

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. No.408/2007**

% **8th December, 2015**

MINISTRY OF DEFENCE, GOVERNMENT OF INDIA Petitioner
Through: Mr. Amit Mahajan, Advocate.

versus

CENREX SP. Z.O.O & ORS. Respondents
Through: Mr. V.M. Kaura, Advocate with Ms.
P.K. Benipal, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') is filed by the Union of India through the Ministry of Defence objecting to the majority Award of the Arbitration Tribunal dated 23.4.2007. The impugned Award dated 23.4.2007 has been passed by two of the three Arbitrators. The two Arbitrators who have passed the majority Award in favour of the respondent no.1 are Mr. George Dobry CBE QC and Dr. Jerzy Modrzejewski. The minority Award is of the third Arbitrator Sh. P.H. Parekh. I may note that the majority Award dated 23.4.2007 was modified by an Order dated 15.5.2007 as

regards the currency of payment aspect.

2. The disputes and differences between the parties pertain to the relationship between them with the petitioner as a buyer and the respondent no.1 as a seller under the Contract dated 25.2.2002 whereby the respondent no.1 was to supply to the petitioner three consignments of parachutes and related equipments. Petitioner on account of delays in the deliveries enforced the performance bond given by the respondent no.1 in view of Articles 2 and 10 of the Contract. Respondent no.1 initiated arbitration proceedings claiming refund of the amount received by the petitioner by encashing the performance bond issued by the banker of the respondent no.1 in favour of the petitioner.

3. By the majority Award dated 23.4.2007, it has been held that the petitioner was not entitled to invoke the performance bond and hence an Award was passed in favour of the respondent no.1 and against the petitioner that petitioner herein shall pay to the respondent no.1 herein (claimant in the arbitration proceedings) a sum of US \$ 82,245.14 alongwith interest @ 18% from 19.6.2004 till the date the Award is made and thereafter till payment.

4. *Inter-alia*, the majority Award has given the following conclusions:-

(i) The period under the performance bond given under the contract had expired and since there was no written amendment to the contract for the extended terms of the performance bond, hence the performance bond could not have been encashed by the petitioner.

(ii) A performance bond is only given as a security, and even if it is encashed, the encashment is subject to final accounting between the parties i.e the majority Award has held that even if the liquidated damages are payable by virtue of articles in the contract, the petitioner still had to prove losses which are caused in order to retain the amount received on encashment of the performance bond as liquidated damages.

(iii) Petitioner not only had wrongly invoked the performance bond and recovered moneys, but also the moneys thus received could have been retained by the petitioner only if the petitioner was able to establish its case of damages caused to it as per Article 10 of the Contract. However since the pleadings of the petitioner filed in the arbitration proceedings did not base itself on Article 10 of the Contract, hence, damages could not be claimed by the petitioner under Article 10 for being adjusted against the performance bond amount realized by the petitioner.

(iv) Even if Article 10 of the Contract has to be applied in favour of
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the petitioner, yet the petitioner cannot retain the amount of the performance bond inasmuch as it was the petitioner who was guilty of breach of contract in not issuing the letters of credit for payment of the goods on time and therefore once letters of credit were not issued by the petitioner on time, respondent no.1 could not be held guilty of delay and delivery of the goods under the contract. While arriving at this conclusion, the majority Award holds that not giving of the performance bond under Article 2 of the Contract and the warranty bond under Article 9 by the respondent no.1 could not be treated as a pre-condition and reason for the petitioner to claim that unless these bonds were given the petitioner need not have opened the letters of credit for payment.

(v) Accordingly, the majority Award has exonerated the respondent no.1 from any breach of contract and has held the petitioner guilty of breach of contract, and thus held the petitioner disentitled to retain the amount of the performance bond.

5. In order to appreciate the reasoning and the conclusions given in the impugned Award, it will be necessary to refer to certain relevant Articles of the Contract, and these Articles are as under:-

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ARTICLE NO. 2

PERFORMANCE BOND

2.1 Performance Bond for an amount equivalent to 5% of the total value of the contract in the form of a Bank Guarantee as per the specimen at **Appendix D** of this contract and from a first class international Bank duly confirmed by either the State Bank of India/Bank of India/Canara Bank/Bank of Baroda will be furnished by the Seller within 30 days of signing of this contract. In case of any delay in furnishing the Performance Bond, the Buyer shall have the right to cancel the contract.

2.2 Performance Bond will be subject to encashment by the Government of India in case conditions regarding adherence to delivery schedule and other provisions of the contract are not fulfilled.

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ARTICLE NO. 4

PAYMENT TERMS

4.1 The accounting and payment currencies shall be in US Dollars.

4.2 The Buyer shall open through the State Bank of India in favour of PHU CENREX SP. Z.O.O. Podawle 23, 00-952 WARSZAWA, POLAND an irrevocable Letter of Credit confirmed by the Seller's bank for a value of 100% of each consignment. The L/C shall be issued within **30 days** of receipt of notification of readiness of goods from the seller. The letter of credit will be valid till 30 days after the delivery schedule of each consignment and shall be notified to the Seller by the State Bank of India through:-

BANK ZACHODNI WBK S.A.

90/WARSZAWA

ACCNT NO: 77 1090 1883 0000 0005 0600 1914

SWIFT CODE: WBKP PK PP

ARTICLE NO. 5

QUALITY AND INSPECTION OF GOODS

5.1 The quality of the goods under the present Contract shall correspond to the technical specification as given in **Appendix A** to this Contract and shall be certified by the Seller's Quality Assurance Department. The quality of assemblies/subassemblies and spares supplied by the OEM should meet their original specifications and should be certified by the Quality

Assurance Department of the Seller. Inspection and acceptance tests shall be conducted in the Seller's facilities in Poland according to the Acceptance Test Specifications.

5.2 The Seller shall at his own cost, have inspection of goods carried out by their Quality Assurance Department, in accordance with the final acceptance tests as laid down in the **Appendix G** and furnish standard **"Inspection and Acceptance Certificate"** as given in **Appendix F**, certifying that such goods have been subjected to final acceptance tests and are according to the Technical Specification prescribed and are preserved/packed according to the provisions of the Contract and as per the quantities and numbers stated in the packing lists of each delivery. Each delivery of store shall be accompanied by connected documents of inspection, proof and acceptance.

5.3 The Buyer shall have the right to depute his Inspector, to witness and participate in the pre despatch inspection each delivery and the inspection of the goods at any stage of manufacture, inspection and acceptance testing at the premises of the Seller for which all facilities shall be provided by the Seller. The Seller shall make available to the inspectors at Poland, all Technical Literature to enable them to undertake effective quality assurance/inspection activities along with authentic technical data/records to demonstrate the actual quality of the supply during their important stages of manufacture and testing. Any deviation from Technical Specification pointed out by the inspectors in writing shall be rectified before despatch.

5.4 The inspectors will have the right to further inspect the rectified goods to ascertain that the deviations are duly rectified. The inspector shall be at liberty to draw samples at random for tests/proof from the bulk offered.

5.5 The Seller shall notify the Buyer of the schedule for inspection of goods at site. Such inspection shall be initiated within **six weeks** of receipt of intimation from the Seller, failing which the latter will deliver the goods as per the delivery schedule. In the event the Buyer does not send his representative to be present at the inspection the Buyer shall provide the Seller not later than **three weeks** from the designated date for such Inspection, a letter/certificate confirming that the Buyer's authorized inspectors were not deputed to the Factory for inspection. In such case, inspection will be carried out and certified by Seller's QA department.

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ARTICLE NO. 7

DELIVERY AND TRANSPORTATION

7.1 The delivery of the goods shall be effected in accordance with the schedule laid down in **Appendix C**.

7.2 The Seller shall intimate to the buyer by letter of fax, **six weeks in advance**, the anticipated date of delivery of each consignment. A copy of similar intimation shall also be forwarded to:-

(a) DDG/PPO, MGO's Branch, Army Headquarters, New Delhi (India) Fax No. 91-11-3793337.

(b) Joint Secretary (AJ), Government of India, Ministry of Defence, South Block, New Delhi, India Fax No.91-11-3014222.

(c) ADG WE, Army Headquarter, New Delhi, Fax No.91-11-3793274.

(d) Commandant, COD, Agra Cantt. Fax No. 0562-412960

(e) Commandant, Embarkation HQ, Fax No. 91-22-2694711

The information shall consist of quantities of the goods and all other details, required in connection with the shipment of the consignment.

ARTICLE NO. 8

WARRANTY

8.1 The Seller warrants that the goods supplied under the contract conform to Technical Specifications prescribed in relevant Appendices to the contract and shall perform according to the said Technical Specifications as given in **Appendix A**.

8.2 Joint Receipt Inspection (JRI) shall be conducted on receipt of goods in India in the presence of OEM rep but not later than Ninety (90) days after arrival of goods in India. The Seller warrants that for a period of **24 months** from the date of JRI for each consignment, that the goods/stores supplied under this contract and each component used in the manufacture thereof shall be free from all types of defects/failures arising on account of poor design, weak material, and bad workmanship, provided that the goods are stored, serviced, maintained and operated according to sellers instructions.

8.3 The Goods shall be of new production, of vintage not earlier than 2001.

8.4 If within the period of warranty as mentioned in Article 8.2 the Goods are reported by the Buyer to the Seller to be of defective material, design and workmanship or the Goods fail to perform as per the

specification and user instruction of the Seller, the Seller shall either replace or rectify the same, free of charge, **within 90 days** from the date of such reporting at Agra in India.

8.5 The cost of replacement rectification of the defective goods and transportation of such repairable or to be replaced Goods from and to Agra shall be borne by the Seller. The warranty provided in this Article shall automatically extend for repaired items from the date of return to Buyer for the balance remaining of warranty period as at the time of notification of defect to Seller and full warranty of **24 months** shall be given for the items that have been provided in replacement.

ARTICLE NO. 9

WARRANTY BOND

9.1 Bank Guarantee for the warranty from a **first class international bank** duly confirmed by the State Bank of India/Bank of India/ Canara Bank/Bank of Baroda in the format at **Appendix E** equal to 5% of the value of the contract will be furnished, by the Seller not later than **10 days** prior to receipt the first consignment in India. This warranty bond shall be valid for a period of **24 months** from the date of completion of JRI of each consignment. The Seller shall be obliged to extend the validity of the warranty bond appropriately to cover the enhanced warranty period in terms of **Article 8** of the contract.

ARTICLE NO. 10

LIQUIDATED DAMAGES

10.1 In the event of Seller's failure to have the goods delivered by the date/dates specified in the contract, the Buyer may, after a grace period of **30 days, at his discretion, withhold any payment** until the whole of the stores have been supplied, and he may also deduct from the Seller as agreed, liquidated damages and not by way of penalty, the sum of **0.5%** of the contract price of the undelivered stores for each and **every week or part of a week** for which the stores have been delayed subject to a **maximum of 5%** of the value of delayed stores, **in case the delay in delivery is acceptable to the Buyer.**

ARTICLE NO.11

CLAIM

11.1 The stores on receipt in India will be inspected by the Inspectors of the Buyers. The Seller, if he so desires may depute his representatives to be present at his own cost at the time of inspection of the goods at Indian

Depot. This inspection will be termed Joint Receipt Inspection (JRI). Quality claims may be raised up to 30 days after expiry of warranty period for defects noticed during warranty period. Quality and Quantity claims, if any, shall be presented to the Supplier within 90 days from the date of Joint Receipt Inspection, including all relevant technical documents, of the Indian depot. Quantity claim will be settled by the Seller by making good deficiency within 90 days of receiving notice from the Buyer.

11.2 Quality claims may be raised upto 30 days after expiry of warranty period for defects noticed during warranty period. Any quality claim shall be accompanied by detailed technical description of defects. The Seller shall have the right to depute his own representatives at his own cost for joint investigation of the defects in India. In case the Seller's representative is not deputed within 30 days of preferring of claim, the Buyer's investigation of defects will be final.

11.3 The Seller's decision as to the settlement of the claim should be made known to the Buyer within 90 days from the date of presentation of the claim. In case no response is received during the period, the claim will be deemed to have been accepted.

11.4 In case of acceptance of claims, the Seller will make good the deficient stores/rectify/replace the defective stores in India free of cost according to the terms of the contract within 90 days of such acceptance. The cost of replacement/rectification of the defective goods including transportation charges from and to Indian destination shall be borne by the Seller.

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ARTICLE NO.17

DEFAULT

17.1 Should the stores or any installment thereof not be delivered within the time or times specified in the contract documents, or if defective delivery is made in respect of the stores or any installment thereof, the purchaser shall be at liberty, without prejudice to the right to recover liquidated damages as provided in Article 10 or to any other remedy for breach of contract, to declare the contract as cancelled either wholly or to the extent of such default.

17.2 Should the stores or any installment thereof not perform in accordance with the specification/parameters provided by the Seller as mentioned in Article 5 during the check proof tests to be done in the

Buyer's country, the Buyer shall be at liberty, without prejudice to any other remedies for breach of contract, to cancel the contract wholly or to the extent of such default.

17.3 The Buyer shall be at liberty to purchase, manufacture, or procure from any other source as he thinks fit other stores of the same or similar description to make good:-

(a) Such default.

(b) In the event of the contract being wholly determined, the balance of the stores remaining to be delivered thereunder.

17.4 Any excess of the purchase price, cost of manufacturer, or value of any stores procured from any other supplier as the case may be, up to three times over the contract price appropriate to such default or balance shall be recoverable from the Seller.

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ARTICLE NO.23

TERMINATION

23.1 The Buyer shall have the right to terminate this contract in part or in full in any of the following cases:-

(a) The delivery of the material is delayed for causes not attributed to Force Majeure for more than three months after the scheduled date of delivery;

(b) The Seller is declared bankrupt or becomes insolvent;

(c) The delivery of material is delayed due to causes of Force Majeure by more than six months;

(d) As per Articles 16 & 18.

(e) In case the equipment fails to perform as per its technical specifications during factory acceptance tests which seller is unable to rectify.

APPENDIX C TO CONTRACT NO

12(1)/99-D(GS-IV) DATED 25th Feb 2002

DELIVERY SCHEDULE

The stores will be delivered as per following schedule:-

- (a) AD-95, AZ-95 parachute and KAP-3P1 opening device:-
 - (i) First consignment consisting of 100 sets 120 days after signing of the contract.
 - (ii) Second consignment consisting of 250 sets 90 days after first consignment.
 - (iii) Third consignment consisting of 275 sets 90 days after second consignment.
- (b) **Test Equipments.** Within 90 days of signing of the contract (with first consignment).
- (c) **Spare Parts for 5 Years Usage.** Within 270 days after signing of the contract (with third consignment).
- (d) **Training.** Training will be performed within 90 days after first consignment reach the ultimate consignee- Commandant, COD, Agra.
- (e) **Spare Parts for KAP-3PI**
 - (i) 40% of ordered qty of each item within 180 days of signing of the contract.
 - (ii) 60% of ordered qty of each item within 270 days of signing of the contract (with third consignment).” (emphasis is mine)

6. In addition to the aforesaid articles, certain dates as fixed under the contract and actual dates of performance with respect to issuing of the performance bond, warranty bond, notice of readiness, opening of L.Cs and date of deliveries are relevant and these dates are as under:-

A. Performance Bond (to secure damages for delays in deliveries and other breaches of contract as per Articles 2 & 10)

Date fixed under the contract	Actual date when Performance Bond
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	was given
Within 30 days of entering into the contract as per Article 2.1 of the Contract. Since date of contract is 25.2.2002, the performance bond had to be given within 30 days and this would mean the last date of giving of the performance bond is 25.3.2002	1.8.2002

B. Warranty Bond (to secure quality, removal of defects etc *inter alia* as per Article 9)

Date for giving of Warranty Bond under Article 9 of the Contract	Actual date of giving of Warranty Bond
Before 10 days of arrival of the first shipment as provided under Article 9.1. Since the theoretical date of the first delivery was 25.6.2002, Warranty Bond had to be given by 15.6.2002	(i) Warranty Bond of US \$ 11552 was given on 16.10.2002. (ii) Warranty Bond of US \$ 70693 was given on 5.2.2003

C. Delivery dates of consignments

As per the contract	Actual dates of delivery
First consignment-25.6.2002	5.9.2002
Second consignment-23.9.2002	10.3.2003
Third consignment-22.12.2002	25.6.2003

D. Receiving of notices of readiness as per Articles 4.2 and 7.2 of the Contract, thereafter opening of letters of credit by the petitioner for consignments and the actual dates of opening of L.C.s. L.C.s not to be opened earlier than 30 days of receiving the Notices of Readiness.

Theoretical dates as per the contract stood modified by giving of Notices of Readiness later by the respondent no.1	Theoretical due dates for opening L.Cs by petitioner as per the contract	Actual dates of opening of L.Cs by petitioner
First notice of readiness: 25.3.2002 or 23.5.2002	Due date as per the contract for opening of L.C.: 25.4.2002 or as modified to 23.6.2002 i.e 30 days from 23.5.2002	29.8.2002
Second notice of readiness: dated 2.9.2002	Due date as per the contract of second L.C.: 2.10.2002 or as modified to 5.3.2003 being 30 days	27.2.2003

	after 5.2.2003 and which is the date when complete warranty bond amount as per Article 9 was given.	
Third notice of readiness: dated 5.2.2003	The modified date for opening of the third L.C. would be 26.3.2003 as per Article 5.5 ie 30 days + 21 days from 5.2.2003	10.6.2003

The actual dates of opening of L.C.s by the petitioner on 29.8.2002, 27.2.2003 and 10.6.2003 stand modified as per and on account of co-relation with when the respondent no.1 delayed/postponed the actual dates to these later/postponed dates completed its obligations under Articles 2 and 9 of the Contract of giving the performance bond and the warranty bond to be taken with the aspect that the requirement of the notice/notification of readiness must be of six weeks before the anticipated date of delivery as per Articles 4.2 & 7.2 of the Contract. Since Article 5.5 of the Contract provides a period three weeks for deemed completion of inspection, petitioner/buyer thus gets a period of three weeks plus 30 days to

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open the L.C.s.

7. It is also, at this stage, necessary to refer to and reproduce Sections 51, 52 and 54 of the Indian Contract Act, 1872 inasmuch as these provisions will be relevant to determine the issue as to whether or not it was the petitioner or the respondent no.1 who was guilty of breach of contract.

These Sections read as under:-

“Section 51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform -When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Section 52. Order of performance of reciprocal promises.- Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the orders is not expressly fixed by the contract, they shall be performed in that order which the nature of transaction requires.

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Section 54. Effect of default as to the promise which should be performed, in contract consisting of reciprocal promises- When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.”

8(i) A conjoint reading of the various articles of the Contract reproduced above shows that performance bond had to be given within 30 days of signing of the contract. On the performance bond being given by the

respondent no.1 to the petitioner within 30 days of signing of the contract, the respondent no.1 only thereafter is entitled to given a notification of readiness of goods of six weeks before the anticipated date of delivery. Before however giving a notification of readiness of anticipated date of delivery as per Articles 4.2 and 7.2 of the Contract, the same has to be preceded by a notice of inspection of goods in terms of Article 5.5 of the Contract of six weeks i.e six weeks of notification of readiness must be preceded by six weeks of notice of inspection of goods as per Article 5.5. Article 5.5 of the Contract however further provides that in case the petitioner/buyer does not send its representative to be present for inspection at the seller's premises in Poland, then, within three weeks of receiving of notice of inspection, the buyer must give a certificate/letter that the buyer's representatives were not deputed to the factory for inspection. In other words, the first date of delivery after entering into the contract or giving of notification of readiness necessarily has to be at least after nine weeks of entering into the contract i.e six weeks of notification of readiness plus three weeks of notice of inspection, and both of which aspects are provided under Article 5.5 of the Contract subject of course to the notification of readiness being preceded by giving of the performance bond by the respondent no.1 as required by Article 2 of the Contract.

(ii) If the respondent no.1/seller has given the performance bond, and has thereafter given the correct notification of readiness of the goods, the petitioner/buyer in terms of Article 4.2 of the Contract had to open the letter of credit for payment of the goods to be supplied within 30 days of the receipt of the notification of readiness and which translates to three weeks plus six weeks as stated above.

(iii) Ten days before the first consignment is to be delivered by the respondent no.1 to the petitioner, the respondent no.1 had to give a warranty bond to the petitioner as required by Article 9.1 of the Contract and which warranty bond is in addition to the performance bond required to be given as per Article 2.1 of the Contract.

9(i). A reading of the relevant Articles of the Contract reproduced above, including Articles 4.2, 5.5, 7.2 and 9.1 of the Contract, shows that the contract has as per its express terms set out in seriatim the schedule of compliances of respective obligation by both the parties under the contract. As per Section 52 of the Indian Contract Act, 1872 as reproduced above, once the order of reciprocal promises to be performed are expressly fixed by the contract, they are to be performed in the order to be fixed by the contract, and hence the performance bond to be given by the respondent no.1 under

Article 2.1 of the Contract would be a condition precedent to the respondent no.1 giving the notification of readiness under Articles 4.2 and 7.2 of the Contract. So far as the first consignment is concerned, giving of warranty bond before 10 days of the delivery of the first consignment would be a condition precedent before supplying of second and third consignments.

(ii) In view of the above discussion, contention urged on behalf of the respondent no. 1 that there is no schedule of compliances in a particular manner under the contract of what has to be performed first and what has to be performed at subsequent stages and that giving of performance bond and warranty bond are not a condition precedent for the petitioner to open the L.C.s, is thus a wholly misconceived argument inasmuch as a reading of the contractual clauses as a whole clearly shows the pre-condition of giving of the performance bond before issuance of the letter of credit by the petitioner for payment of the goods of the first consignment inasmuch the time schedule fixed with respect to giving of the performance bond by the respondent no. 1 is prior in point of time to the issuance of the notification of readiness for the first consignment because the giving of performance bond is within 30 days of entering into the contract and the date of delivery of the first consignment is after 120 days of the contract. Since giving of first L.C

by the petitioner had to be 30 days before the date of delivery, the first L.C had to be issued theoretically after at least 60 days of the contract i.e after the period of 30 days given for giving of the performance bond by the respondent no.1. It is accordingly held that by the schedule of dates fixed theoretically under the contract and thus giving of the performance bond being prior in point of time, on a reading of Sections 51 and 52 of the Indian Contract Act, giving of the performance bond has to be taken as a pre-condition and *sine qua non* before the respondent no.1 could call upon the petitioner to give the first letter of credit for the first consignment.

(iii) Whereas the giving of the letter of credit for the first consignment was not a condition precedent for the respondent no.1 to give the warranty bond under Article 9.1 of the Contract and which was to be given 10 days prior to the receipt of the first consignment in India, however, the fact that warranty bond was to be given at least 10 days before the arrival of the first consignment obviously shows that giving of the warranty bond was a condition precedent to be complied with before the notification of readiness could be issued and the second and third consignments could be delivered by the respondent no.1 to the petitioner under the contract. In other words in case the warranty bond as required by Article 9.1 of the Contract

was not given, and that too for the entire amount of 5% of the contract, the effect in law as per Sections 51 and 54 of the Indian Contract Act quoted above would be that the petitioner/buyer need not have opened L.C.s for second and third consignments of delivery and in fact was entitled to compensation from the respondent no.1 for the loss sustained on account of non-performance of the contract on time. For the loss caused on account of delay in deliveries, the petitioner under the contract was entitled to deduct from the performance bond 0.5% (half percent) of the value of the delayed consignments for every week of delay subject to a maximum of 5% of the value of the delayed stores.

10. The performance bond to be given as per Article 2.1 of the Contract is in the nature of liquidated damages under Section 74 of the Indian Contract Act considering the nature of the present contract. The majority Award however has against the settled principles of law and catena of judgments of the Supreme Court wrongly and illegally held that Articles 2.2 and 10 of the Contract do not entitle the petitioner to seek enforcement of the performance bond towards liquidated damages. It is settled law in this country in terms of various Supreme Court judgments that once the nature of the contract is such that losses cannot be easily calculated, the amount

claimed as liquidated damages can be claimed as per Section 74 of the Indian Contract Act, 1872 without proving and showing how much loss has been caused vide *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., (2003) 5 SCC 705*. Discussion on this is contained in the following part of this judgment.

11. Now therefore let us turn to the discussion and conclusions given by the majority Award to decide as to whether the majority Award can be said to be illegal or in violation of the contractual provisions or perverse so that this Court can interfere with the same under Section 34 of the Act.

12(i) The first conclusion which is reached by the majority Award is that the performance bond given under Article 2.1 of the Contract is only a security and even if encashed, is subject to accounting between the parties ie the encashment of performance bond cannot be towards liquidated damages under Section 74 of the Indian Contract Act. This is stated in paras 12 to 14 of the impugned Award and which read as under:

“12. A fundamental point that may, perhaps, have been overlooked by the parties in their pleadings to start with, is that the performance bond does not represent an obligation to pay a liquidated sum in the event of a breach. A performance bond is (as its name suggests) a simple security for any claim to damages under the Contract (Cargill International SA v. Bangladesh Sugar & Food Industries Corporation [1998] 1 WLR 461). Where the buyer wishes to make a claim, he may call upon the performance bond. However, he can only recover under the bond to the extent of his loss (or his right to recover

liquidated damages under the contract). Any overpayment owes as a debt from the buyer to the seller. As overpayment owes as a debt from the buyer to the seller. As Staughton LJ explained in *Cargill* at 471, in the absence of anything in the wording of the contract to suggest otherwise:

“The general situation as to performance bonds is that they provide that the bank or other party giving the bond has to pay forthwith, usually on demand. But subsequently there has to be an accounting between the parties to the commercial contract.”

13. Here, the wording of Article 2 provides that the bond may be encashed in certain circumstances. There is nothing in this wording to take the Bond outside the usual commercial understanding as to how a performance bond operates.

14. Furthermore, the fact that the bond is mere security is apparent from Article 10. Article 10 provides that if there is a failure to delivery any instalment of the goods by the dates specified (i.e if there is a delay), the buyer may deduct 0.5% of the contract price per week, up to a maximum of 5%. This is a form of liquidated damages. The 5% maximum, of course, equates to the total under the performance bond.” (underlining added)

(ii) This aforesaid conclusion of the majority Award is clearly against the law of this land because the law of this land says that there are two types of contracts, one type of contract is where the actual loss can be calculated and in which type of contracts even if there is a clause of liquidated damages yet only actual loss will be granted subject to the upper limit as specified in the liquidated damages clause under Section 74 of the Indian Contract Act, and the second type of contract is where loss is caused but loss cannot be determined/calculated in view of the nature of the contract and in these latter types of contracts, courts allow enforcement of liquidated damages under Section 74 of the Indian Contract Act. One such example is *OMP No.408/2007* *page 22 of 42*

given by the Supreme Court in the judgment in the case of *Saw Pipes Ltd. (supra)* where a toll road has to be constructed and if there is delay in construction of the toll road, then there cannot be in such cases of delay proof of number of vehicles which would have passed the toll road and hence in such a case, clause of liquidated damages can be enforced. Another type of contract where liquidated damages are provided for but liquidated damages cannot be claimed are contracts where there is an agreement to sell of immovable property containing a clause of forfeiture of earnest money or a part of price, and in such an agreement to sell immovable property even if such a clause is there of liquidated damages, the same will not entitle automatic allowing of claim of damages for the amount specified in the contract as liquidated damages because the nature of contract being of sale of an immovable property is such that loss caused on account of the breach can always be calculated by arriving at difference of the prices of the immovable property on the date of the breach as compared to the contract price, and therefore courts have disallowed enforcement of clause of liquidated damages in such contracts of sale of immovable properties vide *Fateh Chand Vs. Balkishan Dass, AIR 1963 SC 1405* (Constitution Bench Judgment). The recent judgment of the Supreme Court in the case of *Kailash Nath Associates Vs. Delhi Development Authority and Another, OMP No.408/2007*

(2015) 4 SCC 136 reiterates the ratio of *Fateh Chand's* case (*supra*).

13. In the present case, surely, the subject contract is of a type where how much loss is caused to the petitioner/Ministry of Defence, Government of India for delay in supply of parachutes cannot be calculated because how the Army of this country would have been affected by non-delivery of the parachutes on time and what would have been the alternative arrangements made due to delayed deliveries and expenses accordingly which had to be incurred on account of non-availability of parachutes on time, is impossible to calculate and hence Articles 2 and 10 of the subject Contract are valid and can be enforced for enforcement of liquidated damages as per Section 74 of the Indian Contract Act. Clearly, therefore, the majority Award has gone against the settled principles of law for holding that a performance bond is a mere security and cannot be used towards enforcement of the Articles 2 & 10 of the Contract of liquidated damages as per Section 74 of the Indian Contract Act. An illegal Award, in view of Section 28(1)(b)(i) of the Act cannot be sustained.

14. The second conclusion which has been arrived at by the majority Award is that the petitioner had no right to enforce the performance bond because the performance bond as per the contract was only for a period

of 90 days following the delivery of the third consignment which took place on 25.6.2003, and since performance bond was sought to be encashed on 19.6.2004 ie 90 days after 25.6.2003, the petitioner was hence disentitled to encash/enforce the performance bond. This is stated by the majority Award in paras 17 to 20 and which paras 17 to 20 read as under:

“17. As to the first point, it is plain from Article 2.3 that the performance bond ceased to be a remedy under the contract after 90 days following delivery of the third consignment (which took place on 25 June 2003). As a matter of contract MOD was not entitled to invoke the performance bond after 23 September 2003. Although this was a point taken by Cenrex rather late in the day, it is clear that MOD was not entitled to invoke it when it did on 19 June 2004.

18. It appears that the bond was extended (as between the bank and MOD) as the delivery timetable slipped. Such an extension would be necessary to ensure that the bond remained on foot pending completion of the delivery schedules. However, those extensions did not affect Article 2.3, which provided a longstop for its enforcement (as between MOD and Cenrex) of 90 days after the final delivery (whenever that should be). The parties never even purported to amend Article 2.3, let alone amend it in accordance with Article 24.1, which requires a written instrument signed by both parties.

19. To understand why the bond should remain valid as between MOD and the bank, but not between MOD and Cenrex it is necessary to appreciate that there are two relevant contracts. The bond itself is a contract between the issuing bank and the beneficiary (here, the MOD). Doubtless (because the tribunal has not been told otherwise), MOD was entitled to enforce the bond pursuant to its terms. However, the fact that MOD was entitled to force the bond as a matter of contract between MOD and the bank does not mean that it was entitled to enforce it as a matter of contract between MOD and Cenrex. The bank was obliged to perform its obligations under the bond when requested by MOD to do so. However, as far as the contract with Cenrex was concerned, MOD was not entitled to make that request.

20. MOD’s enforcement of the performance bond was therefore not in accordance with the terms of Article 2.3. It was in fact a clear breach of the

terms of Article 2. Under the contract with Cenrex, MOD's right to use the bond expired 90 days after receipt of the third consignment. MOD is therefore prima facie obliged to repay Cenrex the \$82,245.14 wrongly taken from the bank as damages for breach of that contract." (underlining added)

15. Clearly the above conclusion of the majority Award is perverse to say the least because admittedly the performance bond was repeatedly renewed, and therefore, once it is repeatedly renewed by means of letters exchanged, and the corresponding documents issued to the bank, there did take place a written amendment to the contract. Also, respondent no.1 was in any case estopped in any manner from questioning the enforcement of the performance bond as it all along had acted on the basis of extensions given by it to the period of the performance bond. It is also not understood by this Court that once the performance bond is valid as between the petitioner and the issuing bank on account of extension of the performance bond period, and that too as per the directions of respondent no.1, how can the same bond be illegal for the petitioner encashing the same. The majority Award therefore has clearly given a perverse conclusion that the petitioner/Union of India could not have enforced the performance bond because the same had validity only for 90 days after the last delivery. This Court is forced to comment that it is not understood as to how the Arbitrators have reached such a perverse conclusion in spite of parties having acted to the contrary

and the respondent no.1 having regularly extended the period of performance bond.

16. The third conclusion given by the majority Award is that there is no reference in the pleadings of the petitioner filed in the arbitration proceedings to Article 10 of the Contract and therefore a claim based of the petitioner on Article 10 is against law and cannot be looked at. These conclusions are contained in paras 21 to 24 of the impugned Award and these paras read as under:-

“21. However, that it not to say that MOD would not, in the ordinary course, be entitled up to \$82,245.14 in damages from Cenrex for breach of contract if Cenrex did fail to comply with the delivery schedule. Such a right to damages arises under Article 10, and clearly survives the expiry of the performance bond. The fact that MOD cannot rely upon the performance bond as a remedy does not mean that it is not entitled to bring a claim under Article 10 for liquidated damages.

22. In this respect, however, the Tribunal faces some difficulty. The pleaded case of both parties is limited, the enforcement of the performance bond. On the pleadings, MOD does not seek to pursue a claim in damages under Article 10 (or otherwise) in order to set off the right of Cenrex to payment of the sum of \$82,245.14 wrongly taken by MOD pursuant to the performance bond. If MOD was actually entitled to that sum under Article 10, then it would plainly be entitled to keep it, even if it was not entitled to it under the performance bond.

23. Much of the agreement addressed on the pleadings does go to whether there was a breach of contract by Cenrex and, implicitly therefore, a right to damages under Article 10. Article 10 itself, however (like Article 2.3), does not feature at all in any of the pleadings of the parties. Latter submissions have sought to raise it, but the context in which those submissions are made is unclear and the tribunal does not consider that it is properly seized of any claim under Article 10.

24. The tribunal therefore considers that it is bound to deal with this matter by allowing the claim of Cenrex and ordering payment of \$82,245.14 together with interest. The tribunal considers that interest should run from 19 June 2004 at an annual rate of 18%.” (emphasis is mine)

17(i) Once again this aforesaid conclusion and finding of the Arbitration Tribunal is wholly perverse to say the least because even if Article 10 of the Contract is not mentioned by reference, the entire case of the petitioner in the arbitration proceedings has been the entitlement of the petitioner to encash the performance bond on account of delay in deliveries by the respondent no.1 to the petitioner and this is so stated by the Arbitrator themselves in para 23 first line and para 22 first line of the impugned Award. There is no law which requires that unless Article 10 of the Contract is mentioned in the pleadings of the petitioner in the arbitration proceedings, although the facts so as to bring the case under Articles 2.1, 2.2 and 10 of the Contract are mentioned in the pleadings itself, it is not legally permissible for the petitioner to urge a case for encashment and enforcement of the performance bond on account of delays caused by the respondent no.1 in supplying of goods under the contract. The majority Award clearly therefore has acted against the settled legal principles as applicable in this country by holding that the petitioner herein was not entitled to plead a case merely because Article 10 of the Contract is not mentioned in its pleadings

because the substance has to be seen and not the form and the form was also there except the mention of Article 10.

(ii) At this stage let me deal with one contention raised on behalf of the respondent no.1 that as per the last line of Article 2.1 of the Contract, the right of the petitioner/buyer was only to cancel the contract on account of delays and once the contract is not cancelled then the petitioner cannot enforce the performance bond. This argument is stated to be rejected on account of the language used in the last line of Article 10.1 of the Contract, and which provides that petitioner/buyer can accept the deliveries with delays, and on account of delays the petitioner can still enforce the performance bond in terms of Articles 2 & 10 of the Contract. Similar is the effect of the language of Article 17.1 of the Contract which gives 'liberty' i.e an option only to cancel the contract and therefore cancellation of the contract by petitioner is not a condition precedent to enforcement of the performance bond.

(iii) An argument was also raised by the counsel for the respondent no. 1 by placing reliance upon Articles 17 and 23 of the Contract to argue that there was no legal entitlement of the petitioner to encash performance bond inasmuch as the petitioner always had a legal right to purchase the

stores at the market value from another supplier. Also Article 17 of the Contract was relied upon to argue, as was done by placing reliance upon Article 2.1, that, once the contract is not cancelled, there is no entitlement to enforce the performance bond. All these arguments urged on behalf of the respondent no. 1 are misconceived inasmuch as the last line of Article 10.1 of the Contract, as stated above, clearly states that delayed deliveries on being acceptable still entitles to enforcement of the liquidated damages clause of Article 10, and which is also to be read with the language of Article 17 as this Article uses the expression “shall be at liberty” thus showing that there was only an option to be exercised by the petitioner whether or not to cancel the contract and it was not as if the petitioner had only one option i.e to necessarily cancel the contract in case of delayed deliveries. Therefore, it cannot be argued on behalf of the respondent no. 1 that there was only entitlement to cancel the contract and not accept delayed deliveries while simultaneously also enforcing the liquidated damages clause by encashing the performance bond. Further, the argument by the respondent no. 1 by placing reliance upon Article 17 of the Contract for arguing that goods could have been purchased from an alternative source is misconceived inasmuch as this Article when it talks of the entitlement of the petitioner to cancel the contract and purchasing of stores from another

suppliers in terms of Article 17.1 is with respect to non-supply of goods by the respondent no. 1 and the relevant language of the articles which are relied do not pertain to the issue of delayed deliveries. In other words, the language of Article 17 of the Contract for entitlement of the petitioner to procure stores from another supplier is with respect to non-supply of the goods by the respondent no.1 and not as regards the case of delayed deliveries of the goods, and which was the only subject matter of disputes between the parties and which fell under Articles 2.1 and 10 and not Article 17 of the Contract. Accordingly, all these arguments urged on behalf of respondent no. 1 are rejected.

18. That finally takes us to the most important aspect as to whether respondent no.1 is guilty of delays in effecting deliveries of the consignments or that the respondent no.1 is not responsible for delayed deliveries and on the contrary it is the petitioner who breached the contract by not issuing the letter of credit in time. The majority Award has, in this regard, given a very curious finding. The finding given is curious because on the one hand it is held that there is no fixed order for performance of respective obligations and that giving of the performance bond and warranty bond by the respondent no.1 to the petitioner thus could not be taken as a

condition precedent for the petitioner not to have opened the letter of credit for the supply of goods, yet simultaneously on the other hand it is held that as per the contractual clauses there is a prior requirement of the petitioner of opening of the letters of credit before claiming performance/deliveries by the respondent no.1 to the petitioner. This Court has really failed to understand as to how the Arbitrators could have at all reached at such a conclusion in the face of Section 52 of the Indian Contract Act, 1872 which provides that contract when provides the stages of performance then performances have to be in the order provided under the contract. In fact, the majority Award reverses the logic on its head for the benefit of respondent no.1 herein inasmuch as while in one part of the Award it is stated that issuance of performance bond and warranty bond by the respondent no.1 were not a condition precedent for the petitioner to open the letter of credit even though as per the contractual stages giving of these bonds were at specific prior stages, however in the same majority Award, it is held that giving of letters of credit was a condition precedent as it was a prior stage before claiming of timely deliveries and that consequently respondent no.1 was justified not to perform its contract of making deliveries on time on the ground that earlier requirement of giving of letters of credit by the petitioner was not complied with. The majority Award therefore gives benefit of Section 51 of the

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Indian Contract Act to the respondent no.1 although simultaneously illegally denies the benefit of the same to the petitioner, inasmuch as, if Section 51 of the Indian Contract Act applies, and there is a condition precedent stage of performance of an obligation under the contract, the petitioner therefore must also receive benefit of Section 51 read with Section 54 of the Indian Contract Act if the respondent no.1 has been held entitled to the benefit of the same. Since the order of performance has been mentioned in the contract, Section 52 of the Indian Contract Act comes into play and the order of performance necessarily means that before the first letter of credit is issued for the first consignment of delivery, the respondent no.1 necessarily had to issue the performance bond under Article 2.1 of the Contract and which was to be issued within 30 days of signing the contract, and since this pre-condition of performing of the reciprocal obligation by the respondent no.1 of issuing of the performance bond was not complied with, the respondent no.1 hence could not claim performance by the petitioner of the reciprocal obligation of opening of the letter of credit with the same reasoning for giving of warranty bond for second and third consignments.

19. Also, as has been indicated above, since the warranty bond qua the aspects of quality/defects of the goods had to be given 10 days before the

delivery of the first consignment, giving of the warranty bond by the respondent no.1 to the petitioner accordingly was a condition precedent/prior reciprocal obligation to be performed by the respondent no.1 in favour of the petitioner, and before doing so, the respondent no.1 could not claim issuance of letters of credit for the second and third consignments of deliveries. Warranty bond in the present case was given in two instalments; one of US \$ 11552 on 16.10.2002 and of US \$ 70693 on 5.2.2003, and therefore the respondent no.1 can legally only have complied with its prior reciprocal obligation of giving of warranty bond only on 5.2.2003, and therefore before 5.2.2003 respondent no.1 in view of Sections 51 and 52 of the Indian Contract Act could not have claimed issuance of letters of credit from the petitioner towards supply of goods by the second and third consignments. The majority impugned Award holding to the contrary is therefore against the provisions of the Indian Contract Act (the law of the land) contained in Sections 51 and 52 of the Indian Contract Act. Accordingly, the majority Award is therefore clearly illegal and perverse with respect to this finding that it was the petitioner who should be held guilty of breach of contract of not giving the letters of credit because the Arbitrators in the majority Award in fact were duty bound to hold that it was the respondent no.1 who was guilty of breach of contract and not the petitioner.

20(i) I have already reproduced above the theoretical schedule of dates and the actual schedule of dates. So far as the first notification of readiness is concerned, the same is to be taken as 23.5.2002 and therefore though the due date of opening of L.C. had to be within 30 days i.e by 23.6.2002, however since the performance bond was given only later on 1.8.2002 by the respondent no.1 to the petitioner, the 30 days period for giving of L.C. by the petitioner to the respondent no.1 for the first consignment would commence 30 days after 1.8.2002 and ending on 1.9.2002. The petitioner had opened the L.C. on 29.8.2002 i.e before 1.9.2002 and therefore the petitioner cannot in any manner be held to be guilty of breach of contract in delaying the opening of the first L.C. beyond 30 days of the issuance of notification of readiness. The date of notification of readiness has to be taken not as 23.5.2002 but as postponed to 1.8.2002 on account of the respondent no.1 having given to the petitioner the performance bond only on 1.8.2002. Thus there is no breach on the part of the petitioner so far as the delivery of the first consignment is concerned as regards the opening of the L.C.

(ii) Learned counsel for the respondent no.1 sought to argue that there is no delayed delivery so far as the first consignment is concerned

inasmuch the contract was amended by the amendment dated 21.8.2002 and since the first delivery had to be made within 120 days of the entering into the Contract which became final only on 21.8.2002, hence, the first delivery made by 5.9.2002 is not a delayed delivery. This argument urged on behalf of the respondent no. 1 is an incorrect argument because the amendment dated 21.8.2002 amends the place of delivery, and the same has nothing to do with the performance of any other term of the contract already fixed. In case the respondent no. 1 was of the opinion that on account of change in the place of delivery, the schedule of delivery should be altered then the respondent no. 1 could have or ought to have raised this issue at the time when the amendment was made to the Contract on 21.8.2002 and for the first time in the arbitration proceedings, the respondent no. 1 could not claim that the first consignment was delivered on time because of delivery period being automatically postponed within 120 days of the amendment dated 21.8.2002. Clearly, therefore, the argument urged on behalf of the respondent no. 1 of the first consignment being delivered on time as it was delivered within 120 days of the amendment dated 21.8.2002, i.e first consignment delivered on 5.9.2002, is a misconceived argument and is rejected.

21. So far as the second consignment of the delivery is concerned, the notification of readiness was given by the respondent no.1 to the petitioner on 2.9.2002. Ordinarily, the petitioner would have had to open the letter of credit within 30 days of 2.9.2002, however, the respondent no.1 had to simultaneously perform its prior reciprocal obligation/condition precedent, and which was giving of the warranty bond as required under Article 9 of the Contract, ten days before the delivery of the first consignment. The date of delivery of the first consignment was 5.9.2002 and therefore warranty bond had to be given by the respondent no.1 to the petitioner by 25.8.2002. Respondent no.1 however gave the correct and complete amount of warranty bond only by 5.2.2003 when it gave the second amount of the performance bond of US \$ 70693. Thus before 5.2.2003 there was no requirement of the petitioner in opening the L.C. for the second consignment and when 30 days are calculated from 5.2.2003, it is found that the petitioner had issued the L.C. for the second consignment/delivery within 30 days of this date of 5.2.2003 inasmuch as L.C. for the second consignment of delivery was opened by the petitioner on 27.2.2003. Hence, even for the second consignment of delivery there was no delay by the petitioner and in fact the Arbitration Tribunal has therefore committed a clear illegality in holding the petitioner guilty of breach of contract.

22. So far as the third consignment is concerned, the notification of readiness was given on 5.2.2003 and thus the letter of credit was to be opened by 5.3.2003, but the same was actually opened on 10.6.2003, but it is noted that the date fixed for delivery of third consignment as per the contract was earlier as on 22.12.2002 and delay beyond this date entitles the petitioner to deduct half percent per week of the undelivered stores. Thus, even if we take the date of notification of readiness as 5.2.2003 and then we add a period of three weeks from 5.2.2003 as per Article 5.5 of the Contract, with a further entitlement to open the L.C within 30 days thereafter, the delivery of third consignment could not be done by the respondent no.1 to the petitioner 30 days plus three weeks after 5.2.2003 i.e the delivery of the third consignment could not be done prior to 26.3.2003. Thus, from 22.12.2002 which was the date fixed for delivery of the third consignment, there is in fact a delay till 26.3.2003 and since the petitioner is entitled to deduct half percent work of delivery subject to maximum of 5% of the value of the delayed delivery (i.e a total of 10 weeks will make the 5%) the period from 22.12.2002 to 5.3.2003 will be this period of 10 weeks and which is prior to the date of 26.3.2003 for opening of the third L.C. and hence even for the third consignment, the petitioner was entitled to deduct 5% of the value of the delayed consignment. The majority Award therefore is thus

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illegal when it holds that for the third consignment there was no delay in delivery by the respondent no.1 to the petitioner.

23. For the sake of completion of narration, it may be stated that the third Arbitrator Sh. P.H. Parekh and who was a nominee of the petitioner, had raised serious objections to the majority Award by stating that he was not consulted and no hearing was held, however, I need not look into this aspect as I have otherwise held that the majority Award is liable to be set aside.

24(i) In this matter arguments were more or less concluded on 16.10.2015 and whereafter adjournments were granted for parties to compromise the matter. Compromise was not possible and hence today I have heard the counsel for the parties further. Counsel for the respondent no.1 in addition to raising arguments on merit has today also argued that since the Arbitration and Conciliation Act, 1996 has been amended with respect to its Section 34 which provides for filing of objections to the Award, and that now scope of objections under Section 34 of the Act has been further limited after the amendment of the Act by the 2015 amendment Ordinance, and therefore this petition must be tried as per the amended Section 34 and not as per the old Section 34 of the Act. Counsel for the

respondent no.1 in support of his arguments sought to place reliance upon Section 85A which was proposed to be introduced in terms of the Report of the Law Commission but which Section was not introduced, and it is argued that since Section 85A has not been introduced and which created difference between applicability and non-applicability of certain provisions of the Act to the pending proceedings, hence, it should be deemed that the Act has application even with respect to the pending proceedings. Learned counsel for the respondent no.1 also placed reliance upon amended Section 12 of the Act and which provides that the sub-section inserted in Section 12 of the principal Act will not apply to cases where the Arbitrator has been appointed before coming into force of the 2015 Ordinance.

(ii) The argument urged on behalf of the respondent no.1 to decide the case as per the amended Section 34 of the Act has no merits because Section 6 of the General Clauses Act, 1897 provides that an Act (or an Ordinance for that matter) does not have retrospective operation unless so provided and vested rights are not deemed to be taken away by means of the amending or the repealing Act. Once the objections are filed under a wider provision as existing of Section 34 of the Act when objections were filed, such vested rights to have the Award set aside on the basis of Section 34

which existed on the date of filing of the objection petition cannot be taken away by holding that by the 2015 amendment Ordinance such a vested right has been impliedly taken away. Section 6 of the General Clauses Act talks of vested rights being protected and therefore unless such rights are expressly or by necessary implications taken away, it cannot be held that an amending Act will have a retrospective application to the pending litigation. I do not find any express or implied retrospective operation of the newly amended Section 34 of the Act so that this Court should hold that even pending litigations under Section 34 of the Act should not be governed by the said provision as applicable on the date of filing but should be decided on the basis of the Section 34 of the Act as existing after passing of the 2015 amendment Ordinance. Reliance placed upon a provision of Section 85A which has not been introduced by the Legislature cannot assist the respondent no.1 to claim retrospective operation of amended Section 34 of the Act. Also I fail to understand as to how amended Section 12 as relied upon by the counsel for the respondent no.1 can have the effect for not applying the law under Section 6 of the General Clauses Act when Section 12 has no co-relation to Section 34 of the Act.

25. In view of the aforesaid discussion, this petition is allowed and

the impugned Award dated 23.4.2007 as modified by the Order dated 15.5.2007 is set aside with costs. Petitioner will file the certificate of costs within a period of one month from today for all costs incurred by the petitioner for this litigation. Petition is accordingly allowed and disposed of.

DECEMBER 08, 2015
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VALMIKI J. MEHTA, J.