IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 23.12.2022

Judgment Pronounced on : **01.02.2023**

CORAM :

THE HON'BLE MR.T.RAJA, ACTING CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.(CAD).Nos.147 of 2021, 85 and 79 of 2022 and 148 of 2021
and C.M.P.Nos.21000, 21003, 21008 and 21010 of 2021

In O.SA.CAD).No.147 of 2021 :

M/s. Transtonnelstroy – Afcons (JV)
Comprising of :

M/s.Transtonnelstroy Ltd.,
4/1, Lunganskaya Street,
Moscow, 115516, Russia.
&
M/s.Afcons Infrastructure Ltd.,
AFCONS House, 16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O.),
Post Box No.11978, Andheri (W),
Mumbai – 400 053.
Rep. by S.Sivamani ... Appellant

Versus

M/s.Chennai Metro Rail Ltd.,
Administrative Building,
Chennai Metro Rail Depot,
Poonamallee High Road,
Koyambedu, Chennai – 600 107. ..... Respondent

In O.SA.(CAD).No.85 of 2022 :

Chennai Metro Rail Limited
Administrative Building
Chennai Metro Rail Depot
Poonamalle High Road,
Koyambedu, Chennai – 600 107. .....Appellant

Versus

The Joint Venture
M/s. Transtonnelstroy – AFCONS JV,
represented by Afcons Infrastructure Limited,
and comprising:

1. Transtonnelstroy Limited,
   4/1 Luganskaya Str,
   Moscow, 115516,
   Russia.

2. Afcons Infrastructure Limited,
   Afcons House,
   16, Shah Industrial Estate,
   Veera Desai Road, Azad Nagar (P.O.)
   Post box no.11978, Andheri (W),
   Mumbai – 400 053. .....Respondents

In O.SA.CAD).No.79 of 2022 :

Chennai Metro Rail Limited
Administrative Building
Chennai Metro Rail Depot
Poonamalle High Road,
Koyambedu, Chennai – 600 107. .....Appellant

Versus

The Joint Venture
M/s. Transtonnelstroy – AFCONS JV,
represented by Afcons Infrastructure Limited,
and comprising:

1. Transtonnelstroy Limited,
   4/1 Luganskaya Str,
   Moscow, 115516,
   Russia.

2. Afcons Infrastructure Limited,
   Afcons House,
   16, Shah Industrial Estate,
   Veera Desai Road, Azad Nagar (P.O.)
   Post box no.11978, Andheri (W),
   Mumbai – 400 053. ..... Respondents

In O.SA.CAD).No.148 of 2021 :

M/s. Transtonnelstroy – Afcons (JV)
Comprising of :

M/s.Transtonnelstroy Ltd.,
4/1, Lunganskaya Street,
Moscow, 115516, Russia.
&
M/s.Afcons Infrastructure Ltd.,
AFCONS House, 16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O.),
Post Box No.11978, Andheri (W),
Mumbai – 400 053.
Rep. by S.Sivamani..... Appellant

Versus

M/s.Chennai Metro Rail Ltd.,
Administrative Building,
Chennai Metro Rail Depot,
Poonamallee High Road,
Koyambedu, Chennai – 600 107. ..... Respondent

Prayer in O.S.A(CAD).No.147 of 2021 : Original Side Appeal - Commercial Appellate Division filed under Section 13(1A) of Commercial Courts Act of 2015 and Order XXXVII Rule 1 of the Original Side Rules of the High Court of Madras, 1956 read with Section 37 of the Arbitration and Conciliation Act, 1996 to allow this appeal and set aside the order of the learned Single Judge, dated 28.10.2021, consequently, confirming the detailed, well-reasoned unanimous Arbitral Award, dated 07.05.2021 passed by the Tribunal.

Prayer in O.S.A(CAD).No.85 of 2022 : Original Side Appeal - Commercial Appellate Division filed under Section 13(1A) of Commercial Courts Act of 2015 and Section 37(2)(c) of the Arbitration and Conciliation Act, 1996 to allow this appeal and set aside the impugned common order, dated 28.10.2021 passed by the Court in Arbitration O.P. (Comm.Div.) No.96 of 2021, insofar as it grants liberty to the respondent to prove its claims for extension of time (EOT) under Claim Nos.1 and 2 in the existing cost related arbitration proceedings.

Prayer in O.S.A(CAD).No.79 of 2022 : Original Side Appeal - Commercial Appellate Division filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 and Section 13(1A) of Commercial Courts Act of 2015 to allow this appeal and set aside the impugned common order, dated 28.10.2021 passed by the Court in Arbitration O.P. (Comm.Div.) No.97 of 2021, insofar as it grants liberty to the respondent to prove its claims for extension of time (EOT) under Claim Nos.1 and 2 in the existing cost related arbitration proceedings.

Prayer in O.S.A(CAD).No.148 of 2021 : Original Side Appeal - Commercial Appellate Division filed under Section 13(1A) of Commercial Courts Act of 2015 and Order XXXVII Rule 1 of the Original Side Rules of the High Court of Madras, 1956 read with Section 37 of the Arbitration and Conciliation Act, 1996 to allow this appeal and set aside the order of the learned Single Judge, dated 28.10.2021, consequently, confirming the detailed, well-reasoned unanimous Arbitral Award, dated 01.06.2021 passed by the Tribunal.

In O.S.A(CAD).No.147 of 2021 :

For Appellant : Mr.G.Masilamani, Senior Counsel
for Mr.D.Balaraman

For Respondent : Mr.N.Venkataraman,
Additional Solicitor General of India,
for Mr.S.Arujun Suresh

In O.S.A(CAD).No.85 of 2022 :

For Appellant : Mr.N.Venkataraman,
Additional Solicitor General of India,
for Mr.S.S.Arjun

For Respondents : Mr.G.Masilamani, Senior Counsel
for Mr.D.Balaraman, for R1

: Not ready notice for R2

In O.S.A(CAD).No.79 of 2022 :

For Appellant : Mr.Yashodvaradhan, Senior Counsel
for Mr.S.S.Arjun

For Respondents : Mr.Vijay Narayan, Senior Counsel
for Mr.D.Balaraman, for R1

: No Appearance for R2

In O.S.A(CAD).No.148 of 2021 :

For Appellant : Mr.Vijay Narayan, Senior Counsel
for Mr.D.Balaraman

For Respondent : Mr.Yashodvaradhan, Senior Counsel
for Mr.S.Arjun Suresh

COMMON JUDGMENT

D.BHARATHA CHAKRAVARTHY, J.

A. The Question :

The primary question entreats answer in these appeals is "Whether the course adopted by the Arbitral Tribunal, in calling for additional materials being the data entered into by the parties during the execution of the contract and the relevant software, from the claimant, well after reserving orders and thereafter technically analysing the same on its own and consequently awarding the claim, is bad in law on the ground that the respondent was *otherwise unable to present their case*?"

B. The Appeals :

2. These four appeals filed under Section 37 of the *Arbitration and Conciliation Act, 1996* read with Clause 15 of the Letters Patent, are between the same parties arising out of two Arbitral Awards in respect of two contracts. Since all the appeals have raised common questions, they are taken up together and disposed off by this common judgment.

C. The Contracts & The Dispute :

3. Chennai Metro Rail Limited (hereinafter referred to as '*CMRL'*) is a company incorporated under the Companies Act, 2013 for the purpose of creating, designing, establishing, maintaining, and running metro rail in and around the city of Chennai.

3.1. The respondent is an unincorporated joint venture of two companies namely, Transtonnelstroy Limited and Afcons Infrastructure Limited (hereinafter referred to as '*TTA*-JV'). They are contractors undertaking design and construction works.

3.2. In these matters, we are concerned with the disputes arising out of the execution of two contracts, termed as ***UAA-01*** and ***UAA-05***. To

implement the project effectively, *CMRL* also appointed a consultant called as M/s.EMBYE (a consortium of consultants) consisting of five members namely, (i) EGIS Rail SA; (ii) EGIS India Consulting Engineers Pvt. Ltd. India; (iii) AECOM / Maunsell Consultants Asia Ltd., Hong Kong; (iv) Balaji Rail Road Systems Ltd., India and (v) Yachiyo Engineering Co. Ltd., Japan. The said EMBYE was nominated to be the Employer's Representative (hereinafter referred to as 'ER') to assist the contractors in design, supervision, quality control, safety and contract management.

(i) UAA-01:

4. Tenders were invited by *CMRL* on 21.04.2010 for the works of design and construction of five underground stations and associated tunnel works between *Washermanpet* to *May Day Park* (5.6 kms, four stations) and *Chennai Central* to *Egmore* (1.7 kms, two stations) where *Chennai Central* is the common station in both the routes. This tender is termed as 'UAA-01' package of the Chennai Metro Rail Project under Phase - I.

4.1. *TTA-JV* emerged as the successful bidder for a total project consideration of Rs.1566,81,00,000/- (Rupees One Thousand Five Hundred and Sixty Six Crores and Eighty One Lakh only). The contract is a Design-

Build Lumpsum Turnkey, governed by F.I.D.I.C (*Federation Internationale Des Ingenieurs - Conseils*) Part - 1 of 1995 Edition, the General Conditions of Contract (GCC) modified *via* Conditions of Particular Application (CPA), the Employer's Requirements on design, construction, Interface Management, etc., Outline Design Specifications including Tender Documents, etc. (“UAA-01 Contract / Contract”).

4.2. The time for completion of the work was 1521 days, commencing from 07.02.2011 till 07.04.2015. As a matter of fact, subsequently, through Addendum No.1 to the contract, both parties agreed to have the revised completion date as 30.03.2016. *TTA-JV* submitted Extension of Time-II (hereinafter referred to as 'EOT-II') application on 02.09.2014 seeking extension up to 28.12.2018 (2882 days from commencement) which was rejected by the Employers Representatives(ER) on 03.12.2014.

4.3. Ultimately, the work was completed and taken over by *CMRL* on 24.05.2018 for the stretch between *Chennai Central* to *Egmore* and the commercial operations commenced from 25.05.2018. Similarly, between *Washermanpet* to *May Day Park*, the work was completed and taken over

by *CMRL* on 09.02.2019 and the commercial operations commenced on 10.02.2019. As per the *Clause 28* of the Conditions of Particular Application (CPA), the contractor i.e., *TTA-JV* is permitted to apply for extension of time for completion, if he is or will be delayed either before or after the time for completion of anyone of the causes mentioned therein. Since *CMRL* did not agree to the application of EOT-II, a dispute arose between the parties leading to the invocation of Arbitration.

(ii) UAA-05:

5. *CMRL* issued notice inviting tenders on 21.04.2010 for the works of design and construction of four underground stations between *Shenoy Nagar* (SSN) and *Thirumangalam Ramp* (2TI) and Associated Tunnels in Corridor 2. This tender is termed as 'UAA-05' package of the Chennai Metro Rail Project under Phase – I.

5.1. Here also, *TTA-JV* emerged as the successful bidder for a total project consideration of Rs.1030,99,50,000/- (Rupees One Thousand Thirty Crores Ninety Nine Lakhs and Fifty Thousand only). The contract is a Design-Build Lumpsum Turnkey, governed by F.I.D.I.C (*Federation Internationale Des Ingenieurs - Conseils*) Part - 1 of 1995 Edition, the

General Conditions of Contract (GCC) modified *via* Conditions of Particular Application (CPA), the Employer's Requirements on design, construction, Interface Management, etc., Outline Design Specifications including Tender Documents, etc. ("UAA-05 Contract / Contract").

5.2. The stipulated time for completion of the work was 1430 days. The date of commencement of the work was 07.02.2011 and the scheduled date of completion of the work was 07.01.2015. During the execution of the works, an agreement was reached between *CMRL* and *TTA-JV vide* Addendum No.1, dated 29.08.2013, whereby, the parties mutually agreed to extend the contract duration by 179 days i.e., up to 05.07.2015. On 04.07.2014, *TTA-JV* submitted its EOT-II application seeking extension of time, which was duly rejected by the ER *vide* letter dated 01.09.2014. Finally, *TTA-JV* submitted a revised EOT-II application on 10.11.2014 seeking extension up to 29.03.2016 (1877 days from commencement) which was also rejected by the ER on 21.11.2014.

5.3. The works were completed and taken over by *CMRL* on 11.05.2017 and from 14.05.2017, commercial operation commenced in the sector. As per the clause 28 of the Conditions of Particular Application

(CPA), the contractor i.e., *TTA-JV* is permitted to apply for extension of time for completion of the work, if he is or will be delayed either before or after the time for completion for anyone of the causes mentioned therein. Since the request of revised EOT-II was not granted, disputes arose between the parties leading to the invocation of Arbitration.

D. The Arbitration Proceedings & The Awards :

(i) UAA-01:

6. In respect of the contract in UAA-01, *TTA-JV* has nominated *Mr.P.Sridharan* as its Arbitrator to the Tribunal and *CMRL* nominated *Mr.G.Sivakumar* as the Arbitrator and they, in turn, appointed one *Mr.J.C.Shah* as the Presiding Arbitrator. The parties referred the following three claims to the Tribunal:-

> "*(i) Claim No.1 Determination of Extension of Time for the delays/ causes/ reasons accrued up to 28/02/2013.*
> ***(ii)*** *Claim No.2 Determination of Extension of Time for the delays/causes/reasons accrued up to 31/05/2014.*
> ***(iii)*** *Claim No.3 Determination of Additional Costs arising out of Addendum No.1 dt.29/08/2013 (Extension of Time) & Payment thereof.*"

6.1. The Tribunal held its preliminary meeting on 14.12.2015 and

the following procedure/time schedule was agreed upon with the consent of the parties:-

Sl.No.	Action to be taken	Date
1	Claimant to file Statement of Claim (SOC) with supporting documents by	15-01-2016
2	Respondent to file Statement of Defence (SOD), Counter Claim (if any) with supporting documents by	29-02-2016
3	Claimant to file Rejoinder regarding claim and reply to counter claim (if any) with supporting documents by	21-03-2016
4	Admission & Denial of each other's documents by	28-03-2016
5	Framing of issues	31-03-2016
6	List of witnesses (if any) and affidavits of witnesses of both sides by	Later stage
7	Cross examination of witnesses/arguments on	Later stage
8	Respondent to submit certified copy of the Agreement	14-1-2016
9	Arguments by Claimant and Respondent in support of their case	Later stage
10	Submission of written synopsis of arguments	Later stage
11	Preparation & publication of award.	Later stage

6.2. The statement of claims, along with supporting documents, was filed by the Claimant on 15.01.2016 and the counter statement by the respondent, along with supporting documents, was filed on 21.03.2016. A rejoinder, along with supporting documents, was filed by the claimant on 30.04.2016. The claimant submitted its admission / denial of documents on 31.05.2016. The respondent filed its admission / denial of documents through a memo dated 03.06.2016 and on 09.06.2016 through a

supplementary memo. The parties also submitted further disputes under claim Nos.4, 5, 6 and 7 to the same Tribunal *vide* their letters dated 08.03.2016 and 10.03.2016 respectively and the Tribunal adjudicated the above claims and passed awards on claim Nos.4 and 5 on 07.03.2017 and on claim Nos.6 and 7 on 03.06.2017 respectively.

6.3. Thereafter, the Tribunal continued the proceedings in respect of the instant claims 1, 2, and 3 on 04.042017 and the trial resumed. Certain applications were also filed. The Presiding Arbitrator, *Mr.J.C.Shah*, unfortunately passed away due to COVID-19 on 09.07.2020 and a new Presiding Arbitrator, *Dr.M.S.Srinivasan*, was appointed on 22.07.2020. The Tribunal, with its constitution, again held a preliminary meeting on 05.08.2020 and once again, the learned Counsel on either side made detailed arguments and written submissions. An Arbitration, thus, was conducted for 52 months with 108 sittings and two witnesses were examined on behalf of *TTA-JV* and 245 documents were marked. On behalf of *CMRL*, one witness was examined and 463 documents were marked.

6.4. While so, *CMRL* filed an application under Section 23 of the *Arbitration and Conciliation Act, 1996*, stating that the claimant has not

responded to the observation of the Arbitral Tribunal in its virtual hearing, dated 12.09.2020 relating to impact analysis based on Critical Path Method as mandated under the contract and that it had retrieved from its Document Management System a Rolling Programme, dated 16.06.2014 along with purported impact analysis which took into account all events upto 31.05.2014. While it is not admitting some of the data contained in the programme, which was entered by *TTA-JV*, yet, the same should be taken on record and should be marked as ***Ex.R-301*** as the same would only enable the Tribunal to appreciate the relevant facts of the case. To the said application, a counter-affidavit was filed by *TTA-JV* stating that when the respondent itself is not relying on the data, there was no necessity to produce the said document. The Tribunal considered the said application and passed an order on 22.10.2020 allowing the production of the additional document, hence it is necessary to extract paragraph No.5 of the said order, which reads as follows:-

> " ***5.*** *However, the Arbitral Tribunal considered the said application, since the reconstituted Arbitral Tribunal hearing the matters afresh and the Affidavit of the Claimant dated 07.07.2020 being a recent document, the Arbitral Tribunal following the principles of natural justice, decided to provide another and full opportunity to the Respondent. Accordingly, the Rolling Programme dated 16.06.2014 is taken on record as Exhibit R-301 and the*

Affidavit dated 07.07.2020 is taken on record as Exhibit R-302. The above said two documents are taken on record subject to relevancy and materiality to the dispute before the Arbitral Tribunal. The Claimant is also given liberty to raise its objections and to make submissions with reference to the above said documents."

Thereafter, Orders were reserved in the matter on 26.02.2021.

6.5. On 15.03.2021, the Arbitral Tribunal called for the following particulars / documents from the parties including the native files from the Claimant. Therefore, it is essential to reproduce the said E-mail in full which reads as hereunder:-

" *In continuation to the Written Submissions, the Tribunal required the following documents/ programme in the native format (MS word/ PG file).*

1. Written Submission filed on behalf of the Respondent.
2. Written Submission filed by the Claimant.
3. Rolling Programme & Updated Programme dated 16.06.2014 submitted by the Claimant to the E.R.
4. Rolling Programme & Updated Programme as on Feb-2013 submitted by the Claimant to the E.R.

The Claimant may please submit the native file of the above programmes (Sl. no 3 & 4) in P6 format with a copy to the Respondent.

The respective parties may please submit their Written Submissions (Sl. no 1 & 2) in Word format to the Tribunal.
The above documents may be sent at the earliest and not more than a couple of days.

Dr. M.S. SRINIVASAN
Presiding Arbitrator
15.03.2021 "

6.6. In response thereto, *TTA-JV* submitted the native files of the Rolling Programme as called for by the Tribunal to its E-mail, dated 16.03.2021, by duly marking a copy to the opposite party/*CMRL*. It is essential to reproduce the said E-mail which reads as hereunder:-

"*Respected Sirs,*

As directed by the Arbitral Tribunal, we hereby submit the native file of the following programmes

1. Rolling Programme & Updated Programme dated 16.06.2014 submitted by the Claimant to the ER (in P6 format).
2. Rolling Programme & Updated Programme as on Feb-2013 submitted by the Claimant to the ER (in P6 format).

Thanks & Regards
S.Sivamani
JGM - Contracts
Transtonnelstroy-Afcons-JV"

6.7. Thereafter, an award was passed on 07.05.2021. The Tribunal considered the various causes of delay, which *TTA-JV* had attributed to *CMRL* and after consideration of the evidence on record, gave its detailed analysis and findings in volume-II of the award in paragraph No.7. The gist of the same is that ***C.W.1***, being the person, who was directly involved in the execution of the works, is a competent witness to speak about the facts and his evidence, along with his answers in the cross-examination, can be taken into account for the purpose of rendering findings of facts. However, the evidence of ***C.W.2***, who was examined by *TTA-JV* for the method and logic for quantification of claims, is rejected by the Tribunal as he had not used the Critical Path Method which was mandated as the method and logic for quantification of claims in the contract between the parties. The Tribunal, therefore, decided to perform the impact analysis by itself using the Critical Path Method by employing the *Primavera* Software and decided to arrive at a conclusion on the extension of time. The Tribunal, therefore, further analysed the various data as contained in the native files of the Rolling Programme which was submitted by the claimant and thereafter, by following the Critical Path Method by its own expertise and made calculations, analysis, and generated the results and technically determined the issue by generating time delay etc., in graphical charts etc., which were

separately annexed as volume-IV of the award and on the basis of its exercise, passed the following award:-

> " *1) The Claimant is entitled to an Extension of Time for 357 days for overall completion of the works (i.e., KD-19: Achieve issuance of Taking Over Certificate) with the revised Key dates as per Annexure-1 of Addendum No.1, on account of Respondent's delay up to 15/04/2013.*
>
> *2) The Claimant is entitled to an Extension of Time for 851 days for overall completion of the works with revised date as 29/07/2018 (i.e., KD-19: Achieve issuance of Taking Over Certificate) and with revised key dates for completion of individual Key dates as tabulated in Annexure-9 of this award, on account of Respondent's delay up to 31/05/2014.*
>
> *3) The Claimant is not liable to pay any Liquated Damages till the revised date for achievement of each Key Dates as detailed in Annexure-9 of this Award and the refund of LD amount under Claim Nos. 1 & 2 of this Award shall be made only upon considering the further revision of KDs if any in the final adjudication of all extension of time claims under the Contract.*
>
> *4) The Parties are directed to equally share the Arbitrators fees and Arbitral proceedings expenses. However, the expenses incurred by each party in connection with the preparations, presentations, etc., of its case prior to, during and after the proceedings shall be borne by each party itself.*"

(ii) UAA-05:

7. As far as UAA-05 is concerned, the same two arbitrators were nominated by *TTA-JV* and *CMRL* namely, *Mr.P.Sridharan* and *Mr.G.Sivakumar*. The said two arbitrators, in-turn, nominated *Mr.K.Dharmalingam* as the Presiding Arbitrator and the following disputes were submitted for Arbitration:-

> "*(i) Claim No.1 Determination of Extension of Time for the delays/ causes/ reasons accrued up to 31.12.2012.*
>
> *(ii) Claim No.2 Determination of Extension of Time for the delays/causes/reasons accrued up to 31.05.2014.*
>
> *(iii) Claim No.3 Determination of Additional Costs arising out of Addendum No. 1 dt.29.08.2013 (Extension of Time) & Payment there-off.*"

7.1. The Tribunal held a preliminary meeting on 16.12.2015 and the following procedure / time schedule was agreed upon:-

Sl.No.	Action to be taken	Date
1	Claimant to file Statement of Claim (SOC) with supporting documents by	02-02-2016
2	Respondent to file Statement of Defence (SOD), Counter Claim (if any) with supporting documents by	29-03-2016
3	Claimant to file Rejoinder regarding claim and reply to counter claim (if any) with supporting documents by	20-04-2016

4	Admission & Denial of each other's documents by	27-04-2016
5	Framing of issues	30-04-2016
6	List of witnesses (if any) and affidavits of witnesses of both sides by	Later stage
7	Cross examination of witnesses/arguments on	Later stage
8	Respondent to submit certified copy of the Agreement	14-1-2016
9	Arguments by Claimant and Respondent in support of their case	Later stage
10	Submission of written synopsis of arguments	Later stage
11	Preparation & publication of award.	Later stage

7.2. The statements of claim Nos.1 and 2, along with supporting documents, were filed by the claimant on 02.02.2016; the statements of defence in claim Nos.1 and 2, along with supporting documents, were filed by the Respondent on 26.04.2016; rejoinders in claim Nos.1 and 2, along with supporting documents, were filed on 08.06.2016 and 26.06.2016. Both the claimants submitted their admission and denial of documents on 29.06.2016. The Tribunal framed the issues on 15.07.2016.

7.3. When the matter was in progress, the parties also submitted four other claims for adjudication before the Tribunal as claim Nos.4, 5, 6 and 7 and the same were adjudicated and awards were passed in respect of claim Nos.4 and 5 on 07.03.2017 and in respect of the claim Nos.6 and 7, on 28.04.2017. Thereafter, the Tribunal continued the proceedings in respect

of the instant claim Nos.1 to 3. On 08.04.2019, the Presiding Arbitrator, *Mr.K.Dharmalingam*, resigned in view of his health condition and thereafter, the other two arbitrators appointed *Mr.A.P.Radhakrishnan* as the Presiding Arbitrator on 30.05.2019. The newly constituted Arbitral Tribunal held its preliminary meeting on 19.06.2019 and after considering the further course, both the learned Counsel made their oral and written submissions. Hence orders were reserved on 14.01.2020. Totally, the Tribunal held 114 sittings, and on behalf of *TTA-JV*, ***C.W.1*** to ***C.W.3*** were examined and 166 exhibits were marked. On behalf of *CMRL*, no witness was examined and 320 exhibits were marked.

7.4. Thereafter, by an E-mail, dated 16.04.2021, the Tribunal also requested the parties to produce the native files, the Rolling Programme and also to install the Software. The said E-mail is also reproduced which reads as follows:-

> "*Dear Sir,*
>
> *The Tribunal is in the process of finalizing the award on claim No.1 & 2 (package UAA-05)-Ref-I*
>
> *To finalize the award, the Tribunal require the following programmes in the native format (P6 file)*

1. Baseline Programme DWP-Revision C (Ex-CD-11 of CV-3)
2. Addendum No:1 programme -DWP-Revision F (Ex.CD-18 of CV-6)
3. Rolling programme and updated programme as on Dec, 2012 submitted by the Claimant to the ER.
4. Rolling programme and updated programme as on May 2014 submitted by the Claimant to the ER.
5. Requisite software to be installed by the Claimant on the required platform to access the program.

The Claimant may please submit the native files of the above programmes in P6 format in a couple of days with a copy to the Respondent

This direction is issued in consultation the other two Arbitrators.

Thanks and with best regards

A P Radhakrishnan
Presiding Arbitrator "

7.5. On 17.04.2021, *TTA-JV* submitted the said documents through E-mail with a copy marked to *CMRL* which reads as follows:-

"*Respected Sirs,*

As directed by the Arbitral Tribunal, we hereby submit the native file of the following programmes

1. Baseline Programme DWP-Revision C (Ex-CD-11 of CV-3) (in P6 format).

2. Addendum No. 1 programme - DWP Revision F (Ex-CD-18 of CV-6) (in P6 format).
3. Rolling and Updated Programme as on Dec 2012 submitted by the Claimant to the ER on 29.01.2013 (in P6 format).
4. Rolling and Updated Programme as on May 2014 submitted by the Claimant to the ER on 07.06.2014 (in P6 format).
5. With regard to the requisite software (Primevera), the Claimant is taking necessary steps for installation.

Thanks and Regards
S.Sivamani
JGM - Contracts "

7.6. Thereafter, the Tribunal passed an award on 01.06.2021 and in the present award also, ***C.W.1***, being the person, who was directly involved in the execution of the works, was taken as a competent witness to speak about the facts and his evidence, along with his answers in the cross-examination, was taken into account for the purpose of rendering findings of the facts. However, the evidence of ***C.W.2***, who was examined by *TTA-JV* for the method and logic for quantification of claims, was rejected by the Tribunal as he had not used the Critical Path Method which was mandated by the contract. The Tribunal, therefore, decided to perform the impact analysis by itself by using the Critical Path Method by employing *Primavera* Software and came to a conclusion on the extension of time.

Besides, the Tribunal further analysed the various data as contained in the native files of the Rolling Programme which was submitted by the claimant and thereafter, by following the Critical Path Method by its own expertise, made calculations, analysis, and generated the results and technically determined the issue by generating the time delay etc., in graphical charts etc., which were separately annexed as volume-IV of the award and on the basis of its exercise, passed the following award:-

> " *1] The Claimant is entitled to an Extension of Time for 179 days for overall completion of the works [i.e., KD-17: Achieve issuance of taking Over Certificate] within the revised Key dates as per Annexure – 1 of Addendum No.1, on account of Respondent's delay upto 15.04.2013.*
>
> *2] The Claimant is entitled to further Extension of Time for 302 days for overall completion of the works with revised date as 02.05.2016 [i.e., KD-17: Achieve issuance of Taming Over Certificate] and with revised key dates for completion of individual Key dates as tabulated in Annexure – 9 of this award, on account of respondent's delay upto 31.05.2014.*
>
> *3] The Claimant is not liable to pay any Liquidated damages till the revised date for achievement of each Key Dates as detailed in Annexure – 9 of this Award and the refund of LD amount under Claim Nos.1 & 2 of this Award shall be made only upon considering the further revision of Kds if any in the final adjudication of all extension of time claims under the contract.*

> *4] The Parties are directed to equally share the Arbitrators fees and Arbitral proceedings expenses. However, the expenses incurred by each party in connection with the preparations, presentations etc., of its case prior to, during and after the proceedings and shall be borne by each party itself."*

E. The Section 34 Petitions & The Order :

8. Aggrieved by the said awards, *CMRL* filed Arbitration O.P.Nos.96 and 97 of 2021 seeking to set aside both the awards under Section 34 of the *Arbitration and Conciliation Act, 1996*. Both the said petitions were taken up together and by a judgment, dated 28.10.2021, the learned Single Judge, after taking into account the above course adopted by the Tribunal in calling for documents after reserving the orders and relying upon the same without giving an opportunity to the parties, held that the award was passed without an opportunity being granted to *CMRL* to comment upon the said evidence which formed the basis for passing the award and held that the awards were liable to be set aside under Section 34(2)(a) of the *Arbitration and Conciliation Act, 1996*. It is essential to extract paragraph No.16 of the learned Single Judge which reads as follows:-

> " ***16.*** *It is to be noted that the tribunal had considered the communication by way of an*

email in both cases on 16.04.2021 and 15.03.2021 directing the respondents herein to submit primavera software. The rolling programme of the year 2013 was never marked before the arbitral proceedings. The above email indicate that the primavera software was installed in one of the computer of the tribunal which has not been communicated to the petitioner herein. Ultimately, the tribunal extended time only based on the above unmarked rolling programme as on 28.02.2013 and 16.04.2013 and 31.05.2014 respectively. When the parties have raised certain dispute with regard to the data and entries which was stored in the computer and software, merely because the particular software is sought to be followed as per the contract, the contents or data cannot be taken as gospel truth on its face value, particularly, when both sides have raised certain reservations as to the rolling program. The tribunal being a technical member having decided in their internal deliberations to analyse the data stored in the primavera software ought to have given an opportunity to the parties, particularly after embarking such an exercise. Only on such opportunity being given, the parties would have been in a better position to show each of the entries are binding and reliable and which of the entries are not relied and not proved. Only on the proof of such entries or by way of an admission, the documents can be relied upon by the tribunal. No doubt, strict rule of Evidence Act is not required to be followed by the Tribunal. However, fundamental principles governing the fields of adjudication to prove any document cannot be ignored altogether. In this case, the tribunal has relied upon the software and rolling programmes which was produced after the arguments was over and the tribunal themselves had undertaken such an exercise to analyse the

entires and concluded its finding by extending EOT."

8.1. After considering the relevant decisions, more specifically a judgment of the Hon'ble Supreme Court of India in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)***[1], the learned Single Judge finally held, in paragraph No.21, as follows:-

" ***21.*** *The tribunal has relied upon the documents which has been disputed by the other side without giving an opportunity to substantiate or disprove certain entries made in the software and the conclusion of the tribunal is merely on the basis of such documents, without an opportunity being granted and the same certainly violates the procedure contemplated under section 34[2] [a] of the Arbitration and Conciliation Act. Since the petitioner was not given an opportunity to present their case, besides, the statements and documents not being communicated to the petitioner and the same has been relied upon by the tribunal and no opportunity has been given to disprove the contents of the documents, particularly when the data and the entries have been denied by the petitioner herein, this Court is of the view that the award of the arbitral tribunal extending time without proper opportunity is liable to be interfered.*"

1 (2019) 15 SCC 131

8.2. This apart, the learned Single Judge also further directed that since the cost related claims are pending before the concerned Arbitral Tribunal and since the impugned dispute is still pending, the present question, as to the extension of time, can also be taken up before the same Tribunal and after affording proper opportunities to both sides, the Tribunal can determine the extension of time. It is necessary to extract paragraph No.22 which reads as follows:-

> " ***22.*** *It is relevant to note that the dispute with regard to the other claims, cost related claims are still pending before the arbitral tribunal. Though these awards have been passed separately in respect of extension of time, since, the main dispute in respect of various monetary claims are pending before the arbitral tribunal, the learned Arbitral Tribunal ought to have decided all the disputes in the same proceedings instead of passing separate award for extension of time alone. Since, the main dispute is still pending before the Arbitral Tribunal, it is well open to the claimant to prove the documents and claim extension of time in the existing proceedings. The learned arbitral tribunal can very well give an opportunity to the parties in respect of extension of time sought by the claimant. After affording proper opportunity to both sides, extension of time can be decided in the existing claim itself which are pending before the arbitral tribunal in both the contracts viz., UAA 05 and UAA 01. In such view of the matter, this Court is of the view that the claimant instead of going for mere extension of time before the tribunal, they ought to have referred the entire dispute including extension of time. As this Court*

has found that no opportunity has been given and unmarked documents have been relied upon by the tribunal, the award passed by the Tribunal in both the matters are liable to be set aside."

8.3. Aggrieved by the decision of the learned Single Judge in setting aside the arbitral awards, *TTA-JV* has filed O.S.A.Nos.147 and 148 of 2021 praying to set aside the order of the learned Single Judge and to revive the awards. *CMRL* also has filed O.S.A.Nos.79 and 85 of 2022, raising a grievance that once the arbitral awards are set aside, the directions of the learned Single Judge in paragraph No.22 virtually would amount to remanding the matter back to the Arbitral Tribunal which is impermissible and unsustainable in law.

F. The Submissions :

9. Heard *Mr.G.Masilamani,* learned Counsel appearing on behalf of *TTA-JV* in O.S.A.Nos.147 of 2021 and 85 of 2022, *Mr.Vijaynarayan*, learned Senior Counsel and *Mr.D.Balaraman*, learned Counsel appearing on behalf of *TTA-JV* in O.S.A.Nos.148 of 2021 and 79 of 2022. On behalf of *CMRL,* heard *Mr.Yashodvaradhan*, learned Senior Counsel in O.S.A.Nos.148 of 2021 and 79 of 2022 and *Mr. N. Venkataraman*, Learned

Additional Solicitor General of India in O.S.A. Nos. 147 of 2021 and 85 of 2022.

9.1. *Mr.G.Masilamani*, learned Senior Counsel appearing on behalf of *TTA-JV* in O.S.A.Nos.147 of 2021 and 85 of 2022, by taking this Court through the detailed project map and scope of the work and factual details of the contract relating to its time schedule etc., would submit that after filing the Arbitration Original Petitions for setting aside the award, the only contention raised by *CMRL* before the learned Single Judge during the oral arguments was that the Tribunal had relied on two unmarked documents after reserving the award without giving opportunity to them to comment on the said documents. Except for the said ground, no other ground was urged before the learned Single Judge. At the outset, he would submit that mere non-affording opportunity to comment is different from 'unable to present the case', and therefore, the phrase in Section 34(2)(a)(iii) of the Act, has a distinct meaning in law. In this regard, it should be noted that the Tribunal summoned the said documents to the knowledge of *CMRL*. *TTA-JV* also furnished those documents to the knowledge of *CMRL*. In both E-mails, copies have been marked to the parties as well as their respective Counsels on record. After calling for the documents, the

Tribunal passed the award only after 53 days. For all these 53 days, there was no demur on the part of *CMRL* and it kept quiet. As a matter of fact, the first award was passed on 07.05.2021 and even in the said award, it was seen that the said two documents were relied upon by the Tribunal. Thereafter, there was 23 days time gap in passing the second award. Even during the said period, absolutely, no objection whatsoever was raised in writing or orally before the Tribunal regarding the additional documents. The entire Arbitration process was a mammoth exercise and the award itself comprised of 861 pages after considering the voluminous evidence or documents adduced by the parties. The award is elaborate, unanimous, and well reasoned. The arbitrators chosen by the parties were experts in the field, having retired as Chief Engineers etc., with not less than 20 years of experience to their credit and each of them are well qualified experts on the subject. The Tribunal did not rely upon any new document, on the other hand, only called upon to install *Primavera* Software, which is the software used by the parties and using the said software, analysed the very data which was entered into by *TTA-JV* on day to day basis during the working of the contract.

9.2. Learned Senior Counsel would stress upon the fact that when the data was actually entered, *TTA-JV* was acting as an agent of *CMRL* as after the completion of the contract, the entire data was the property of *CMRL*, and *TTA-JV* was even paid for the said work. At the time of entering of the data, absolutely, no objection whatsoever was raised on behalf of *CMRL* or on behalf of their representatives. All that the Tribunal did was that it found some of the causes for delay claimed by *TTA-JV* as correct and having found some of the causes for the delay as factually incorrect. Thereafter, it held that as per the contract, the Critical Path Method had to be adopted by the parties to calculate the impact delays or the delays which had impacted the progress of the contract. The members of the Tribunal were appointed only for the said expertise in the field. They had not created any evidence or brought in any external factors, therefore, the mere analysis of the evidence on record would not amount to creation of any new evidence.

9.3 With regard to calling for the additional documents, he would submit that atleast in one contract (UAA-01), one Rolling Programme was already marked by *CMRL* itself as ***Ex.R-301*** and all that the Tribunal did was to call for the soft version of the said files (native files) so as to perform

the analysis by itself. Similarly, the other Rolling Programme also contained the soft version of the day to day data which can never be disputed by the parties, therefore, Learned Senior Counsel would submit that the approach of the Arbitral Tribunal can never be found fault with. *Mr. G. Masilamani* would submit that the learned Single Judge had erroneously set aside the award, as if the case was covered under Section 34(2(a)(iii) of the *Arbitration and Conciliation Act, 1996* and that the parties were unable to present their case. The learned Senior Counsel, taking this Court to the various dictionary meanings of the words 'able' as well as 'unable', would submit that the term 'unable to present the case' has to be understood with reference to the specific meaning attributed to it. The learned Senior Counsel, tracing the legislative history, would place reliance upon Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), more specifically on Article V(b); UNCITRAL Model Law on International Commercial Arbitration (United Nations document), 1985, and again on Article 34(2)(a)(ii); The Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45 of 1961), on Article V(1)(b); European Convention on International Commercial Arbitration of 1961 – Geneva, on Article IX(1)(b) and would contend that all these Legislations / International Treaties contain similar clause, which is adopted

under Section 34(2)(a)(iii) of the *Arbitration and Conciliation Act, 1996*. The term 'unable to present the case' has been dealt with by way of judicial pronouncements.

9.4. Learned Senior counsel would first rely upon a judgment of the Queen's Bench Division (Commercial Court) in ***Minmetals Germany GmbH Vs. Ferco Steel Ltd.,***[2] to contend that the inability to present the case before the arbitrators should arise from factors / matters beyond the control of the party and if a party had the opportunity to contest, then the party cannot plead inability. More specifically, the following passage from the said judgment is relied upon:-

> "*In my judgment, the inability to present a case to arbitrators within s. 103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention. In the present case that is what has happened.*
>
> *I therefore reject the submissions of Ferco that it was unable to present its case.*"

2 (1999) CLC 647

9.5. Learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court of India in ***Ssangyong*** (cited *supra*), more specifically on paragraph Nos.49, 51, 52 and 74, which read as follows:-

> " ***The ground of challenge under Section 34(2)(a)(iii)***
>
> ***49.*** *Under Section 34(2)(a)(iii), one of the grounds of challenge of an arbitral award is that a party is unable to present its case. In order to understand the import of Section 34(2)(a)(iii), Section 18 of the 1996 Act should also be seen. Section 18 reads as follows:*
>
> > *"**18. Equal treatment of parties**.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case."*
> > *(emphasis supplied)*
>
> *Section 24(3) also states as follows:*
>
> > *"**24. Hearings and written proceedings**.—(1)-(2) * * **
> >
> > *(3) All statements, documents or other information supplied to, or applications made to the Arbitral Tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the Arbitral Tribunal may rely in making its decision shall be communicated to the parties."*

Section 26 of the 1996 Act is also important and states as follows:

> *"**26. Expert appointed by Arbitral Tribunal**.—(1) Unless otherwise agreed by the parties, the Arbitral Tribunal may—*
> *(a) appoint one or more experts to report to it on specific issues to be determined by the Arbitral Tribunal; and*
> *(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.*
> *(2) Unless otherwise agreed by the parties, if a party so requests or if the Arbitral Tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.*
> *(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report."*

51. *Sections 18, 24(3) and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii). Under Section 18, each party is to be given a full opportunity to present its case. Under Section 24(3), all statements, documents, or other*

information supplied by one party to the Arbitral Tribunal shall be communicated to the other party, and any expert report or document on which the Arbitral Tribunal relies in making its decision shall be communicated to the parties. Section 26 is an important pointer to the fact that when an expert's report is relied upon by an Arbitral Tribunal, the said report, and all documents, goods, or other property in the possession of the expert, with which he was provided in order to prepare his report, must first be made available to any party who requests for these things. Secondly, once the report is arrived at, if requested, parties have to be given an opportunity to put questions to him and to present their own expert witnesses in order to testify on the points at issue.

52. *Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out.*

74. *The learned counsel for the respondent also agreed that these guidelines were never, in fact, disclosed in the arbitration proceedings. This being the case, and given the authorities cited hereinabove, it is clear that the appellant would be directly affected as it would otherwise be unable to present its case, not being allowed to comment on the applicability or interpretation of those guidelines. For example, the appellant could have argued, without prejudice to the argument that linking is dehors the contract, that of the three methods for linking the New Series with the Old Series, either the second or the third method would be preferable*

to the first method, which the majority award has applied on its own. For this reason, the majority award needs to be set aside under Section 34(2)(a)(iii)."

9.6. Learned Senior Counsel, relying upon Section 4 of the *Arbitration and Conciliation Act, 1996*, would submit that *CMRL*, being a party which knew with the above procedure adopted by the Tribunal, never objected the same inspite of receipt of the E-mail and therefore, it should be deemed to have waived its rights. Again drawing the attention of this Court to Section 16(2) of the *Arbitration and Conciliation Act, 1996*, learned Senior Counsel would submit that objection to the action of the Arbitral Tribunal, traveling beyond the evidence and the mandate of the parties had to be mandatorily raised before the arbitrators, but, *CMRL* kept quiet. The learned Senior Counsel, drawing the attention of this Court to Section 32 of the *Arbitration and Conciliation Act, 1996*, would submit that the proceedings before the Tribunal would stand terminated only by passing of the award and therefore *CMRL* ought to have moved the Tribunal if it had got any objection whatsoever for seeking the soft copies of the *Primavera* Software and Rolling Programmes. Learned Senior Counsel would draw the attention of this Court to Section 34(2)(a), whereunder, by way of amendment, it was made mandatory that the ground mentioned in Section

34(2)(a)(i) to (v) shall be specifically met out on the basis of the record of the Arbitral Tribunal and not otherwise. In this case, on the available record, it can be seen that the E-mail by the Arbitral Tribunal was marked to both the parties and there was no objection on behalf of CMRL to the same.

9.7. Learned Senior Counsel further relied upon a judgment of the Hon'ble Supreme Court of India in ***Sohan Lal Gupta (Dead) through LRs. and Ors. Vs. Asha Devi Gupta (Smt) and Ors.***[3], more specifically on paragraph No.43, which reads as follows:-

> " ***43.*** *Furthermore, in this case Ghanshyamdas Gupta expressly relinquished his right by filing an application stating that he would withdraw his objection. Such relinquishment in a given case can also be inferred from the conduct of the party. The defence which was otherwise available to Ghanshyamdas Gupta would not be available to others who took part in the proceedings. They cannot take benefit of the plea taken by Ghanshyamdas Gupta. Each party complaining violation of natural justice will have to prove the misconduct of the Arbitration Tribunal in denial of justice to them. The appellant must show that he was otherwise unable to present his case which would mean that the matters were outside his control and not because of his own failure to take advantage of an opportunity duly accorded to him. (See* ***Minmetals Germany GmbH v. Ferco Steel Ltd. [(1999) 1 All ER (Comm) 315****]) This Court's decision in* ***Renusagar Power***

3 (2003) 7 SCC 492

Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644 : AIR 1994 SC 860] *is also a pointer to the said proposition of law.*"

9.8. Again to bring home the point that *CMRL* had sufficient notice, learned Senior Counsel relied upon a judgment of the Kerala High Court in ***SJP Motors Vs. TVS Motors Company Ltd.***[4], more specifically on paragraph Nos.8 and 10. To press the point that a party cannot purposefully ignore the procedural directives of the decision-making body and then successfully claim that the procedures are unfair or violative of due process, learned Senior Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***Vijay Karia and Ors. Vs. Prysmian Cavi E Sistemi Srl and Ors.***[5], specifically on paragraph Nos.61 to 67. Learned Senior Counsel would further rely upon a judgment of the Hon'ble Supreme Court of India in ***Centrotrade Minerals and Metals Inc. Vs. Hindustan Copper Limited***[6], more particularly paragraph No.48, whereunder, the ratio in ***Minmetals*** (relied on *supra*) was quoted with approval to hold that the party was at no time outside its control to raise objections. For the proposition that after keeping quiet, *CMRL* cannot be permitted to raise issue, learned Senior Counsel relied upon a judgment of the Constitution Bench of the Hon'ble

4 2008 SCC OnLine Ker 282
5 (2020) 11 SCC 1
6 (2020) 19 SCC 197

Supreme Court of India in ***State of Madras, etc. Vs. A.Habibur Rehman and Sons, etc.***[7], more specifically on paragraph No.7. Learned Senior Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***Jugal Kishore Prabhatilal Sharma and Ors. Vs. Vijayendra Prabhatilal Sharma and Anr.***[8] for the proposition that when no objection has been raised for relying upon some material before the arbitrator, award cannot be assailed on that ground. The learned Senior Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International) Company Limited***[9], more specifically on paragraph Nos.33, 34 and 35, to submit that when *CMRL* itself decided to produce one of the Rolling Programmes, by applying the doctrine of estoppel and doctrine of election, it cannot be permitted to approbate and reprobate. To press home the point that well considered arbitral awards cannot be lightly interfered by this Court under Section 34 of the *Arbitration and Conciliation Act, 1996*, the learned Senior Counsel relied upon a judgment of the Hon'ble Supreme Court of India in ***Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited***[10], more specifically on paragraph No.28 of the

7 AIR 1968 SC 339
8 (1993) 1 SCC 114
9 (2011) 10 SCC 420
10 (2022) 1 SCC 131

judgment. The learned Senior Counsel also relied upon a judgment of the High Court of Delhi in ***S.N.Malhotra and Sons Vs. Airport Authority of India and Ors.***[11], specifically on paragraph Nos.20 and 33 of the judgment to contest that if a party chooses not to object, there will be deemed waiver under Section 4 of the *Arbitration and Conciliation Act, 1996*.

9.9. Learned Senior Counsel would rely upon the judgment of the Hon'ble Supreme Court of India in ***K.P.Poulose Vs. State of Kerala and Anr.***[12], specifically on paragraph Nos.3, 4 and 6 to contend that it was well within the power of an arbitrator to ask for the relevant documents. Finally, learned Senior Counsel would submit that when the parties chose Arbitration by domain experts and when they have rendered a well considered award, merely complaining that two documents (which are called for by an E-mail marked to both the sides), were relied upon, is a hypertechnical and flimsy reason, especially when there was a time gap of 53 days and 46 days after the E-mail communications in both the contracts to raise objections. Having remained silent, the said reason is now found as an excuse to attack the award. As a matter of fact, before the learned Single Judge, the provision of law namely, Section 34(2)(a)(iii) was not

11 2008 SCC OnLine Del 442
12 (1975) 2 SCC 236

specifically mentioned in the petition. The learned Single Judge only considered the 'opportunity of hearing' which cannot be taken as equivalent to 'unable to present the case'. *CMRL* can plead that it was 'unable to present the case' only if it was prevented by external factors and not when it had chosen to remain silent and mere deviation in procedure of marking etc., cannot be deemed to be a ground to set aside the award within the mischief of 'unable to present the case'.

9.10. *Mr.Vijay Narayan*, learned Senior Counsel and *Mr.D.Balaraman*, reiterated the above submissions. *Mr.D.Balaraman*, learned Counsel taking this Court through the case in respect of the details of the contract, pointed out that the only difference between the two cases is that the Rolling Programme was not produced and marked. In any event, even in the other contract, both the two technical members were present in the Tribunal and therefore, the E-mail request to produce the documents, was sent to both the parties and only with due notice, the documents were submitted. Learned Counsel would submit that even in the present case, the factors of delay were only attributable to *CMRL* and when *TTA-JV* had to wait in the same project for two long years with all their machinery for the sheer fault of *CMRL*, they are entitled for the extension of time for

provisions for which were duly provided under the contract. By raising hypertechnical objection, the same cannot be overcome by *CMRL*.

9.11. Per *contra*, *Mr.Yashodvaradhan*, learned Senior Counsel appearing on behalf of *CMRL*, drawing the attention of this Court to the impugned award, would submit that firstly, it can be seen that the Tribunal had called for the documents after reserving the award only from one party. The Tribunal did not disclose anything as to for what purpose the documents were called for. If there was any specific purpose behind summoning the documents, the Tribunal ought to have reopened the matter and heard the parties. Having called for the documents, if the Tribunal had found that the documents are relevant and necessary for the purpose of deciding the issue, as per the original procedure adopted for marking documents through oral evidence, it ought to have marked the said documents through the proper witnesses and if the proper witnesses were not coming forward, it could have marked as Court documents also and thereby, an opportunity could have been given to *CMRL* to raise all its objections. Even while producing a physical copy of the Rolling Programme of the year 2014 and seeking to mark it as ***Ex.R-301***, *CMRL* had specifically denied the data and its contents and therefore, the Tribunal had

due notice that the data in the said Rolling Programme had been denied by us.

9.12. Taking this Court through the relevant passages of the arbitral award, *Mr.Yashodvaradhan*, learned Senior Counsel submits that it is not a mere case of summoning the documents. In this case, on perusal of the award, he would submit that it is clear that after reserving the orders, the Tribunal had made internal deliberations and it had found that the existing evidence was not enough for awarding the claim of *TTA-JV*. Therefore, there were only two courses which the Tribunal should have adopted. Firstly, it should have dismissed the claim as the claimant has not proved the matter by letting in appropriate evidence. Secondly, if the Tribunal was of an opinion that further opportunity had to be given, then, it should have reopened the matter directing the parties to adduce further evidence with reference to the Critical Path Method and thereafter, could have decided the issue fairly. The Tribunal, without adopting either of these courses, while categorically rejecting the claimant's case in paragraph No.7, had taken upon itself to analyse the data and come to a wrong conclusion. Learned Senior Counsel would submit that the Tribunal has taken up the exercise of analyzing and drawing conclusions and had created one volume of evidence

by way of charts and tables by itself, which is annexed to the award as volume-IV of the award and the entire award is made only on basis of the self-generated documents of the Tribunal. Therefore, this is a case, in which, the Tribunal totally ignored the parties and *CMRL* had no opportunity to comment on the data, method or analysis, and the results and thus, there was complete inability on the part of *CMRL* to present its case. He would submit that *CMRL* did not know as to what purpose the documents were called for and therefore, it cannot be non-suited on the basis that it did not raise any objection.

9.13. Relying upon paragraph Nos.30 and 31 in the judgment of the Hon'ble Supreme Court of India in ***Associate Builders Vs. Delhi Development Authority***[13], learned Senior Counsel would contend that the Hon'ble Supreme Court of India had clearly held that the *audi alteram partem* principle, which is a fundamental juristic principle in Indian law, contained in Section 18 of the *Arbitration and Conciliation Act, 1996*, as well as in Section 34(2)(*a*)(*iii*) of the Act cannot be ignored. The learned Senior Counsel, further taking this Court through the judgment in ***Ssangyong*** (cited *supra*), would rely on paragraph Nos.34, 35, 42, 49, 50, 51 to contend that the sections 18, 24(3) and 26 of the *Arbitration and*

13 (2015) 3 SCC 49

Conciliation Act, 1996 are important pointers to what is contained in the ground of challenge mentioned in the section 34(2)(*a*)(*iii*) of the Act and if full opportunity is not given as in the present case, the same would be a ground for setting aside the arbitral award. Relying further on paragraph Nos.52, 53 and 74 of the said judgment, he would contend that the learned Single Judge had rightly set aside the award.

9.14. *Mr.N.Venkataraman*, learned Additional Solicitor General of India appearing on behalf of *CMRL*, would take this Court through the relevant passages of the award and would submit that in these cases, the Arbitral Tribunal had found that the case of the claimant as unsustainable on the basis of the evidence which is already presented. Therefore, the Tribunal, which is to decide the claims on the evidence already submitted by the parties, overstepped its authority and jurisdiction, thereby, turning the very nature of its duty as that of an investigator and as if it is exercising an inquisitorial jurisdiction, indulged in the huge exercise behind the back of the parties. Learned Additional Solicitor General of India would submit that both the parties did not know what was happening. Such an exercise was carried in the internal deliberation of the Tribunal. Supposing the award had gone in favour of *CMRL*, certainly, *TTA-JV* would have also

complained about the said course of action, because it is a wrong course of action. Keeping both the parties in dark, the Tribunals in both the contracts, entered into the uncharted territory of being both the expert as well as the decider on its own and performing the investigator's job of finding out relevant data by drawing/making inferences and conclusions on the basis thereof.

9.15. Learned Additional Solicitor General, taking this court to the analysis charts and tables, would submit that as a matter of fact, there are number of errors in the said data and had an opportunity been given to the parties, *CMRL* would have pointed out the same. As a matter of fact, in the petition under Section 34 of the Act, such errors have been pointed out.

9.16 Learned Additional Solicitor General of India, taking this Court to the said exercise of pointing out atleast two such errors in respect of delay in handing over High Court Station and its impact in respect of Mannadi Station, would impress upon this Court as to how risky the exercise was, in the absence of comments on behalf of *CMRL*. Learned Additional Solicitor General of India would submit that the impugned award has to be set aside on the principles of natural justice simply based on

Vanilla principles inasmuch as the Tribunals did not give *CMRL* the opportunity on the evidence. The principles of natural justice is also enshrined in various provisions of the *Arbitration and Conciliation Act, 1996*, more specifically, in Sections 18, 24 and 26 of the Act which are also reiterated in Section 34 of the Act. Grave prejudice has been caused to *CMRL* on account of the said course adopted by the Tribunal. When it has to shell out huge amount if the extension of time is allowed, the same cannot be without even providing with proper opportunity to *CMRL*. Learned Counsel would contend that the entire exercise which is done in the award is that of investigation and not adjudication. If the Tribunal wants to use its expert knowledge and step into the role of that expert, then, it has to take the necessary precaution which is specifically laid down by the Hon'ble Supreme Court of India in ***Ssangyong*** (cited *supra*) by providing proper opportunities to the parties. When the parties have let in oral and documentary evidence which are the relevant material, the Tribunal had chosen to ignore all the relevant material and pass an award entirely on the basis of irrelevant material, which are the unmarked documents and has created evidence. The impact of such an exercise is huge and 205 pages of its own findings and data is created. Most of the analysis borders on creation of new data and evidence. Several factors which are taken into

account by the Tribunal for awarding extension of time was not even claimed by the claimant in EOT (I) and (II) presented to *CMRL* in the claim. Once the Tribunal found that 'deferred method process', on the basis of which the claim was made, the same is erroneous approach, hence it ought to have dismissed the claim. As a matter of fact, there are also several other perverse findings in the Arbitral Awards, especially when the entire issue got settled by way of Addendum to the agreement.

9.17. Learned Additional Solicitor General of India, again taking us through ***Associate Builders*** and ***Ssangyong*** (cited *supra*) would submit that the Hon'ble Supreme Court of India, in ***Ssangyong***, has categorically held and settled this issue that not providing an opportunity to other side would clearly be within the scope of Section 34(2)(a)(iii) of the *Arbitration and Conciliation Act, 1996* and all the relevant parameters are pleaded. As a matter of fact the learned Single Judge had extracted these facts in Paragraph No.16 of the order (extracted *supra*). Therefore, mere non-mentioning of the provision of law in the petition will not defeat the rights of *CMRL*. As a matter of fact, all the grounds have been specifically raised in the petition under Section 34 of the Act. It was argued in detail before

the learned Single Judge and therefore, the learned Single Judge has rightly set aside the award.

9.18. Learned Additional Solicitor General of India, also relying upon a judgment of the Hon'ble Supreme Court of India in ***State of Chhattisgarh and Anr. Vs. Sal Udyog Private Limited***[14], would contend that the plea of waiver cannot be raised by the appellants in the matter of illegality. Learned Additional Solicitor General of India specifically relied upon paragraph No.24 of the said judgment and specifically relying upon paragraph Nos.5-049, 5-050 and 5-051 of *Russel on Arbitration, 24th Edition (Sweet and Maxwell Publications),* to contend that the entire proceedings as adopted by the Tribunal is a classic example of how a Tribunal should not conduct itself. According to the learned Additional Solicitor General of India, this error is fundamental and substantial in nature. He also placed strong reliance on the Judgment in ***T. Takano Vs. Securities and Exchange Board of India and Anr.***[15], to contend that when it comes to the compliance of the principles of natural justice by any quasi-judicial authority or Tribunal deciding a *lis*, the duty was on the Tribunal and it was not the parties' burden to pray for it. The burden of the Tribunal becomes heavy if it indulges in any technical exercise by itself.

14 (2022) 2 SCC 275
15 (2022) 8 SCC 162

9.19. Both sides also submitted brief written submissions summarizing the above oral arguments. Certain other judgments were also relied upon by both sides which were also quoted in the written submissions.

G. Points for consideration :

10. We have considered the rival submissions made on either side and perused the material records of the case. The following questions arise for consideration in these appeals:-

(i) Whether *CMRL* has to be non-suited for not taking the ground of 'unable to present its case' before the learned Single Judge?

(ii) Whether *CMRL* has made out a ground for setting aside the award under Section 34(2)(a)(iii) of the *Arbitration and Conciliation Act, 1996* before the Learned Single Judge?

(iii) Whether the observations / directions of the learned Single Judge in paragraph No.22 of the impugned judgment, enabling the parties to raise the issue once again before the Tribunals in pending Arbitrations, is sustainable?

H. Question No.1 :

11. On a perusal of the Original Petition filed by *CMRL*, in Ground (a), the Heading No.I reads as hereunder:-

> "*Arbitral Tribunal has unilaterally modified/amended the basis and methodology of the claim of the Respondent by analyzing the claim on an entirely different methodology and basis, more so, after reserving the impugned award and without providing an opportunity to the Petitioner to defend the same.*"

And under the same heading grounds (b), (c) and (d), specifically raise objections as to the course adopted by the Tribunal, summoning and consideration of the additional documents, non-marking of the documents, analysis by using the software on its own etc. Therefore, all the parameters and circumstances, to assail the award under section 34(2)(a)(iii) of the *Arbitration and Conciliation Act, 1996*, have been specifically raised. These submissions were also made during the course of the hearing before the learned Single Judge which are recorded in paragraph No.16 of the Judgment under appeal, the same have been extracted *supra*. Therefore, it can neither be said that the ground has not been specifically raised before the learned Single Judge, nor can it be said that it is raised for the first time before this Court. It is a well settled legal position that a mere omission to

mention the provision of law in the cause title by itself is not a ground to non-suit the petitioner / *CMRL* and we answer the question accordingly.

I. Question No.2 :

12. The award is primarily sought to be set aside on the grounds under Section 34(2)(a)(iii) of the *Arbitration and Conciliation Act, 1996* which is extracted hereunder for ready reference:

> " ***34 Application for setting aside arbitral award. —***
> .
> .
> .
> *(2) An arbitral award may be set aside by the Court only if —*
> *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that -*
> .
> .
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;*"

12.1. All the learned Senior Counsel would primarily rely upon the judgment of the Hon'ble Supreme Court of India in ***Ssangyong*** (cited *supra*), to restate the meaning of the phrase 'unable to present the case' by considering the relevant passage of ***Ssangyong*** (cited *supra*) which also

relied upon the earlier judgment of ***Associate builders*** (cited *supra*) and other judgments including ***Minmetals*** (cited *supra*) decides the scope of challenge under Section 34(2)(a)(iii) of the Act. From the above judgment and the other decisions relied upon by the learned Counsels on either side, it can be seen that :

(a) the requirement that the parties shall be given full opportunity to present their case under Section 18 of the Act;

(b) the requirement under Section 24(3) under the Act that all statements, documents or other information supplied to or application made to the Arbitral Tribunal by one party shall be communicated to the other party and any expert report or evidentiary document on which the Arbitral Tribunal may rely in making its decision shall be communicated to the parties;

(c) the necessity to communicate the expert evidence and give an opportunity against the expert evidence appointed by the Tribunal is found mandatory under Section 26 of the Act;

(d) if the materials are taken behind the back of the parties by the Arbitral Tribunal, on which, the parties have had no opportunity to comment would amount to a party being otherwise unable to present its case;

would be the material errors/grounds for challenging the Arbitral Award under Section 34(2)(a)(iii) of the Act.

12.2. The narrow compass of contention between the parties is that as per the learned Senior Counsel for *TTA-JV*, *CMRL* had remained silent on its own and was not prevented by external factors, and therefore, they cannot complain that it was unable to present its case, while according to the learned Senior Counsel for *CMRL* the burden is on the Tribunal to provide the opportunity and *CMRL* had no clue whatsoever so as to raise an objection. We have extracted the E-mail communication of both the Tribunals *supra*. Absolutely, nothing has been communicated by the Tribunals as to their internal deliberation or about the fact that they are going to conduct the exercise of analysing the data and drawing inferences / outputs being the experts in the field. That being the situation, when orders have been reserved, especially, on the previous occasion, at the time of marking of document in ***Ex.R.301***, when the Tribunal had specifically given opportunities to both the sides, it cannot be expected of *CMRL* to rush to the Tribunal with an objection. It was expected of the Tribunal to comply with the principles of natural justice and when the Tribunal called for particulars, no possible knowledge of the purpose can be imparted on either party and

now *post facto*, it cannot be alleged that *CMRL* remained silent. It can further be seen that after consideration of the evidence on record, the Tribunal accepted the evidence of the claimant in respect of some of the factual aspects relating to the delay and rejected them with respect to other aspects. But, the Tribunal further found that taking into consideration the said factual aspects by itself will not entitle the claimant for an award as the said factual aspects have to be further factored in and worked out as per Critical Path Method and only then an award can be passed. No exception can be taken for the finding of the said Tribunal which was on merits. Further, the course adopted by the Tribunal, to proceed further without superficially rejecting the claim and to resort to the correct method, by itself cannot also be found fault with. The parties have, in this case, chosen to appoint well qualified domain experts as arbitrators. In this regard, it is relevant to quote paragraph No.53 of a judgment of the Hon'ble Supreme Court of India in ***Ssangyong*** (cited *Supra*), in which, certain passages from *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary*, edited by Dr.Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012) is quoted with approval and the same reads as hereunder:-

> " ***53.*** *In New York Convention on the Recognition and Enforcement of Foreign Arbitral*

Awards — Commentary, edited by Dr Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

*"**4. Right to Comment***

According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.

(a) Right to Comment on Evidence and Arguments Submitted by the Other Party

As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.

In order to ensure that the parties can exercise their right to comment effectively, the Arbitral Tribunal must grant them access to the evidence and arguments submitted by the other side. Affording a party the opportunity to make submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure rules apply (e.g. such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have afforded Arbitral Tribunals considerable leeway in setting and adjusting the procedures by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings". Accordingly, absent any specific agreement by the parties, the Arbitral Tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

(b) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised sua sponte, provided it was entitled to do so. For instance, if the tribunal gained "out of court knowledge" of circumstances (e.g. through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same rule applies to cases where an arbitrator intends to base the award on his or her own expert knowledge, unless the arbitrator was appointed for his or her special expertise or knowledge (e.g. in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on facts of common knowledge if it intends to base its decision on those facts, unless the parties should have known that those facts could be decisive for the final award." (emphasis in original)"

12.3. Further, paragraph No.5-051 of Russel on Arbitration relating to Tribunal's expert knowledge reads as hereunder:-

> " ***Tribunal's expert knowledge.*** *A tribunal may be entitled to rely on its own expert knowledge and experience in deciding the case. Indeed the arbitrators may have been selected for appointment precisely because they have experience of the trade or industry in relation to which the dispute arises. However, unless that is clearly the case, or the parties have agreed that it may do so, the tribunal should disclose the matters within its own knowledge on which it intends to rely to avoid any subsequent argument that the parties should have been given an opportunity to address them. That said, the courts take a different approach depending on the manner in which tribunals rely on their own experience and knowledge. So, for example, there can be no objection to arbitrators using their experience and technical knowledge when applying the law or evaluating the evidence before them and making findings of fact. However, in* ***Checkpoint Ltd Vs. Strathclyde Pension Fund*** *[**[2003] EWCA Civ 84**] the court drew a distinction between the arbitrator supplying new evidence by using his own knowledge and him using that knowledge to evaluate and adjudicate upon the evidence before him. In relation to the latter, the arbitrator is fully entitled to make use of his own experience and knowledge in evaluating the evidence before him and in reaching his conclusions, provided that it is of a kind and in the range of knowledge that one would reasonably expect the arbitrator to have, and provided he uses it to evaluate the evidence called and not to introduce new and different evidence. Accordingly the tribunal can draw an inference from the evidence before it*

> *even if that inference has not specifically been raised by either party, but the tribunal may not make a finding based on new evidence.*"

12.4. As a matter of fact, a judgment of the Court of Appeal, UK in ***Checkpoint Limited Vs. Strathclyde Pension Fund***[16], clearly analyses the legal position as to the distinction between the Arbitrator supplying new evidence of his own knowledge and using his knowledge to evaluate and adjudicate upon the evidence before him. A perusal of the said judgment makes it vividly clear that if the ultimate analysis and conclusions are based on the expertise of the Arbitrator arising out of his "intracranial information"(*Arivattral* (mwpthw;why;) in Tamil and *SvaBuddhi* (?????????) in Hindi), then the same would not amount to creating new evidence. Thus, applying the above principle to the case on hand, it can be seen that in this case the Arbitrators proceeded to adopt Critical Path Method which is the correct method as per the Contract and they had the expert knowledge within them, (intracranial information), to carry out such an exercise.

12.5. But unfortunately, in this case, so as to apply their knowledge, there was no material on record to carry out such an exercise

16 (2004) EWCA Civ 84

they needed additional evidence in the form of the native files and the data contained therein. Therefore, having found the necessity of the said documents, simply calling for the documents without divulging the reasons therefor, after reserving the case for orders and after their internal deliberation, clearly amounts to taking these materials behind the back of the parties. The E-Mails of both the Tribunals are extracted *supra*. It can be seen that there is absolutely no whisper whatseover as to what for the materials were called for. Mere marking a copy of the mail to both sides, does not amount to grant of opportunity, when the parties had no idea or clue as to what the purpose was. Further, having summoned these data without divulging its actual intention to the parties, the Tribunals relied upon the data, which was already disputed by *CMRL*, without an opportunity to comment on the said data, clearly brings this case within the rubric of the party's inability to present the case as categorically explained by ***Ssangyong*** (cited *supra*) as explained in Paragraph Nos.51 and 52 of the judgment.

12.6. Further, the above exercise is no minor part of the award. The Tribunal found that the parties had only covered half the distance and it had to take upon itself to complete the remaining exercise to decide the *lis*.

The above self-anointed exercise of the Tribunal forms the very basis of the award. It cannot be said that the Tribunal was unaware of the requirements of opportunity for the parties to present their respective cases, as it can be seen from its own order extracted *supra* when it marked ***Ex.R-301.*** A detailed oral evidence procedure has been agreed upon in the preliminary hearing itself. This kind of informal calling for evidence and acting upon it without even marking them as Exhibits certainly amounts to a departure from the agreed procedure, behind the back of the parties and has caused huge prejudice to the other side. A duty is enjoined on the Tribunal to provide the parties of an opportunity to comment on matters when it decided to deviate from the already agreed procedure of evaluating the case of the parties on the basis of evidence adduced, both oral and documentary and to adopt the method of technical evaluation by its own expertise, which would be clear from the passages extracted by the Hon'ble Supreme Court of India in paragraph No.53 of ***Ssangyong*** (cited *supra*). Therefore, the error on part of the Tribunal is grave in nature.

12.7. This apart, the facts and circumstances of this case is that the parties have executed the contract. The project had become operational for *CMRL* and *TTA-JV* has availed the payments. Thus, the Arbitration Trial

took place post execution. The Tribunals *post mortem* finding the methodology adopted as unacceptable, exhumed the data of the past and took them into account for their *sua sponte* expert analysis. Certainly, the parties are entitled to comment upon the correctness or otherwise of the data. The error committed by the Tribunal thus is apparent on the face of the record, substantial and fundamental in this case as only the additional materials forms the basis for the core reasoning of the award. Therefore, it is a compelling reason for the Court to set aside the arbitral award. Therefore, we do not find any error whatsoever in the order of the learned Single Judge inasmuch as it sets aside both the awards, hence, the question is answered accordingly.

J. Question No.3 :

13. Coming to paragraph No.22 of the judgment under appeal, it can be seen that the learned Single Judge had observed that since the same Tribunal is continuing in respect of the other claims which are larger in nature submitted by the parties, the parties can plead the issue of extension of time also before the same Tribunal and the Tribunal can consider the issue after giving due opportunities to the parties. In this regard, the law on the point has been settled as to the power of remanding the matter to the

Arbitrators. The Hon'ble Supreme Court of India in its judgment in ***Kinnari Mullick and Anr. Vs. Ghanshyam Das Damani***[17], has categorically held that such an exercise of remand can only be resorted to if only a written application is made under Section 34(4) of the Arbitration Act which would be without setting aside the Award. Once the award has been set aside, the Court has no other option than to leave the matter for *de novo* proceedings by the parties in the manner known to law and therefore, the observations / directions contained in paragraph No. 22 of the judgment under appeal cannot be sustained and they are set aside. Accordingly, this question is answered.

K. The Result :

14. In the result:

(i) O.S.A.Nos.147 and 148 of 2021 shall stand dismissed and the common order, dated 28.10.2021 in Arbitration O.P.Nos.96 and 97 of 2021 shall stand confirmed inasmuch as it sets aside the impugned awards, dated 07.05.2021 and 01.06.2021;

(ii) O.S.A.Nos.85 and 79 of 2022 shall stand allowed and the common order, dated 28.10.2021 in Arbitration O.P.Nos.96 and 97 of 2021 shall stand set aside and modified in respect of the observations / directions

17 (2018) 11 SCC 328

contained in paragraph No.22 and leaving it open for the parties to commence *de novo* proceedings in the manner known to law;

(iii) There shall be no order as to costs; and

(iv) Consequently, the connected miscellaneous petitions are closed.

(T.R., ACJ.) **(D.B.C., J.)**
01.02.2023

Index : yes
Speaking order
Neutral Citation : yes
grs

To

The Chennai Metro Rail Limited,
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Koyambedu, Chennai – 600 107.

T.RAJA, ACJ.,
AND
D.BHARATHA CHAKRAVARTHY, J.,

grs

O.S.A.(CAD).Nos.147 of 2021,
85 and 79 of 2022 and 148 of 2021

01.02.2023