

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

% *Judgment Reserved on: April 05, 2016*
Judgment Delivered on: April 08, 2016

+ **FAO(OS) 147/2015**

MC-ROTEM-MELCO CONSORTIUM Appellant
Represented by: Mr.Jayant Bhushan, Sr.Advocate
instructed by Mr.Arunav Patnaik,
Ms.Bhabna Das and Ms.Kirat
Randhawa, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. Respondent
Represented by: Mr.M.G.Ramachandran, Advocate
with Mr.Pulkit Agarwal, Advocate
and Mr.Puneet Garg, Law Officer
(DMRC)

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Delhi Metro Rail Corporation Ltd. (referred to as DMRC hereinafter) issued a notice inviting tenders for design, manufacture, supply, testing and commissioning of passenger rolling stock including consumables, spares etc. for 240 cars (60 trains) with an option of additional 40 cars. For benefit of the tenderers the scope of work as also terms and conditions for executing the works was made known through the General Conditions of Contract (GCC) and the Special Conditions of Contract (SCC). Instructions to the tenderers required an offer to be made quoting the lump sum price for the works.

2. Being found technically eligible, the appellant MC-Rotem-Melcon Consortium comprising Rotem Company, Mitsubishi Corporation and Mitsubishi Electric Corporation (referred to as MC-Rotem hereinafter) quoted the price with conditions concerning custom duty rate for the imported component and variation of taxes and duties in view of Clause 13.1 of the GCC, which reads as under:-

***“Clause 13.1:** Unless otherwise stated in the Special Conditions of Contract, the Employer shall pay to the Contractor a fixed lump sum Contract Price subject to any adjustment thereto in accordance with these Conditions. Except as otherwise expressly provided, the Employer shall not be required to pay interest on any money claimed by the Contractor, nor for the Employer’s Representative’s failure in certifying any payment due or payable to the Contractor.*

The Contract Price shall not be adjusted in respect of any increase or decrease of cost to the Contractor in carrying out the Works by reason of:

(a) An alteration in the rates of wages or allowances payable to labour or a change in the conditions of employment thereof;

(b) A change in the cost of Materials (whether for the permanent or temporary works), consumable stores, fuel or power;

(c) A variation in the rates of freight or insurance;

(d) Variations in the incidence of landing charges;

(e) A variation in the cost of any other matter or thing of whatsoever nature except as stated in this Sub Clause.

The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from changes in Custom Duties, Excise Duties, Sales Taxes and legislations of India, made after the latest date of submission of Tender. Such legislation means any law, order, regulation or by-law having the force of law, which affects the Contractor in the performance of his obligations.

In the event of exemption or reduction of Customs Duties, Excise Duties, Sales Tax or any other Cess/Levy being granted by the Government in respect of the Works, the benefit of the same shall be passed on to the Employer.”

3. Clause 20 of the SCC (a clause complimentary to Clause 13.1 of the GCC), forming part of the notice inviting tender, stipulated as under:-

“20. The Contract Price shall be inclusive of all taxes, duties, levies, cess and any other charges leviable, including tax to be deducted at source, except that :

(a) Customs Duties on 15 offshore manufactured trains and Mock-up shall not be included in price.

(b) Excise Duties (after availing MODVAT) as well as Sales Tax on finished 45 trains indigenously manufactured shall not be included in the price. (It should, however, be noted that the Customs Duties on the imported components and equipment as also the Excise Duties as well as Sales Tax on the indigenous components and equipment installed in the indigenously manufactured trains shall be included in the price).

(c) Customs Duties on the Imported Spares, Jigs, Fixtures, Special tools and Diagnostic equipment etc. and Excise Duties, Sales Tax and other levies if any on

the indigenous finished Spares, Jigs, Fixtures, Special tools and Diagnostic equipments etc. sourced in India and supplied to the Employer shall not be included in the Price (It should, however, be noted that the Customs Duties on the imported components and equipments as also the Excise Duties as well as Sales Tax on the indigenous components and equipments installed in the indigenously manufactured Spares, Jigs, Fixtures, Special Tools and Diagnostic equipments, etc. shall be included in the price).

The Customs Duty on 15 Imported trains, Mock-up and imported spares, Jigs, Fixtures, Special Tools etc. and the Excise Duties (after availing MODVAT) as well as Sales Tax on the 45 finished trains and indigenously manufactured finished spares Jigs, Fixtures, Special Tools etc., shall be paid to the Contractor on the basis of actual on submission of documentary proof of payment in addition to the fixed Lump Sum Price.

The Contract Price shall not be adjusted on account of fluctuations in the rates of exchange between the foreign currencies of the Contract and Indian Rupees from the Base Date.”

4. Clause 26 of the SCC (being an additional Clause) forming part of the notice inviting tender, stipulated as under:-

“26. Record of Taxes, Duties etc.

The contractor shall maintain complete records in respect of payments made for taxes, duties, octroi and other levies payable to various authorities and advise the Employer complete details of such payment every month. These details will be kept separately for:

- (a) Custom Duties on the 15 offshore manufactured trains and Mock UP;*
- (b) Excise Duties (after availing MODVAT) and Sales Tax on the finished trains;*

- (c) Customs Duties on the Imported components and equipments installed in the indigenously manufactured Cars;*
- (d) Excise Duties and Sales Tax on the indigenous components and equipments installed in the indigenously manufactured Cars;*
- (e) Similar details as in a, b, c and d above should be kept in respect of Spares, Jigs, fixtures etc.; and*
- (f) Any other taxes, duties etc. paid.*

These records shall remain open for inspection by the Employer/Employer's Representative at any time. Should the Employer obtain a waiver for the above taxes, duties etc. In full or part thereof, the Contractor will be advised on the process to be followed to obtain refund of such taxes, etc., from the concerned authority. The Contractor shall arrange for the remittance of the refund so obtained to the Employer. In case of failure by the Contractor to remit the refund to the Employer, the same will be recovered by the Employer from the amounts due for payment to the Contractor or as debt due from the Contractor. If the Contractor fails to take the required action to obtain refund, the Employer may take action in accordance with Sub-Clauses 15.1 and 15.2 of the General Conditions of Contract."

5. Listing the priority in which the documents would be considered,
Clause 1.6 of the GCC reads as under:-

"1.6 Priority of Documents

The documents forming the Contract are to be taken as mutually explanatory of one another. If there is an ambiguity or discrepancy in the documents, the Employer's Representative shall issue any necessary clarification or instruction to the Contractor, and the priority of the documents shall be as follows:

- (a) The Contract Agreement;*

- (b) *The Letter of Acceptance;*
- (c) *The Outline Design Specifications (Design Criteria) and Outline Construction Specifications;*
- (d) *The Employer's Requirements*
- (e) *The Tender;*
- (f) *The Special Conditions of Contract;*
- (g) *The General Conditions of Contract;*
- (h) *The Schedules;*
- (i) *The Contractor's Proposal; and*
- (j) *Any other document forming part of the Contract."*

6. A dialogue ensued between the parties. On November 25, 2000 DMRC wrote a letter to MC-Rotem seeking a clarification on the tax component factored in by MC-Rotem in the price offered. The relevant part of the letter reads as under:-

"The aim of negotiation is as follows:

(i) The lump sum Tender Price offered by you in your Financial Offer is considered high. The amounts apportioned against various Cost Centres and Milestones also appear disproportionate and high. The negotiation should result in appropriate price reduction of the lump sum Tender Price.

(ii) The INR portion in the Financial Offer should possibly increase, and consequently the foreign component should reduce with an overall reduction in total costs. Kindly see item 1 of Appendix C.

(iii) The cash flow as per Financial Offer appears to indicate front-end loading. It is also seen from the cash flow statement that almost the entire payment is required to be paid one year before the end of the Contract. The negotiation should result in re-apportionment of cost in Milestones to reflect a realistic time of completion of the Milestones.

5. The Tenderer will be advised to submit the following at the appointed time and date.

5.1 A revised tender programme with a covering letter confirming compliance with the Key Dates.

5.2 A sealed envelope containing the Final Bid Price which shall be a fixed lump sum price along with apportionments against Milestones and Cost Centres. The 900 series questions previously issued and all changes in Employer's Requirements issued during negotiations shall be taken into consideration for the lump sum Prices and the costs distributed against the Cost Centres.

5.3 The Final Bid Price shall contain no clarifications, conditions or remarks. If the Tenderer still includes conditions, remarks or clarifications, these must be priced for unconditional withdrawal. Any clarifications, remarks or conditions which are not priced shall not be considered as a part of the offer."

7. On December 11, 2000, MC-Rotem responded to DMRC letter dated November 25, 2000 giving its response by tabulating in a chart form its comments. It was followed by two letters dated December 19, 2000 numbered MKM-1219-(1) and MKM-1219-(2). In the first letter DMRC was informed that for 60 train sets, tax and duties had been factored by it in sum of ₹2,064,000,000/- out of which import tax and custom duties is ₹1,290,000,000/-. In the second letter dated December 19, 2000 MC-Rotem informed DMRC, inter alia, as under:-

"1. The Contract shall be split into two i.e. one for Off-shore portion and the other for On-shore portion.

2. Taxes and duties including import tax and customs

duty in India for all the 60 train sets shall be exempted.

3. GCC & SCC shall be modified as per “MKM Proposal for GCC & SCC”

8. It appears that on December 28, 2000 a meeting had taken place, in respect of which MC-Rotem wrote on the same date to DMRC that changes had to be made in the GCC. To the three communications dated December 19, 2000 and with reference to earlier correspondence on December 28, 2000, the Consultant engaged by DMRC informed MC-Rotem, inter alia, as under:-

“2. You are advised that amendments to GCC and SCC as well as new clauses, proposed in the documents mentioned in para 1 above, are not acceptable, in view of the consideration that the proposed changes will have the effect of changing the character of the Tender.

3. DMRC, however, is considering certain changes in the Tender condition as a cost reduction measure. These changes are shown in Annexure 1 of this letter.

4. You are requested to furnish the reduction in cost to the Lump Sum Price for each change separately, both in terms of foreign currency and Indian Rupees. We look forward to receiving your reduced price proposal on 08.01.2001 in a sealed envelope. We would like to emphasise that DMRC will take final decision regarding these changes, depending upon the magnitude of the reduction in prices offered by you for these changes.”

9. In response, vide its letter dated January 25, 2001, MC-Rotem provided an estimated break-up of taxes as under:-

“We MKM Consortium, are pleased to submit herewith our Final Proposal. This proposal incorporates the result of all the negotiation meetings we have had with DMRC.

Original 240 Cars:

1. Revised Price:

*US\$ 260,997,269 plus ₹3,110,439,836
(please refer to the Attachment-1)*

This price is based on the following:

(1) All the indirect taxes and duties in India are included in this price. Those amounts are as follows:

Import Tax and Customs Duty : ₹1,290,000,000

Other Indirect Taxes in India: ₹774,000,000

(2) Modification of the terms and conditions shall be made in accordance with Attachments 2 & 3 which have been agreed by both parties, and for which the price adjustment has been made and incorporated into the above revised price.

(3) Price reduction by US\$ 4,800,000 and by ₹41,280,000 have been made for adoption of R22 for refrigerant of air conditioner and incorporated into the above revised price.

(4) Price reduction by ₹142,599,072 has been made as the MKM's special consideration of goodwill to DMRC and incorporated in the above revised price.

2. Options and Price Reductions

(1) Import Tax and Customs Duty:

We propose that import tax and customs duties for all the imported equipment and components to be installed in indigenously manufactured trains and spare parts shall be exempted. ₹1,290,000,000 shall be deducted from the contract price in case this proposal is accepted.

(2) Other Indirect Taxes in India:

We propose that the other indirect taxes in India shall be exempted. ₹774,000,000 shall be deducted from the contract price in case this proposal is accepted.

(3) Changed Condition of Liquidated Damage

We propose Liquidated Damages shall be applied to Delayed Works only instead of the Fixed Lump Sum Price. US\$ 4,500,000 will be deducted in case this option is exercised before the issue of the NTP. ”

10. Thereafter, DMRC sent a letter dated April 25, 2001 to MC-Rotem specifically, inter-alia, asking the following clarifications:-

“(vi) Do you agree and confirm that you will pay to the Employer the difference between the declared sum for Custom Duties viz. ₹1290 million and the actual total amount, should this be less? Do you also agree that in the event that the actual amount is greater than the ₹1290 million declared, you shall remain responsible for the additional amount, in terms of Clause 20 of SCC?”

(vii) Do you agree and confirm that you will pay to the Employer the difference between the declared sum for Other Indirect Taxes viz. ₹774 million and the actual total amount, should this be less? Do you also agree that in the event that the actual amount is greater than the ₹774 million declared, you shall remain responsible for the additional amount, in terms of Clause 20 of SCC?”

11. Thereafter the new understanding was incorporated in the letter of acceptance dated May 02, 2001 as under:-

“Ref: DMRC/134/98/PtXV-II-1203

2nd May 2001

*Mitsubhishi Corporation, India
New Delhi Liaison Office
2nd Floor Vijaya
17, Barakhamba Road,
NEW DELHI 110001*

*For the kind attention of Mr.A.Minamoto, General
Manager*

Dear Sirs,

*CONTRACT RS-1
DESIGN, MANUFACTURE, SUPPLY, TESTING AND
COMMISSIONING OF PASSENGER ROLLING STOCK*

Reference 1: Your Original Tender Submission received under cover of your letter reference MKM-001 dated 23rd February 2000.

Reference 2: Your Tender Submission received under cover of your letter reference MKM-002 dated 14 August 2000

Reference 3: Your Subsequent Tender Submission received under cover of your letter reference MKM-1219(1) dated 19th December 2000

Reference 4: Your Subsequent Tender Submission received under cover of your letter reference MKM-1219-(4) dated 19th December 2000

Reference 5: Your negotiated Tender Submission letter reference MKM-01-0124-(1) dated 25th January 2001.

Reference 6: Your negotiated Tender Submission for 40 Option Cars: letter reference MKM-01-0214 dated 14th February 2001.

Reference 7: Your letter reference MKM-01-0312-1 dated 16th March 2001.

Reference 8: Mitsubishi Electric Corporation letter dated 16th March 2001.

Reference 9: Your letter reference MKM-01-0426 dated 26th April 2001.

We are pleased to inform you that Delhi Metro Rail Corporation Ltd. has accepted the negotiated offer submitted by you on behalf of MKM Consortium led by Mitsubishi Corporation and comprising in addition Korean Rolling Stock Corporation (KOROS) and

Mitsubishi Electric Corporation (MELCO), as set out in your letter referred below:

MKM-01-0124(1) dated 25th January 2001 for 240 Cars as set out in the scope of work as defined in RS1 Tender Documents as amended by Tender Addenda, Nos. 1 (Rev A) and 2 to 6 inclusive at a total price (inclusive of import tax, Customs Duty and Indirect Taxes), equivalent in Indian Rupees to fourteen billion, five hundred and sixty three million only (INRs 14,563,000,000), comprising US Dollars two hundred and sixty million, nine hundred and ninety seven thousand two hundred and sixty nine only (US\$ 260,997,269) and Indian Rupees three thousand one hundred and ten million, four hundred and thirty-nine thousand, eight hundred and thirty six only (INRs 3,110,439,836).

The total price of INR 14,563,000,000 includes the following amounts of taxes and Duties:

- i) Import Tax and Customs Duty : INRs 1,290,000,000*
- ii) Other indirect taxes in India : INRs 774,000,000*

You shall pay the difference between the declared amounts of import tax and customs duty and other indirect taxes, as stated above, and the actual amounts paid to the concerned authorities, should these be less. In the event that the actual amounts are greater than the declared amounts, you shall be fully responsible for the additional amounts.

2. Your negotiated offer, submitted on behalf of MKM Consortium for Forty Optional Cars is also accepted, as set out in your letter referred to below:

MKM-01-0214 dated 14th February 2001 for 40 Optional Cars, at a total price, equivalent in Indian Rupees to two thousand four hundred and thirteen million, four hundred thousand only (INRs 2,413,400,000) comprising US Dollars forty-four million only (US\$ 44,000,000) plus Indian Rupees Four hundred and eighty two million, six

hundred and eighty thousand only (INRs 482,680,000), if ordered within 12 months of signing this contract.

Or

MKM-01-0214 dated 14th February 2001 for 40 Optional Cars, at a total price equivalent of Indian Rupees to two thousand four hundred and eighty five million, eight hundred and one thousand, six hundred only (INRs 2,485,801,600) comprising US Dollars forty five million, three hundred and twenty thousand only, (US\$ 45,320,000) plus Indian Rupees four hundred and ninety-seven million, one hundred and sixty thousand only (INRs 497, 160,000), if ordered within 24 months of signing this Contract.

Or

MKM-01-0214 dated 14th February 2001 for 40 Optional Cars, at a total price equivalent in Indian Rupees to two thousand six hundred and thirty-four million, nine hundred and forty one thousand, three hundred and twenty only (INRs 2,634,941,320) comprising US Dollars forty-eight million and thirty-nine thousand only (US\$ 48,039,000) plus Indian Rupees five hundred and twenty six million, nine hundred and ninety thousand only (INRs 526,990,000), if ordered within 36 months of signing this Contract. 3% escalation for each interval of 12 months shall be permitted to be added to the price indicated above. In case the contract for the Optional Cars is placed after 36 months of signing this Contract but before 31st March 2005.

Regarding these Optional Cars, DMRC reserves the right to exercise this Option at an appropriate time. The Contract will come into force when concurrence of JBIC for the Contract Agreement is received.

3. The resulting contract for Contract RSI shall consist of and be constituted by this Letter of Acceptance, including letters identified as Reference 1 to Reference 9 inclusive above and its Annexures together with:

- a) Instructions to Tenderers (Tender Document Volume 1)*
- b) General Conditions of Contract (Tender Document Volume 2)*

- c) *Special Conditions of Contract (Tender Document Volume 2)*
 - d) *Employer's Requirements Technical Specification (Tender Document Volume 3)*
 - e) *Employer's Requirements Technical Specification (Tender Document Volume 3)*
 - f) *The Contractor's proposals and as clarified by subsequent correspondence*
 - g) *The Tender Addenda Nos. 1 (Rev.A), 2, 3, 4, 5 and 6*
 - h) *Amendments to Tender Documents submitted under Questions Q900 to Q912 inclusive*
 - i) *Annexure A to the Letter of Acceptance*
 - j) *Annexure B to the Letter of Acceptance- Questions and Answers.*
4. *If there is any conflict of inconsistency between this Letter of Acceptance with its Annexures and the documents listed in paragraph 2 above, this Letter of Acceptance with its Annexures shall take precedence.*
 5. *Unless otherwise expressly identified in the Annexures to this letter, all qualifications to the General Conditions of Contract, the Special Conditions of Contract, the Employer's Requirements General Specification, and Technical Specification, in submissions by the Contractor, and subsequent correspondence, shall be deemed to be removed by the contractor and shall have no effect whatsoever.*
 6. *The Contractor shall furnish to the General Consultants*
 - a) *the Bonds, Guarantees and Warranties as stipulated in Clause 4.2 of GCC and C18.5 of I.T.T.*
 - b) *the updated milestone schedule including all milestones.*
 - c) *the Memorandum of Understanding between all the Consortium members.*
 7. *The Contractor shall also undertake not to use information gained in the Contract for any purpose without obtaining the prior approval of DMRC and shall not make any public announcement or divulge any material relating to the project both in India and overseas without the prior written consent of DMRC.*

8. *This Letter of Acceptance is sent to you in duplicate. You are required to return one copy duly signed on all pages, including your conditional acceptance thereof so as to reach the undersigned within two days of issuance of this letter.*
9. *You are requested to contract the General Consultant to DMRC for signing the Contract Agreement as stipulated in Clause F4 of the Instructions to Tenderers (Volume 1), and make necessary preparation in advance for mobilization of men and materials.*

Yours faithfully

*Satish Kumar
Director (RSE),
For Managing Director, DMRC”*

12. Relevant would it be to highlight that in Annexure A to the letter of acceptance such general conditions of the contract and special conditions of the contract were reflected as amended. There is admittedly no reference to Clause 13.1 of the GCC being deleted or amended nor Clause 20 of the SCC being deleted or amended.

13. MC-Rotem accepted the letter of acceptance on May 03, 2001, and relevant would it be to highlight it did not raise any issue concerning Clause 13.1 of the GCC not being deleted nor amended nor Clause 20 or Clause 26 of the SCC being deleted or amended.

14. MC-Rotem lowered the price quoted including quantification of the amount which it had factored in the lump sum price quoted towards customs duty and other indirect taxes. The result was an agreement being reduced into writing on May 22, 2001, Clause 4 whereof, concerning Value of Work and Completion Time, reads as under:-

“Clause 4 Value of Work and Completion Time :

The Employer agrees to pay for the total cost of the Works and the Contractor agrees to accept the sums mentioned below in the following currencies, to be the total cost for the work carried out by him as part of his obligations, responsibilities and liabilities under and according to the provisions and obligations imposed on him by the Contract.

Fixed Lump Sum Price

- (i) Rupees three thousand one hundred and ten million, four hundred and thirty-nine thousand, eight hundred and thirty six (₹3,110,439,836); and*
- (ii) In the foreign currency of United States Dollars two hundred and sixty million, nine hundred and ninety seven thousand, two hundred and sixty nine (US\$ 260,997,269);*

Subject to adjustment in accordance with the provisions of GCC.

The above fixed lump sum price includes all taxes, royalties, duties, fees, cess, octrol, other levies, etc. and any tax to be deducted at source, except :

- a) Customs Duty on the first fifteen offshore manufactured trains and mock-up.*
- b) The Excise Duties, (after availing MODVAT) as well as Sales Tax on the finished 45 trains indigenously manufactured.*
- c) Customs Duties on the Imported Spares, Jigs, Fixtures, Special Tools, and Testing and Diagnostic Equipment, etc., and Excise Duties and Sales Tax if any on the indigenously finished Spares, Jigs, Fixtures, Special Tools, and Testing and Diagnostic Equipment sourced in India.*

The Customs Duty on the fifteen Imported Trains,

Mock-Up, and Imported Spares, Jigs, Fixtures, Special Tools, Diagnostic and Testing Equipment, etc., and the Excise Duty (after availing MODVAT), as well as Sales Tax on the 45 finished indigenous trains and indigenously manufactured finished Spares, Jigs, Fixtures, Special Tools, Diagnostic and Testing Equipment, etc., shall be paid to the Contractor on the basis of actuals on the submission of documentary proof of payment in addition to the Fixed Lump Sum Price quoted.

In accordance with Clause 21A of the Special Conditions of Contract, (Addendum 4) the Employer shall pay to the Contractor an interest free advance in Indian Rupees to meet the Custom Duties on the first fifteen trains manufactured offshore. The advance will be paid in tranches after shipment, at appropriate times to meet the payment of duties on requests being made by the Contractor. The payment of the Customs Duties shall be made by the Contractor within 7 days of the advance being given to him. This advance will be adjusted against the reimbursable Customs Duties on the first fifteen trains manufactured offshore.

There shall be no liability of the Employer for the Customs Duties, Excise Duties, Sales Tax on components and equipment installed in the indigenously manufactured Cars, Spares, Jigs, Fixtures, Special Tools and Testing and Diagnostic Equipment.

The above Fixed Lump Sum Price, in addition to other taxes, also includes the following amounts of Taxes and Duties :

<i>i) Import Tax and Customs Duty on the imported components and equipment installed in indigenously manufactured 45 trains, Spares, Jigs, Fixtures, Special Tools, and Testing and Diagnostic Equipment, etc.</i>	<i>IN ₹1,290,000,000</i>
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ii) Other indirect Taxes in India

IN₹ 774,000,000

The Contractor shall pay the Employer the difference between the declared amounts of Import Tax and Customs Duty and other indirect Taxes, as stated above, and the actual amounts paid to the concerned authorities, should these be less. In the event that the actual amounts are greater than the declared amounts, the Contractor shall be fully responsible for the additional amounts.

The Contractor shall complete the Works as per the Schedule of Key Dates within an overall period of two hundred and fifty three (253) weeks from the Commencement Date stipulated in the Notice to Proceed, issued by the Employer. The Contract Period shall be the period from the Commencement Date to the date two years after the date of issue of the Taking Over Certificate for the whole of the Works (under Clause 11 or as extended under sub-clause 12.3 of the General Conditions of Contract)."

15. On April 01, 2003, the Government of India issued three notifications under the : (i) Central Excise Act, 1944, (ii) Customs Act, 1962, and (iii) Customs Tariff Act, 1975. Custom Duty, Excise Duty and Indirect Taxes for all items of equipment including machinery and rolling stock procured by or on behalf of DMRC for use in Delhi MRTS Project were reduced to Nil. The result was MC-Rotem addressing a letter to DMRC on May 06, 2003 expressing its desire to discuss the procedure to be adopted to adjust the contract price in view of the exemption notifications. The discussion was proposed with reference to Clause 13.1 of the GCC and Clause 26 of the SCC, in response to which DMRC through its consultant wrote to MC-Rotem to submit complete record of all taxes, duties, octroi and other levies paid to various authorities.

16. Responding on May 24, 2003; and making a reference to Clause 26 of the SCC, MC-Rotem wrote that Custom Duty on the off-shore manufactured trains was directly paid by DMRC and with regard Mock up, since it was not imported into India, the question of payment of any custom duty did not arise. Regarding Excise duties and Sales Tax on finished trains, it informed that the incidents had not yet happened. But sought guidance as regards the procedure to be followed keeping in view the exemption notification pertaining to excise duty. Regarding custom duty on imported components and equipment installed in the indigenously manufactured cars, it enclosed the necessary documents.

17. Thereafter a dispute surfaced between the parties concerning amount of ₹1290 million on account of import tax and custom duties and ₹774 million in respect of indirect taxes, indicated by MC-Rotem in its letter dated January 25, 2001, as included by it in the price offered. In view of the notifications under the Central Excise Act, 1944, Customs Act, 1962 and Customs Tariff Act, 1975, DMRC took the stand that the sum of ₹2064 million on account of taxes and duties would be treated as advance on which notional interest @ 10% would be charged.

18. There being an arbitration clause in the agreement between the parties, the Arbitral Tribunal was constituted. MC-Rotem sought following relief:-

“a) A declaration that on a proper interpretation of the contract between the parties, as a consequence of the exemption granted by the Government of India by its Notification dated 1st April, 2003, the Respondent is entitled to deduct from Indian Rupee portion of the fixed lump-sum price of ₹3,110,439,836 only a sum of ₹2,064,000,000 consisting of ₹1,290,000,000, on account of Import tax and Customs Duty and ₹774,000,000 on account of Indirect taxes (Excise Duty) and nothing else.

- b) A declaration that the Respondent is not entitled to claim from the claimant any interest whatsoever by treating the exempted Duty as an advance as described, inter alia, by the Respondent in its letter dated 10th October 2003;*
- c) Award a sum of ₹54,961,030,25 to the Claimant;*
- d) Costs”*

19. Keeping in view the facts which we have noted in the preceding paragraph it is apparent that the case of MC-Rotem was that letters dated November 25, 2005 and December 19, 2000 written by it to DMRC quantified taxes and duties in sum of ₹2064 million out of which import tax and custom duties were ₹1290 million and ₹774 million was indirect taxes; and in view of the exemption notifications dated April 01, 2003 under the Central Excise Act, 1944, Customs Act, 1962 and Customs Tariff Act, 1975 exempting all items of equipment procure by or on behalf of DMRC for use in Delhi MRTS Project, DMRC was entitled to reduce the contract price by a sum of ₹2064 million and therefore it was not liable to render any accounts concerning excise and customs duty.

20. It was the case of DMRC that in view of Clause 13.1 of the GCC and Clause 20 and Clause 26 of the SCC, MC-Rotem was liable to maintain the necessary record concerning custom duty and excise duty and pay the difference, and not the reduction with reference to ₹2064 million, but with reference to customs and excise duties as applicable on the last day of submission of tender in view of para (e) of Clause 13.1 of the GCC. It was the case of DMRC that correspondence exchanged between the parties after MC-Rotem was found technically qualified and in respect of its price bid was to negotiate on price reduction and not to quantify the taxes and duties payable, both direct and indirect. DMRC highlighted that suggestions by

MC-Rotem to amend Clause 13.1 of GCC and Clause 20 and 26 of SCC were rejected by it and that is why when the formal agreement was drawn up, in Clause 4, concerning value of the work, after indicating the fixed lump sum price and also indicating that it included import tax and custom duty in sum of ₹1290 million and indirect taxes in sum of ₹774 million, it was clearly indicated that the fixed lump sum price was subject to adjustment in accordance with the provisions of GCC.

21. Vide interim award dated April 04, 2007 the Arbitral Tribunal has rendered a verdict against MC-Rotem directing it to render true and full accounts concerning customs duty, excise duty and other indirect taxes, holding that the price adjustment has to be with reference to the taxes payable on the specified rates on the last date of submission of tender and as reduced.

22. Noting the facts and the correspondence which we have noted in the preceding paragraphs, the Arbitral Tribunal focused on the question whether the parties bargained on the footing that in the event of reduction of import tax, custom duty and indirect taxes, fully or in part, the liability of MC-Rotem to reimburse would extend only upto ₹1290 million on account of import tax and customs duty and upto ₹774 million on account of indirect taxes; conversely as a part of the bargain MC-Rotem was to bear the risk of paying the taxes and duty in excess of ₹2060 million in the event of increase. Noting Clause 4 of the Contract Agreement as also Clauses 13.1 of the GCC and Clause 20 and 26 of SCC, the Tribunal highlighted the words '*actual amounts*' in one of the Sub-para (C) of Clause 4 of the contract : the sub-Clause being : *The Contractor shall pay the Employer the difference between the declared amounts of Import Tax and Customs Duty and other indirect Taxes, as stated above, and the actual amounts paid to the*

concerned authorities, should these be less. In the event that the actual amounts are greater than the declared amounts, the Contractor shall be fully responsible for the additional amounts. The award reasons (and we refer to the caption ‘Discussion’ commencing from paragraph 49 of the award) that Clause 4 of the contract deals with the value of the work and completion time requiring DMRC to pay a fixed lump sum price of ₹3,100,439,836 and US\$ 260,997,269 subject to adjustment in accordance with the provisions of the GCC. The said price includes all kinds of taxes, duties and levies. The further reason is that the said Clause endorses applicability of Clause 13.1 of the GCC. One conclusion arrived at in para 51 is : *‘It appears to us that the words “actual amounts paid to the concerned authorities” refer to the amounts which are actually paid to the concerned authorities by the contractor on account of taxes and duties. In case actual amount is not payable to the concerned authorities, the primary term (x) of Clause 4 will not apply. It is noteworthy that it does not talk of exemption from taxes and duties at all.’* The reasoning is extended in para 52 by assigning the letter ‘x’ to the primary term of Clause 4 of the contract : *‘that the contractor shall pay to the employer the difference between declared amounts of import tax and custom duty and other indirect taxes amounting to ₹2064 million’*; holding : in the case of grant of exemption from payment of taxes and duties, the aforesaid stipulation (the primary term (x) of the Clause 4) is not attracted. In fact it does not operate in a situation where no amount of tax and duty is levied. It applies only where actual payment on account of levy of taxes and duties is made. The words “amounts paid” are accompanied with the word “actual”. The word “actual” is significant. It has nexus with reality. In reality zero or nil amount is not capable of being paid. The stipulation talks of the actual payment

and not a payment by a deeming fiction. Thus a situation arising from exemption and waiver of taxes is not covered by the ‘primary term (x)’ of Clause 4 of the contract agreement as it is not physically or actually possible to make payment of a nil or zero amount. In other words where there is no liability to pay taxes or duties on account of exemption granted by the State, the primary term (x) of Clause 4 of the contract agreement will not apply, since no amount of taxes and duties is actually payable or in case it is paid before the grant of exemption, which has a retrospective effect, it is liable to be refunded in full and, therefore, in real terms, on refund of taxes and duties no amount is paid on this account. Highlighting that the extent of payment of custom duty and import tax depends upon two distinct and different factors : (i) value of import; and (ii) rate of taxes and duties, the Tribunal has reasoned that the penultimate and last para of Clause 13.1 of the GCC deals with the situation arising from exemption from taxes and duties and adjustment of the lump sum price on account of increase or decrease in taxes and thus the primary term ‘x’ of Clause 4, being of a general nature, will not apply to the change or variation in the rate of taxes or exemption from taxes. In other words, the field covered by the penultimate and last para of Clause 13.1 of the GCC would be excluded from the primary term ‘x’ of Clause 4. A conclusion to this line of reasoning is arrived at in paras 58 and 59 of the award as under:-

“58. In order to appreciate the difference between ‘the primary term (x)’ of Clause 4 of the contract agreement and the penultimate and last paras of Clause 13.1, we may juxtapose them and in the light of the aforesaid analysis sum up their scope and ambit:-

<i>Penultimate and last paras of Clause 13.1</i>	<i>Term of Clause-4 of the GCC referred to by us as</i>
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	<i>primary term (x) of Clause-4</i>
<i>“The contract price shall be adjusted to take account of any increase or decrease in cost resulting from changes in Custom Duties, Excise Duties, Sales Taxes and legislations of India, made after the latest date of submission of Tender. Such legislation means any law, order, regulation or by-law having the force of law, which affects the Contractor in the performance of his obligations.</i> <i>In the event of exemption or reduction of Custom Duties, Excise Duties, Sales Tax or any other Cess/Levy being granted by the Government in respect of the Works, the benefit of the same shall be passed on to the Employer”.</i>	<i>“The Contract shall pay the Employer the difference between the declared amounts of Import Tax and Customs Duty and other Indirect Taxes as stated above, and the actual amounts paid to the concerned authorities, should these be less. In the event that the actual amounts are greater than the declared amounts, the Contractor shall be fully responsible for the additional amounts”.</i>
<i>Nature of the clause</i>	<i>Nature of the clause</i>
<i>Specifically covers the field relating to variation in the rates of taxes or complete or partial exemption or waiver of taxes</i>	<i>General in terms, therefore, deals with the situation not covered by the penultimate and last paras of clause 13.1 of the GCC. Consequently it covers the residuary field relating to the variation in the quantum of taxes due to variation of the value of imported Equipment etc.</i>

59. In nutshell, the penultimate and last paras of clause 13.1 will apply to the contingencies arising from exemption

from taxes and duties or increase or decrease in taxes and duties resulting from the change in the rates of taxes after submission of the tender. Such a situation will not be covered by the 'primary term (x)' of clause 4 of the contract agreement. This primary term will apply where due to change in the value of imported equipments, components etc. there is variation in the actual amounts of tax paid to the concerned authorities. We must clarify that this analysis is confined only to the 'primary term (x)' of clause 4 and penultimate and last paras of clause 13.1 and their impact and inter-play on each other."

23. The Tribunal has thereafter noted an argument advanced by learned counsel for MC-Rotem with respect to a sub-para of sub-para (c) of Clause 4 of the Contract Agreement, by referring to the same as term 'y'; the relevant provision being *'There shall be no liability of the Employer for the Customs Duties, Excise Duties, Sales Tax on components and equipment installed in the indigenously manufactured Cars, Spares, Jigs, Fixtures, Special Tools and Testing and Diagnostic Equipment'*. The argument was that the same was in conflict with Clause 13.1 and since the contract had to be given primacy over the GCC Clause 13.1 was superseded. Repelling the same in para 60, the Tribunal has reasoned : *Assuming that Clause 13.1 to the extent pointed out by the learned senior counsel for the claimant is in conflict with the aforesaid primary term (y) of Clause 4 of the contract agreement, the later shall prevail over the former to the extent of conflict or incongruity. Therefore, all that will happen is that the penultimate para of Clause 13.1 to the extent of the liability of the respondent to pay the difference between the enhanced taxes and duties and the taxes and duties payable on the latest date of submission of the tender will be inoperative. But in so far as the rest of the penultimate para of Clause 13.1 is concerned, there is no conflict with Clause 4 of the agreement. It also needs to be noted*

that the penultimate para of Clause 13.1 is somewhat a reflection of Section 64A of the Sales of Goods Act, 1930. That, however, does not make any difference to either the interpretation of the primary term (y) of Clause 4 of the contract agreement or the penultimate and last paras of Clause 13.1 of the GCC. This term of Clause 4 of the contract agreement is a permissible departure from Section 64A of the Sales of Goods Act, 1930 in as much as it absolves the respondent from any liability from payment of the taxes, whether they fall or rise. In Chotey Bhai Patel vs. Union of India, AIR 1962 SC 1006, it was, inter alia, held that in the case of increase in duties seller would be entitled to recover the same from the buyer provided there was no contract to the contrary, by which he had been precluded from claiming such enhanced duty after the date of the contract. To the same effect is the decision of the Delhi High Court in Ajudhia Distillery vs. Delhi Administration, 1998 11 AD (Delhi), cited by the learned senior counsel for the claimant. Therefore, parties can enter into a contract where the seller is precluded from claiming increase in the rate of duty after the date of the contract.'

24. Thereafter the Arbitral Tribunal considered the letters exchanged between the parties after MC-Rotem was found to be technically qualified, in which letters parties discuss issue of reduction in the price. These are the letters which we have noted hereinabove in paragraphs 5 to 12 above. With reference to the letters the Arbitral Tribunal has brought out that request of MC-Rotem to amend Clause 13.1 of the GCC and related Clauses of the SCC were not insisted upon. The Tribunal held that in the letter of acceptance the correspondence which was intended to be made a part of the contract was referred to. The Tribunal highlighted that the letter of acceptance dated May 02, 2001 makes it incumbent on MC-Rotem to pay

the difference between the declared amounts of import tax and customs duty and other indirect taxes and actual amounts paid to the concerned authorities. The Tribunal opined that this obligation was not made subject to grant of exemption from payment of taxes and duties and held that even otherwise this liability could not be made subject to exemption from taxes and duties as that would have been incompatible with the obligations under Clause 13.1 of the GCC.

25. Reasoning terminates in paragraph 70 of the award which reads as under:-

“70. The fact that the claimant confirmed the LOA unconditionally by its communication dated May 03, 2001, fortifies the position that the reduction of contract price by deduction of specified amount of taxes was not subject to the grant of exemption from payment of taxes. There is nothing in clause 4 of the contract agreement which shows that the reduction in the lump-sum price of the contract on one of the counts of the deduction of the specified amount of taxes and duties was not made conditional on the grant of exemption or waiver from payment of taxes. Therefore, the argument of the learned senior counsel for the claimant that the whole exercise of price reduction was based on the assumption of exemption from payment of taxes and duties cannot be sustained. While holding so, we do not discount the fact that there was an expectation that the taxes and duties may be exempted Clause C2.3 of the Instructions to Tenderers to which our attention was drawn for the purpose of showing that it was being contemplated from the outset that there could be partial or complete exemption or waiver of taxes, itself provides that in case of such exemption or waiver the contractor will be advised of the process to be followed to obtain the refund from the concerned authorities and the contractor shall arrange for the remittance of the refund to the employer. This being so, the fact that clause 13.1 of the GCC and clause 26 of the SCC were kept intact also indicates that the parties

wanted to preserve the right of the employer (respondent) to claim the benefit of the exemption in case it comes through. As clause 4 of the contract agreement stands, unless words are added to it, it cannot be held that clause 4 applies to the situation created by the exemption notifications. Clause 13.1 of the GCC and Clause 26 of the SCC, which deal with exemption from payment of taxes and duties cannot be ignored, as otherwise it will amount to creating a new contract. We cannot permit demise of these two very vital clauses or emasculation of their content. These clauses have been deliberately retained in the agreement to cover contingencies that may be created by the exemption notifications, which were in the contemplation of the parties.”

26. Challenge to the award has been negated by the learned Single Judge vide impugned decision dated January 05, 2015.

27. The reasoning of the learned Single Judge is that what fell for consideration before the Arbitral Tribunal was an interpretation of the terms of the contract and the view taken being plausible, in view of the decision of the Supreme Court reported as (2003) 7 SCC 396 State of UP Vs. Allied Constructions, the award could not be set aside because the Arbitral Tribunal had the specific mandate to interpret the contract.

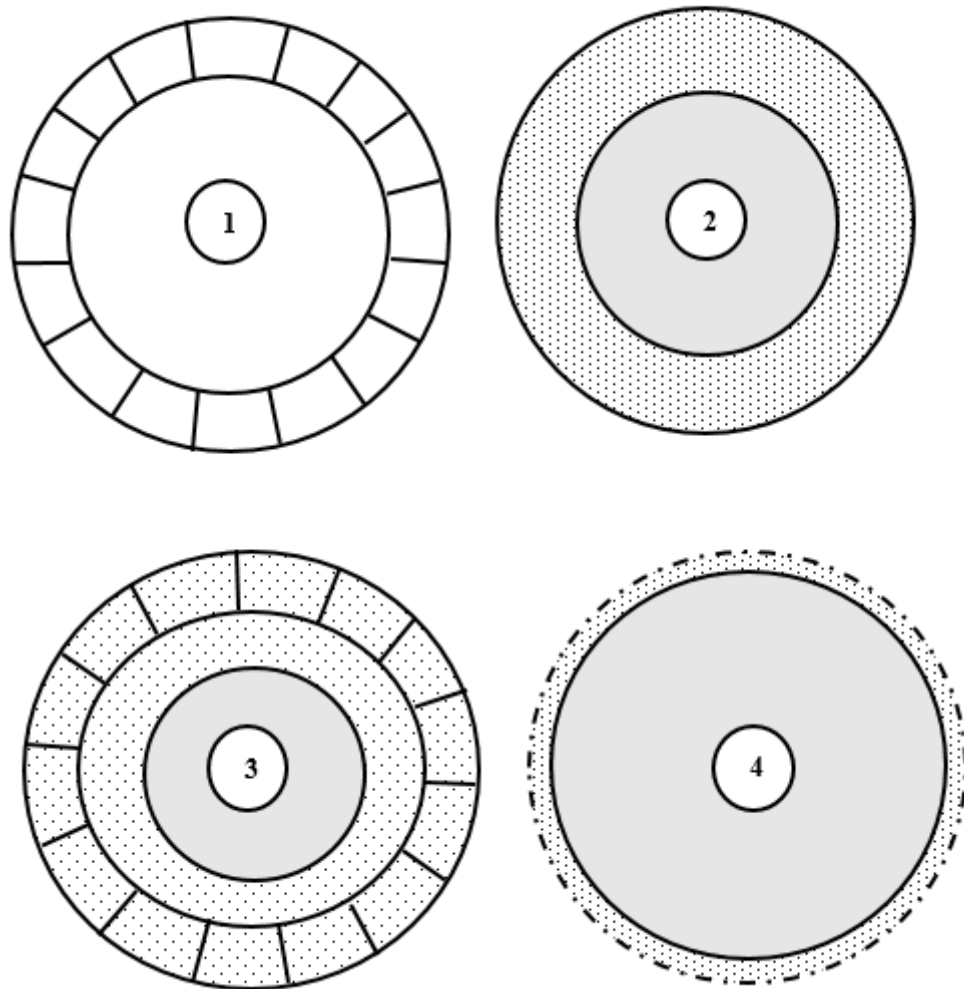
28. The hearing of the appeal was influenced by the ‘Set Theory’, which is the branch of mathematical logic that study Sets, which informally are called collections of object. The reason was only then could the functional binary relationship between Clause 13.1 of GCC and along therewith Clause 20 and 26 of SCC and Clause 4 of the contract could be ascertained and then find out whether the reasoning in the award was plausible for the reason one way to find whether a reasoning is irrational is to see whether the functional binary relationship between different clauses has not been ascertained on a logical reasoning. A reasoning would be logical if the decision maker comes

to grips with the problem and step wise resolves the same to reach the conclusion.

29. Pithily put, argument of learned senior counsel for MC-Rotem was that giving Clause 13.1 of the GCC the nomenclature ‘Set A’ and to Clause 4 of the contract the nomenclature ‘Set B’, the following elements concerning taxes are covered in Set A : sharing of tax burden consequent to changes in taxes paid owing to either (a) changes in the rates of taxes, or (b) exemption or reduction in taxes; after the last date of submission of tender. On the other hand the elements concerning taxes covered under Set B are : (a) fixed lump sum price, inclusive of certain taxes, (b) break-up of taxes (declared amounts) included in the fixed lump sum price, and (c) sharing of tax burden consequent to changes in taxes paid against declared amounts owing to either (i) change in the value of the goods, or (ii) change in the rate of taxes; during the execution of the contract. Thus the element ‘*change in the rate of taxes during the course of execution of contract*’ in Set B subsumes both elements ‘*changes in the rates of taxes, or exemption or reduction in taxes; after the last date of submission of tender*’, of Set A and hence Set A is a sub-set of Set B. It was thus urged that there was an overlap of the element of the two sets with a conflict and thus both clauses cannot operate simultaneously. Clause 1.6 of the GCC, which deals with the priority of documents, stipulated that the contract agreement will prevail over the GCC and thus Clause 4 of the contract had to be given primacy. The additional reason being that said Clause was the result of a mutual agreement between the parties and departed from original Clause 13.1 of the GCC. On this reasoning it was argued that the award was patently illegal and contrary to the express terms of the contract between the parties.

30. Learned counsel for DMRC referred to the problem, using the

language of mathematics to urge that if Venn diagrams could be drawn concerning Clause 4 of the contract agreement and Clause 13.1 of the GCC read with Clause 26 of the SCC, four Venn diagrams could be drawn as under:-



31. Learned counsel argued that Venn diagram 1 would represent the implication of Clause 4 of the contract agreement, with the outer circle referring to the total fixed lump sum consideration provided in Clause 4 and the track lined portion between the outer circle and the inner circle representing ₹2064 million as taxes @ taxes prevalent at the time of submission of tender and also at the time of signing the contract agreement

on May 22, 2001. Venn diagram 2 would represent the implication of Clause 13.1 of the GCC read with Clause 26 of the SCC based on the subsequent exemption notification dated April 01, 2003, with the outer circle representing the total lump sum fixed consideration as agreed to between the parties under Clause 4 and the dotted part till the inner circle representing the total benefit accruing on actual basis as a result of the exemption notification. Venn diagram 3 would represent the treatment of taxes etc. as a result of the exemption notification (as in Venn diagram 2) and its implication to taxes dealt in the contract agreement i.e. the dotted portion superseding the track line portion. Meaning thereby, the obligation of MC-Rotem was to pass on to DMRC the entire benefit of exemption from taxes. Venn diagram 4 would represent the implication of Clause 13.1 of the GCC if the rates of taxes had increased and there was no exemption notification.

32. It is trite, and for which proposition of law, the learned Single Judge has referred to the decision of the Supreme Court in Allied Construction's case (supra), that if a dispute arises concerning interpretation of a contract containing an arbitration clause the mandate of the arbitrators would be to interpret the contract. As held in the decision reported as AIR 1989 SC 1263 Food Corporation of India Vs. Joginderpal Mohinderpal & Anr., the function of the Court is to oversee that the Arbitrators act within the norms of justice, once they do so and the award is clear, just and fair, the Courts should, as far as possible, give effect to the award of the parties and made the parties compel to adhere to and obey the decision of their chosen adjudicator. The law of arbitration should be made simple, less technical and more responsible to the realities of the situation. It is not misconduct on the part of an Arbitrator to come to an erroneous decision, whether the error is one of fact or law and whether or not the findings of fact are supported by

evidence of the kind required before a Court. (Refer para 7).

33. In the decision reported as AIR 1995 SC 2423 Trustees of The Court of Madras Vs. Engineering Construction Corporation Ltd. the Supreme Court observed (refer para 18) that a Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal.

34. In the decision reported as (1994) 6 SCC 485 State of Rajasthan Vs. Puri Construction Co.Ltd. & Anr. the Court observed that errors of every kind would not warrant interference with an award. Patently erroneous finding are the ones which would warrant interference with an award. The Supreme Court guided the path to draw the distinction between a mere error not warranting an award to be set aside and a patent error. A patent error would be of a kind which is easily demonstrable without the necessity of carefully weighing the various possible viewpoints.

35. In the decision reported as AIR 1989 SC 890 M/s.Sudershan Trading Co. Vs. The Government of Kerala & Anr., the Supreme Court observed that reasonableness of the reason given by the Arbitrator cannot be gone into by a Court.

36. There is a strong need to adopt a hands off approach by Courts concerning awards. And we are not to be misunderstood by saying that a Court would be justified in abdicating its duty. What we intend to say is that mistakes which are capable of correction by a cumbersome process i.e. to re-read the evidence and re-read the contract, weigh in a delicate balance all the pros and cons, is not the journey to be undertaken. Men in commerce want quick decisions and therefore the price to be paid is the possibility of a mistake for which there is no legal redress. These are the words echoed by the authors of the treaties : **The Law and Practice of Commercial**

Arbitration in England by Sir Michael J. Mustill and Stewart C. Boyd.

37. Approaching the award with aforementioned guiding principles we simply have to highlight that the learned Arbitral Tribunal has painstakingly noted the entire correspondence exchanged between the parties after MC-Rotem's price bid was opened and parties negotiated on the price reduction till when the letter of acceptance was issued on May 02, 2001, to which MC-Rotem accorded concurrence on next day on May 03, 2001. In paragraphs 22 to 25 hereinabove the line of reasoning adopted by the Arbitral Tribunal has been succinctly stated by us. The reasoning indicates that the Arbitral Tribunal came to grips with the problem and juxtaposed the reasoning of MC-Rotem to interpret the contract i.e. Clause 4 of the written contract to supersede Clause 13.1 of the GCC with the reasoning of DMRC.

38. In appeal, as noted by us in paragraph 28 above arguments were influenced by the said theory which is a branch of mathematical logic to study sets which informally may be called collection of objects; and in this case would be the constituent elements of Clause 4 of the written contract and Clause 13.1 of the GCC. Conscious of Clause 1.6 of the GCC which gave primacy to the written contract above the SCC and GCC, noting Clause 1.6 of the GCC as also Clause 13.1 thereof and Clause 20 and Clause 26 of the SCC and Clause 4 of the contract, the learned Arbitral Tribunal has demarcated the respective territories of Clause 4 of the Contract and Clause 13.1 of the GCC and thus has found no conflict between the two clauses and as a result has found no applicability of Clause 1.6 of the GCC to resolve the conflict. The arguments of MC-Rotem on the Set Theory which we have noted in paragraph 29 above have to be juxtaposed with reference to the arguments advanced by DMRC noted by us in para 30 and 31 above, and we simply terminate by recording that whereas there may be considerable logic

in the reasoning of MC-Rotem, there is also considerable logic in the reasoning of DMRC. It is thus not a case of a patently erroneous finding because the error sought to be pointed out is not of a kind which is easily demonstrable without the necessity of carefully weighing the various possible views. If two lines of reasoning discernibly flow out while interpreting various clauses of a contract or as in the instant case a clause in the tender document and a clause in the contract, it would not be permissible for a Court to weigh the relative merits of the two reasoning and then decide whether the reasoning adopted by the learned Arbitrator is justified and hence to be accepted. Such an approach is an approach by an Appellate Court which re-appreciates the law and the fact appreciated by the Court of plenary jurisdiction. Civil appellate jurisdiction is distinct from a jurisdiction exercised by a Court before which an award is challenged.

39. We dismiss the appeal, but leave the costs easy.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 08, 2016
mamta/skb