IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 9 OF 2021

Pratibha Industries Limited (In Liquidation) Thr its Liquidator, Mr. Anil Mehta ...Appellant

Versus

Navi Mumbai Municipal Corporation, Through Its Executive Engineer (Morbe) ...Respondent

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Ms. Ridhi Nyati, *a/w Kunal Naik, Vanshika Jain, i/b Ashwin Shanker, for the Appellant.*

Mr. Tejesh Dande, *a/w Bharat Gadhvi, Sarvesh Deshpande, Mansi Dande, Trusha Shah, for Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : FEBRUARY 6, 2026

JUDGEMENT:

Context and Factual Background:

1. This is an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("***the Act***") impugning an order dated December 10, 2020 ("***Impugned Judgement***") passed by the Learned Principal

District Judge, Thane, setting aside the arbitral award dated November 05, 2015 passed by a Learned Sole Arbitrator ("***Arbitral Award***"). The arbitral award partly allowed certain claims of the Appellant, Pratibha Industries Limited, Mumbai (in liquidation) ("***Pratibha***") in its claims against the Respondent, Navi Mumbai Municipal Corporation ("***NMMC***").

2. The disputes between the parties relate to a project awarded by NMMC to Pratibha by a Contract dated April 04, 2005 ("***Contract***") entailing laying of pipelines in Navi Mumbai under a deferred payment scheme ("***Project***"). All payments for the Project were required to be made after completion of the Project. The cost of the Project was approximately Rs. 200 crores. Right of way over land on which pipelines had to be laid,– for over a 30-kilometer stretch – was necessary, but the last parcel of land was actually received after approximately two years, while the Project was to be completed within one year.

3. There is no dispute between the parties on the quantification of the claimed amounts. Suffice it to say that Pratibha had claimed Rs.~20.8 crores towards increase in financing costs on account of delayed release of instalment payments, but was awarded only Rs.14.68 crores. Pratibha also made a claim for price escalation during the

extended contract and also for the cost of extended stay for the Project in the sum of Rs.8.56 crores and Rs.7.27 crores respectively, but was awarded sums of Rs.3.07 crores and Rs.3.11 crores respectively. The length of the pipeline was increased, and Pratibha made a claim for such increase in length in the sum of Rs.1.74 crores, which was disallowed. Finally, interest had been claimed until the date of the award, in the sum of Rs.15.51 crores but the Learned Arbitrator granted interest which amounted to Rs.5.41 crores. No costs were awarded in the Arbitral Award. The aggregate amount awarded by the Learned Arbitral Tribunal was in the sum of Rs.26.29 crores along with interest at the rate of 18% per annum from the date of the Arbitral Award until realisation.

Contentions of the Parties:

4. I have heard Ms. Ridhi Nyati, Learned Advocate for Pratibha and Mr. Tejesh Dande, Learned Advocate for NMMC and with their assistance, examined the record.

5. It is seen from the material on record that the quantification of the claims is not subject matter of dispute between the parties. The core question that arises for consideration in the adjudication of this

Appeal is whether the Section 34 Court was right in its intervention, quashing and setting aside the Arbitral Award.

6. Ms. Nyati would contend that the Section 34 Court has adjudicated the facts and the evidence afresh, re-appreciating the evidence to effectively carry out fresh trial. In other words, the contention is that the Section 34 Court has not been mindful of the scope of jurisdiction under Section 34 of the Act and has instead chosen to conduct the proceedings as if it were a first appeal with full consideration of facts as well as the Contract involved in the matter. Ms. Nyati would contend that the Learned Arbitral Tribunal had interpreted the Contract between the parties to return an eminently plausible and reasonable view, and that the Section 34 Court ought not to have substituted such a plausible view with another view that was considered more plausible and more appropriate by the Section 34 Court.

7. Ms. Nyati would also contend that the Section 34 Court, in adopting the aforesaid approach, has gone so far as to rule on the entire material on record, even relying upon points that had never been pressed into service by NMMC either in the arbitral proceedings or in the Section 34 proceedings. Ms. Nyati would submit that the Impugned Judgement is also perverse because the Section 34 Court alluded to

evidence which does not exist. She would further submit that the Impugned Judgement is also inherently contradictory in holding that there is no ambiguity in the contractual terms even while noting that there were two competing sets of conditions, with the Section 34 Court choosing to reconcile such competing sets of conditions in a manner that appealed more to the Section 34 Court.

8. Mr. Tejesh Dande on behalf of NMMC would counter the foregoing submissions to contend that the Section 34 Court has been mindful of the scope of review available under Section 34 of the Act and has arrived at a considered view that the Arbitral Award was against the fundamental policy of Indian law. He would point to Paragraphs 20 to 26 of the Impugned Judgement to justify the approach of the Section 34 Court and contend that the Learned Arbitral Tribunal had completely ignored the priority and relevance of the constituent documents constituting the Contract between the parties. Therefore, since the Arbitral Award had applied incorrect parameters of assigning priorities to multiple documents constituting the Contract, the Section 34, according to Mr. Dande, has rightly interfered with findings that were contrary to contract.

9. Mr. Dande would submit that the Learned Arbitral Tribunal had erred in appreciating the exact controversy between the parties in connection with breach of the escrow arrangement put in place and it was the Section 34 Court that has correctly interfered on this count. He would submit that it was Pratibha's obligation to pursue and obtain all necessary permissions to secure the right of way and the General Conditions of Contract ("***GCC***") had specifically stipulated that no compensation can be granted for delay in obtaining of sanctions. Since the Learned Arbitral Tribunal has wrongly interpreted this issue, Mr. Dande would submit, the Section 34 Court was entitled to interfere and set aside the arbitral award.

10. Mr. Dande would also submit that the grant of a claim for price escalation was also wrongly granted by the Learned Arbitral Tribunal. Pratibha had sought extension of time for completion of milestones and each time NMMC granted such extension, it imposed a categorical condition that the extension was granted without any compensation or cost escalation. Therefore, the Learned Arbitral Tribunal was perverse in allowing claims in this regard.

Core Issues:-

11. Having heard the parties, it is evident to me that the core issue that needs to be dealt with for adjudication of this Appeal is whether the Learned Arbitral Tribunal had erred in its interpretation of the interplay between the terms of the Fédération Internationale Des Ingénieurs-Conseils ("***FIDIC Conditions***") and the GCC, which form part of the tender document ("***Tender Terms***"). Should a conflict arise between the FIDIC Conditions and the Tender Terms, which one would prevail, is the question that arose. The Learned Arbitral Tribunal held that the Contract between the parties is to be interpreted in a manner that the FIDIC conditions and the Escrow Agreement would override the Tender Terms where a conflict emerged, whereas the Section 34 Court held that the Tender Terms would override the FIDIC conditions and the Escrow Agreement, in its interpretation of the precedence and priority in the contract-forming instruments.

12. The implications for the delay in obtaining the right of way for timely completion of the Project is the other key broad issue that falls for consideration. The Arbitral Award returns a finding that NMMC was entirely responsible for providing the right of way at its own cost and time, and in the event of delay, Pratibha would be entitled to time

extension and cost compensation for such delay. The Section 34 Court held that NMMC was only required to make the applications and pay the requisite fees towards the right of way, but securing the right of way was entirely Pratibha's obligation with cost implications for its own account in the event of delay. Therefore, Section 34 Court held that while NMMC was entitled to grant extension of time to Pratibha, the Arbitral Tribunal ought not to have awarded any costs or damages in favour of Pratibha.

Scope of Review:-

13. The scope of review of Section 34 Court is now quite clear and has been laid down in multiple judgements of the Supreme Court including ***Dyna Technologies***[1], ***Associate Builders***[2], ***Ssyangyong***[3], ***Konkan Railway***[4] and ***OPG Power***[5]. The arbitral award having been passed on November 5, 2015, there can be no quarrel that the Act as amended in 2015 would apply in the instant case.

14. The principles of law laid down in ***Ssyangyong***, to the extent it overwrote the principles declared earlier in ***Associate Builders*** would

1 Dyna Technologies Private Limited v. Crompton Greaves Ltd – (2019) 20 SCC 1
2 Associate Builders vs. Delhi Development Authority – (2015) 3 SCC 49
3 Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India – (2019) 15 SCC 131
4 Konkan Railways v. Chenab Bridge Project Undertaking – 2023 INSC 742
5 OPG Power vs. Enoxio – (2025) 2 SCC 417

apply. In a nutshell, it must be remembered that the Section 34 Court must not lightly interfere with arbitral awards. The Section 34 jurisdiction lends itself to disturbing arbitral awards strictly within the parameters legislated within Section 34 of the Act. It cannot be forgotten that arbitral tribunals are the master of the evidence and therefore, the best determinants of the quality and the quantity of the evidence. Indeed, it is quite right that if the findings of the arbitral tribunal are plausible, the Section 34 Court ought not to re-appreciate the evidence, re-interpret the contract and return its own view on what ought to have been the arbitrator's view so long as the arbitrator's view is a plausible one.

15. For the Section 34 Court to interfere with an arbitral award, it must come to a view that the arbitral award suffers from unpardonable perversity in a manner that cuts to the root of the matter with no possibility of another view.

16. To avoid prolixity, each of the aforesaid judgements need not be extracted from, but the following extract from ***Dyna Technologies*** would suffice:

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as in-*

terpreted by various courts. ***We need to be cognizant of the fact that arbitral awards should not be interfered with*** *in a casual and cavalier manner,* ***unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award****. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction.* ***The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.***

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. ***The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act****."*

[Emphasis Supplied]

17. In ***Dyna Technologies***, the Supreme Court also ruled on the scope of jurisdiction of the Section 37 Court to remind that the jurisdiction of Section 37 Court is akin to the jurisdiction of Section 34 Court. The scope of interference by the Section 37 Court in examining an order under Section 34 would be to see whether the review of the

Arbitral Award was effected in the manner stipulated iun Section 34 of the Act. If the Section 34 Court did not discharge its powers consistent with its jurisdiction, the Section 37 Court would play the role the Section 34 Court ought to have played. If the Section 34 Court had exercised its jurisdiction accurately, the Section 37 Court ought not to interfere with the Section 34 Court's view.

18. Specifically, dealing with the facets of interpretation of contract, in ***Konkan Railway*** the Supreme Court ruled thus:

> *14. Analysis:* ***At the outset, we may state that the jurisdiction of the Court under Section 37 of the Act, as clarified by this Court in MMTC Ltd. v. Vedanta Ltd., is akin to the jurisdiction of the court under Section 34 of the Act****. Scope of interference by a court in an appeal under Section 37 of the Act****, in examining an order, setting aside or refusing to set aside an award,* ***is restricted and subject to the same grounds as the challenge under Section 34 of the Act****.*
>
> ***[Emphasis Supplied]***

19. Specifically, on the subject of re-interpretation of contracts, the Supreme Court has cautioned that reinterpretation to arrive at an alternate view is impermissible. This ought to be remembered both by the Section 34 Court and the Section 37 Court.

20. The upshot is that the Supreme Court has specifically cautioned time and again against re-interpreting a contract on the ground that a different alternate view was felt to be more appealing than how the arbitral tribunal interpreted it.

Analysis and Findings:-

21. Against this aforesaid backdrop, it would be necessary for this Court to examine whether the Section 34 Court had exercised its jurisdiction consistent with the scope of review contemplated under Section 34 of the Act.

22. To begin with, it is apparent, even from a plain reading of the submissions made by NMMC in defence of the Impugned Judgement, that NMMC's robust defence is entirely based on interpretation of the evidence, finding fault with the Learned Arbitral Tribunal's interpretation. It is important to examine the issue of the conflict between the FIDIC Conditions and the Tender Terms. The Impugned Judgement indeed recognizes that there was an ambiguity and conflict between the FIDIC Conditions and the Tender Terms. Thereafter, the Section 34 Court has proceeded to delve deep into the merits to return a finding as to what was a more appropriate interpretation for resolving such conflict.

23. The Project, which entailed a laying of a pipeline passing through land belonging to various third parties, including authorities such as the Railways. This necessitated obtaining permission for right of way from such parties to lay the pipelines in their land. At the time of the Tender, since the right of way was not readily available for the entire stretch of the Project and the Project was covered by a deferred payment scheme, financial closure was a challenge. The contractor's payments would not be made from time to time, but only after due completion of the Project of pre-agreed milestones. Therefore, the contractor, had to achieve financial closure for the Project in advance on its own. In other words, there could have been no reliance on any cash flows emanating from NMMC (i.e. the client) for Pratibha (i.e. the contractor) to manage its cash flows, although the Project is the client's project and never the contractor's project. Therefore, even before the Contract was awarded, the uncertainty as to how this facet would be handled came up for discussion in pre-bid meetings. It was pointed out that the Tender Terms led to financial uncertainty and therefore in discussions between NMMC and the bidders for the Project, it was clarified that although the tender stipulated that NMMC would provide the right of way and that there shall be only a time extension without compensation for delay, FIDIC Conditions would be adopted. The record bears out the fact that

the parties had agreed in the pre-bid stage itself that to make the Project bankable it would be appropriate to adopt the FIDIC Conditions.

24. Once the evidence on record reasonably and plausibly pointed to the adoption of FIDIC Conditions, which provide that the contractor would be entitled to compensation on account of delay in right of way being made available, the Arbitral Award cannot be faulted in its analysis of the consequences of delay. It is also apparent that the financial uncertainty in sequencing and timing of release of payments under the deferred payment scheme had to be addressed for which the escrow arrangement was also contracted although never envisaged in the original Tender Terms.

25. It is in this context, that the submissions made by Ms. Nyati on behalf of Pratibha are quite accurate inasmuch as the Statement of Defence on behalf of NMMC specifically pleaded that NMMC had allowed suggestions from the bidders in relation to the conditions of contract at the pre-bidding stage. It is clear that based on suggestions from bidders, NMMC *"had agreed to adopt FIDIC"*. In view of such pleading by NMMC, it would follow that to the extent the FIDIC Conditions entailed any conflict with the Tender Terms, the FIDIC Conditions would apply. Indeed, even while the Tender Terms were not

wholly substituted, lock stock and barrel with the FIDIC Conditions, what was certainly achieved is that wherever there was a conflict, it would be the FIDIC Conditionsthat would prevail.

26. Therefore, the contract-forming provisions governing the relationship between the parties was an amalgam of the Tender Terms and the FIDIC Conditions, and to the extent there was any conflict between the two, it would not be unreasonable to conclude that the FIDIC Conditions would govern the area of conflict between the two instruments. Under the FIDIC Conditions, the delay in providing right of way would lead to an extension of time coupled with compensation whereas under the Tender Terms the delay in right of way would lead to only extension of time without compensation.

27. Likewise, if the FIDIC Conditions were to be applied, while Pratibha was to obtain permits and licences in relation to the design, execution and completion of the Project, it would follow that the risk and reward of the permissions being secured would lie in the domain of NMMC.

28. Indeed, as Ms. Nyati would rightly point out, there also are terms contained in the Tender Terms which would not stand displaced

by the FIDIC Conditions – for example, the dispute resolution procedure or the period of limitation for raising claims.

29. It cannot be forgotten that the discussion and adoption of the FIDIC Conditions in the pre-bid meetings was essentially centered around the financial uncertainty that emerged from the Project being implemented on a deferred payment basis. Indeed, under Section 28(3) of the Act, the Arbitral Tribunal must rule not only in accordance with the terms of the contract, but also in accordance with customs and trade usages applicable to the transactions in question. It goes without saying that against this backdrop, when parties applied their mind to the problems that would emerge in achieving financial closure, and for timely execution of the contract, adopted the FIDIC Conditions, the view returned by the Learned Arbitral Tribunal cannot be considered to be an unreasonable, arbitrary or perverse view. Therefore, interference with the Arbitral Award on this count does not appear to be a correct, specifically bearing in mind the scope of review envisaged under Section 34 of the Act.

30. As regards the escrow agreement, there is again a conflict and ambiguity that has emerged in the contract-forming documentation between the parties. Under the original tender, the commencement date

of the Project would have been May 20, 2006 whereas under the escrow agreement the commencement date was July 14, 2006. The escrow agreement was in fact executed between Pratibha and NMMC and State Bank of Mysore on June 14, 2006, well after the date of commencement envisaged under the Tender Terms. Under the escrow agreement, the pleaded case of NMMC acknowledges that the commencement date would be the date following 60 days from the date of issuance of the letter of acceptance and therefore, the scheduled commencement date for the Project would be July 14, 2006. While this is an admitted position in the statement of defence of NMMC, the Impugned Judgement has taken a view contrary to the pleadings of NMMC.

31. Reference may be made to Paragraph 4 in the tender notice pursuant to which the Project was awarded. In this paragraph, it was explicitly envisaged that a pre-bid conference of all interested bidders would be held. The bidders would be allowed to seek clarifications and suggest "*suitable modifications in specifications, conditions of contract, etc.*". This paragraph squarely provided that queries about the Project would need to be communicated in writing well prior to the conduct of the pre-bid conference and such suggestions which are accepted by NMMC would be communicated to all. Only the changes that are so communicated would bind NMMC and the bidders.

32. It is in this backdrop, that one must note that the Tender Terms explicitly provide that the contract-forming documentation would include the tender notice and instructions given to the bidders. Paragraph 4 is an integral part of the tender notice, and the pre-bid discussions, which led to the adoption of the FIDIC Conditions, which then become a part of the Tender Terms. The minutes of the meeting which contained the pre-bid clarifications were communicated by NMMC by a letter dated January 30, 2006, also calling upon the bidders to duly sign the same in acceptance. Specifically, in the pre-bid meeting, it was agreed between the parties that FIDIC Conditions would be adopted and the parties would need to execute the FIDIC Conditions and return the same to NMMC.

33. In response to the FIDIC suggestion from another bidder namely, IVRCL Infrastructure and Projects Ltd. ("***IVRCL***"), the decision communicated by NMMC stated, "*We agree to adopt FIDIC conditions. However, the agency has to submit FIDIC document duly signed and accepted*".

34. Likewise, in response to a query raised by Pratibha, suggesting that NMMC must pool all its revenues into an escrow account with a designated bank and release payments to the contractor

through that account, and suggested that a tripartite agreement for the purpose, NMMC provided its decision stating that "*Escrow Account Procedure can be considered*". Other bidders too had raised queries in relation to escrow procedures for the milestone-based payments to be released to the contractor and NMMC has replied that "*Deposit can be escrowed*". The execution of a signed copy of the pre-bid minutes of meeting and of the FIDIC conditions is a matter of record. The actual execution of an escrow agreement is also a matter of record.

35. When these terms are explicitly executed as provisions governing the parties, based on the decision taken even prior to the award of the project, it would be completely plausible that these additional measures adopted by the parties would form part of Item No.3 of Clause 3(e) of the Tender Terms in the "*order of precedence in case of discrepancies*" stipulated in the GCC.

36. The order of precedence in the GCC places the tender notice and bidder instructions at Item 3 of Clause 3(e); special conditions of contract at Item 4 and the GCC at Item 5. The issue before the Arbitral Tribunal was to examine whether the FIDIC Conditions could reasonably be regarded as forming part of the tender notice and instructions given to bidders.

37. Since the decision to adopt FIDIC Conditions, and the decision to adopt an escrow mechanism was taken prior to award of the Project and in modification of the Tender Terms themselves, it is completely plausible for the Learned Arbitral Tribunal to treat them as having priority over the special conditions of contract and the general conditions of contract in the order of precedence.

38. That apart, to my mind, since Section 28(3) of the Act requires the arbitrator, (that too in the facts of this case, an arbitrator with expertise in the domain) to rule not only in accordance with the terms of the contract, but also in accordance with customs and trade usages applicable to the transactions in question, one cannot lose sight of the context in which FIDIC Conditions and the escrow agreement were introduced into the contract-forming documentation – the core objective being to make the Project bankable and amenable to a smooth financial closure. This being the objective for which the parties consciously agreed to move away or to improve upon the originally stipulated Tender Terms, in my opinion, it would be very difficult to take a view that the Learned Arbitral Tribunal had adopted a perverse view, not supported by the terms of contract between the parties.

39. What complicated the matter further for the Section 34 Court is that the FIDIC Conditions themselves also contain a sequence and order of priority among the contract-forming documents. Clause 1.5 of the FIDIC Conditions stipulates a priority whereby the contract agreement would have priority over particular conditions which would then have priority over general conditions, and the tender and other documents forming part of the contract would come in last in the order of priority.

40. The Section 34 Court has concluded that the tender Terms, which included the GCC and the special conditions of contract, would fall within the ambit of "particular conditions" under Clause 1.5 and that the FIDIC Conditions, would fall under the category "general conditions", with a lower precedence. Without intending to comment on the accuracy of such reading, what becomes abundantly clear is that the Section 34 Court has waded deep into the ambit of interpretation of contract to substitute its reading of the contract for the reasonable reading adopted by the Learned Arbitral Tribunal. Even assuming such a view were plausible, it was not open to the Section 34 Court to replace a plausible view already taken by the Learned Arbitral Tribunal with another view that appeared more plausible to the Section 34 Court.

41. That apart, it appears that treating the FIDIC Conditions as forming part of the tender conditions under Clause 1.5(e) of the FIDIC conditions or to indicate that the general conditions and the special conditions would fall within the ambit of "particular conditions" under Clause 1.5(b) of the FIDIC Conditions, one would necessarily need to conclude that there were conflicting terms of priority, even while treating the FIDIC Conditions themselves as forming part of one of the competing instruments in such priority. This would lead to a circular and irrational conflict within a conflict.

42. The upshot of this situation is that evidently the contract contains an ambiguity requiring a forum interpreting the contract to adopt the business efficacy test to give true meaning to the situation at hand and interpret the same in a commercially logical and rational manner.

43. In ***Nabha Power***[6] the Supreme Court noticed various earlier judgements on how to give commercial sense to terms in a contract that may not lend themselves to a clear unequivocal meaning, in the following terms:

6 Nabha Power Ltd. v. Punjab SPCL – (2018) 11 SCC 508

49. *We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question.* ***Parties indulging in commerce act in a commercial sense. It is this ground rule*** *which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties.* ***The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious Bystander Test"*** *[Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)]* ***requiring the requisite conditions to be satisfied****: (1)* ***reasonable and equitable****; (2)* ***necessary to give business efficacy*** *to the contract; (3)* ***it goes without saying*** *i.e. the Officious Bystander Test; (4)* ***capable of clear expression****; and (5)* ***must not contradict any express term of the contract****. The same penta-principles find reference also in Investors Compensation Scheme Ltd.v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)]* ***Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a***

manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

[Emphasis Supplied]

44. In coming to the foregoing view, the Supreme Court endorsed and reiterated what had been stated in a long line of judgements that had endorsed these principles including in the cases of ***Dhanrajamal Gobindram***[7] (paragraph 19); ***D.N. Revri***[8] (paragraph 7); and ***Satya Jain***[9] (paragraphs 33 to 35).

45. In my opinion, the view returned by the Learned Arbitral Tribunal can also be upheld on the premise that it was a rational, logical and fair manner of giving business efficacy to the contract between the parties. Effectively, what the Learned Arbitral Tribunal has found is clearly justifiable on the aforesaid parameters since its formulation of the interpretation is responsive to the business efficacy test.

46. It is also well-settled law that if an arbitral award returns a fair finding, and could be justified by any logical reasons that may not have been explicitly set out by the arbitrator, then too, the Section 34

7 Dhanrajamal Gobindram v. Shamji Kalidas and Co. – (1961) 3 SCR 1020 : AIR 1961 SC 1285
8 Union of India v. D.N. Revri & Co. – (1976) 4 SCC 147
9 Satya Jain v. Anis Ahmed Rushdie – (2013) 8 SCC 131

Court must lean in favour of giving deference to such logical and fair outcome rather than look for reasons to set aside the arbitral award.

47. In addition to the foregoing, it must also be noted that the reliance by the Learned Arbitral Tribunal on trade practice, to supplement its reasoning, with particular regard to the facet of obtaining permissions for right of way, ought not to have been faulted by the Section 34 Court. It is undisputed that the time taken for obtaining the right of way took way beyond the 12 months within which the Project was to be completed. The Section 34 Court has criticized the invocation of practice and usage by the Learned Arbitral Tribunal by stating that this was not a matter of any technical or scientific issues having to be examined to necessitate any expert knowledge of the arbitrator. The Section 34 Court disagreed with the Learned Arbitral Tribunal in its view on taking into account usage of trade applicable to the transaction.

48. Section 28(3) of the Act squarely requires the arbitral tribunal to take into account usages of trade applicable to the transaction. The Learned Arbitral Tribunal was manned by a former Chief Engineer of City and Industrial Development Corporation of Maharashtra Limited ("*CIDCO*") and was in fact a unilateral appointee

of NMMC. He has taken a view on what it entails to secure the right of way and that too from other government agencies such as the Railways, Development Authorities, Public Works Departments and CIDCO. In my view, there was no need to find fault with the Arbitral Award on this count. An instrumentality of the State would be best placed to engage with other instrumentalities of the State in obtaining approvals as serious as the right of way to dig up land and lay pipelines. It is reasonable and plausible to interpret Pratibha's obligation to obtain the right of way as the obligation to engage with the requisite officials of these State agencies to facilitate securing the right of way. Such a role would be a role of interacting on behalf of NMMC. It also cannot be forgotten that the principal in the contract is NMMC while Pratibha is the agent.

49. It is in this light that when parties have agreed to a specific timeframe for completion of the contract and the very basic requirement i.e. obtaining the right of way, took far longer than the envisaged Project timeline, it was only logical and fair for the arbitrator, having examined the evidence on record, to return the view that he did.

50. Equally, it is a matter of record that even in disallowing Pratibha's claim for additional costs for the additional pipeline, it is

trade usage that the arbitrator has relied upon to dismiss that component of Pratibha's claim in favour of NMMC.

51. Therefore, in my opinion, it would be inappropriate to second guess the findings of the Learned Arbitrator and effect a whole-scale substitution at the Learned Arbitrator's view. This is not a a permissible approach for the Section 34 Court's review of the Arbitral Award.

52. The tender notice itself specifically provided Clause 55 of the GCC that NMMC would give the contractor possession of the site. To give possession of the site and possession of further portions of the site, as required from time to time, the NMMC had contracted that it would do so with due dispatch. Clause 56 of the GCC provided that in the event of failure to give possession, it was the contractor's obligation to plan his work commensurate with the handing over of the site. If handing over of the entire site itself was well after the scheduled period for completion of the Project, it cannot be said that there would be no scope whatsoever for the time extension obliterating scope for compensation for the delay. In this regard, it is noteworthy that the contract indeed envisaged that NMMC would make all necessary applications for right of way and pay the administrative charges while the contractor would be responsible "*for follow up and getting all types of permissions*". This too was the

outcome of the pre-bid meeting clarifications issued by NMMC in response to a query raised by IVRCL.

53. Likewise, similar answers were given to another bidder Petron Civil Engineering Pvt. Ltd., which had highlighted that Project execution could be exorbitantly delayed and that the contractor may at the most be asked to liaison with the concerned authorities. The assurance give by NMMC was that "*NMMC will give right of way to agency*".

54. Pratibha itself had raised a query seeking clarification on whether the time period for completion would commence from the placement of the work order or from handing over of the site, to which NMMC replied that "*time limit will be considered from the date of work order or date of handing over of the site whichever is later*". If the handing over of the entire site took nearly two years, Pratibha had a strong case to be compensated.

55. Pratibha had also raised a query with specific regard to the delay in allocation of sections of the site and the absence of compensation, which would lead to loading of excessive interest burden for the idle period when a contractor would have mobilized in all respects and would simply be waiting for the site to be provided for

lying the pipeline. In response, NNMC replied that *"tender conditions shall prevail. Will be paid on actuals*".

56. This again leads to the relevance of the FIDIC Conditions. If there were any provisions in the FIDIC Conditions that would be in conflict with the Tender Terms that originally occupied such field of conflict, it would follow that the FIDIC Conditions would prevail. Towards this end, it is submitted on behalf of Pratibha that Clause 1.13 of the FIDIC Conditions provides that the employer shall have obtained the planning, zoning or similar permission for the permanent works and the employer shall indemnify the contract from the consequences of any failure to do so. This certainly can be considered to be a head on conflict between the FIDIC Conditions and the Tender Terms which stipulate that there would be no compensation for a delay.

57. On this count too, it would be reasonable to hold that the Learned Arbitral Tribunal can simply not be said to have returned an implausible view in its interpretation of the various contract terms. It becomes evident that the interpretation given by the Learned Arbitral Tribunal is harmonious, plausible, and quite logical and reasonable. Therefore, in my opinion, there was no basis for the Section 34 Court to wade into how the Learned Arbitral Tribunal has interpreted the

evidence, and to replace the Learned Arbitral Tribunal's plausible interpretation with a competing plausible view.

58. For the aforesaid reasons, in my opinion, the interference by the Section 34 Court is not sustainable. Indeed, what was meant to be a 12-month project was finished in 26 months with the last parcel of land on which the pipeline was to be laid, having been handed in 24 months.

59. The Learned Arbitral Tribunal, in my opinion, has returned a reasonable, logical and harmonious reading of multiple constituent instruments that on a combined basis, represent the contract between the parties.

60. Once it is clear that evidently the Section 34 Court had overstepped the scope of review as envisaged in the law governing challenges to arbitration, in my opinion, there is no scope for sustaining the Impugned Judgement.

61. It must also be mentioned before concluding, that the approach while assessing an Arbitral Award is not to examine whether it can be set aside or whether it is accurate, but to examine whether the grounds specified in Section 34 of the Act are at all made out to warrant a decision to set it aside. What is clear from a plain reading of Section

34 of the Arbitration Act is that the Section 34 Court must not set aside an arbitral award unless the ingredients of Section 34(2) are available. The opening line of Section 34(2) provides that an arbitral award may be set aside by the Court ***only if*** the ingredients of the provisions get attracted. There is nothing in the material on record to indicate that the ingredients of Section 34(2) have been attracted.

62. For the reasons already articulated above, in my opinion, the Arbitral Award does not return any decision beyond the scope of what was submitted to arbitration. It also cannot be said to not be in accordance with the agreement between the parties. The analysis relating to the conflict between the FIDIC Conditions and the Tender Terms eminently fell within the domain of interpretation of contract that formed subject matter of the Learned Arbitrator's jurisdiction. Such analysis being a reasonable, logical and plausible one, the Section 34 Court ought not to have substituted the views of the Learned Arbitrator Tribunal with its own views to set aside the arbitral award.

63. For the aforesaid reasons, in my opinion, the Impugned Judgement is hereby ***set aside*** and the Arbitral Award is hereby revived.

64. Deposits, if any, made in the course of the challenge under Section 34 and the further challenge under Section 37 shall be released

to Pratibha along with accruals, if any thereon, within a period of six weeks from the date of upload of this judgement on the website of this Court.

65. In the peculiar circumstances of the case, I refrain from imposing costs in the matter.

66. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]