

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

% *Judgment reserved on : 30th January, 2016*
Judgment pronounced on: 8th March, 2016

+ **O.M.P. (COMM) 30/2015**

ORGANIZING COMMITTEE COMMONWEALTH GAMES, 2010

..... Petitioner

Through Mr.Maninder Singh, Sr. Adv. with
Mr.Neeraj Sharma, Ms.Archana
Lakhotia, Mr.Karan Kanwal and
Ms.Shruti, Advs.

versus

PICO DEEPALI OVERLAYS CONSORTIUM & ANR.

..... Respondents

Through Ms.Meenakshi Arora, Sr. Adv. with
Mr.Dharmendra Rautray, Ms.Tara
Shahani and Mr.Ankit Khushu, Advs.
for R-1.
Mr.Shikher Garg, Adv. with
Mr.Abhishek Gupta, Adv. for R-2.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The petitioner namely, Organizing Committee Commonwealth Games, 2010 has filed the objections/application under Section 34 of the Arbitration and Conciliation Act, 1996 (herein after referred to as “the Act”) for setting aside arbitral award dated 3rd December, 2015 passed by the Arbitral Tribunal comprising of Justice R.C. Lahoti (Retd. Chief Justice of India) (Presiding Arbitrator), Justice Sujata Manohar (Retd. Justice of

Supreme Court) (Co-Arbitrator) and Justice Mukul Mudgal (Retd. Chief Justice of Punjab and Haryana High Court) (Co-Arbitrator).

Admitted Facts

2. The petitioner is a society registered under the Society Registration Act, 1860, having its office at Gate No. 25, Jawaharlal Nehru Stadium, Lodhi Road, New Delhi - 110003. The petitioner was formed to lead the planning efforts and to manage the operations and successfully deliver the Commonwealth Games 2010, to be held at New Delhi, in accordance with the rights and obligations conferred and imposed upon it by the Host City Contract entered on 13th November, 2003.

3. The respondent No. 1 is a Joint Venture/Consortium of PICO Hong Kong Limited (Lead Partner), a Hong Kong based company. Respondent No. 2 - Deepali Designs & Exhibits Private Limited, a company registered under the Companies Act, 1956 and is one of the consortium partners and was perforce party to the arbitration proceedings and is having its registered office at 9, 1st Floor, Printing Press Area, Wazirpur, behind Punjab Kesan, New Delhi.

4. PICO Event Marketing (India) Private Limited (PIEC) is a subsidiary of Pico Far East Holdings Ltd. (PFE) which is a listed company in Hong Kong with an annual turnover of HK\$2.226 billion and profit of HK\$124 million for the year 2009. PICO Hong Kong and other subsidiaries of Pico Far East Holdings Ltd. have successfully completed Overlays work for Commonwealth Games in Melbourne, the Olympics in Athens, the Olympics in Beijing and many other world events.

5. The petitioner decided to adopt a cluster-wise procurement on turnkey basis and invited an Expression of Interest ("EOI") on 5th December, 2009.

The Request for Proposal ("RFP") was issued to only four qualified bidders on 16th January, 2010. The bids were invited for appointment of Overlays Providers on turnkey rental basis for supply, installation, testing, commissioning, operation, maintenance, de-commission and removal of Overlays for Cluster I to VII. The term "Overlays" refers to temporary structures such as marquees, tents, pre-fabricated office units, porta cabins/WC units, chairs, fences, barricades, temporary partitions etc.

6. The respondent No. 1 submitted its bid for all 7 clusters including (Cluster I and VI on 26th February, 2010 but was selected for providing overlays for Clusters I and VI being the lowest bidder).

7. During the period 26th March, 2010 to April, 2010, negotiations between the petitioner and the respondent No. 1 took place and the respondent No.1 submitted its revised price after negotiation. The respondent No.1's bid was accepted only for Cluster I and VI on the basis of the revised price.

8. The petitioner issued a Letter of Intent in favour of the respondent No.1 on 5th May, 2010 accepting the revised price quoted by the petitioner. The total value of the order for Cluster I and Cluster VI was for a value of Rs.136.73 crores and Rs.94.03 crores respectively. The letter of intent required the respondent No. 1 to furnish a Performance Bank Guarantee of 10% of the Contract value towards performance security and Bank Guarantee for advance payment of 10% of the contract value for an advance of equivalent amount.

9. The petitioner also issued a letter on 18th May, 2010 in favour of respondent No. 1 and proposed to sign a formal contract with the respondent No. 1. The said letter proposed signing of a turnkey contract on rental basis

for Commonwealth Games Delhi 2010 for a total value of Rs. 1,239,597,128 for Cluster I works and Rs. 852,455,662 for Cluster VI works. (The said amounts included all taxed and duties but excluded service tax.) Thus the total contract value for Cluster I and VI awarded to the respondent No. 1 was Rs.209,20,52,790.

10. The petitioner and respondents entered into a formal contract on 2nd June, 2010 which *inter-alia* reiterated that the respondent No. 1 has been appointed as Overlays Provider on Turnkey Rental Basis for Clusters I and VI.

11. The respondent No. 1 issued 2 Letters of Guarantee to the petitioner by State Bank of India acting as counter Guarantor to the guarantee letter issued by the respondent No.1's foreign banker HSBC since the petitioner required an Indian bank to give the guarantee. The Guarantee No.09999100PBG0000447 was for an amount not exceeding USD1,786,600 and Guarantee No. 0999910PBG0000448 dated 15th June, 2010 was for an amount not exceeding USD 2,598,000. Both were valid up to 30th November, 2010 (currently valid up to 14th March, 2016). The petitioner issued several letters to the respondent No. 1 seeking extension of the Performance Bank Guarantee dated 15th June, 2010.

Scope of Work of the respondent No. 1 under the Contract

12. The scope of works included all labour, materials, plant and equipment necessary to carry out the above and any other work that may be required to ensure successful functioning of entire overlays. Further, for the work relating to temporary structures such as Marquees, Tents, Pre-fabricated Office Units and Containers etc., it included works such as design and documentation of temporary structures, supply of temporary structure

and associated equipment in the Schedule of Quantities, installation and erection, co-ordination with government agencies, decommissioning and removal etc.

12.1 Cluster I consisted of three competition venues, one opening ceremony venue and one training venue as mentioned below:

- (i) Jawahar Lal Nehru Stadium - Athletics (competition venue)
- (ii) Jawahar Lal Nehru Stadium- Ceremonies (ceremony venue)
- (iii) Jawahar Lal Nehru Stadium-Lawn Bowls (competition venue)
- (iv) Jawahar Lal Nehru Stadium - Weight Lifting (competition venue)
- (v) Delhi Public School, R.K.Puram - Lawn Bowls (training venue).

12.2 Cluster VI consisted of six competition venues and eight training venues as mentioned below:

- (i) Siri Fort Sports Complex - Badminton (competition venue)
- (ii) Siri Fort Sports Complex- Squash (competition venue)
- (iii) Siri Fort Sports Complex- Badminton (training venue)
- (iv) Siri Fort Sports Complex- Squash (training venue)
- (v) Siri Fort Sports Complex- Aquatics (training venue)
- (vi) Siri Fort Sports Complex- Tennis (training venue)
- (vii) Saket Sports Complex- Squash (training venue)
- (viii) Dr. Karni Singh Shooting Range – Shooting (competition venue)
- (ix) Thyagaraj Sports Complex - Netball (competition venue)
- (x) Thyagaraj Sports Complex- Athletics (training venue)
- (xi) Jamia Milia Islamia- Rugby7 (training venue)
- (xii) Jamia Milia Islamia- Table Tennis (training venue)
- (xiii) R.K Tennis Complex- Tennis (competition venue)
- (xiv) CRPF Campus, Kadarapur, Haryana – Shooting (competition venue)

12.3 The Scope of Works also provided that the costs of supplying, installation and dismantling shall include all and any cost associated with the aforementioned scope including:

- (i) All preliminary overheads, profits and expenses (including all photocopying and drawing supply);
- (ii) Overtime, penalty rates, site allowances and permit rates;
- (iii) Shipping charges;
- (iv) Mobilization and repatriation of staff;
- (v) Management and administrative costs;
- (vi) Rental of local equipment and store/yard;
- (vii) Material handling charges;
- (viii) Transportation charges;
- (ix) Labour Specialised and Trained Manpower charges;
- (x) Local material transfer charges;
- (xi) Accommodation charges.

12.4 Clause 1 of the Invitations for Bids (IFB) stated that the games will be held over a period of 12 days from 3rd October to 14th October, 2010 with the participation of over 8,000 athletes and delegates from 71 Commonwealth Games Associations. The Games would have 17 sports and the competition events would be held across 23 competition, 32 training and 7 non-competition venues within the National Capital Territory of Delhi.

12.5 The said Agreement provided that the time and dates were the essence of the contract and the key milestones were as follows:

- (i) Putting up of advance samples for the approval of Delhi 2010- 5th June, 2010.
- (ii) Submission of shop/detailed drawings for the approval of Delhi 2010- 5th June, 2010.
- (iii) Start of installation of Games Overlays – 5th June, 2010.

- (iv) Completion of Installation & Commissioning of Games Overlays in all respects for Cluster 1 & 6- 10th September, 2010.
- (v) Operation & Maintenance of Games Overlays- 10th September, 2010 to 15th October, 2010.
- (vi) Decommissioning & Removal of Games Overlays in all respects- 30th November, 2010.

Payments

13. The payment and the contract was required to work as per the Turnkey Agreement as recorded which is not disputed by either parties.

(i)	10% of the contract value on signing of the contract against submission of BG of an equivalent amount.	Stage-1
(ii)	10% of the contract value after approval of Designs against submission of BG of an equivalent amount	Stage-2
(iii)	10% of the value of the goods to be supplied on proof of dispatch and on submission of BG of an equivalent amount	Stage-3
(iv)	30% of the value of the goods supplied at site on certification by committee appointed by OC	Stage-4
(v)	30% on successful installation, testing and commissioning of all overlays as per the contract and certification by committee appointed by OC	Stage-5
(vi)	Balance 10% after completing of de-commissioning and removal of rented overlays from site and certification by committee appointed by OC	Stage-6

14. The contract was required to be worked as follows:

- i) The respondent No.1 was required to deliver the goods at the site of the Commonwealth Games.
- ii) The Project Managers would then issue Certificate of Works (CoW) to the authorized person of the petitioner.

- iii) The said authorized person of the petitioner would thereafter verify the inventory of the goods and the quantities and qualities thereof.
- iv) The Certificate of Payment (CoP) would thereafter be prepared on the basis of the CoW and submitted to the office of the petitioner.

Admitted position before publishing the Award

15. As mentioned earlier, the petitioner in its petition under Section 34 of the Act has admitted the facts during the course of hearing that petitioner released a sum of Rs.94,35,74,430/- during the performance of the contract of respondent No.1 and it was released corresponding to Stages 1 to 4 of the Contract.

The said admissions made by the counsel on the basis of the grounds of objection is also recorded by the Arbitral Tribunal in para No.9.14 which reads as under :

“9.14 During the course of hearing it became very clear that out of the six stages for payment, upto four stages the payments have been made to the Claimant. First and Second Stage payments needed no certification. The Third Stage payment of 10% needed only proof of dispatch of material by the suppliers. The Fourth Stage of 30% related to the value of goods supplied at site and payable on certification by three member committee appointed by the Respondent. At this stage arose some dispute relating to certification. As to this stage also during the course of hearing the factual position became more or less clear as we will shortly notice. Thus, upto the stage of 60% payment there is almost no controversy. The real dispute is about Stage 5 and Stage 6 certification of payments and payments. Stage 5 payment was on commissioning equivalent to 30% of BOQ. The last, Stage 6, payment related to the remaining 10% which became due and payable on (i) decommissioning, (ii) removal, and (iii) certification thereof.”

16. It is recorded in the award and undisputed by the parties that the major dispute in the present proceedings is the validity of certification of invoices raised by the respondent No.1. It was also recorded that the counsel for the parties agreed that the certification at Stage 5 and 6 was required to be done by 3 officials of the petitioner (who was respondent before Arbitral Tribunal) and the only dispute was whether the 3 signatures relied upon by the respondent No.1 were by such persons / officials as would be sufficient to sustain the claim and as per the respondent the invoices had to be certified for Stage 5 and 6 by three officials of the petitioner and all the invoices relied upon by them had the certification by three officials of petitioner. The respondent bases its claim on the Certification of Work (hereinafter referred to as COW) signed by any three officials and hence claims for these invoices. The respondent has denied the receipt of the letter dated 17th September, 2010 issued by the petitioner through which the changed process of certification was communicated. The respondent has further submitted that Mr. Nikesh Jain (RW) has admitted in his cross examination that no complaint was ever made by the Functional Area Head (FAH), Consultant or the Architect that the COWs for Stage 5 and 6 submitted by the respondent were incorrect or deficient in any manner.

Challenge of the petitioner before the Arbitral Tribunal at the stage of 5 and 6

17. Before the Arbitral Tribunal for the stages 5 and 6 the petitioner has refuted this claim by submitting that the requisite certification is not as per the procedure prescribed and contemplated by the contract between the parties and communications made by the petitioner to the respondent for working the contract. It was also submitted that the certification had to be by officials falling in each of the three categories i.e. Functional Area Head

(FAH), Consultant and Architect. It was argued that the procedure as per contract was framed that COWs, signed by the authorized representative of the petitioner, were required to be submitted by the respondent. The respondent also submitted a "Certificate of Payment" in order to get paid. This was received by the petitioner but was not countersigned.

18. After recording the evidence of the parties, the details of questions and answers are recorded in paras 9.17A to 9.36. The Arbitral Tribunal in para 9.37 has recorded as follows:-

“During the course of final hearing, compilations of the claims, supporting documents and certifications were exchanged between the two parties under copy to the Tribunal. It became clear that the quantum of amount for the works alleged by the Claimant to have been certified was Rs. 90,36,85,726/-. From out of the above, excluding such claims as were not certified by at-least three officials of the Respondent answering the description as per Exhibit RW-1/6, the net amount would come to Rs. 79,24,21,449/-. This figure is based on a chart drawn by the Ld. Counsel for the Respondent and the correctness of the calculations of the figures entered in the chart was not disputed by the Ld. Counsel for the Claimant. Let it be noted that the compilations as above in support of the claims, were meticulously well done and while reserving, the contentions already advanced, the learned counsel have been agreeable that so far as the quantification, i.e. the arithmetical part thereof is concerned, there is no dispute. In the opinion of the Tribunal, it would be just and fair to allow the claims of the Claimant to the extent of this amount. Accordingly, the Claimant is held entitled to the recovery of an amount of Rs.79,24,21,449/-.”

19. Even during the course of hearing, the question was put to the petitioner's counsel as to whether the petitioner would have paid additional sum for Stages 5 and 6 (i.e. in addition to a sum of Rs.94,35,74,430/- released for Stages 1 to 4) had respondent No.1 completed all the works

under the Contract and reached Stage 6. The petitioner's counsel answered that 'yes' it would have paid 40% of the balance payments in addition to the above 60% payment of Rs.94,35,74,430/-.

20. The petitioner has not disputed that respondent No.1 has completed the work for all stages and that the certificates for completion of work relating to Stage 6, i.e. de-commissioning and removal of the overlays materials, from all the venues in Cluster I and VI was handed over to respondent No.1.

21. It is admitted by the petitioner that the Arbitral Tribunal held in favour of the petitioner that (i) due certification was required for release of Stage 5 and Stage 6 payments; (ii) certification committee for stage 5 comprised of three members, being FA head or representative, Overlays Architect and Consultant; and (iii) the respondent was aware of the constituents of the certification committee for stage 5 certification. The relevant excerpts of the Arbitral Award are as follows:

“9.14 During the course of hearing it became very clear that out of the six stages for payment, upto four stages the payments have been made to the Claimant. First and Second Stage payments needed no certification. The Third Stage payment of 10% needed only proof of dispatch of material by the suppliers. The Fourth Stage of 30% related to the value of goods supplied at site and payable on certification by three member committee appointed by the Respondent. At this stage arose some dispute relating to certification. As to this stage also during the course of hearing the factual position became more or less clear as we will shortly notice. Thus, upto the stage of 60% payment there is almost no controversy. The real dispute is about Stage 5 and Stage 6 certification of payments and payments. Stage 5 payment was on commission equivalent to 30% of BOQ. The last, Stage 6, payment related to the remaining 10% which

became due and payable on (i) decommissioning, (ii) removal and (iii) certification thereof.

9.22 ... It is difficult to comprehend that the Respondent would not have appointed some process for certification of payment and also would not have designated at-least by description the officials who would be competent to certify the works done. Similarly, it is also difficult to comprehend that the Claimant would expect being paid large sums without inquiring from the Respondent as to how certification was to be done so as to satisfy the Respondent for the payment being released. On a totality of the facts and circumstances of the case, in the light of the evidence adduced, we are inclined to hold, as we do, that there was a procedure of certification, that the certification was required to be done by three officials of the Respondent description whereof was known to the Claimant though particular holders of the office were not named. In short, we hold that such of the certifications as have been done by three officials of the Respondent answering particular descriptions are binding on the Respondent and have to be honoured as being correct though they are not necessarily by particularly names officials. So also we hold that any certification by persons less than three would not bind the Respondent and would not entitle the Claimant to payment....

9.23 The above cross examination clearly shows that no question was put to the respondent's witness about the lack of necessity for having certification by all the three different categories of officials. Thus the averment in the affidavit of the respondent's witness to the effect that each of the specified categories i.e. FAH, Consultant and the Architect available in each of the venues was required to certify the COW's has gone un rebutted.

9.25 There is also some dispute as to whether the letter dated 17.09.2010 was sent by the respondent and received by the Claimant. We are of the view that irrespective of the receipt of this letter dated 17.09.2010 by the Claimant, the nature of outlay

work was such that on preponderance of probabilities we have to accept the plea of the Respondent that due to hour to hour and day to day interaction of the officials of the Claimant with those of the Respondent, the Claimant was fully aware of the constitution of Committee and the nature of the constituents. The Claimant was thus aware of the fact that the certification of invoices was required to be by all the three persons falling in the 3 categories.

9.27 In our view in the written statement sufficient plea about the lack of due certification was taken and the constitution of a three-member Committee for issuing COWs in the affidavit of evidence is merely an amplification of this plea and to accept the claimant's plea would tantamount to taking a hyper technical view of pleadings which as Arbitrators we should avoid.

9.28 In so far as Issue No.1 is concerned we are of the view that only such amounts as are covered by the duly certified COWs upto Stage 6, where signatures exist from the 'three categories' discussed above, become payable to the Claimant. This amounts to a total of Rs. 79,24,21,449/-. This figure has been taken from the Chart submitted by Mr. Neeraj Sharma, Ld. Counsel for the Parties Counsel for the Respondent, which is not disputed by the Counsel for the Claimant.

9.34 The Claimant has till date only received Rs. 94,35,74,430/20p (inclusive of Service Tax @ 10.30%). The last payment by the Respondent No. 1 was made on 18.10.2010 (see: pages 619-666, Annexure C-3/1A, Volume 7).

9.36 According to the Respondent, the persons competent to certify were: (i) architect (ii) consultant (iii) functional area head or his representative, and (iv) venue operation head or his representative. If three out of four have certified then the certification would be treated as valid; certification by less than three would be invalid.

9.37 During the course of final hearing, compilations of the claims, supporting documents and certifications were exchanged between the two parties under copy to the Tribunal. It became clear that the quantum of amount for the works alleged by the Claimant to have been certified was Rs. 90,36,85,726/-. From out of the above, excluding such claims as were not certified by atleast three officials of the Respondent answering the description as per Exhibit RW-1/6, the net amount would come to Rs.79,24,21,449/-. This figure is based on a chart drawn by the Ld. Counsel for the Respondent and the correctness of the calculations of the figures entered in the chart was not disputed by the Ld. Counsel for the Claimant. Let it be noted that the compilations as above in support of the claims, were meticulously well done and while reserving the contentions already advanced, the learned counsel have been agreeable that so far as the quantification, i.e. the arithmetical part thereof is concerned, there is no dispute. In the opinion of the Tribunal, it would be just and fair to allow the claims of the Claimant to the extent of this amount. Accordingly, the Claimant is held entitled to the recovery of an amount of Rs.79,24,21,449/-."

NOW CASE OF THE PETITIONER IN SECTION 34 PETITION

22. The petitioner's case now before this Court in the objection under Section 34 of the Act is that the finding arrived at by the Arbitral Tribunal that the respondent is entitled to receive additional amount of Rs.79.24 Crore towards Stage 5 and Stage 6 is patently illegal, erroneous and liable to be set aside.

23. In a nutshell, the main case of the petitioner is that the figures of Rs.79.24 crores was the 100% contract value and not balance 40% for stages 5 and 6 and that a sum of Rs.15.11 crores has been paid in excess of the total contract amount due and payable to the respondent No .1. The petitioner could not have verified as to whether the materials delivered at site by the respondent No. 1 in respect of Stage 4 deliveries were as per the contract or not. The

petitioner pleaded that the sum of Rs.79.24 crores was the entire value of the contract as the respondent No. 1 failed to deliver the materials and or did not complete the work. The award is unenforceable as the contract was induced by corrupt or fraudulent practices.

24. The main arguments of the petitioner now is that the last three lines of para 9.37 of the impugned Award are completely irrational, contrary to the findings of the learned Arbitral Tribunal and cannot coexist in the same Award. This figure of Rs. 79.24 crore had been derived from the admitted value for which the respondent had secured 5th stage certification. This was the total value of the work with securing the 5th stage certification which the respondent had performed in terms of the Contract and against this total payable amount of Rs.79.24 crore, admittedly, the respondent had stood paid an amount of Rs. 94.35 crore.

24.1 It is submitted by the petitioner that despite holding in favour of the petitioner in the paragraphs quoted above, that the certification by three member committee constituted by the petitioner was the condition precedent for release of the payment and also that the total valid certification obtained by the respondent No. 1 was only for an amount of Rs. 79.24 crore, (as admitted by the counsel for the respondent No. 1 also and recorded as such in para 9.28 and 9.37), the Arbitral Tribunal erroneously holds, in the last part of para 9.37, that the respondent No. 1 is entitled to additional amount of Rs. 79.24 crore over and above the sum of Rs. 94.35 crore already paid to them by the petitioner. It is submitted that in fact respondent No. 1 has been paid a sum of Rs. 94.35 crore which is approximately Rs. 15.11 crore in excess of the total amount due and payable to respondent No. 1, i.e. Rs. 79.24 crore. The fact that the sum of Rs. 94.35 crore has been paid by the

petitioner has also been admitted by respondent No. 1. Therefore, respondent No. 1 was obligated to refund an amount of Rs. 15.11 crore (Rs. 94.35 crore - Rs. 79.24 crore) to the petitioner- for the value of goods which were not certified as having been successfully installed/commissioned at Stage 5 and Stage 6. Further, it is submitted that the findings arrived at by the Arbitral Tribunal are inconsistent and mutually contradictory. In any case the operative direction in para 9.37 for payment of a further amount of Rs.79.24 crore to the respondent is entirely unsustainable and deserves to be set aside.

24.2 It is argued that the impugned Arbitral Award deserves to be set aside by this Court as it suffers from patent illegality and there is an error apparent on the face of the Award. The Supreme Court has held in *Associate Builders v. Delhi Development Authority*, reported as (2015) 3 SCC 49, that an interpretation of a contractual terms by the Arbitrators is 'patent illegality'. These are valid grounds for setting aside of the award. It is argued that an error is apparent on the face of record, it is liable to be set aside on the ground of patent illegality. The Supreme Court made the following observations:

"42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28.Rules applicable to substance of dispute.-(1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily

for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do"

24.3 It is stated that the parties had also agreed to payment terms which were linked to the milestones. Stages 1, 2, 3 and 4 were essentially to make payments in the nature of interim or advance payments to the Respondent, Stage 5 corresponds to the supply, installation, commissioning, operation and maintenance of the Overlay items and Stage 6 to the de-commission and removal of the Overlay items. The first 3 stages did not require any certification and stages 4, 5 and 6 did require certification by a committee appointed by the petitioner. Stage 4 certification was limited to acknowledging the supply of various BOQ items at the contract sites and only required one authorized person to certify the same. Pertinently, this certification was based on a self declaration by the respondent No.1 on the basis of documents and no inspection of the Overlay items was contemplated at this stage. Till this Stage 4, 60% of the payment was agreed to be paid in the nature of an interim advance payment. Even if an item was not available at a contract site and Stage 4 certification was missing, the fact that at the subsequent Stage 5, it has been acknowledged to be installed and commissioned, the delivery of the same is implied and payment of that item, even if not made at Stage 4 upto 60% has been acknowledged by the petitioner at Stage 5 and 90% payment is to be released by the petitioner for such items. The operation of the contract, based on not just the terms of the contract but also in terms of the industry practice, was that at Stage 5, when supply, installation, commissioning, operation and maintenance were to be

certified, the contractor (Overlays Provider) was either entitled to receive 90% of the payment being 10 + 10 + 10 + 30 + 30 or in the absence of due certification being given by the committee, not only would the respondent No.1 not receive the Stage 5 payment equal to 30% of the BOQ amount but would also be liable to return and disgorge the advance/interim payment of upto 60% that had been released by the petitioner to the respondent No.1. The respondent No.1's case on the other hand has been that if it has received 60% payment against certification at Stage 4, then even in the absence of certification at Stage 5 and Stage 6 it is entitled to the amounts payable at Stage 5 and Stage 6.

24.4 It is not disputed that Rs. 94.35 crore have been paid as advance payments till Stage 4 by the petitioner to the respondent No.1. It is the petitioner's case that since the certification at Stage 5 and 6 is for a total amount of Rs. 79.24 crore, then to the extent that the advance payments exceeded the total entitlement of the respondent, such excess being Rs. 15.11 crore is liable to be refunded by the respondent No.1 to the petitioner. On the other hand, the respondent No.1's case that while it has received Rs. 94.35 crore till 18th October, 2010 at Stage 4, it is entitled for a further payment of Rs.90.36 crore as awarded.

24.5 To satisfy the Court, the petitioner in a nutshell submits the modus operandi of payment payable to the respondent, in which it is stated that the payment terms up to Stages 4 and for Stages 5 and 6 are summarised as under:

- a. The respondent No. 1 had received the advance/interim payment of Rs. 94.35 crore upto Stage 4 - i.e. the advance/ interim payment of

Rs. 94.35 crore was 60% of the total payment due to the respondent No.1 - if it fulfilled the other stipulations under the contract.

- b. Till this stage, there was neither any commissioning nor any utilization nor placement of the BOQ items as per the designs.
- c. The next stage of payment of 30% of the amount i.e. from 61% to 90% (Stage 5) was on the installation and commissioning of the BOQ items during the Commonwealth Games.
- d. For payment at Stage 5 and 6, it was mandatory for the respondent No.1 to have obtained 5th stage and 6th stage certifications on successful commissioning and de-commissioning of the BOQ items.
- e. However, at Stage 5 and 6, the respondent No. 1 had been able to obtain due certification only for a part of the BOQ items comprising of the total BOQ items, i.e. the respondent No. 1 was able to obtain certification for BOQ items of 100% value of only Rs. 79.24 crore. It is submitted that the Arbitral Tribunal failed to appreciate that the figure of Rs. 79.24 crore provided by the Petitioner in its tabulation was the 100% value on the basis of the certification provided by Respondent No. 1 and not the balance 40% for Stage 5 and 6. As such, the Arbitral Tribunal by awarding this amount of Rs. 79.24 crore to the respondent No. 1 in addition to the amount already paid by the petitioner had made a gross and patent error which is apparent on the face of the award and justifies setting aside of the impugned Arbitral Award.
- f. As such, the respondent No. 1 was obligated to refund an amount of Rs. 15.11 crore (Rs.94.35 crore – Rs.79.24 crore) to the petitioner - for the value of goods which were not certified as having been

successfully installed/commissioned. It is submitted that the petitioner has categorically stated in its Written Synopsis, submitted before the Arbitral Tribunal that the petitioner is entitled to a refund of Rs. 15.11 crore paid in excess to respondent No. 1.

- g. Further, the respondent No. 1 was only eligible for 100% payment of certified BOQ items at Stage 5 (30%) and Stage 6 (10%) which amounts to Rs. 79.24 crore (which is the 100% payment for the respondent) and no other amount whatsoever.

25. By making the said submissions, the petitioner has now submitted that the impugned Award suffers from gross mathematical errors and anomalies. The Arbitral Tribunal has taken Rs. 79.24 crore as 40% value for stage 5 and 6 (30% + 10%) while making the Award. If so, the 100 % value of the Contract works out to Rs.198.10 Crore including Service Tax which does not match with the total contracted value of Rs. 230 crore. Total value of the supporting document mentioned in the summary relied upon by the Tribunal is Rs. 190.60 crore.

26. It is submitted on behalf of the petitioner that applying the same corollary, if this summary refers only to the 40% value, and total value of Rs. 190.60 crore is considered as 40%, then the 100% value will work out to Rs. 474 crore. Therefore with any stretch of imagination it is incorrect to presume that the amount of Rs. 79.24 crore is the 40% value for stage 5 and 6.

27. It would be appropriate to refer the petitioner's case who was the respondent No.1 before Arbitral Tribunal and counter-claims put before Tribunal which was recorded in paras 5.1 to 5.15. The same is extracted as under:-

“5.1 It is the Respondent's contention that one of the consortium partners of the Claimant, M/s Deepali Designs and Exhibits Pvt. Ltd., vide its letter dated March 21, 2011 terminated the Consortium Agreement dated December 19, 2009, along with the Addendum dated June 1, 2010, executed by and between M/s PICO Hong Kong Ltd., M/s PICO Event Marketing (India) Pvt. Ltd. and M/s Deepali Designs and Exhibits Pvt. Ltd. and that pursuant to termination of the Consortium Agreement, the Claimant ceased to exist and did not have the right or authority to commence arbitration.

5.2 Pursuant to Clause 55.1 of the Instruction to Bidders, the Respondent was well within its rights to suspend payment under the Turnkey Agreement in the light of the various defaults on part of the Claimant in performing its obligations under the contract.

5.3 The Claimant, in contravention of Clause 25 of GCC, not only failed to take consent of the Respondent for sub-contracting a part of the Contract to Sudhir Sales & Services, but also failed to adhere to the conditions precedent stipulated under Clause 25.2 of GCC.

5.4 In respect of the Bank Guarantee's the Respondent states that the Claimant, on account of the deficiency in services, violated Clause 19 of the Instruction to the Bidders and Clause 11.6 of GCC. Also, that no interest was required to be paid on the performance security as per Clause 19.5 of the Instruction to the Bidders and Clause 11.6(d) of GCC.

5.5 The Claimant defaulted in completing the work as required under the contract and failed to obtain the requisite certification in respect of Stages V and VI as stipulated in the contract on account of several deficiencies in performance of its services. Accordingly, in the absence of due certification by the concerned committee of the Respondent; as required under the contract and agreed to between the parties, the Claimant is not entitled to make any claim for the payment of such invoices.

5.6 The claims for recovery, of the overhead claims are entirely misconceived and unwarranted. A perusal of the particulars of the expenses incurred by the Claimant to maintain its staff indicates that the said expenses are remote and indirect and the Respondent cannot be held liable for the same.

5.7 Thus, the Respondent has denied the correctness and tenability of the alleged reliefs prayed for by the Claimant and prayed that the claim be dismissed with costs.

5.8 The Respondent has preferred counter claims also which are briefly noticed in the succeeding paragraphs.

5.9 Counter Claim No.1: For recovery of amount paid to the Claimant under the contract on the contract becoming void ab initio due to Criminal Conspiracy/Fraud. The Respondent submits that, based on the FIR lodged by the CBI as well as the observations made by the Comptroller and Auditor General of India, it has reason to believe that the Claimant and the remaining Overlays providers are guilty of obtaining the respective Overlays Contract by collusive bidding and criminal conspiracy; therefore the present Turnkey Agreement awarded to the Claimant was induced by corrupt and fraudulent practices.

5.10 Accordingly, the Respondent submits that, as per settled principles of law read with Clause 29 (Improper Inducement, Influence and Behaviour), Clause 31 (Liability and Indemnity) and Clause 35 (Termination) of GCC, the consideration underlying the Turnkey Agreement has become unenforceable and opposed to public policy and thus the Respondent is entitled to recover the amount of Rs.94,35,74,434/33 already paid to the Claimant under the contract.

5.11 Counter Claim No.2: Towards interest on the amount already paid to the Claimant

Counter Claim No.2 flows from Counter Claim No.1. The Respondent submits that as the contract was obtained by the Claimant fraudulently and by employing corrupt practice, the same becomes void ab initio and resultantly the Respondent is entitled to recover the amount released to the Claimant along with interest at the rate of 18% per annum on the sum of Rs.94,35,74,434/33 from the date of payment to Claimant till the refund of the same by the Claimant to the Respondent.

5.12 Counter Claim No.3: Towards Compensation of the Labour Cess and penalty etc., including interest payment imposed on the Respondent

The Respondent seeks from the Claimant reimbursement of the Cess paid pursuant to an Assessment Order issued by Deputy Labour Commissioner on 24.02.2012.

5.13 The Respondent seeks reimbursement of Rs.2,52,53,000/- (being 1% of the total amount paid by the Respondent to the four Overlays Providers) along with interest at the rate of 2% per month from the completion of the project to the date of deposit i.e. a total amount of Rs.94,35,754.

5.14 Counter Claim No. 4: Towards Compensation of the DVAT and penalty, etc., including interest payment imposed on the Respondent.

The Respondent seeks from the Claimant the payment of Rs.11,11,744.68 (being tax calculated at the rate of 2% of Rs.1,85,29,078A alongwith penalty at the rate of 200% of the tax under the Delhi Value Added Tax Act, 2004 (DVAT Act)), pursuant to the Notice of Assessment of Penalty dated April 26, 2012 under Section 33 of the DVAT Act.

5.15 Counter Claim No.5: Towards Compensation of the damages incurred by the Venue Owners due to the deficiency of service of the Claimant and imposed on the Respondent

The Respondent states that since the conclusion of the Games, several claims have been made, by the Venue Owners for damages that have occurred to the fittings, fixtures, finishes etc at the various venues due to the Overlays Providers, including the Claimant. Due to this reason the contract cannot be said to be completed till the time the claims made by the venue Owners are satisfied and the Venues are restored to their original condition by the Claimant. In lieu of the same the Respondent seeks from the Claimant an amount of Rs.1,27,71,673 being the amount of damages suffered by Venue Owners due to the deficiency in rendering services by the Claimant.”

28. It is necessary to refer the respondents’ case which is narrated in Part-IV of the Award in paras 4.1 to 4.8. The same is extracted as under:-

“4.1 The Claimant states that time was the essence of the contract and that it had to perform the entire scope of work with strict time schedules. According to Clause 10 of the Invitation for Bids, Annexure XI of Section 1 of the RfP the dates for award of LoI/Contract was 05.05.2010 and completion of installation and commissioning was 10.09.2010 with the Commonwealth Games starting on 03.10.2010. However, the Respondent entered into-a formal contract with the Claimant (i.e. the Turnkey Agreement) only on 02.06.2010 even though the LoI had been issued by the Respondent in favour of the Claimant on 05.05.2010.

4.2 The Claimant completed all aspects of the contract including de-commissioning of overlays material; payment of customs duties for all material imported on permanent basis; clearance of all materials imported with customs exemption certificates and return of the same to the country of original import. The Claimant asserts that having performed its contractual obligations in full and as per the terms of the contract it is entitled to the return of the Bank Guarantees held by the Respondent. (The Claimant furnished counter PBGs issued; by the State Bank of India vide Letter of Guarantee No.099991OFBG0000447 for an amount not exceeding USD 1,786,600 for Cluster VI and Letter of Guarantee

No.0999910FBG0000448 for USD 2,598,000 for Cluster I, both of which were dated 15.06.2010.) Despite the completion of the contract within the stipulated time schedule, the Respondent illegally and arbitrarily holds the PBGs and threatens to invoke the same should the Claimant refuse to extend it as per the Respondent's illegal demands.

4.3 Despite having fully completed the works within the contractual time schedule and the commonwealth games, which ended on 14.10.2010, the Respondent did not release the payments due to the Claimant. As a result, the Claimant had to continue the employment of its staff that remained engaged during the commonwealth games even after the games were over. The said staff had to be retained by the Claimant to liaise with the Respondent's authority for payments, to keep accounts and to ensure proper follow ups with the Respondent's representatives, vendors, suppliers, contractors who had not been paid due to default of the Respondent.

4.4 The Respondent arbitrarily and unlawfully withheld payment of various amounts due to the Claimant under the Turnkey Agreement for the works already executed. Various claims of the Claimant were not settled / paid and kept pending by the Respondent unlawfully notwithstanding numerous reminders and representations of the Claimant. The Claimant was constrained to invoke the arbitration clause to seek redress of its grievances by way of the present arbitration.

4.5 As the Respondent has not released the payments due to the Claimant, the Respondent is further liable to pay to the Claimant the losses/damages suffered by it as a result of the breach of the Turnkey Agreement.

4.6 The Claimant, in its Statement of Claim (SoC) has categorized its claims against the Respondent broadly under two heads; first, based on the total delivered quantities of BOQ items and, second, for damages.

4.7 Details regarding Claim:

(i) Total Claim for BOQ for Rs. 2,010,343,281/-11p (inclusive of service tax). The claim includes total fee consumption for generators. Variation Orders, cost of deliveries of items whose CoW was raised at commissioning. Quantities certified and CoW issued for Stage 5 by Respondent. The claim also includes goods that were delivered but were not commissioned by Respondent. Since the Claimant incurred costs in delivering the goods, the Respondent is liable for payment. The amount for the said goods is Rs.56,739,134/01p.

Deepali was involved in providing generator sets only for Cluster 1. Claim for Deepali's work is Rs. 449,905,681 (excluding service tax @10.30%) + Rs. 9,837,387/37p for fuel consumption (inclusive of service tax @ 10.30%)

(ii) Damages (calculated from 1.12.2010 to 31.07.12) is Rs.2,036,370,93/33p. This includes the cost of damaged golf cart, cancelled hypoxia chamber for which a subcontract was entered into, extension of Performance Bank Guarantee and overhead payment for employees.

(iii) Amount already received is Rs.943,574,430/20p (Last Payment was received on 18.10.2010)

4.8 Thus, the claimed amount payment for BOQ and damages combined is Rs.1092,796,513/13 paise as per SoC.”

29. The case of the respondent No.1 is straight and simple that it had completed all the works in all stages 1 to 6 and the Games were successfully completed entitling the respondent No. 1 to receive a payment of Rs.90,36,85,726 crore for completion of Stages 5 and 6 in addition to (or over and above) the amount of Rs.94,35,74,430/- already received by it for completion of delivery of materials up to Stage 4.

30. It is canvassed by the Senior counsel on their behalf that the petitioner has admitted in para (k) at page 22 of the Section 34 petition that the deliveries made at Stage 4 for a value of Rs.94,35,74,430 crores was duly certified by one representative of the petitioner at the venue and the payments were accordingly released.

It is undisputed fact that the respondent No. 1 had duly completed all work and that payment had been made by the petitioner after the Games had commenced and also after they were completed on 14th October, 2010. No objection whatsoever had been raised by the petitioner that the work was incomplete or the deliveries were not made or defective. Infact, no objections were ever raised by the petitioner in respect of the bill submitted by the respondent No. 1 for payment against work done at Stage 4 or Stages 5 and 6. RW-1 in his cross examination had stated as under:

"Q. 15. Did you at any point of time see any COW referable to stage 6?

A: Yes, I did see.

Q.16. Did you reject any COW pertaining to stage 6 which you had seen?

A: No, I did not reject any such COW.

Q. 48. Did you see any COWs for stages 4 and 5 submitted by the Claimant?

A: Yes. I have seen such COWs for as reached me with the bills.

Q. 49. Did you reject any of the COWs for stage 5?

A: Stage 5 bills did not come to me. I think that they are all pending for payments. Only stage 4 COWs came to me. My this answer may also be reads as clarification to my answer to Q48.

Q. 50. Would it be correct to say that you have never seen any of the COWs for stage 5?

A: I have seen the COWs for stage 5 only after the Claimant filed the Claim before this Tribunal. "

31. It is submitted on behalf of the respondents that the petitioner has placed no documents/evidence on record either during the arbitral proceedings or in the Section 34 proceedings to show that the works executed by the respondent No. 1 entitling it to additional payments over and above Rs.94,35,74,430 was either incomplete or defective. The only counter-claim raised by the petitioner before the Arbitral Tribunal is for an amount of Rs.1,27,71,673 which is towards damage caused to the venue owners due to deficiency in service of the respondent No. 1 which amount according to petitioner had been claimed by the venue owners from it. The Arbitral Tribunal in its Award has held at pg. 32 (Issue No. 6) that the petitioner has produced no credible evidence on record to substantiate its plea. It is pertinent to mention the alleged claim for damages is in respect of the damages caused to the stadiums/venues during the course of removal of the overlays works. Thus, it is apparent that no counter claim or refund had been sought by the petitioner against the respondent No. 1 in the arbitration proceedings on the ground that the work executed by the respondent No. 1 were either incomplete or defective.

The challenge to the Award by the petitioner, on the ground that the figure of Rs.79.24 crores was the 100% contract value and not the balance 40% for Stages 5 and 6 and that a sum of Rs.15.11 crores has been paid in excess of the total Contract amount due and payable to the respondent No.1, has been raised for the first time in the Section 34 petition and was never taken before or during the Arbitral proceedings neither orally nor in its pleadings filed before the Arbitral Tribunal.

32. Ms. Meenakshi Arora, learned Senior counsel has specifically informed that the petitioner has never raised any counter-claim or sought refund of the excess amount of Rs. 15.11 Crores (Rs. 94.35 Crores - Rs. 79.24 Crores) on the ground that the respondent No. 1 had not delivered the materials for achievement of Stage 4 and that the works were not completed prior to commencement of the Games.

The only plea taken by the petitioner before the Tribunal and in its pleadings in respect of Rs.94,35,74,430 payment made by the petitioner to the respondent No. 1 after deliveries made at Stage 4 was that the petitioner “is entitled to recover a sum of Rs.94,35,74,434.33 or any other amount on the ground that the contract is *void ab initio* due to fraud and conspiracy as prayed for under the Counter Claim”.

33. There is a force in the submission of the respondents that the dispute which was adjudicated by the Arbitral Tribunal was in respect of additional payments to be paid under the Contract was in respect of Stage 5 and 6 certification of payments which is over and above the payments already made by the petitioner for 60% of works completed for an amount of Rs.94,35,74,430 to the respondent No. 1 and that as per para 9.14, of the Award, there was no controversy between the parties for payments made by the petitioner to the respondent No. 1 up to Stage 4 i.e. 60% payment.

34. The only dispute before the Arbitral Tribunal was in respect of the validity of certification of payments for Stages 5 and 6.

35. The additional payments for completed works under Stages 5 and 6 of Rs.79,24,21,449 crores as awarded by the Arbitral Tribunal is derived from para 13 of the RW -1 's Affidavit. It was admitted by R W -1 in its cross

examination held on 11th March, 2014 in reply to Q. 77 that the said figure of Rs.79.24 Crores were:

"As per the documents filed by the Claimant with this Tribunal, contained in Volumes C 9, C 10 and C 11, it has been found that the certification by the committee appointed by the Respondent for stage 5 and 6 is to the extent of this amount only ... "

36. Further, RW-1 in its cross examination has admitted and deposed as under:

" Q. 78. Is it correct that the figure of Rs.94, 35,74,430.20 is in relation to the interim payments made by the OC up to stage 4?

A: Yes, it is correct. However, I wish to add that stage 4 payments might include certain items brought by the Claimant as spare or as extra which might not have been used during the installation and commissioning stage. Final payments to the Claimant are to be released based on certifications by the respective committees after finding them fit for use.

Q. 79. According to you, the sum of Rs.79.24 crores was in regard to the commissioned and de commissioned quantities, is that correct?

A: The amount is with regard to the certifications filed by the Claimant before the Tribunal. The amount relates to stage 5 and 6.

Q. 80. I put it to you that the payments with regard to stage 4 have nothing to do with the certifications, which you say, is for stage 5 and 6 ?

A: I do not agree. It has a bearing. See my answer to Q. 78. The items brought in at stage 4 may not have been used and hence the payments made at stage 4 to that extent will be liable to be adjusted at stage 5 and 6.

Q. 81. Is that correct that according to you, 60% of Rs. 79.24 crores is Rs. 47.54 crores approximately? Would that be

according to you the value of stage 4 materials which were supplied?

A: As per the documents filed by the Claimant before the Tribunal and as already stated by me, the value of certifications of stage 5 and 6 (see the documents included in Volumes C 9, C 10 and C 11) comes to Rs. 79.24 crores ..."

37. It is rightly submitted by the respondent No.1 that the plea raised by the petitioner in its Section 34 petition that the total contract value i.e. 100% was Rs.79.24 crores and that an excess payment had been made by it to respondent No.1 for Rs.15.11 Crores is devoid of merits and being raised for the first time before this Court. To the said grounds, no plea was taken by the petitioner neither upon completion of the Games nor during the arbitration proceedings. Further, no case was made out or set out by the petitioner in its pleadings filed before the Arbitral Tribunal stating that it had paid the respondent No. 1 an excess amount of Rs. 15.11 crores and/or that the works had not been completed by the respondent No. 1. Furthermore, there was no counter claim raised or refund sought by the petitioner of the sum of Rs.15.11 crores before the Arbitral Tribunal.

The petitioner did not even take the defence that the sum of Rs.15.11 crores had been paid in excess to the respondent No. 1 against respondent No. 1 's claim for additional payments (which was over and above the sum already received by it for Stage 4 works i.e Rs. 94,35,74,430 crores), of Rs. 90,36,85,726/- towards certified value of works completed by respondent No. 1 at Stages 5 and 6.

38. Mr. Neeraj Sharma learned counsel for the petitioner has admitted that the entire case now pleaded before Court, was not pleaded in the pleadings before the Arbitral Tribunal. Infact, for the sake of repetition it is mentioned

that he has not disputed the fact that many points now raised by the petitioner were not pleaded or proved in evidence before the learned Tribunal.

39. The general rule with respect to pleadings was stated by the Supreme Court in *Bachhaj Nahar v. Nilima Mandal & Ors* (2008) 17 SCC 491 as follows:

"The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the Course which, litigation on particular causes must take."

In *Bachhaj Nahar*, (supra) the Supreme Court laid down that a case not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case, the issues also generally cover the question involved, the parties proceed on the basis that such a case was at issue, and had led evidence on the same. In order for implication to apply, all parties must be conscious of such a specific pleading.

40. The general rule of pleadings has an exception in implication. The primary test of implication was laid down in *Bhagwati Prasad v. Shri Chandramaul*, AIR 1966 SC 735 as follows:

“What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them- has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter.”

41. At the cost of repetition, it is stated that in arbitrations, each party must plead the material facts upon which that party relies for their claim or defence. It is settled law that in the absence of a pleading, no amount of oral evidence could be let in. The said principles have also been discussed in the case of *Bhagwati Prasad* (supra) and *Ram Sarup Gupta (Dead) By LRs vs. Bishim Narain Inter College & Ors* (1987) 2 SCC 555.

42. Thus, I am clear in my mind that *Ram Sarup Gupta* (supra) the Supreme Court held that no party should be permitted to travel beyond its pleading, as the object of the pleading is to enable the adversary party to know the case it has to meet; and that allowing a party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice.

43. Thus, there is a valid objection taken on behalf of the respondents that the plea and argument addressed without the basis of any pleadings should not be allowed to be raised after the entire trial is over. I agree with the argument of the learned Senior Counsel for the respondents. As a matter of fact nothing more is to be discussed in the matter as findings in the award is so clear and cogent. Both the parties have made their submissions on two preliminary issues and issue No.1 which is the main issue in the matter.

44. Still, in order to satisfy my conscious, this Court inclines to relook the matter issue-wise and to examine as to whether any interference within the scope of Section 34 of the Act is called for.

45. The following preliminary issues as well as issues on merit were framed:-

Preliminary Issues

A. Whether the claims preferred by the Claimant are not maintainable in view of clause 39.1 and 39.3 of the Contract between the parties, as urged by the Respondent No.1 vide para III (k) of the Statement of Defence?

B. Whether the arbitral Tribunal cannot adjudicate upon the claims preferred in the present proceedings in view of serious allegations of fraud and malpractice made by the Respondent No.1, as urged in para 111 (o) of the Statement of Defence?

Issues on Merits

1. Whether the Claimant is entitled to an amount of Rs.1,420,455,829.29 including interest as prayed for in the Statement of Claim?

2. Whether the Contract between the parties is vitiated by fraud, conspiracy and corrupt or fraudulent practices, and hence is void and un-enforceable being opposed to public policy?

3. Whether the Claimant is entitled to release of Performance Bank Guarantee dated 15.06.2010 issued by the State Bank of India bearing No.0999910FBG0000447 for USD 1,786,000 and 0999910FBG0000447 for USD 2,598,000 as prayed for?

4. Whether the Claimant has defaulted in completing the works under the Contract?

5. Whether the Respondent No.1 is entitled to recover a sum of Rs.94,35,74,434.33 or any other amount on the ground that the contract is void ab initio due to fraud and conspiracy as prayed for under the Counter Claim?

6. Whether the Respondent is entitled to Rs.1,27,71,673/- towards damage caused to venue owners due to deficiency in service of the Claimant, which amount is stated to have been claimed by the venue owners from the Respondent?

7. Whether the Respondent is entitled to recover from the Claimant, a sum of Rs.94,35,754/- as compensation in respect of labour cess, penalty and interest demanded by the Labour Department, with interest @2% per month from the date of payment till date of reimbursement?

8. Whether the Respondent is entitled to recover from the Claimant, a sum of Rs.11,11,744,68/- for which a notice of demand has been issued to the Respondent towards DVAT, penalty and interest thereof?

9. Whether in view of attachment order dt. 28-02-2011, no payment can be made by Respondent to the Claimant under Section 281 (b) of the Income Tax Act?

10. (a) Whether Ministry of Youth Affairs and Sports, Government of India, has on 19-05-2011 directed withholding the release of any dues to the overlays providers?

(b) If so, its effect?

11. (a) Whether the Claimant or the Respondent is entitled to pre-pendentelite, pendent lite and future interest?

(b) If so, on what amount and at what rate?

12. Relief & Costs?

46. The respondents-claimants filed affidavit of one witness, namely, Mr.Chung Chee Keong, Authorized Representative of respondent Consortium. The petitioner also filed affidavit of one witness, namely, Mr.Nikesh Jain, Deputy Director General (Venue Development & Overlays). Both the witnesses were cross-examined by the respective parties.

47. On the preliminary issues A and B mentioned in para 45, the objection raised by the petitioner have been dealt by the Arbitral Tribunal as per detailed reasons by referring the relevant clauses, documents, arguments and law applicable, the same were decided against the petitioner. The findings arrived on these two preliminary issues are given in para 8.12 to 8.19. The same are read as under:-

8.12 In the case at hand we have carefully examined the pleadings and the evidence adduced. Respondents' pleadings do not give full particulars of alleged fraud and conspiracy. The evidence falls short of proving such allegations. The plea is therefore rejected. Let it be stated that during the course of hearing, Mr. Sharma, Ld. Counsel for the Respondent after arguing for some time on the plea of fraud, collusion and conspiracy, at the end submitted that the Respondent's case needs to be examined confined to testing the validity and enforceability of the contract by reference to Clause 29 of the contract which reads as under:

"29. Improper Inducement, Influence and Behaviour

29.1 Each party represents and warrants on a continuing basis that it has not done anything to improperly or unlawfully induce, reward or influence any person in relation to the execution of this Agreement or the supply or acquisition of goods or services under this Agreement including but not limited to.

(a) directly or indirectly offering, soliciting, giving, agreeing to give or receiving any gift, commission, rebate, money or consideration of any kind as an inducement or reward for

- improperly or unlawfully doing, not doing, influencing, favouring, disfavoured or carrying out any act;
- (b) seeking to influence decisions by improper means; or
 - (c) any other conduct which would constitute a breach of the secret commissions provisions of any applicable laws.

29.2 Each party represents and warrants on a continuing basis that it has not improperly or unlawfully given or received, or agreed to give or receive, any gift, commission, rebate, money or consideration of any kind in relation to any advice given to or received by a party to this Agreement which is or intended in any way to induce or influence the party advised to enter into this Agreement.

29.3 The Overlays Provider acknowledges the importance placed by Delhi 2010 on all of its tender selection processes connected with the provision 'of goods and services in relation to the Games and the policies and procedures put in place by Delhi 2010 that require all bidders to observe the highest standard of ethics in connection with all tender selection processes and the execution of contracts for the supply of goods and services in relation to the Games. Accordingly, the Overlays Provider represents and warrants that

- (a) the prices contained in its bid were arrived at independently and without any collusion, communication or agreement with any other bidder for the purpose of restricting competition;
- (b) the prices contained in its bid were not knowingly disclosed by the Overlays Provider, directly or indirectly, to any other bidder prior to opening;
- (c) no attempt was made to induce any other person to submit or not to submit a bid for the purpose of restricting competition;

- (d) neither it nor its Representatives has engaged prior to the date of this Agreement, and neither it nor its Representatives will engage at any time during the Term, in any Corrupt, Fraudulent, Collusive or Coercive Practices in connection with the tender selection process for the award of the contract evidenced by this Agreement, in connection with the execution of this Agreement or in connection with the provision of the Services.

The Overlays Provider acknowledges and agrees- that, in accordance with MI Clause 35 of the Agreement, Delhi 2010 shall have a right to terminate this Agreement if Delhi 2010 determines that the Overlays Provider or any of its Representation has engaged in any Corrupt, Fraudulent, Collusive or Coercive Practices in connection with the tender selection process for the award of the contract evidenced by this Agreement, in connection with the execution of this Agreement or in connection with the provision of the Services.”

8.13 There is no direct evidence adduced in support of the plea which may enable the Tribunal in arriving at a finding that the contract was vitiated by the effect of Clause 29. Learned counsel for the Respondent submitted that operation of Clause 29 is not confined just to the terms of the contract; it encompasses the events and circumstances prevailing prior to, and also .subsequent to the date of the contract. Learned counsel for the Respondent mainly relied on: (i) that there was cartelization and collusive bidding on the part of the Claimant and other overlays service providers, and (ii) that there are findings arrived at by the CBI and those recorded in the Shunglu Committee Report.

8.14 Learned counsel for the Claimant submitted that the plea of cartelization and consequent breach of Clause 29 of the contract was never taken by the Respondent until the invocation of arbitration by the Claimant though any such fact if it did exist must have come to the knowledge of the Respondent at the time of opening of bids themselves, the plea is- therefore clearly an afterthought. Mr. Nikesh Jain (RW) admitted in his cross-examination that this plea is

based on the report of CAG. Learned counsel pointed out that the CAG report only states a "possibility" of cartelization. Further, there is much substance in the submission of the Ld. Counsel for the Claimant that after the opening of the bids there were negotiations between the parties where-after only the terms of the contract were finalized. If at all there was a cartelization resulting into the vitiation of the bidding process then, in that case, the Respondent should not and would not have entered into negotiations with the Claimant.

8.15 So far as CBI report is concerned, the findings arrived at by CBI form the basis only of filing of the charge-sheet and the veracity thereof is yet to be tested by the competent court.

8.16 Both the reports, CAG and Shunglu Committee, are fact finding reports and merely investigative for the purpose of making recommendations which are not enforceable proprio vigore. The Enquiry cannot be looked upon as a judicial enquiry and no parties have been heard or examined to arrive at the conclusions. In the case of Ram Krishna Dahniav. Justice S.R. Tendolkar, AIR. 1958 SC538 a Constitution Bench of the Supreme Court while considering the constitutional validity of the Act, indicated that the Commission is merely to investigate, record its findings and make its recommendations which are not enforceable proprio vigore and that the inquiry or report cannot be looked upon as judicial inquiry in the sense of it being an exercise of judicial function properly so called. The Reports of the CAG and Shunglu Committee do not constitute evidence and are fact finding exercises which in all cases require further investigations.

8.17 Even if the Shunglu Committee Report can be relied upon by the Respondent No. 1, the following observations must be noted:

- i. Respondent No. 1 admitted before the Shunglu Committee that the high rates were not further negotiated because of lack of time.
- ii. Respondent No. 1 admitted that there was no time to re-tender even though they were aware of such vast differences in costs for similar items across vendors.

iii. Respondent No. 1 had failed to negotiate prices.

8.18 Respondent No. 1 has produced no evidence at all to prove its allegations. In the submission of the Claimant, the Respondent No. 1 is relying on merely on inferences and surmises in order to avoid payments to the Claimant. The Respondent No. 1 has resorted to such allegations only after the works were duly executed by the Claimant and after having taken advantage of such works.

8.19 The plea of the Respondent based on Clause 29 of the contract, therefore, fails and is rejected.

48. It is evident from the above that in respect of the allegation of fraud and cartelization, the Arbitral Tribunal had framed preliminary issues A and B and Issue No. 5. The Arbitral Tribunal, paras 8.11 and 8.12 upheld the contentions and averments of the respondent No. 1 and concluded that the petitioner had not discharged its burden to prove its allegation of fraud against the respondent No. 1. Further, the petitioner had neither given full particulars of alleged fraud and conspiracy nor produced evidence to prove its allegations. Hence, the Arbitral Tribunal rejected the said plea. Further, at para 8.13 of the Award, the Arbitral Tribunal has held that there is no direct evidence adduced in support of the plea so as to enable the Tribunal to arrive at a finding that the Contract was vitiated by the effect of Clause 29.

It clearly appears from the finding arrived by the Tribunal in para 8.12 of the Award has recorded that the petitioner after arguing for some time on the plea of fraud, collusion, conspiracy gave up its plea and simply based its arguments on the applicability of Clause 29 of the Contract.

49. The petitioner has made such allegations only after the works were duly executed by the respondent No.1. The contract have been performed. Thus, there is no reason why the BG's should not have been released to the

respondent No.1. The petitioner has produced no direct evidence in support of its plea of fraud. Further, it has an admitted position of the parties that no charge sheet has been filed till date against respondent No.1 by the CBI. Referring to the Shunglu Committee Report, the Arbitral Tribunal at para 8.18 of the Award, has concluded that the petitioner has produced no evidence at all to prove its allegations and that it had resorted to such allegations only after the works were duly executed by the respondent No. 1 and after having taken advantage of such works.

50. After deciding the said issues against the petitioner, the Arbitral Tribunal has discussed the case of the parties on merits as per issues framed. I have gone through the finding of all the issues. The findings of Arbitral Tribunal in the Award have arrived on the basis of solid evidence placed on record. The award can only be set aside if on the face of it is illegal and erroneous as it arrived at the conclusion. Such circumstances are missing on these issues.

51. **Issue No. 1 :** Whether the claimant were entitled to an amount of Rs. 1,420,455,829/29 including interest as prayed for in the Statement of Claim? The Arbitral Tribunal in para 9.1 to 9.13 has discussed the claims of the respondent as well as the case of the petitioner in details. In para 9.14 of the Award, the Tribunal has recorded as under:

“9.14 During the course of hearing it became very clear that out of the six stages for payment, upto four stages the payments have been made to the Claimant. First and Second Stage payments needed no certification. The Third Stage payment of 10% needed only proof of dispatch of material by the suppliers. The Fourth Stage of 30% related to the value of goods supplied at site and payable on certification by three member committee appointed by the Respondent. At this stage arose some dispute relating to certification.

As to this stage also during the course of 'hearing the factual position became more or less clear as we will shortly notice. Thus, upto the stage of 60% payment there is almost no controversy. The real dispute is about Stage 5 and Stage 6 certification of payments and payments. Stage 5 payment was on commissioning equivalent to 30%) of BOQ. The last, Stage 6, payment related to the remaining 10% which became due and payable on (i) decommissioning, (ii) removal, and (iii) certification thereof.”

52. The Arbitral Tribunal pertaining to validity of certification of invoices raised by the claimant/respondent No.1. Both the counsel agreed that the certification at Stage 5 & 6 was required to be done by 3 officials of the respondent and the only dispute was whether the 3 signatures relied upon by the claimant were by such persons/officials as would be sufficient to sustain the claim and as per the claimant the invoices had to be certified for Stage 5 and 6 by three officials of the respondent and all the invoices relied upon by them had the certification by three officials of respondent. The claimant bases its claim on the Certification of Work (hereinafter referred to as COW) signed by any three officials and hence claims for these invoices. The claimant has denied the receipt of the letter dated 17th September, 2010 issued by the respondent through which the changed process of certification was communicated. The claimant has further submitted that Mr. Nikesh Jain (RW) has admitted in his cross examination that no complaint was ever made by the Functional Area Head (FAH), Consultant or the Architect that the COWs for Stage 5 and 6 submitted by the claimant were incorrect or deficient in any manner. The respondent claim by submitting that the requisite certification is not as per the procedure prescribed and contemplated by the contract between the parties and communications made by the respondent to the claimant for working the contract. It was also

submitted that the certification had to be by officials falling in each of the three categories i.e. Functional Area Head (FAH), Consultant and Architect.

53. The Arbitral Tribunal has held that there is no record to show that the claimant raised any query or sought any clarification in relation to the certification process for the payment of Stages 5 and 6. Mr. Chug Chee Keong (CW-1), admitted to being in the know of the certification process in his cross examination in question No. 11 to 14.

54. Questions and answer numbers 54 to 70 of the evidence of petitioner's witness Mr. Nikesh Jain all the communications by the petitioner to respondent herein were not necessarily in writing; they could be verbal also. Similarly, even as to written communications it was not necessary that a formal procedure was followed and that an acknowledgement of every paper delivered to the respondent was obtained.

55. It seems that at that point of period there was a rush of events; officials of both the parties were meeting each other several times during the course of the day and. in view of theirs having become thick to each other some formalities were not necessarily insisted upon. The petitioner's reliance was on Exhibit RW-1/6 which is a letter dated 17th September, 2010 dealing with constitution of certification committee. After discussing evidence of both parties, it was held that any certification by persons less than three would not bind the respondent and would not entitle the petitioner to payment as three signatures of the officials on the invoices relied upon by the claimant and disputed by the respondent did not fall within the defined categories the invoices had more than one signature which belonged to one of the three categories specified without having signatures from all the three categories.

56. It is evident that the finding on payments due to the respondent No. 1 for Stages 5 and 6 in addition to the payments made up to Stage 4 for Rs.94,35,74,430 as in para 8.18 of the Award, the Tribunal arrives at the finding that the works were duly executed by the respondent No.1. In para 9.14, of the Award, the Arbitral Tribunal records the position of the parties that up to the stage of 60% payment, there was no dispute between the parties and that:

"The real dispute is about Stage 5 and Stage 6 certification of payments and payments."

57. In para 9.15 of the Award, the Tribunal records as under:

"The crux of the major dispute in the present proceedings is the validity of certification of invoices raised by the Claimant. Both the counsel agreed that the certification at Stage 5 & 6 was required to be done by 3 officials of the respondent and the only dispute was whether the 3 signatures relied upon by the Claimant were by such persons/ officials as would be sufficient to sustain the claim. "

58. In para 9.28, read with para 9.34 and 9.35 and paras 9.37 and 9.39 at of the Award, while answering the Issue No. 1 as viz. "Whether the Claimant is entitled to an amount of Rs.1,420,455,829.29 including interest as prayed for in the Statement of Claim", the Arbitral Tribunal has held as under:

"9.28 In so far as Issue No. 1 is concerned we are of the view that only such amounts as are covered by the duly certified COWs up to Stage 6, where signatures exist from the 'three categories ' discussed above, become payable to the Claimant. This amounts to a total of Rs. 79,24,21,449 ... "

"9.34 The Claimant has till date only received Rs.94,35, 74,430/20p ... "

"9.35 During the course of hearing the final submissions, the width of difference between the two learned counsels narrowed down. Reserving the validity of the original contentions between which the gulf of divide has been too wide, the Ld. Counsel with all the fairness at their command appeared to have arrived at a consense, though under demur, on such certification as would entitle the Claimant to payment of its bills as is stated hereafter.

9.37It became clear that the quantum of amount for the works alleged by the Claimant to have been certified was Rs. 90,36,85,726/-. From out of the above, excluding such claims as were not certified by at-least three officials of the Respondent answering the description as per Exhibit R W-1 /6, the net amount would come to Rs. 79,24,21,449/-

....Accordingly, the Claimant is held entitled to the recovery of an amount of Rs. 79,24,21,449/- 9.39 For the sake of clarity, let it be noted that upto Stage 4 all the claims on which there was no dispute have been paid. So far as the above figure of Rs. 79,24,21,449/- is concerned this belongs to the disputed claims as against which the claimant has not been paid anything."

59. At the time of deciding issue No. 1, it was again clarified by the Arbitral Tribunal that upto Stage 4 all the claims on which there was no dispute, have been paid. So far as the above figure of Rs.79,24,21,449/- is concerned this belongs to the disputed claims as against which the Claimant has not been paid anything. This Court totally agrees with the finding arrived on issue No.1 decided by the Arbitral Tribunal. There is no infirmity in the award. The arguments of the petitioner are rejected. It is also pertinent to mention that most of the arguments addressed on behalf of the petitioner are beyond the pleading and evidence adduced by the petitioner.

60. Thus, on Issue No. 1 is concerned, the same has been correctly decided by the Arbitral Tribunal. The amount awarded by the Arbitral Tribunal the only amounts which are covered by the duly certified COWs

upto Stage 6, where signatures exist from the 'three categories' discussed above, become payable to the Claimant. The said amounts to a total of Rs. 79,24,21,449/-. The said figure has been taken from the Chart submitted by Mr. Neeraj Sharma, learned counsel for the petitioner which is not disputed by the counsel for the respondent. Therefore, the question of interference on this issue does not arise.

61. **Issue No. 2:** Whether the contract between the parties is vitiated by fraud, conspiracy and corrupt or fraudulent practices, and hence is void and un-enforceable being opposed to public policy? The said issue has already been dealt in details while deciding two preliminary issues A and B and in my finding no further discussion is required.

62. **Issue No. 5:** Whether the respondent No. 1 is entitled to recover a sum of 94,35,74,434/33p or any other amount on the ground that the contract is void ab initio due to fraud and conspiracy as prayed for under the Counter Claim?

In so far as Issue No. 2 and 5 are concerned these are already covered by our findings on the preliminary Issue B. The contract is not vitiated by fraud, conspiracy and corrupt practices as alleged by respondent, The Contract is enforceable. It is not void much less void ab initio. It has been informed by the learned Senior counsel appearing on behalf of the respondent that the charge sheet in the criminal case has already been filed and respondent No. 1 was not named at all anywhere. The question of fraud does not arise as far as the respondent is concerned. The said fact was not denied by Mr. Neeraj Sharma, Advocate who admitted that no criminal case is pending against the respondent. No further discussions are necessary in view of my discussion in earlier part of my judgment.

63. **Issue No. 3:** Whether the Claimant is entitled to release of Performance Bank Guarantee dated 15th June, 2010 issued by the State Bank of India bearing No.0999910FBG0000447 for USD 1,786,000 and 0999910FBG0000447 for USD 2,598,000 as prayed for ?

64. The Tribunal framed issue No.3 of the Award and held at para 11.1 that since issue No.1 has been held in favour of the respondent No.1 i.e. that in addition to a sum of Rs. 79.24 crores was payable for Stages 5 and 6, the PBG's submitted by the respondent No.1 should be released forthwith. Moreover, in para 12.1 of the Award, the Tribunal has held that the respondent No.1 has not defaulted in completing the works under the contract. In 18.9 of the Award and para 19.5 of the Award the Tribunal has held as under:

“18.9 The last extension has extended the two BGs upto 31.7.2010 and 30.6.2015 respectively. As we have held the contract to have been performed, there is no reason why BGs should not have been released to the claimant. The documents filed on record go to show that the claimant was called upon every time by the respondent to renew the BGs or else the BGs would be encashed. Thus, the claimant has no other option but to renew the BGs under threat of encashment and incurred expenses thereon. Each of the applications filed by the claimant is supported by affidavit and vouchers which there is no reason to disbelieve. The claimant is held entitled to recovery of the expenses incurred by the claimant on renewable of BGs. It is further clarified that if the claimant has incurred expenses on renewal of BGs till the date of passing of the Award, the claimant would be entitled to recovery thereof subject to furnishing proof of the expenses to the respondent.

19.5. The PBGs furnished by the claimant and available with the respondent shall be returned forthwith to the claimant duly discharged. The claimant shall also be entitled to be reimbursed for the expenses incurred on extension i.e. keeping alive of the PBGs if

there have been any extension beyond 11th extension. Particulars of such claim supported by documents shall be furnished by the claimant to the respondent whereupon the respondent shall reimburse the claimant with the amount of expenses incurred one extensions.”

65. In so far as Issue No. 3 is concerned it was held that the findings arrived at on Issue No. 1 that the Performance Bank Guarantees of the Claimant dated 15th June, 2010 issued by the State Bank of India bearing No. 0999910FBG0000447 for USD 1,786,000 and 0999910FBG0000447 for USD 2,598,000 should be released forthwith. As there is no merit in the objections filed by the petitioner under Section 34 of the Act. I agree with the finding of the Arbitral Tribunal. Thus, no further discussion is necessary.

66. It is not disputed by Mr. Neeraj Sharma, learned counsel for the petitioner during the hearing that the respondent No. 1 had completed the works and had successfully decommissioned and removed the overlays materials marking the completion of Stage 6 of the Contract. The event was successful. Before event, there was no complaint about the quality of the material supplied by the respondent No.1. Thus, the Award on the issue is upheld.

67. **Issue No. 4:** Whether the Claimant has defaulted in completing the works under the Contract?

On Issue No.4 it was held by the Arbitral Tribunal that the respondent herein has performed the contract in respect of those COW's which are signed by three committee officials belonging to the 3 categories as discussed and is entitled to be paid in respect of duly certified works to the tune of Rs. 79, 24, 21,449/-. This figure has been deduced from the chart prepared and submitted by the learned counsel for the respondent Mr. Sharma and the

calculations made therein having been not disputed by the learned Counsel for the Claimant Mr. Routray. Thus, the finding on this issue is sustained.

68. **Issue No. 6:** Whether the respondent is entitled to Rs. 1,27,71,673/- towards damage caused to venue owners due to deficiency in service of the Claimant, which amount is stated to have been claimed by the venue owners from the Respondent?

With regard to Issue No. 6 in the light of the evidence it was held that it was brought on record we are not satisfied that the petitioner is entitled to the sum of Rs. 1,27,71,673/-. No arguments are addressed on behalf of the petitioner. Plausible view has been taken by the learned Arbitral Tribunal. There is no infirmity otherwise.

69. **Issue No.7:** Whether the respondent is entitled to recover is entitled to recover from the Claimant, a sum of Rs.94,35,754/- as compensation in respect of labour cess, penalty and interest demanded by the Labour Department, with interest @ 2% per month from the date of payment till date of reimbursement ?

On Issue No. 7 is concerned, as per the case of the petitioner before Arbitral Tribunal who gave its findings mentioned in para 14.1 to 14.3. The same is extracted as under:-

“14.1. it has been assessed to payment of Cess under Section 3 of the Building and Other Construction Workers' Welfare Cess Act, 1996 which requires the 'Employer' to deposit Cess at the rate of one per cent of the total cost of the construction. Assessment Order dated 24-02-2012 has been filed. The Order shows that there were four contractors including the Claimant. On the amount of Rs. 630 crores, the total value of the contracts awarded, cess has been levied on the Respondent. The amount of Cess falling to the share of the Claimant on pro rata basis comes to Rs. 94,35,754/-. Penalty and interest have also been levied on account of delay in deposit.

According to the Respondent, though it is the obligation of the Employer' to deposit Cess at one per cent of the total cost of the construction but the incidence can be passed on to the contractors.

14.2. The Claimant has disputed the Counter Claim submitting that the Claimant is not liable to pay the amount.

14.3 A perusal of the pleadings and evidence adduced shows that the Respondent has itself disputed the liability to Cess. The plea of the Respondent before the assessing authority has been that there were only Overlays Contracts requiring temporary fitting/fixtures for duration of games and removed from the venues after the Games were over and such contracts do not fall within the net of the Cess Act. On similar lines the Claimant has also denied the contract with the Respondent attracting liability of Cess.”

After discussing Clause 12.1 of the General terms and conditions of the contract it was held that the delay was attributable to the petitioner who should have deposited the amount of cess and ought to have recovered from the respondent. Despite that it was held that the legitimate amount of cess shall be paid by the respondent to the petitioner.

70. So far as interest and penalty are concerned, it is attributable to the delay on the part of the petitioner in depositing the amount of Cess if it was leviable. It was held that the petitioner should have promptly deposited the amount of Cess and then recovered it from the Claimant if the contract and/or the Law permitted it to do so. So far as the Cess is concerned, it was stated during the course of final hearing that the petitioner was contesting the legality of the assessment order as per law. both parties were to join the contest. It was held that if the petitioner is exonerated from payment of liability, the matter would end. No argument is addressed by any of the counsel. Thus, the award is upheld on this issue also.

71. **Issue No.8:** Whether the respondent is entitled to recover from the Claimant, a sum of Rs.11,11,744,68/-for which a notice of demand has been issued to the Respondent towards DVAT, penalty and interest thereof?

As per the case of the petitioner, the Department of Trade and Taxes, GNCTD issued a notice dated 29th November, 2011 to the respondent No.1 directing it to deposit 2% DVAT under the Delhi Value Added Tax Act, 2004. The amount of tax has been assessed at Rs.94,05,905/- in respect of the four overlays providers including the Claimant. Penalty @ 200% of the tax has been levied. The amount liable to be paid by the respondent comes to Rs. 11,1 1,744/68p being the amount of tax. Penalty @ 200% of the tax is also the liability of the respondent.

72. In paras 15.3 and 16.1 of the Award, the Arbitral Tribunal has taken into account the counter claims of the petitioner in respect of DVAT and non-payment of income tax. The Tribunal has held that in respect of DVAT, that should the petitioner not succeed in its appeals against the levy of DVAT, the same shall be available for realisation by the petitioner from the fixed deposit sum of Rs.11,11,744.68 and Rs.94,35,754 towards labour cess from the awarded amount to be kept in interest bearing fixed deposit account. As regards income tax dues under Issue No.9 and 10, the Tribunal at paras 16.1 and 16.2 has held that the petitioner is directed to withhold the payment of PDOC of income tax till 15th February, 2012 and in respect of issue No.10 it has held that the same is an internal matter between the Government and the petitioner. It is pertinent to mention that the income tax letter dated 24th July, 2014 was within the petitioner's knowledge prior to the final hearing before the Arbitral Tribunal. The petitioner did not make any submission in respect to the same, however the Arbitral Tribunal has taken

note of the income tax order dated 9th August, 2011 and passed directions as stated in para 16.1 of the Award. The Award does not call for interference.

73. **Issue No.9:** Whether in view of attachment order dated 28th February, 2011, no payment can be made by respondent to the claimant under Section 281(b) of the Income Tax Act?

74. **Issue No.10:** (a) Whether Ministry of Youth Affairs and Sports, Government of India, has on 19th May, 2011 directed withholding the release of any dues to the overlays providers? (b) If so, its effect?

75. With regard to Issue No.9 as per the case of the petitioner before the Arbitral Tribunal that the petitioner is not liable to pay any amount to the Claimant in view of an order of attachment having been passed by the Assessing Officer under Section 281B of the Income Tax Act 1961. However, no order of attachment has been produced. An order of attachment under Sub-Section 1 of Sec. 28 IB is only a provisional protective attachment, which under sub-Section (2) ceases to have effect on expiry of six months from the date of the order unless the period of attachment is extended which also cannot be for any period exceeding two years. Vide para 46 of the SoC it is stated - "vide order No. ITO/Ward-23(3)/2011-12/289 dated 9th August, 2011, issued by the Income Tax Authorities, the OC has been directed to withhold the payment to PDOC under Section 281 Bof the Income Tax Act, 1961 till 15th February, 2012." This averment is not disputed by the petitioner. As such the plea raised by the respondent cannot be upheld as recorded in para 16.1 of the award. Nothing has been addressed by either side, the award is upheld.

76. On issue No.10 – It was held in the award that if it is an internal matter between the Government and petitioner as it was held that such an

order cannot come in the way of an award being passed in favour of the petitioner which would settle the quantum of liability of the petitioner towards the respondent. Nothing was argued on behalf of the petitioner on this issue at the time of hearing.

77. **Issue No.11** (a) Whether the claimant or the respondent is entitled to pre-pendente lite, pendent lite and future interest? (b) If so, on what amount and at what rate?

With regard to Issue No.11 it is discussed that the issue as to payment of interest is governed by sub-Section (7) of Section 31 of the Act. The provision reads as under:-

“7(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.”

78. In para 17.2 of the Award, the Tribunal has granted interest on the amount of Rs.79,24,21,449 @ 12% p.a. w.e.f. from 23rd September, 2011 (date of invocation of the arbitration clause).

79. The finding of the Arbitral Tribunal was passed that the contract between the parties does not provide for payment of interest. Taking a totality of the facts and the circumstances into consideration, we deem it fit proper to allow interest @12% per annum on the awarded amount with effect from 23rd September, 2011, the date of invoking the arbitration clause by the

claimant till the date of the Award. With effect from the date of the award, the awarded amount shall carry interest @18% per annum. Plausible view has been taken by the learned Arbitral Tribunal. No interference is called for.

80. There are Supplemental claims for keeping the PBGs alive which PBGs should have been discharged upon the completion of the contract it was held that the costs incurred in keeping these PBGs alive should also be paid by the petitioner to the respondent.

81. Cost of extension of PBGs till date

<u>S.No.</u>	<u>Extension No.</u>	<u>Amount of Expenses (Rs.)</u>
1.	Upto 11 th Extension as awarded by the Tribunal	1,98,89,432/-
2.	12 th Extension	47,92,875/-
3.	13 th Extension	3,92,434/-
4.	14 th Extension	12,67,554/-
	Total Due (for 12th, 13th and 14th extension)	64,52,863/-

Copies of supporting documents showing expenses incurred for 12th, 13th and 14th Extensions have been filed.

82. Expenditure incurred by Claimant on keeping alive PBGs

In the Statement of Claim, under "Claim B - Damages/overhead claims", one of the heads is - "expenses towards Bank charges for extension of performance Bank Guarantee (PBG)". Particulars of the claim were mentioned on pages 30-33 of the SoC. According to the respondent, the

petitioner vide its letter of award dated 18th May, 2010 requested the claimant to furnish PBG as follows:-

- "a) PBG of 10% of the contract value towards Performance Security. The Proforma for Performance Security is given in the RFP document;
- b) Bank Guarantee for advance payment of 10% of the contract value for an advance of equivalent amount to be released to you, as per the proforma attached."

It has been specially recorded by the Arbitral Tribunal in the award that towards damages caused to venue owners due to deficiency in services of the respondent as no credible evidence has been brought on record to substantiate this plea. None of the venue owners have been examined. The petitioner should have brought on record the particulars of the alleged damages and also justified then quantification. Simply because the venue owner is complaining of the venue having been damaged and claiming some amount by way of compensation, liability cannot be fastened on the respondent.

83. On 15th June, 2010, two Letters of Guarantee were issued to the petitioner by the respondent's Bank i.e. the State Bank of India Corporate Account Group Branch, Chennai. The State Bank of India issued the said Guarantees as counter Guarantor to the guarantee letter issued by respondent's foreign banker HSBC since the petitioner required an Indian Bank to give the guarantee. The Guarantee No, 099991 0PBG0000447-was in relation to Cluster 6 for an amount not exceeding USD 1,786,600 and Guarantee No. 099991 0PBG0000448 was for Cluster 1 for an amount not exceeding USD 2,598,000, both valid up to 30th November 2010.

As per the respondent, it was recorded that these PBGs should have been released to the respondent on completion of the performance under the Contract. However, in spite of the respondent having fulfilled its contractual obligations, the respondent issued several letters to the claimant asking for extension of the PBG, inter alia, on 19th November, 2015, 15th March, 2011, 4th June, 2011; 15th September, 2011; 12th December, 2011 and sought six extensions for the periods from 31st December, 2010 to 31st December, 2012.

It is recorded in the award that respondent No.1 had no option but to extend the PBGs up to 31st December, 2012. Copies of the letters issued by the respondent for extension of PBGs have been filed as Annexure C-3/2(3) of Volume-I. The respondent has incurred a total cost of USD 129,684.51 towards the bank charges for extension of the Bank Guarantee which converted @ Rs.57 to 1USD would be Rs. 7,392,017. The same have also been extended by the respondent No.1 by order of the Court upto 14th March, 2016.

It was held that as the respondent was required to keep the PBGs renewed during the pendency of these arbitral proceedings also. The expenses were recurring and there would have been need to amend Statement of Claim again and again with every renewable.

On 15th July, 2013, the Tribunal had also recorded the following Order in its proceedings,

"Mr. Routray, the Ld. Counsel for the Claimant stated that the BGs are being renewed and the Claimant is incurring expenditure thereon which have accumulated during the pendency of these proceedings and are likely to accumulate further. He submits that the Claimant would be claiming such additional expenses incurred and whether the amount, of such additional expenses is to be awarded or not, would depend on the finding of the Tribunal on

Issue No. 2 already framed. Mr. Neeraj Sharma, Ld Counsel for the respondent No. 1 stated that he does not object to such claim being considered dispensing with the need of formal amendment in the pleadings and the defense which the Respondent has already taken would be relied on for the purpose of disputing entitlement of the Claimant to such claim.

Accordingly, it is directed that the Claimant may move an application supported by affidavit and documents, if any, raising such further claim referable to the Bank Guarantees on or before 16-11-2013 and the respondent may, if only necessary, file a counter affidavit limited to such claim; else, the present pleading of the Respondent would suffice.”

Pursuant to the liberty granted by the Tribunal, the respondent has from time to time filed the following applications.

Date of application	Extension	Amount of Expenses
06.12.2013	7 th and 8 th	Rs.82,45,432/-
05.03.2014	9 th	Rs.39,04,493/-
16.10.2014	10 th	Rs. 38,42,119/-
25.02.2015	11 th	Rs.38,97,388/-
Total		Rs.1,98,89,432/-

In para 18.9 of the award, it has been recorded that the last extension has extended the two BGs upto 31st July, 2015 and 30th June, 2015 respectively. As we have held the contract to have been performed, there is no reason why the BGs should not have been released to the respondent. The documents filed on record show that the respondent was called upon every time by the petitioner to renew the BGs or else the BGs would be encashed. Thus, the respondent had no other option but to renew the BGs, under threat of encashment and incurred expenses thereon. Each of the applications filed by the respondent is supported by affidavit and vouchers which there is no reason to disbelieve. The respondent is held entitled to recovery of the

expenses incurred by the respondent on renewable of BGs. It is further clarified that if the respondent has incurred further expenses on renewal of BGs till the date of passing of the Award, the respondent would be entitled to recovery thereof subject to furnishing proof of the expenses to the petitioner.

84. Thus, the award was passed and it was directed that the petitioner shall pay an amount of Rs.81,97,02,898/- to the respondents as per the details mentioned in paras 19.2 to 19.9. The same is not repeated for the sake of brevity.

Particulars of Claim	Total Amount	Para of Award
Claim on account of BOQ items and variation orders.	Rs.79,24,21,449/-	Para 9.28 & 9.37
Expenditure on keeping alive the PBG - For the period upto 31.12.2012 – Rs.73,92,017/- 07th to 11th Extensions – Rs.1,98,89,432/-	Rs.2,72,81,449/-	Para 18.5 Para 18.8
	Rs.81,97,02,898/-	

85. Counter claims of the petitioner :

In para 19.6 at pg. 39 of the Award, the Arbitral Tribunal has dismissed the counter claims raised by the petitioner including the counter claim for refund of Rs.94,35,74,430 on the ground that the Contract was vitiated by fraud and conspiracy. The said issues have already been dealt with in detail while deciding the other issues. No further discussion is necessary.

86. Re : Respondent No.2

As to the status of respondent No.2 and the background in which it has come to be joined as respondent No.2, a few facts need to be placed on record.

The statement of claims were filed by the respondent herein impleading the petitioner herein. On 27th January, 2013, Deepali Designs & Exhibits Private Limited (now, the respondent No.2) filed an application titled as “Application on behalf of applicant for impleadment as a co-claimant along with permission to file claims”. The application disclosed that it was by Agreement dated 19th December, 2009 that the three parties had entered into an agreement to set up a consortium. It was also agreed that the three would incorporate a joint venture company, wherein the three would have a share/percentage/ratio of 20%, 60% and 20% respectively.

The application for impleadment as co-claimant was opposed by the respondent No.1 who agreed for the respondent No.2 being joined as proforma respondent as no relief was sought for against the respondent No.2 but the respondent No.2 was certainly interested in watching the proceedings and protecting its own interest.

87. By order dated 22nd April, 2013 the application was disposed of by directing *inter alia* the claimant shall implead the applicant as respondent No.2 (proforma) by filing an amendment memo of parties. The present petitioner herein in the proceedings shall be treated as the respondent No.1. The reference in the claim petition to the ‘respondent’-wherever it occurs- shall be treated as reference to the petitioner herein. The respondent No.2 shall not be permitted to file any pleadings or documents. Claimant is not seeking any relief against the respondent No.2 (Applicant) and its impleadment is being permitted only for the purpose of protecting its own

interest. This pleadment as permitted hereby, does not prevent the applicant (now respondent No.2, in these proceedings) from filing its own Statement of Claim against any of the present parties for seeking enforcements of its own rights or claims but that shall be only in such independent proceedings as may be advised and the present order and impleadment directed hereby shall not be so constructed as to bar that remedy to the applicant/respondent No.2. Therefore, now the respondent No.2 came to be impleaded.

88. In view of dismissal of the objections filed by the petitioner under Section 34 of the Act, the order passed by the Arbitral Tribunal on 22nd April, 2013 is still sustained.

Scope of Interference

89. The present petition is also ultra vires under Section 34 of the Act. The petitioner has challenged the Award dated 3rd October, 2015 which was passed after considering the pleadings, documents and evidence. There are specific findings of facts, merits and appreciation of evidence.

90. The petitioner has challenged the arbitral award on the grounds as set out in the petition and there is not even a whisper in the said grounds as to how it falls under the limited and narrow mandate of Section 34 of the Act. Even if the additional grounds under Section 34, as laid down by the Supreme Court in the case of *ONGC v. Saw Pipes Ltd.*, AIR 2003 SC 2629 are considered, which are patent illegality arising from statutory provisions or contractual provisions or that the Award shocks the conscience of the Court, no such facts are narrated in the present petition. Most of the grounds raised were not taken before the Arbitral Tribunal. The endeavour of the petitioner is thus to convert the challenge to the arbitral award into an

appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and which endeavour as per the consistent dicta of the Supreme Court is impermissible in law.

91. It is settled law that even otherwise the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct although in the present case, I do not find even a single wrong conclusion by the Arbitral Tribunal who has dealt with each and every aspect of the matter.

92. The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. The Supreme Court has expounded on the principle as to the sanctity of the decision of the Arbitrator in the case of ***Markfed Vanaspati and Allied Industries v. Union of India***, (2007) 7 SCC 679, where in paragraph 17 of the said judgment it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honor and support the award as far as possible”.

93. Even otherwise, the scope of judicial review of an arbitral award as held in a series of decisions by the Supreme Court:

(i) In ***Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar***, 1987 (4) SCC 497 at 503, the Supreme Court held:

"Appraisalment of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have

selected their own forum and the deciding forum must be conceded the power of appraisal of the evidence..... The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator."

(ii) In ***Indian Oil Corpn. Ltd v. Indian Carbon Ltd***, 1988 (3) SCC 36, the Supreme Court held that the jurisdiction to set aside an award on the ground of an error apparent on the record is not to be "lightly exercised" and observed that:

"The court does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous."

(iii) In ***Puri Construction Pvt Ltd. V. Union of India***, 1989 (1) SCC 411 at 415, the Court held:

"When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits."

(iv) In ***Sudarshan Trading v. Govt of Kerala***, 1989 (2) SCC 38 at 56, the Supreme Court held that a Court has no jurisdiction to examine the different claims to find out whether in arriving at its decision the arbitrators acted correctly or incorrectly. The Court cannot evaluate conclusions of law or fact. It observed:

"Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the

arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. "

(v) In ***P.R. Shah, Shares and Stock Brokers Private Limited v. B.HH Securities Private Limited***, (2012) 1 SCC 594, at page 601, it was held:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence."

94. After having gone through the award passed by the Arbitral Tribunal, I find that there is no error therein. It is evident on reading the award and pleadings that the Arbitral Tribunal has awarded the additional amount of the work of stage 5 and 6 in addition to the amount already paid by the petitioner for the work done on stage 1 to 4. Thus, the petitioner is now trying to create confusion by raising the pleas which were not taken before the Arbitral Tribunal who has given its correct findings on the basis of facts and evidence available. New stand taken by a party after completion of evidence and arguments before the Arbitral Tribunal is not permissible under the law. As far as merit of award is concerned, it is settled law in the case of ***Associate Builders vs. Delhi Development Authority*** (supra) that a possible view by the Arbitral Tribunal on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when the award is delivered. Once it is found that the Arbitral Tribunal's approach is not arbitrary or capricious, then it is the last word on facts. The present case is a classic example where the Arbitral Tribunal is so correct and reasonable, it is difficult to find out even an iota of any flaw in

any part of the award. The said findings are in consonance with the contract between the parties.

95. The objections of the petitioner are thus without any merit. The same are accordingly dismissed. The interim order passed on 30th December, 2015 is vacated accordingly.

96. No costs.

(MANMOHAN SINGH)
JUDGE

MARCH 08, 2016

