that although there was no ambiguity on the subject of the payment of royalty, somehow, the Respondent-Claimant had missed / excluded the royalty while working out the costs of earthwork, due to ignorance of law. He has submitted that ignorance of law is not a valid defence as per the settled law.

17. Mr. Purohit has submitted that it is the contention of the Respondent-Claimant that the Collector's office (Mineral Branch), Madhya Pradesh vide its Demand Letter dated 27th December 2018 made a demand for the royalty charges at the rate of Rs. 100/- per cubic meter (cum) for the earth used in making the embankment for the subject work aggregating to approximately Rs. 22,00,00,000/-. It is contended that this Demand Letter imposes liability for the first time, and that under an earlier Circular issued by the Government of Madhya Pradesh, Mining Department dated 18th August 2009 ("**2009 Circular**"), no royalty was payable on earth having a CBR value less than 12. He has submitted that the contention of the Respondent-Claimant on the 2009 Circular is untenable. It has been observed by the Arbitral Tribunal that all the relevant Circulars, notifications, directives, etc. were issued prior to the issuance of the Notice Inviting Tender dated 23rd November 2016 and the opening of the technical bids on 26th December 2016. He has submitted that on reading of the 2009 Circular, it is evident that the same does not make any kind of categorical assertions that no royalty is payable on the earth used in filing in embankment having a CBR value less than 12. He has submitted that neither the said Demand Letter nor the relevant Act / Rules have been challenged by the Respondent-

Claimant.

18. Mr. Purohit has submitted that in order for the Respondent-Claimant to succeed, the Arbitral Tribunal would have to interpret the 2009 Circular and arrive at a definitive conclusion that no royalty was payable on the earth used in filing in embankment having a CBR value less than 12, and that the royalty demand under the Demand Letter dated 27th December 2018 was a subsequent levy, which was not in force prior thereto. He has submitted that unless such a finding is rendered, the Respondent-Claimant cannot succeed in its claim.

19. Mr. Purohit has submitted that the Arbitral Tribunal has refrained from deciding the effect and the consequence of the 2009 Circular, since the Arbitral Tribunal felt that this issue remained outside the purview of the Arbitral Tribunal and that the limited issue before the Arbitral Tribunal was as to which party is required to pay royalty.

20. Mr. Purohit has submitted that the only basis for the Respondent-Claimant to seek payment of royalty on the earth used in

filing in embankment having a CBR value less than 12 is on its 'understanding'. The same has not been decided by the Arbitral Tribunal and hence, the question of the Petitioner-Respondent to pay the amount of royalty does not arise.

21. Mr. Purohit has submitted that the parties are bound by the terms of Contract as agreed, and any mistake of law does not permit any party to avoid the consequences of a Contract.

22. Mr. Purohit has submitted that the Arbitral Tribunal has relied upon the minutes of the meeting of the Tender Committee constituted by the Petitioner-Respondent. He has submitted that the Tender Committee is an in-house advisory body to advice the Petitioner-Respondent on the financial and technical aspects of the matter. He has submitted that being only an advisory body, its recommendations do not bind the Petitioner-Respondent. The question of the same being binding on the parties to the final Contract does not arise.

23. Mr. Purohit has submitted that the Tender Committee has evaluated the various bids submitted by the tenderers. The

minutes of the meeting of the Tender Committee is a confidential document. It is a part of the internal decision making process of the Petitioner-Respondent. The minutes of the meeting of the Tender Committee was never communicated to the Respondent-Claimant. Thus, the minutes are not available in the public domain and were only produced for the first time during the course of the arbitral proceedings on the request of the Respondent-Claimant and on the specific directions of the Arbitral Tribunal.

24. Mr. Purohit has submitted that it is well settled that inter departmental communications / file notings cannot be relied upon on the basis to claim any right, as the same have no legal sanctity. He has placed reliance upon the judgments of the Supreme Court in **Delhi Development Authority Vs. Hello Home Education Society**[2], **Mahadeo Vs. Sovan Devi**[3] and **Union of India Vs. Airwide Express Cargo**[4].

25. Mr. Purohit has submitted that the Arbitral Tribunal could not have relied upon the minutes of the meeting of the Tender

2 **(2024) 3 SCC 148**

3 **(2023) 10 SCC 807**

4 **2015 SCC OnLine Bom 4917**

Committee, as the basis of its Award. Further, the Arbitral Tribunal erred in holding that the minutes of the meeting of the Tender Committee reflected the intention of the parties. He has submitted that the minutes of meeting of the Tender Committee was not a bilateral document, but an internal evaluation of the bids submitted by the tenderers.

26. Mr. Purohit has submitted that the Arbitral Tribunal based on the minutes of meeting of the Tender Committee proceeded to hold that the Contract entered into between the parties did not incorporate that the royalty towards earthwork in filing in embankment was to be paid by the Petitioner-Respondent, as the Respondent-Claimant had not considered the same while submitting its bid.

27. Mr. Purohit has referred to the findings of the Arbitral Tribunal that the Petitioner-Respondent having decided to accept the rates quoted on lower side, has failed to incorporate in the said Contract for the corresponding basis for accepting the earthwork in filing in embankment. He has submitted that the Arbitral Tribunal is duty bound to ascertain whether the intention of the parties are fully

covered by the Contract, particularly when the Petitioner-Respondent is the author of the Contract. It is necessary to ensure that the intention of the parties before Award of the Contract are transformed into writing. He has submitted that all the above findings of the Arbitral Tribunal are contrary to the stated case of the Respondent-Claimant.

28. Mr. Purohit has submitted that the Respondent-Claimant has neither in its prayers sought rectification of the Contract under Section 26 of the Specific Relief Act, 1963 nor has the Respondent-Claimant alleged or made out any case for *contra proferentem*. He has submitted that the Arbitral Tribunal assumed *suo motu* powers and awarded a claim for rectification of the Contract. He has submitted that it is trite law that reliefs not specifically prayed for by a party cannot be granted. He has placed reliance upon **Mrs. Akella Lalitha Vs. Sri Konda Hanumantha Rao**[5] in this context.

29. Mr. Purohit has submitted that the Arbitral Tribunal by finding that non execution of a formal agreement / amendment to the said Contract to exclude the royalty payable towards earthwork

5 **2022 SCC OnLine SC 928**

in filing in embankment cannot be an impediment to honour the intention of the parties at the time of tender evaluation. This is by overlooking Clause 41 of the GCC, which expressly provides that any modification(s) to the Contract were to be in writing signed by both parties and no work was to proceed under such modification until this has been done.

30. Mr. Purohit has submitted that finding of the Arbitral Tribunal relying upon Clause 57.2 of the SCC – Part A is also erroneous. He has submitted that assuming whilst specifically denying that the Petitioner-Claimant has failed to ascertain the royalty payable, the said clause still does not make the Petitioner-Claimant liable for payment of royalty towards earthwork in filing in embankment. The said Clause also makes it clear that it is the Respondent-Claimant that has to make payment of all royalty obligations. He has submitted that the findings of the Arbitral Tribunal that the Petitioner-Respondent did not respond to letter dated 4th June 2018 addressed by the Respondent-Claimant is of no consequence. He has submitted that in any event, the obligation to perform the Contract was on the Respondent-Claimant.

31. Mr. Purohit has submitted that for all these reasons, it is prayed that the present Arbitration Petition under Section 34 of the Arbitration Act be allowed and the said Award be set aside.

32. Mr. Anturkar, the learned Senior Counsel appearing for the Respondent-Claimant has submitted that the crucial issue involved in the matter is as to whether the approach of the Arbitrators in not limiting themselves to the literal interpretation of the terms and conditions of the Contract, but instead making a *bona fide* and sincere effort to ascertain the real intention of the parties to find out as to whether the parties had reached a consensus on the disputed position, cannot be considered so erroneous, as to warrant interference under Section 34 of the Arbitration Act.

33. Mr. Anturkar has submitted that the majority Arbitrators in Clause 15.6.2 of the said Award have clearly articulated that they had chosen to proceed on the basis of consensus, i.e. to discover the real intention of the parties, rather than by a literal interpretation of the Contract. He has submitted that notably, even the minority view, as expressed in paragraphs 2.9 and 2.10, demonstrates that the parties were in consensus that no royalty was payable on ordinary

earth. He has placed reliance upon the judgments of the Supreme Court as well as this Court in support of his contention that the manner in which the Arbitrators chose to interpret the terms and conditions of the Contract to demonstrate real intentions of the parties is not to be interfered with. These judgments include **Konkan Railway Corporation Limited Vs. Chenab Bridge Project Undertaking**[6] at paragraphs 19, 20 and 27; **McDermott International Inc. Vs. Burn Standard Co. Ltd.**[7] at paragraphs 112 and 113 and **Ivory Properties & Hotels Private Limited Vs. Vasantben Ramniklal Bhuta**[8] at paragraph 43. He has submitted that all these judgments have consistently held that the interpretation of the terms and conditions of the Contract by the Arbitrator and the manner, in which interpretations are made, cannot be faulted and cannot be substituted, even if another interpretation is possible.

34. Mr. Anturkar has submitted that the reliance placed by the Petitioner-Respondent upon Clause 41 of the said Contract is misconceived. Clause 41 applies only when there is an explicit provision in the Contract, of which modification has been sought and

6 **(2023)9 SCC 85**

7 **(2006)11 SCC 181**

8 **2024 SCC OnLine Bom 1900**

which is required to be in writing. He has submitted that Clause 41 would not apply when no explicit provision exists in the Contract. He has submitted that if the intention of the parties to a Contract is established, then there would be no need to modify the provision of the Contract, because no explicit provision requires modification. The parties are behaving according to their real intentions. He has submitted that the latter portion of Clause 41 expressly allows for such verbal arrangements – abandoning, modifying, extending, reducing, or supplementing the Contract. He has submitted that if the first part of Clause 41 is given effect to, i.e. no work shall proceed under such modification until this has been done, this would result in the stoppage of work, which under no such circumstances, should be resorted to, because that would cause loss to Petitioner-Respondent and stop the ongoing work. He has submitted that the Arbitral Tribunal has determined the real intention of the parties and not modified the terms of the Contract, as contended by the Petitioner-Respondent.

35. Mr. Anturkar has submitted that no fault can be found with the approach of the Arbitrators in the present case in not given importance only to the actual verbatim of the Contract, but by trying

to identify what was the real mutual intention of the parties and what was the *consensus ad idem* of both the parties. He has submitted that this is the correct approach of adjudication, either by the Court or by the Arbitrator.

36. Mr. Anturkar has submitted that the reliance placed by the Petitioner-Respondent upon the judgments of the Supreme Court in **Union of India Vs. Airwide Express Cargo** (supra) and **Mahadeo Vs. Sovan Devi** (supra) is wholly misplaced. These judgments are applicable only to those cases, wherein it is contended that a certain decision has been taken in the noting which are internal in nature and that decision reflected in the noting is sought to be enforced. It was held in the context of inter-departmental communications that they cannot be used to claim legal rights and merely writing something in a file does not constitute an official order.

37. Mr. Anturkar has submitted that it is not the Respondent-Claimant's contention that any "*decision*" has been taken in the internal noting of the Tender Committee (minutes of Tender Committee) and is relied upon not to contend that there is any such decision taken there, but for the purpose to bring the real *consensus*

ad idem between the parties and the real and mutual intention of the parties vis-a-vis the issue viz. whether both the parties were under the mutual impression, factually that no royalty is payable on the ordinary earth and in such circumstances, whose responsibility it is to pay the royalty on ordinary earth.

38. Mr. Anturkar has submitted that the Supreme Court in **Subodh Kumar Singh Rathour Vs. Chief Executive Officer**[9] has held that internal deliberations or file notings that formed part of decision making process can certainly be looked into by the Court for the purpose of judicial review to satisfy itself of the impeccability of the said decision.

39. Mr. Anturkar has submitted that the Petitioner-Respondent and the Respondent-Claimant at all stages, were at consensus *ad idem* that no royalty is payable on ordinary earth. He has submitted that as per Clause 57.2 of the said Contract, it was the obligation of the Petitioner-Respondent to confirm the percentage of royalty charges to be recovered for supply of minor minerals in consultation with the State Government. He has submitted that the

9 **2024 SCC OnLine SC 1682**

parties never intended for the Contractor to pay royalty on the ordinary earth. These circumstances show that it was the *consensus ad idem* between the parties, which was given effect to by the Arbitrators and cannot be faulted under Section 34 of the Arbitration Act.

40. Mr. Anturkar has submitted that it is an admitted position that Schedule B of the Tender pertaining to the earthwork in filing in embankment did not include charges for royalty on ordinary earth, which submission is taken by the Respondent-Claimant in paragraph 18 of the claim. He has submitted that the Respondent-Claimant had also made specific averment in their Statement of Claim at paragraph 3.4 that during the pre-award negotiated meeting with the Tender Committee, the fact of non-consideration of royalty on ordinary earth in the bid has been conveyed. There is no specific denial as far as paragraph 3.4 is concerned and general denial is resorted to.

41. Mr. Anturkar has submitted that it was not only on the Tender Committee's recommendations, but even the Directors Committee on 15th May 2017 reviewed the Tender Committee

minutes, deliberated, and agreed with the Tender Committee's recommendations to accept the financial bid offer of the lowest bidder. Tender Committee's recommendations, which were reviewed and agreed upon by the Directors Committee have been accepted as recommended by the Chairman and Managing Director on 15th May 2017. He has submitted that on receipt of approval from the Chairman and Managing Director, the draft Letter of Acceptance was prepared as per the recommendations of the Tender Committee (financial bid) which is evident from the noting dated 16th May 2017. He has submitted that at all stages, namely, at the Tender Committee, the Directors Committee and the Managing Directors level everyone was under the impression that no royalties were payable on ordinary earth. It was in accordance with such consensus that the draft Letter of Acceptance was prepared as per the Tender Committee recommendations and which is deemed to be an integral part of the Agreement.

42. Mr. Anturkar has submitted that the minutes of the Tender Committee which show that no royalty was payable on ordinary earth is not based on the Government Circular dated 18th August 2009, but also on account of confirmation from WCR /

Jabalpur vide email dated 29th April 2017 that no royalty is payable on ordinary earth in Madhya Pradesh State. This was also the impression carried by the Petitioner-Respondent.

43. Mr. Anturkar has submitted that the Arbitration Award cannot be set aside on the mere possibility of an alternative view of the facts or interpretation of the Contract. He has placed reliance upon the judgment of the Supreme Court in **Konkan Railway Corporation Limited Vs. Chenab Bridge Project Undertaking** (supra) at paragraph 19 in this context.

44. Mr. Anturkar has submitted that it is settled law that contravention of substantial law of India would not sound the death-knell for an Arbitral Award. He has in this context relied upon the judgment in **Ivory Properties & Hotels Private Limited Vs. Vasantben Ramniklal Bhuta** (supra) at paragraph 43. He has also placed reliance upon the judgment of the Supreme Court in **McDermott International Inc. Vs. Burn Standard Co. Ltd.** (supra) at paragraphs 112 and 113 and 115, 116. The Supreme Court has held that construction of the Contract is within the jurisdiction of the Arbitrator and correspondence exchanged between the parties are required to be

taken into consideration for the purpose of construction of the Contract. Interpretation of a Contract is a matter for the Arbitrator to determine, even if it gives rise to the determination of a question of law. He has also placed reliance upon **MMTC Limited Vs. Vedanta Limited**[10] in this context.

45. Mr. Anturkar has submitted that it is now not open for the Petitioner-Respondent to argue that the Arbitrators should not have called for the documents before the formation of the Contract, viz. documents like the minutes of the Tender Committee, the minutes of the Directors Committee, the decision taken by the Managing Director, etc. He has submitted that the Arbitrator did this on the application made by the Contractor as seen from paragraph 5.2.2 of the said Award. The said application was not opposed. It was at the time of making of the application for the Petitioner-Respondent to contend that the Arbitrators cannot go beyond the *ad verbum* of the Contract.

46. Mr. Anturkar has submitted that reliance upon the grounds in the Petition where it is alleged that the Arbitrators have

10 **(2019)4 SCC 163**

exceeded their authority is impermissible in the light of Section 4 and Section 16(3) of the Arbitration Act and the judgment given in **Narayan Prasad Lohia Vs. Nikunj Kumar Lohia & Ors.**[11] at paragraphs 15 and 16.

47. Mr. Anturkar has submitted that a mere erroneous application of law by itself is not a ground to set aside the Award. He has placed reliance upon the judgment of the Supreme Court in **OPG Power Generation Private Limited Vs. Enexio Power Cooling Solutions India Private Limited**[12] at paragraph 45. He has submitted that on a careful reading of the entire Award, coupled with the documents relied upon, along with the underlying reasons, factual or legal that form the basis of the Award is discernible or intelligible, the same does not exhibit any perversity, and the Court need not set aside the Award in exercising the power under Section 34 of the Arbitration Act.

48. Mr. Anturkar has submitted that the Petitioner has at the stage of Rejoinder erroneously submitted that the tender quoted rates

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11 **(2002) 3 SCC 572**

12 **2024 SCC OnLine SC 2600**

and the quotations of all the other Contractors included royalty on ordinary earth. This submission is without any pleading to that effect either before the Arbitral Tribunal or in the Arbitration Petition filed before this Court. He has submitted that in any event, the submission on behalf of the Petitioner-Respondent is entirely incorrect and contrary to the documents on record.

49. Mr. Anturkar has submitted that both the Petitioner-Respondent and NTPC Limited being Government owned undertakings are duty bound to act fairly and inspite of which, they have sought recovery of royalty charges with complete knowledge that the quoted rates by the Respondent-Claimant did not include royalty on ordinary earth. Such action on the part of the Petitioner-Respondent and NTPC Limited is unconscionable.

50. Mr. Anturkar has submitted that the contention of the Petitioner-Respondent that Arbitrators have traversed beyond the scope of reference and modified / rectified the Contract is factually incorrect, as the operative part of the Award in Clause 20 directs the Respondent to make the payment of royalty for ordinary earth and merely provides that “the Respondent may modify / amend the

Contract with the Claimant to this extent so as to correctly reflect the consensus *ad idem*, if need be". He has submitted that this is merely an option provided by the Arbitral Tribunal and no directions are passed either rectifying or modifying the Contract.

51. Mr. Anturkar has accordingly submitted that the present Arbitration Petition be dismissed, as not raising any valid ground of challenge under Section 34 of the Arbitration Act.

52. Having considered the submissions, the limited issue which fell for determination before the Arbitral Tribunal was whether the royalty levied by the State Government of Madhya Pradesh towards earthwork in filing in embankment used in the said work was payable by the Petitioner-Respondent or the Respondent-Claimant. It was therefore, necessary for the Arbitral Tribunal to determine this issue in consonance with the terms of the Contract between the Petitioner-Respondent and the Respondent-Claimant. It is well settled that the Arbitral Tribunal being a creature of Contract cannot traverse beyond and is bound by the Contract. This has been held in the judgment relied upon by the Petitioner-Respondent viz. **Union of India Vs. Bharat Enterprise** (supra).

53. The Arbitral Tribunal has in the said Award accepted the literal interpretation of the Contract, viz. that royalty payments are to be borne by the Respondent-Claimant. In so doing, it was not competent for the Arbitral Tribunal to delve into *"real intention"* of the parties. For the Arbitral Tribunal to examine the *"real intention"* of the parties, it would first need to hold that the terms of the Contract are ambiguous or vague. This is not the case of the Respondent-Claimant as can be seen from the pleadings and/or issues framed and there is no finding on this aspect rendered. The Petitioner-Respondent and the Respondent-Claimant are *ad idem* that on a plain reading of the Contract, it was the Respondent-Claimant's liability to pay royalty. The Arbitral Tribunal by disregarding the plain terms of the Contract, which are clear and unambiguous and inferring a different intention from that contemplated by the terms of the Contract has committed a patent illegality.

54. The reliance placed by the Respondent-Claimant upon the judgments, namely **Konkan Railway Corporation Limited Vs. Chenab Bridge Project Undertaking** (supra), **McDermott International Inc.** (supra) and **Ivory Properties & Hotels Private Limited** (supra) in

support of their contention that merely because the Court would have interpreted the Contract differently interference with the Award is not warranted, is misplaced.

55. The above contention of the Respondent-Claimant is misconceived as the present case is not one involving two competing interpretations of the Contract. Here all the parties concerned including the majority Arbitrators, the dissenting Arbitrator, Respondent-Claimant and the Petitioner-Respondent have accepted that the Contract requires the Respondent-Claimant to bear the royalty liability. The ground of challenge raised in the Arbitration Petition is not to seek a new and different interpretation from that arrived at by the Arbitrators, but to point out that the final conclusion of the majority Arbitrators contradict their own interpretation of the Contract. The majority Arbitrators having first held that the Respondent-Claimant must pay royalty as per the Contract, have thereafter rendered an Award that shifts the burden onto the Petitioner-Respondent. This is not a permissible cause of action and renders the Award perverse apart from being patently illegal.

56. The reliance placed by the majority Arbitrators on the

minutes of the meeting of the Tender Committee, is misplaced. It is settled law that inter-departmental communications / file notings have no legal sanctity and/or do not create any enforceable rights. The judgment relied upon by the Petitioner-Respondent, namely **Mahadeo Vs. Sovan Devi** (supra) is apposite. It has been held that these inter-departmental communications are at best preparatory steps or expressions of tentative views. Unless notings culminate in a final decision, they cannot be relied upon as a basis for any legal right or liability. It has also been held by this Court in **Union of India Vs. Airwide Express Cargo** (supra), relied upon by the Petitioner-Respondent that inter-departmental notings have no legal effect unless communicated to the other party. This Court set aside the Arbitral Award, which relied upon such uncommunicated notings, observing that internal discussions cannot alter Contract terms or bind parties unless formally conveyed.

57. The Arbitral Tribunal has erroneously relied on such internal notings to make the Petitioner-Respondent liable for royalty payment. This constitutes a gross error in law and failure to apply settled legal principles. The minutes of the meetings of the Tender Committee records a speculative understanding of the Tender

Committee as to what the bid of the Respondent-Claimant constituted and how they have factored royalty. This is not a decision of the Petitioner-Respondent to treat royalty as Nil for this project. It is pertinent to note that the minutes of the Tender Committee meeting is dated 28th August 2017 and it is only thereafter, that the parties entered into the said Contract on 5th December 2017. Therefore, the minutes of the Tender Committee meeting at best were pre-Contract negotiations which cannot supersede the final written document.

58. The minutes of the Tender Committee meeting does not make the Petitioner-Respondent liable for the royalty. The said minutes would show that the parties contemplated that bid of the Respondent-Claimant did not provide for any amount of the royalty. However, the parties still agreed that any royalty payable will be borne by the Respondent-Claimant.

59. The judgment relied upon by the Respondent-Claimant in **Subodh Kumar Singh Rathour** (supra) in support of their submission that official records can be looked into by the Arbitrator for the purpose of finding the real intention of the parties is

distinguishable on facts. In that case, there was a challenge to a Tender cancellation based on alleged *mala fides*, where internal notings were examined to ascertain intent in the present case, the reliance on internal notings as a substantive basis for imposing liability, is impermissible.

60. Presuming that the Arbitral Tribunal could have relied upon the minutes of the Tender Committee meeting, which suggested that the parties contemplated that royalty is not payable on ordinary earth, it does not in any manner affect the interpretation of the Contract or make the Petitioner-Respondent liable for royalty. The said Contract between the Petitioner-Respondent and Respondent-Claimant overrides and supersedes any prior or collateral correspondence, minutes or opinions, unless they are incorporated into the Contract. It is well settled that once the parties have reduced their understanding into a written agreement, the said agreement becomes conclusive of their intentions. The said Contract clearly and unambiguously provides that the Respondent-Claimant is liable to bear or to pay the royalty.

61. Another fact which the Arbitral Tribunal ought to have considered is that at no point of time was the Contract rectified, modified or novated by mutual consent. The terms of the Contract remain valid, binding, and enforceable and the parties had acted upon the same during the performance of their obligations. Clause 1.11 of the SCC, clearly defines what constitutes the "Contract" and governs the rights and obligations of the parties. Thus, the reliance on the minutes of the Tender Committee meeting by the Arbitral Tribunal is untenable and *de hors* of the Contract. The Arbitral Tribunal having failed to confine itself to interpretation of the binding Contract would render the said Award liable to be set aside on this ground itself.

62. The bid documents which conclude standardized Tender document incorporating the General Conditions of Contract, Special Conditions of Contract and related specifications were made available to all bidders. The Respondent-Claimant at the time of participating in the bid had full opportunity to examine their terms. If the Respondent-Claimant was under impression that no royalty would be payable, they ought not to have participated. The onus was on the Respondent-Claimant in the event, assuming that negotiated /

modified royalty payment clause were permissible, to seek clarification or modification of the tender terms. On the contrary, the Respondent-Claimant submitted its bid unconditionally, accepting the terms including those that placed an unconditional liability for royalty on the Contractor. Further, had the royalty amount be factored in the bid amount, then the Respondent-Claimant would not have emerged the L1 bidder. Having accepted the Contract as it stands and being the successful bidder, the Respondent-Claimant cannot be permitted to revise the bid amount. The Arbitral Tribunal by arriving at a finding *de hors* the terms of the Contract, has created a parallel negotiation after Contract finalization, which defeats the very purpose of tendering.

63. This Court is mindful of the fact that judicial interference with Arbitral Awards under Section 34 of the Arbitration Act is limited. However, where the Arbitral Tribunal departs from the terms of the Contract or acts beyond its jurisdiction by making a new Contract of the parties, such interference is not only be permissible but necessary. The Supreme Court in **Associate Builders Vs. Delhi Development Authority**[13] laid down that an Award would be liable to

13 **(2015) 3 SCC 49**

be set aside under Section 34, if it suffers from patent illegality, including contravention of substantive provisions of law; ignoring binding judicial precedents; or misconstruction of the terms of the Contract. The present case is one such case where the Award is liable to be set aside under Section 34 of the Arbitration Act, as it suffers from patent illegality.

64. The Arbitral Tribunal has in the present case improperly invoked Section 26 of the Specific Relief Act, 1963 by effectively rewriting the Contract, despite the absence of any pleading, prayer or issues framed to that effect. Section 26 requires specific prayer for rectification of a written instrument supported by clear averments or pleadings. It is settled law that rectification of the Contract cannot be granted in the absence of a foundational plea and/or prayer. The Arbitral Tribunal has by rewriting the Contractual terms by invoking Section 26, has not only violated the procedural safeguards under the statute, but also offended the fundamental policy of Indian law, which requires adjudicatory bodies to remain within the scope of the dispute as framed by the parties.

65. I do not find any merit in the submission on behalf of the

Respondent-Claimant that the Arbitral Tribunal has not re-written the Contract, but has merely in Clause 20 of the said Award provided an option for the Petitioner-Respondent to modify / amend the Contract with the Respondent-Claimant to reflect the purported consensus *ad idem,* if needed. This cannot be considered as an option as it would require the re-writing of the Contract. Further, the finding of the Arbitral Tribunal that the Petitioner-Respondent is liable for the royalty payment inspite of the terms of the Contract providing otherwise, is perverse.

66. It has been held by the Supreme Court in **Nabha Power Ltd. Vs. Punjab State Power Corporation Limited**[14] that in the absence of ambiguity, an Arbitrator must strictly enforce the terms of the Contract and cannot introduce terms on the basis of business efficacy unless the rigorous test is satisfied. The Supreme Court accordingly, formulated the *"Penta Test"* for identifying implied Contractual terms. The Supreme Court in **Food Corporation of India Vs. Chandu Construction**[15] has held that the Arbitrator cannot travel beyond the express terms of the Contract and that doing so constitutes

14 **(2018) 11 SCC 508**

15 **(2007) 10 SCC 697**

misconduct and jurisdiction overreach. It reaffirmed that an Arbitral Award which ignores or contradicts binding Contractual provisions cannot be sustained under law.

67. I find that there is no waiver of the Petitioner-Respondent's rights in the arbitral proceedings. The Petitioner-Respondent's have not waived their legal objections to the Arbitral Tribunal's reliance on certain documents produced by the Petitioner-Respondent in compliance with the directions of the Arbitral Tribunal. These documents in question, being internal notings, inter-departmental correspondence, etc. fall within the category, not susceptible to the evidentiary reliance. The Petitioner-Respondent adhering to the Tribunal's direction to produce these documents cannot be construed as a conscious relinquishment or abandonment of their substantive legal right to object to the admissibility or evidentiary value of such documents. It is well settled that waiver in law, requires a clear and unequivocal intent to forgo a known right; mere compliance with the judicial or quasi-judicial directive does not meet this standard. The embargo on the use of such documents is not merely a private right of the party to assert or waive, but a limitation imposed upon the Adjudicating Authority itself. The Tribunal is

precluded by law by relying upon documents such as internal notings and communications even if they are inadvertently or compliantly placed on record.

68. Accordingly, the said Award is liable to be set aside on the valid grounds raised in the present Petition under Section 34 of the Arbitration Act. The said Award suffers from *"patent illegality"* and offends the fundamental policy of the Indian law.

69. Commercial Arbitration Petition No. 646 of 2021 is accordingly allowed and the said Award impugned therein is quashed and set aside.

70. The Commercial Arbitration Petition No. 641 of 2021 which challenges an identical Award as that challenged in Commercial Arbitration Petition No. 646 of 2021 is also allowed. The said Award impugned therein is also set aside.

71. The Commercial Arbitration Petitions are accordingly disposed of. There shall be no order as to costs.

72. All pending Interim Applications, if any in the Commercial Arbitration Petitions, do not survive and are accordingly disposed of.

[R.I. CHAGLA J.]