

**THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.549 OF 2013

M/s.Oil and Natural Gas Corporation Ltd.)
a Company incorporated under the)
Companies Act, 1956, having its registered)
office at Jeevan Bharati Building,)
Tower -II, 124, Cannaught Circus,)
New Delhi - 110 001.) .. Petitioner

VERSUS

M/s.Interocean Shipping (India) Pvt. Ltd.)
a Company registered under the)
Companies Act, 1956, having its registered)
office at 75, Link Road, Lajpath Nager-III,)
New Delhi - 110 001.) .. Respondent

Mr.Pankaj Sawant, Senior Advocate a/w Mr.J.P. Kapadia a/w
Mr.O.Mohandas a/w Mr.Amrit Khare i/by M/s.Little & Co. for the
petitioner.

Mr.Javed Gaya a/w Ms.Rehmat Lokhandwala i/by M/s.Chamber of Javed
Gaya.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 14th March 2017
PRONOUNCED ON : 9th June 2017

Judgment :-

. By this petition filed under Section 34 of the Arbitration
and Conciliation Act, 1996, the petitioner has impugned the arbitral
award dated 16th November 2012 rendered by the arbitral tribunal

allowing some of the claims made by the respondent. The petitioner herein was the original respondent before the arbitral tribunal whereas the respondent was the original claimant. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. Some times in the year 1995, the petitioner floated a tender for operation and maintenance of the vessel Samudrika-3. Various contracts were awarded to the respondent relating to the five vessels which were owned by the petitioner. The respondent was successful in its bid pursuant to the said tender invited by the petitioner. Five separate contracts were executed by and between the parties in respect of different period in respect of vessels Samundrika-3, Samundrika-8, Samundrika-9, Sindhu-9 and Sindhu-11. The contracts were executed by and between the parties in respect of the aforesaid vessels on 22nd March 1995. It is the case of the petitioner that under the said contracts, the duties and obligations of the respondent included inter alia “.... manning, operation, victualling, repair and maintenance and provisioning of the vessel with a view to provide round-the-clock logistics support services....” to the petitioner's offshore operations. According to the petitioner, it was the duties and obligations of the respondent to keep the vessel in good running order and condition, and substantially in the same condition in which it was received by the respondent.

3. In so far as this petition is concerned, the dispute is arising out of the contracts dated 22nd March 1995 in respect of the vessels Samundrika-3, Samundrika-8, Samundrika-9, Sindhu-9 and Sindhu-11.

4. The dispute arose between the parties in respect of the vessels Samudrika-2 and other vessels. It is the case of the petitioner that the petitioner made various deductions from the bills of the respondent in accordance with the contract clause 4.0, 12.0-b, 10.0-iv, 14 etc. The respondent accordingly invoked the arbitration clause in respect of the vessel Samudrika-2 on 20th March 1999. The said matter was referred to the arbitral tribunal. The respondent filed a statement of claim before the said arbitral tribunal on 21st September 1999. The petitioner filed its written statement on 11th December 1999. The parties filed further pleadings before the arbitral tribunal. The dispute thereafter arose in respect of the vessel in question which is the subject matter of this arbitration petition. This dispute was also referred to the same arbitral tribunal.

5. The arbitral proceedings, however, continued only in respect of one reference pertaining to vessel Samudrika-2. In view of the demise of one of the arbitrators on 28th February 2004, the said vacancy was filled up in appointing another arbitrator. On 12th March 2009, the arbitral tribunal made an award in respect of the reference pertaining to the vessel Samudrika-2 (for short "Sam-2) allowing certain claims made by the respondent. The petitioner herein challenged the said award dated 12th March 2009 in this Court by filing an arbitration petition (4 of 2009). By an order and judgment dated 13th March 2015, the learned Single Judge of this Court allowed the said arbitration petition (4 of 2009). Being aggrieved by the said judgment delivered by this Court in the said arbitration petition, the respondent has preferred an appeal (369 of 2016) before the Division Bench of this Court. The said appeal is admitted and is pending for hearing and final disposal.

6. In so far as the arbitral proceedings which is the subject matter of this arbitration petition is concerned, the respondent appointed Mr. Michael Pinto, I.A.S. (Retd.) as their substitute arbitrator. On 24th July 2009, Shri Justice D.M. Rege (Retd.) originally appointed by the petitioner resigned. The petitioner, thereafter, appointed Shri Justice A.P. Ravani (Retd.) as their substitute arbitrator but he declined to act as the arbitrator. On 14th January 2010, the petitioner appointed Shri Justice M.S. Rane (Retd.) as their substitute arbitrator.

7. On 6th February 2010, the arbitral proceedings in respect of the remaining five references continued. The arbitral tribunal was reconstituted. Certain directions were issued by the arbitral tribunal in alia regarding disclosure of further documents by both the parties.

8. On 24th February 2010, the arbitral tribunal made a supplementary award in respect of the vessel Samudrika-2. The said supplementary award was thereafter challenged by the petitioner in the Arbitration Petition No.209 of 2010. On 8th April 2010, the arbitral tribunal directed that the parties were free to adduce additional oral and documentary evidence and finalised the issues in respect of five references.

9. On 26th July 2010, the respondent forwarded to the petitioner copies of eleven volumes of third party repair invoices without segregating them in three categories as directed by the arbitral tribunal on 14th December 2000 and 18th April 2001.

10. The respondent had examined witness Mr.Col. Uday Naik. His evidence was concluded on 5th August 2010. On 7th August 2010, the petitioner denied the existence as well as the correctness of the contents of all third party correspondence and other documents referred to and relied upon by the respondent.

11. On 16th August 2010, the respondent filed an application for seeking certain directions from the arbitral tribunal i.e. for taking on record the compilation of documents provided to the arbitral tribunal by the respondent in the year 2000-01 and to mark the schedule of Exhibits given by the respondent or in the alternate to produce the said compilation for each vessel through the said witness Mr.Col. Uday Naik. In the said application, the respondent also sought a direction that if the petitioner herein had any objection regarding invoices or third party supporting of the respondent, the same shall be provided forthwith by the petitioner to the respondent herein in a schedule and be replied to by the respondent herein in a further column of such schedule within seven days thereafter. The respondent also sought various directions in the said application.

12. On 28th August 2010, the respondent filed another application before arbitral tribunal inter alia praying that the respondent should not be called upon to prove the documents relating to the repair claims on the grounds inter alia of delay, waiver, estoppel etc. The petitioner opposed the said application by reply dated 30th August 2010 before the arbitral tribunal. The petitioner filed an additional reply to the said application dated 28th August 2010 on 6th September 2010. The petitioner also filed written submissions of the respondent in respect of

the application dated 28th August 2010 on 6th October 2010 and on 13th October 2010.

13. On 11th November 2010, two of the arbitrators rendered an award allowing various claims in favour of the respondent. On 15th November 2010, the learned arbitrator nominated by the petitioner made a dissenting minority award. The petitioner has impugned the said majority award in this petition.

14. All five contracts were identical with respect to the rights and obligations of the parties except minor differences. The parties agreed before the arbitral tribunal that all five references to be clubbed and to be heard together.

Submissions on behalf the petitioner :-

15. Mr. Sawant, learned senior counsel for the petitioner made following submissions :-

(I) Claim for reimbursement of cost of alleged repairs/spares :-

a) The respondent had made this claim under the heading “Manning Fees”. It was the case of the respondent that the vessel had been on down time from time to time. The work carried out during the downtime was on account of and as a result of requirements/conduct of the petitioner. It was the case of the respondent that the major repairs were undertaken including the repairs to rectify HOTO defect, steel renewal, overhauling of the engine and repairs to other equipments such as navigation equipment. It was the case of the respondent that the

vessel SAM-3 as also the remaining five vessels required substantial/major repairs, replacement and renewal of the machinery, equipment and steel plating. The said vessel SAM-3 was subject to continuous heavy duty work. It was the case of the respondent that the petitioner had neglected to repair and carry out steel repair work and other essential repairs in time resulting in extensive wear and tear of the vessels' machinery, steel plating and parts, which repairs were to be carried out at the cost and liability of the petitioner, according to the respondent. The respondent made a claim for reimbursement of costs of the alleged repairs as per the particulars mentioned in Exhibit 'B.'

b) The contract does not contain any term such as "Manning Fees." The contract provides for payment of a "lump-sum amount per day" under clause 2.1 for all the obligations and duties of the respondent under the contract. Reliance is placed on clause 2.0 and 2.1 which provides for terms "Compensation" and "Monthly Payment" respectively. The duties and obligations of the respondent included manning, operation, victualling, repair and maintenance and provisioning of the vessel with a view to provide round-the-clock logistics support services to the offshore operations of the petitioner. The contract awarded to the respondent was a comprehensive contract. Reliance is also placed on clauses 2.6, 3.0, 4.0, 5.0, 7.0, 7.2(iv) & (v), 8.0, 8.1, 8.2, 8.4.2, 9.0 and 10.0 (vi) of the contract.

c) It was duties and obligations of the respondent to carry out repairs of the vessels at its own cost. The provisions of the contract were absolutely clear and had no ambiguity of any nature whatsoever.

Question of invoking of principle of “contra proferentem” or “dominant purpose of the contract” did not arise. There is no clause in the contract which provides that the respondent could claim reimbursement from the petitioner for such repairs. Reliance is placed on the evidence of Mr.Athaley and more particularly on paragraphs 3.4 to 3.6 who was examined by the petitioner as a witness.

d) Even if the respondent was entitled to seek reimbursement for the cost of repairs from the petitioner, the respondent could not have been awarded the said claim for repairs by the arbitral tribunal contrary to clause 2.6 of the contract which stipulated a condition precedent, i.e.“... provided Owner has approved such action in advance.” There is no evidence on record showing any prior approval granted by the petitioner to the respondent for carrying out any such repairs or approved any estimated cost for such repairs.

e) Reliance is placed on Letter of Award dated 4th February 1994 which provides that the petitioner had awarded the contract for operation, manning, maintenance, repairs, spares & dry docking on turnkey basis.

f) The respondent in its letter dated 24th September 1993 had contended and recorded its regret, considering the steep increase in wages, spares and inflation rates the rate offered by the petitioner was not workable. The said letter of the respondent would clearly indicate that the respondent was to bear the cost of spares and also the cost of repairs.

g) The witness examined by the respondent in his cross-examination in SAM-2 arbitration admitted that repairs and maintenance referred in clause 7 i.e. “minor repairs” could be carried out by the crew on board. He, however, subsequently admitted that clause 7 did not refer to minor repairs.

h) Reliance is placed on clause 2.4 of the contract. It is submitted that the monthly lump-sum compensation payable to the respondent included the entire cost of drydocking and was not a mere “Manning Fees.”

i) For the period between 1991 and 1994, under similar contract, the respondent had itself carried out repairs at its own cost. Clauses in the said contract were identical to the clauses in the contract which are the subject matter of this petition. The respondent did not make any claim for reimbursement of cost of repairs from the petitioner for those contract. The witness of the petitioner had deposed in the affidavit of evidence that the respondent had been operating the vessel under a similar contract for the period between 1991 and 1994. No evidence is produced by the respondent to show that during the earlier contract period, the respondent had claimed cost of repairs for the petitioner. The witness examined by the respondent in his cross-examination deposed that he did not know when he was put a suggestion that for the earlier period between 1991 and 1994, the respondent had not made any claim on account of repairs.

j) The witness examined by the petitioner in his deposition stated that there were other operators who were operating about 24

vessels under similar contracts and none of those contractors had claimed any cost of repairs which were to be borne by them. In his cross-examination, the said witness deposed that he was sure that no operator was reimbursed expenditure for repairs of the vessel except for HOTO defects and five items mentioned in response to the petitioner. The said witness denied that the petitioner was paying cost of repairs to some of other operators.

k) Reliance is placed by the respondent on clauses 3.0 and 16.0(e) of the contract which provides that normal wear and tear did not apply for making claim for repairs. The said clauses do not refer to any normal wear and tear repairs at all. The said term has been used in relation to condition of the vessel at the time of re-delivery. The said terms are to be read *ejusdem generis* with the words 'same shipshape condition as at the time of delivery' and would not include any repairs alleged to have been carried out by the respondent. When the vessels is to be handed back in the same shipshape condition then, the petitioner has to accept the normal wear and tear and cannot insist that the vessel should be in the identical shipshape condition down to the minutest details. The words "normal wear and tear" do not refer to repairs/replacements. Reliance is placed on clause 3.0 which provides that if any repairs/replacements are to be carried out, the operator shall pay any/all charges of repair and survey.

l) No procedure is provided in the contract for seeking (i) reimbursement of any cost of repairs, (ii) obtaining prior approval from the petitioner for the necessity/requirement of carrying out the repairs (iii) giving an estimate of the repairs etc. The contract expressly

provides that it is the duty and obligation of the respondent to repair the vessel at its own cost.

m) Reliance is placed on the award rendered by the arbitral tribunal in SAM-2 arbitration and also the judgment delivered on 13th March 2015 in Arbitration Petition No.459 of 2009 holding that the operator was liable for the repairs. The said contract for the period of 1994-1996 is almost identical to the present contracts.

n) Without prejudice to the submissions aforesaid, as a special case, the petitioner agreed subsequently to reimburse all operators for the cost of expenditure incurred on renewal of five specific items arising out of normal wear and tear though the operators were responsible and liable for the same as per the terms of the contract. Reliance is placed on paragraphs 3.8 and 3.9 of the affidavit of evidence of Mr.Athaley examined by the petitioner in which he has deposed that as a special case, the petitioner had agreed to compensate the cost for five specific items. The said compensation was agreed by the petitioner for all operators including the respondent. The petitioner has already made reimbursement to the respondent in respect of those five items.

o) The witness examined by the respondent admitted in his cross-examination in Sam-2 arbitration and in particular paragraphs 54, 55, 56 and 83 that he was not present when the decision was taken in respect of reimbursement for overhauling of engine and the repairs/replacement of radar. He also admitted that he was not aware as to who from the petitioner had agreed to the said two items and that he cannot

produce any record to show that the petitioner had agreed to compensate for the said two items.

p) The arbitral tribunal could not have considered the oral and documentary evidence led by the respondent on various grounds. In the minutes of meeting dated 14th December 2000, the arbitral tribunal directed that the respondent herein will furnish to the petitioner copies of the invoices in respect of the repairs carried out to the vessel Samudrika-2 on 23rd December 2000 and thereafter for each of the other five vessels at the end of each following week on Saturday of each of such week. The respondent was also directed to give inspection of the original invoices and the supporting vouchers on the request being made by the petitioner in that behalf. It was directed that invoices to be supplied by the respondent to the petitioner will be separately grouped according to those five items of repairs which according to the respondent fell within the five items in respect of which the petitioner had agreed to make payment. It was directed that on being supplied copies of the invoices by the respondent, the petitioner will admit or deny the correctness and/or validity of the contents of such invoices within four weeks of receiving the same.

q) Reliance is also placed on Minutes of Meetings dated 18th April 2001. The respondent was directed to prepare these group of the invoices and file them before the arbitral tribunal after supplying the copies to the Attorneys of the petitioner on or before 25th May 2001. The petitioner was directed to furnish to the respondent its comments and objections in regard to the different groups of invoices given to them by the respondent which shall be filed with the arbitral tribunal

on or before 22nd June 2001. The respondent was granted liberty to file affidavits of its witnesses on or before 31st July 2001.

r) The respondent was directed to segregate the invoices for repairs into three categories. The respondent, however, complied with the said direction only in respect of the vessel Sam-2 which culminated into an arbitral award dated 12th March 2009 and Supplementary Award dated 24th February 2010. The respondent, however, did not comply with the similar directions in respect of the other five vessels.

s) After reconstitution of the tribunal in view of demise of one of the learned arbitrator and in view of resignation of the other two arbitrators, in the meeting held on 6th February 2010, the parties had agreed for consolidation of the references in the five matters for the purpose of hearing and accepted that the pleading in all the five cases had been completed. In the said Minutes of meeting, the parties were directed that if either party wanted to disclose any further documents, they would be at liberty to do so within three weeks from the date of the said order and would exchange copies thereof. The arbitral tribunal also directed the parties to submit statement of admission and denial of documents disclosed by the other side within two weeks clearly indicating that the documents admitted with regard to the existence as also the correctness of the contents thereof and those documents which were not admitted and those documents in respect of which the existence and contents were disputed. The parties were free to adduce additional oral evidence in respect of each of the references if they so desire.

t) The respondent thereafter forwarded copies of eleven volumes of third party invoices of repairs bills without segregating them into three categories as directed by the arbitral tribunal on 14th December 2000 and 18th April 2001. The petitioner by its advocate's letter dated 7th August 2010 denied the existence and correctness of contents of all third party correspondence and other documents including the alleged supporting documents submitted with the invoices for the alleged repairs. The oral evidence of the witness Mr.Col. Uday Naik was concluded on 5th August 2010. The respondent sought to produce those eleven volumes of repair invoices during the course of evidence of the said witness Mr.Col. Uday Naik. The petitioner objected to the production of those eleven volumes of alleged repairs invoices by the respondent. The arbitral tribunal accordingly recorded that those documents were marked as exhibits "subject to their veracity being established."

u) The petitioner placed reliance on the two applications dated 16th August 2010 and 28th August 2010 filed by the respondent to contend that the respondent should not be called upon to prove the documents relating to the repairs claims on the grounds of delay, waiver, estoppel, conduct of the petitioner etc. The petitioner filed a reply to those two applications. The respondent filed rejoinder. Both the parties also filed their written submissions in those two applications filed by the respondent.

v) Reliance is placed on the order dated 11th November 2010 passed by the majority of the arbitrations allowing the said two applications and holding that third party invoices for repairs be admitted

in evidence without requirement of further proof. The learned arbitrator nominated by the petitioner, however, rejected those two applications filed by the respondent.

w) The said decision dated 11th November 2010 given by the arbitral tribunal by majority was described as interim award. The arbitral tribunal issued clarification on 6th January 2011 that the said decision dated 11th November 2010 was not an interim award but was an order on the applications of the respondent dated 16th August 2010 and 28th August 2010. The petitioner filed an arbitration petition challenging the said decision rendered by the arbitral tribunal. By an order dated 23rd June 2011, this Court dismissed those petitions as not maintainable.

x) The order dated 11th November 2010 passed by the arbitral tribunal by majority is in gross violation of principles of natural justice and is opposed to the public policy of India and also contrary to the procedure prescribed by the arbitral tribunal in the Minutes of Meetings dated 14th December 2000 and 18th April 2001. The arbitral tribunal belatedly could not have dispensed with the requirements of proof of those disputed documents and could not have considered those documents while allowing the claims made by the respondent. The interpretation of direction dated 14th December 2000 by the arbitral tribunal in the impugned award shows perversity and absurdity. Though the arbitral tribunal is not bound to follow the provisions of the Evidence Act, 1872, principles of natural justice apply to the arbitral proceedings. In this case, the parties had agreed to follow the procedure of segregation of the disputed invoices and documents, admission or denial of those documents by the petitioner and thereafter to lead oral evidence

to prove the existence and correctness of the contents of the disputed documents. The arbitral tribunal thus could not have passed an order dispensing with the proof subsequently.

y) Reliance is placed on the following judgments :-

(i) Bareilly Electricity Supply Co. Ltd. Vs. The Workmen & Ors. - (1971) 2 SCC 617,

(ii) Narbada Devi Gupta Vs. Birendra Kumar Jaiswal – (2003) 8 SCC 745,

(iii) Bi-Water Penstocks Ltd. Vs. Municipal Corporation of Gr. Bombay - 2011 (3) Mh.L.J. 706

in support of the submission that mere production and marking of documents as exhibits is not sufficient and also in support of the submission that the arbitral tribunal could not have considered the disputed and unproved documents and was bound to follow the principles of natural justice and provisions of the Evidence Act, 1872.

16. As and by way of the alternate submissions, the following submissions are made :-

a) The petitioner had always disputed the factum of repairs alleged to have been carried out by the respondent. The respondent had made claims towards repairs cost in five arbitrations i.e. Samundrika-3, Samundrika-8, Samundrika-9, Sindhu-9 and Sindhu-11 in the sum of Rs.67,99,611/-, Rs.38,35,171/-, Rs.91,75,969/-, Rs.84,85,670/- and Rs.73,27,076/- respectively. The claims for repairs made by the respondent were rejected by the petitioner by its advocate's letter dated 10th April 2001 on various grounds.

b) The witness produced by the respondent had no personal knowledge of the alleged repairs carried out by the respondent or whether there was any necessity for carrying out such repairs and whether sanction was granted by the petitioner about the estimated cost of repairs etc. The said witness was also not aware whether the respondent made any payment to third party workshops/contractors for the alleged repairs. The said witness in his cross-examination admitted that he had no personal knowledge as to what repairs were carried out prior to May 1998 and had no personal knowledge of the actual work done during that time. He could not say as to who was the person who actually prepared invoices and about the process of preparing the invoices. The said witness was not involved in the process of preparation of invoices. He did not have any record to show that the petitioner was aware of the repairs carried out on board the vessel.

c) The said witness was also not in the employment of the respondent when the payments for such alleged repairs were alleged to have been made by the respondent. He also admitted that there was no prior approval in writing from the petitioner as per the documents available with him before deciding to carry out any repairs. He admitted that there was no 'work done certificate' or repair verification issued by the petitioner in respect of such repairs. Second witness i.e. Mr.Gupta examined by the respondent admitted in his cross-examination that he had worked only in the Delhi office and he was never stationed in the Mumbai office of the petitioner. He admitted that he would not be personally aware of a particular transaction in respect of which an entry made in the ledger which had taken place in Mumbai since he worked only in Delhi office and was never stationed in the Mumbai office of the

petitioner. He admitted that he was not personally aware about the alleged repairs to the vessels in respect of which the entries in the ledger were made.

d) Invoices on which the respondent had placed reliance before the arbitral tribunal were not tendered by any of the witnesses but was simplicitor produced by the respondent. The respondent did not correlate or re-concile or gave any cross reference between eleven bundles of the invoices and the ledger and the bank statement. There was no opportunity to cross-examine the person who had alleged to have prepared table which was forwarded by the respondent to the petitioner through its advocate's letter dated 20th February 2012. The said table was full of discrepancies which were pointed out by the petitioner before the arbitral tribunal.

e) The petitioner had disputed the factum of repairs alleged to have been carried out by the respondent. Reliance is placed on various letters exchanged between the parties in respect of the claim for repairs. Reliance is also placed on letter dated 10th April 2001 addressed by the petitioner through its advocate giving various reasons for non-payment of the invoices for making claim for repairs in respect of five vessels.

f) Clauses 2.6, 3.0, 4.0, 5.0, 7.0, 7.2(iv) & (v), 8.0, 8.1, 8.2, 8.4.2, 9.0 and 10.0 (vi) of the contract expressly stipulate that it is the duty and obligation of the respondent to repair its vessels at its own cost. Clause 2.6 relating to "Reimbursements" and clause 10 relating to "Liability of Owner" do not refer to cost of repairs. Cost of repairs is not

the liability of the petitioner. The petitioner is not required to reimburse the respondent for the cost of repairs.

g) In his alternate arguments, it is submitted that even if the petitioner is liable to pay cost of repairs to the respondent, since the conditions prescribed in clause 2.6 have not been complied with nor any evidence is produced on record to show that the need for repairs or cost was approved by the petitioner, whether actual repairs were carried out or not and if carried out was satisfactorily carried out or not was not verified by the petitioner, no such claim could be awarded by the arbitral tribunal. Reliance placed on clause 3.0 and 16.0(e) of the contract by the respondent is totally misconceived.

h) This Court in Arbitration Petition No.459 of 2009 arising out of Sam-2 arbitration has held that the operator was liable for the repairs and has set aside the arbitral award rendered by the same arbitral tribunal. The terms and conditions of these contracts are identical to the said contract i.e. Sam-2. The said judgment delivered by this Court in Arbitration Petition No.459 of 2009 between the same parties relating to the identical subject matter which is not set aside is binding on the parties as well as this Court.

i) The respondent had made claim for repairs belatedly and not in accordance with the contractual procedure agreed by the parties. Most of the invoices for the cost of the alleged repairs had been submitted on 24th December 1998 in violation of the agreed procedure stipulated under clauses 20.0 read with clause 21.0(A) of the contract. The arbitral tribunal has allowed this claim contrary to the terms of the contract.

j) The claims for repairs made by the respondent are beyond the scope of reference. Since those claims were not forming part of the notice invoking arbitration agreement, the arbitral tribunal acted beyond their jurisdiction.

k) The finding of the arbitral tribunal that there was no provision in the contract for carrying out repairs by the respondent is totally perverse and contrary to the terms of the contract. Similarly, the finding of the arbitral tribunal that the principle of “contra proferentem” is applicable to this contract is also perverse and shows patent illegality. Most of the issues raised by the parties in respect of the claim for repairs are already concluded in the judgment delivered by this Court in the case of Sam-2 arbitration.

l) Reliance is placed on the judgments of the Supreme Court in the cases of ***National Insurance Company Limited Vs. Boghara Polycab Private Limited***, reported in ***(2009) 1 SCC 267*** and in particular paragraph 48 and ***S.K. Jain Vs. State of Haryana & Anr.***, reported in ***(2009) 4 SCC 357*** and in particular paragraph 8 in support of the submission that the principle of “contra proferentem” does not apply to the commercial contracts. Reliance is also placed on the judgment of the Supreme Court in the case of ***Indian Bank Vs. Blue Jaggers Estates Limited and Ors.***, reported in ***(2010) 8 SCC 129*** and in particular paragraph 23 in support of the submission that the arbitral tribunal cannot rewrite the contract on the ground that the contract entered into between the parties was an unconscionable contract.

m) The arbitral tribunal has applied Section 65(G) of the Evidence Act, 1872 for dispensation of primary evidence on the ground that the documents were voluminous. No such application for dispensation of primary evidence was made by the respondent under Section 65(G) of the Evidence Act, 1872. The claim in the sum of Rs. 3,56,23,297/- has been allowed by the arbitral tribunal contrary to the terms of the contract, based on no evidence and is illegally awarded.

n) Reliance placed on clause 8.4.2 of the contract by the respondent by making claim for repairs arising due to accident in the case of vessels Sam-8, Sam-9 and Sindhu-9 was totally misplaced. It is submitted that clause 8.4.2 of the contract expressly stipulated that all expenses for repairs arising due to accident shall be borne exclusively by the respondent. Whatever amount has been received from the Insurance Company by the petitioner, the same has been paid to the respondent on a back-to-back basis.

o) Claim for Sam-8 has been allowed by the arbitral tribunal in the sum of Rs.4,05,000/-. The witness examined by the respondent in his cross-examination and more particularly reply to questions 38 and 39 admitted that the amount of claim should stand reduced to Rs.1,07,203/-. The said claim is contrary to clause 8.4.2 of the contract.

p) The award in respect of the claim for repairs for Sam-9 is also challenged on the ground that the claim was lodged by the respondent itself with the insurance company and was rejected by the insurance company because the respondent did not furnish proof of

proximity of cause of the accident to the insurance company. Reliance is placed on letters dated 19th September 2000, 12th February 2002 and 4th March 2003 addressed by the Average Adjusters/Insurance Company. The insurance company had rejected the claim on the ground that the damages and repairs had not arisen due to accident. The respondent could not claim the said amount in the statement of claim under the head of claim for cost of repairs arising out of accident. The respondent did not amend the statement of claim.

q) The claim for repairs for Sindhu-9 is opposed on the ground that the said claim was rejected by the insurance company on the ground that the damages/repairs had not arisen due to accident. Statement of claim was not amended by the respondent. Clause 8.4.2 of the contract prohibits such claims for repairs. It was the case of the respondent that the repairs were necessary due to accident. In the statement of claim, the respondent had pursued the claim on the basis of Sam-3. The arbitral tribunal could not consider the claim for repairs due to accident as general repairs in view of there being neither any pleading nor any evidence in support thereof.

r) The arbitral tribunal has allowed the claim for repairs on the premise that the contract awarded to the respondent was for 'manning' though there is no provision in the contract for manning fees. The lump-sum compensation is provided in clauses 2 and 2.1 of the contract.

s) Reliance is placed on clause 12 of the contract which provides for 'Down Time Compensation.' Maximum downtime was

prescribed for contract upto six days in two quarters at any time. Under clause 12(b), there was express bar for payment of any daily charges.

t) The arbitral tribunal made a reference to the award of the arbitral tribunal in Sam-2 arbitration wherein the claim for repairs was rejected by the same arbitral tribunal. Re-visit of decision by the arbitral tribunal in these contracts was perverse.

u) Under clause 2.1 of the contract, the respondent was entitled to the payment only for the period when the vessel was in operation. The claim awarded by the arbitral tribunal is contrary to clause 2.1 of the contract. The arbitral tribunal could not have awarded claim contrary to clause 12.1 which provided for three days down time payment in a quarter. The respondent did not challenge the rejection of claim by the arbitral tribunal in Sam-2 by filing a separate arbitration petition.

v) It is submitted that admittedly the contract period was between 1994 and 1996. The respondent was under an obligation to submit an invoice in quadruplicate for the lumpsum monthly fee covering the period of proceeding month before 7th of every month to the office of the petitioner under clause 20(A) of the contract. The petitioner was required to pay the monthly invoices for the monthly lumpsum compensation within 30 days from the date of receipt of the invoices. Cause of action arose when the amount was alleged to have been spent or incurred by the respondent towards repairs and not on the date of the invoices. Reliance is placed on Article 23 of the Schedule to the Limitation Act, 1963 which provides for three years' limitation period

and time begins to run “when the money is paid.” It was the case of the respondent that all payments were made to third party work shops for the parts/spares during the term of the contract i.e. between February 1994 and November 1996.

w) Time began to run and the limitation did not stop due to discussion, if any, between the parties. The respondent did not produce any material before the arbitral tribunal to show that any negotiations were going on between the parties and as to when such negotiations ended. Though the repairs were allegedly carried out from the year 1994 onwards, the bills were raised by the respondent in the month of December 1998 for the works carried out between 1994 and 1996. Arbitration notice was admittedly issued on 26th March 1999. Under arbitration clause only such dispute which could not be resolved by negotiations could be referred to the arbitration. It is submitted that the substantial part of cause of action were thus barred by law of limitation.

x) The burden was on the respondent to establish the date when the respondent had alleged to have made the payments to third party workshop for repairs to show that its claim was within the period of limitation. Payments allegedly made by the respondent upto 26th March 1996 i.e. three years prior to the date invoking arbitration by the respondent were ex facie barred by law of limitation.

y) The finding of the arbitral tribunal that there were negotiations between the parties and therefore, the period of limitation got extended is untenable and is perverse. The respondent had not

produced any record as to when the meetings/negotiations were held. The arbitral award is totally silent on this aspect. The negotiation between the parties does not extend the period of limitation. There is no acknowledgment of any liability or any part payment under Sections 18 and 19 of the Limitation Act.

z) Learned senior counsel for the petitioner placed reliance on the following judgments :-

- i) The judgment of the Calcutta High Court in the case of ***Sunkur Pershad Vs. Goury Pershad***, reported in ***1879 ILR Vol.V Cal 321*** and in particular paragraphs 323 and 324.
- ii) The judgment of the Patna High Court in the case of ***Mukhdeo Singh and Anr. Vs. Harakh Narayan Singh & Ors.***, reported in ***AIR 1931 Patna 285***.
- iii) The judgment of this Court in the case of ***Vishindas Bhagchand Vs. Chairman, Maharashtra State Electricity Board, Mumbai & Ors.***, reported in ***2002 (1) Mh.L.J. 222*** and
- iv) The judgment of the Supreme Court in the case of ***Steel Authority of India Ltd. Vs. J.C. Budharaja, Government and Mining Contractor***, reported in ***AIR 1999 SC 3275***.

aa) It is submitted that any negotiation held after the claims already having become time barred cannot revive time barred claims. Reliance is placed on the judgment of this Court in the case of ***Victor Albuquerque Vs. Saraswat Co-operative Bank Ltd. & Ors.***, reported in ***1998 (2) Mh.L.J. 437***. The respondent has not shown as to which claims were under active consideration of the petitioner and upto what

date.

bb) The witness of the respondent admitted in his cross-examination that most of the bills were submitted almost two years after the contract came to an end. He could not explain the delay in submitting the invoices. The witness deposed that he had assumed that the bills were submitted subsequently because the petitioner took a decision to make payments in respect of repairs of certain items after expiry of the contract.

cc) The respondent had quantified the specific amount in the notice invoking arbitration agreement and thus could not claim any higher amount subsequently in the statement of claim. The arbitral tribunal, however, having allowed the higher amount than what was claimed in the notice invoking arbitration agreement, the arbitral tribunal had exceeded its jurisdiction. The parties were under an obligation to specify the points of dispute by enumerating the claims i.e. to crystallize the dispute arising out of specific invoices with quantified amount. The respondent could not have enhanced the claim amount in the statement of claim for the first time.

dd) It was not stated by the respondent that amounts claimed in the arbitration notices were tentative and subject to modification/amendment/finalisation at a later stage. The respondent could not increase the claim before the arbitral tribunal directly. The rejection of this submission by the arbitral tribunal is contrary to the law laid down by the Supreme Court and by this Court. The arbitral tribunal has exceeded its jurisdiction and has travelled beyond the scope of reference.

ee) Reliance is placed on the following judgments of the Supreme Court :-

- (i) ***Indian Aluminium Cables Ltd. Vs.H.S.E.B.***, reported in **1996 (5) SCALE 708**,
- (ii) ***State of Goa Vs.Praveen Enterprises***, reported in **(2012) 12 SCC 581** and in particular paragraphs 9 to 11 and 26.
- (iii) ***Voltas Ltd. Vs. Rolta India Ltd.***, reported in **(2014) 4 SCC 516** and in particular paragraphs 26, 29 and 31.
- (iv) Reliance is also placed on the judgment of this Court in the case of ***Patel Engineering Vs. B.T. Patil and Sons*** delivered on 8th January 2016 in Arbitration Petition Nos.891 of 2010 and 893 of 2010 and in particular paragraphs 21, 34, 51 to 55, 77, 78, 91, 100, 124, 125, 128, 130, 131 and 138.

ff) It is submitted by the learned senior counsel for the petitioner that if the vessel was in-operative and was not made available for use beyond thirty days, in that case, the petitioner was entitled to deduct the liquidated damages from the payment due to the respondent @10% of pro-rata daily rate as agreed between the parties under Clause 14 read with 12.0 (b) of the contract. He submits that the parties had also agreed that the said deduction was by way of an ascertained and agreed liquidated damages and was not by way of penalty. The respondent has not pleaded that the amount of liquidated damages @10% of pro-rata daily rate was by way of penalty or that reasonable amount of damages ought to have been lesser than the amount deducted by the petitioner. It would be impossible for the Court to assess

compensation arising from breach by the respondent and would also be difficult for the petitioner to prove how much actual loss of the petitioner was suffered on account of non-availability of the vessel. The respondent failed to show that any of its vessel was actually operative when it had been shown on down time.

gg) It is submitted that the petitioner had raised an issue of jurisdiction and that the claim for refund of the recovery of the amount deducted from the petitioner by the respondent was prohibited under the terms of the contract in the written statement. He submits that the finding of the arbitral tribunal that the objection of the jurisdiction ought to have been raised by the petitioner before filing written statement is totally perverse. He submits that the issue of jurisdiction could be raised by the petitioner even in the written statement under Section 16 of the Arbitration and Conciliation Act, 1996 which in this case was done by the petitioner and thus there was no question of waiver under Section 4 of the Act.

hh) Learned senior counsel for the petitioner also raised an issue of limitation in respect of the claims for recoveries made by the petitioner by way of deductions. He submits that the contract period was between 1994 and 1996. The respondent was under an obligation to submit monthly bills on or before 7th day of each month. Notice invoking arbitration agreement was issued on 26th March 1996 and thus claims made by the respondent arising out of all such deductions made by the petitioner prior to 26th March 1996 were barred by law of limitation. The limitation thus did not stop once it had commenced on

the date of such deductions made by the petitioner. He submits that cause of action arose when the amount was deducted by the petitioner and not when the respondent issued an invoice for the said claim.

ii) Learned senior counsel placed reliance on the cross-examination of the witness examined by the respondent and more particularly on paragraphs 38 and 51 in which the said witness admitted that most of the bills were submitted almost two years after the contract came to an end. The said witness did not know the reason for the delay in submitting the invoices but he had assumed that the bills were submitted subsequently because the petitioner had taken a decision to make payments in respect of repairs of certain items after expiry of the contract.

jj) It is submitted by the learned senior counsel that the petitioner was not obliged to guarantee profit to the respondent. The respondent could not have refused to carry out its part of obligations including the work of repairs on the ground that the terms of the contract were onerous or that the contract was not profitable. Reliance is placed on the judgment of the Supreme Court in the case of ***Assistant Excise Commissioner Vs. Issac Peter***, reported in ***(1994) 4 SCC 104*** and also on the judgment in the case of ***Continental Construction Co. Ltd. Vs. State of M.P.***, reported in ***(1988) 3 SCC 82***.

kk) There was neither any pleading nor any proof produced by the respondent to prove in support of the submission of the respondent that the provisions of the contract were onerous or one sided. The

petitioner had pleaded and had led evidence in support of the pleadings during the earlier contract period of 1991-94 and also the respondent had operated and maintained the vessels and had carried out repairs to the vessels at its own cost without claiming any reimbursement for repairs cost from the petitioner. The respondent had not disputed the position that the terms and conditions of the earlier contract performed by the respondent during the period between 1991 and 1994 were similar.

ll) In so far as the the said claim for reimbursement of cost of repairs arising of accident made by the respondent in Sam-9 arbitration is concerned, it is submitted that the said claim was lodged by the respondent itself with the insurance company and was rejected by the insurance company on the ground that the respondent had not furnished proof of proximity of cause of the accident to the insurance company. Reliance is placed on letters dated 19th September 2000, 12th February 2002 and 4th March 2003 addressed by the Average Adjusters/ Insurance Company rejecting the claim on the ground that the damages and repairs had not arisen due to accident. He submits that the said claim was thus ex faice untenable and ought to have been rejected by the arbitral tribunal.

mm) In so far as the similar claim made by the respondent in Sindhu-9 arbitration is concerned, it is submitted by the learned senior counsel that the said claim was also rejected by the insurance company vide its letter dated 3rd April 2000 on the ground that the damages and repairs had not arisen due to accident. The respondent did not carry out any amendments to its statement of claim to add the said claim under

the heading 'cost of repairs.' He submitted that in any event, cost of repairs was to be borne by the respondent itself under the provisions of the contract and not by the petitioner. He submits that the award rendered by the arbitral tribunal allowing this claim is contrary to the terms of the contract and is in conflict with the public policy of India.

Submissions of the petitioner on claim for interest :-

nn) It is submitted that clause 2.2 and 20.0 (c) specifically prohibits payment of interest on disputed or delayed payments. The respondent had not pressed the claim for interest upto the date of award. He submits that the claim for interest from the date of award till payment is also prohibited under the same provisions. Reliance is placed on the judgment of this Court in the case of ***Oil and Natural Gas Corporation Ltd. Vs. Dolphin Offshore Enterprises Ltd.***, reported in ***(2011) 3 Bom CR 370***.

oo) Learned senior counsel for the petitioner placed reliance on the letters dated 4th January 2005 from the petitioner to the respondent and dated 7th March 2005 from the respondent to the petitioner which were shown to the witness Mr.Col.Uday Naik who was examined by the respondent on 9th December 2010. The arbitral tribunal did not decide at that stage the question of admissibility of the documents and deferred the same. Learned senior counsel relied upon the answer of the witness to question no.200 recorded on 10th December 2010. It is submitted that though the arbitral tribunal had deferred the question of admissibility of the documents to a later point of time, the arbitral tribunal has totally

overlooked the said issue and failed to decide the admissibility of those two important documents which shows total non-application of mind on the part of the arbitral tribunal.

Submissions of the petitioner on the award for payment of arbitration costs :-

pp) Learned senior counsel for the petitioner submits that the arbitration proceedings were prolonged solely on account of the respondent. The respondent had not followed the agreed procedure as recorded in the Minutes of meetings dated 6th February 2010 and 8th April 2010 and conducted the proceedings contrary to the agreed procedure. The arbitral tribunal held that since the respondent is not entitled to be awarded any interest under the contract, the respondent shall be compensated by payment of arbitration cost. He submits that no evidence was produced by the respondent in support of huge claim for arbitration costs. Since the respondent was solely responsible for delay in conducting the proceedings, exorbitant costs of arbitration could not have been awarded by the arbitral tribunal against the petitioner and that also in lieu of interest. He lastly submits that since each and every claim awarded by the arbitral tribunal is patently illegal and perverse and contrary to the terms of the contract, the arbitral tribunal could not have awarded the arbitration costs in favour of the respondent and against the petitioner but ought to have dismissed the claim of the respondent with costs.

17. Mr.Gaya, learned counsel for the respondent, on the other hand, submits as under :-

a) The petitioner has impugned various findings of facts rendered by the arbitral tribunal and seeks re-appreciation of the evidence already appreciated by the arbitral tribunal in the impugned award which is not permissible under Section 34 of the Arbitration and Conciliation Act, 1996. Scope of challenge to an arbitral award under Section 34 is very limited. He submits that the impugned award does not show any perversity or is not irrational and thus no interference with such an award is permissible under Section 34 of the Arbitration and Conciliation Act, 1996. He placed reliance on the following judgments of the Supreme Court in support of the aforesaid submission :-

- (i) *M/s. Sumitomo Heavy Industries Vs. ONGC, reported in AIR 2010 SC 3400;***
- (ii) *Associate Builders Vs. Delhi Development Authority, reported in AIR 2015 SC 620.***

b) The respondent had always maintained that the contract dated 22nd March 1995 awarded to the respondent was a manning contract. The contract required complement for the OSV consisting of 14 persons i.e. 6 officers – Master, Chief Officer, Chief Engineer, 2nd Engineer, Radio Officer, Electrical Officer, 8 Crew. There were three 8 hour shifts. Reliance is placed on clause 5.1 of the contract which provides for scope of works. Clause 5.1 of the contract does not refer at all to repairs from base ports which would necessarily mean repairs which can be conducted on the vessel by the crew. Clause 7.0 of the contract which provides for “repair and maintenance” must be interpreted '*ejusdem generis*' with other responsibilities referred to in the said clause. The Acts of manning, operation, victualling and provisioning of

the vessel are all related to the operations of the OSV while not in dry dock or in berth.

c) The words “repair and maintenance” must be read as referring only to such repairs incidental to the main purpose of the contract which was to operate the vessel so as to keep it in a functioning condition and cannot refer to major repair or repairs that required dry-docking. The consideration due under the contract was to be in accordance with the manning level: less manpower, less stipend, no manpower no stipend basis. It is submitted that the dominant intention of the parties must be looked into which was that of a manning/operating contract. There are references to maintenance and repairs which was on the basis that the vessel was handed over under clause 3 in a good ship shape and sea worthy condition and the respondent was required to maintain in that way until the duration of the contract.

d) The vessels which required major steel renewal cannot be described as sea worthy under the Merchant Shipping Act. The repairs were something which the respondent had stated was confined to repairs which could be carried out on the vessel by the crew and cannot extend to major refurbishment of the vessel including replacement of machinery and rebuilding the vessel. Learned counsel placed reliance on the following judgments :-

(a) *Spun Casting & Engg.Co. Pvt. Ltd. Vs. Dwijendra Lal Sinha, reported in AIR 2005 SC 2054;*

(b) *State of Orissa Vs.Titaghur Paper Mills, reported in AIR 1985 SC 1293 at 1294, 1347;*

(c) Economic Transport Organization Vs. Charan Spg. Mills Pvt. Ltd., reported in (2010) 4 SCC 114.

e) Under clauses 3 and 16 of the contract, the operator was required to ensure that the offshore vessel remained in the same condition in which it was delivered. The respondent was at the most liable to bear the risk and responsibility of normal wear and tear.

f) Reliance is placed on clause 17.0 of the contract which provided that besides, the entire responsibility and liabilities whatsoever in respect of crew and master shall lie with the operator.” Reliance is also placed on clause 7.2 of the contract which provided that the operator shall exclusively own all liabilities for and in respect of the master and crew deployed by the operator pertaining to their salaries etc.

g) In so far as of issue of jurisdiction raised by the petitioner that the arbitral tribunal could not have entertained the claims made by the respondent more than the claims mentioned in the notice invoking arbitration agreement is concerned, it is submitted that this plea was rightly rejected by the arbitral tribunal in paragraph 59 of the impugned award, in view of the petitioner not having raised the said issue by filing any application under Section 16 of the Arbitration and Conciliation Act, 1996 and by not raising issue in the written statement. In support of this submission, the learned counsel for the respondent relied upon the following judgments :-

(i) Calcutta High Court in the case of Krishna Kumar Mundra Vs. Narendra Kumar Anchalia reported in 2004(2) Arb.L.R.

469 Cal:

- (ii) Division Bench of the Gauhati High Court in the case of Union of India Vs. J.G. Engineers, reported in 2005(2) Ar.L.R. 412 Gau;**
- (iii) Delhi High Court in the case of Lalit Kala Accademi Vs. Svapan Constructions reported in 2005 (2) Arb.L.R. 447;**
- (iv) Supreme Court in the case of Southern Gas Ltd. Vs.Vishveswarya Iron & Steel Ltd., reported in 1998 (1) SCALE 250;**
- (v) Supreme Court in the case of M/s.Gas Authority of India Ltd. Vs.M/s. Ketu Construction & Ors. decided on 11th May 2007 in Appeal (Civil) No.2440 of 2007.**

Submissions of the respondent on the claims :-

- a) None of the deductions made by the petitioner were in accordance with the contract and on factual basis. Onus was on the petitioner to prove the basis of the deductions made by the petitioner. No opportunity was granted to the respondent to examine such calculations submitted by the petitioner.
- b) Reliance is placed on the cross-examination of Mr. Athaley who was examined by the respondent who established that there was no backup and proof to corroborate the charts submitted by the petitioner which were internal documents and was not furnished to the respondent. There were several discrepancies between the charts and schedules in the written statement. Reliance is placed on the answer given by the said witness to question nos.564 to 568.

c) The onus was on the petitioner to demonstrate its entitlement under the contract to make deductions on the ground of non-compensable downtime under clause 12(d) under Section 102 of the Indian Evidence Act, 1872 which the petitioner failed.

d) The witness Mr.Rajamani examined by the petitioner admitted that the preparation for the said downtime statement was not based on any contractual reading but simply to ascertain whether the vessel was available or not. The Daily Progress Reports were not located and were not actually placed on record of the arbitral tribunal. The petitioner did not produce the logbooks. The said Mr.Rajamani conceded that for the purpose of processing and making payments towards the invoices, it is important to rely upon the downtime statement which can be cross-checked with the logbooks which were withheld by the petitioner. The said witness did not consider the true import of clause 3.0 and clause 12(a) and (b) as the vessels had to undergo routine repairs within the meaning of clause 3.0 read with clause 12 which excluded the time taken for such repairs for the ambit of downtime. The said witness Mr. Rajamani admitted that he had never read the contract.

e) Mr.Pankaj Arora, another witness examined by the petitioner conceded that the deductions for downtime were made on account of the downtime statements which were not shared with the respondent. Mr.Athaley in his evidence examined by the petitioner admitted that the deductions for non-compensable downtime were on the alleged account of poor planning and poor maintenance on the part

of the respondent.

f) In so far as the reliance on clause 12 of the contract by the petitioner is concerned, it is submitted that the said provision has to be read in the context of the entire contract including clause 3 and clause 12(a) and (b) under which the time required to put the vessel in a shipshape seaworthy condition is expressly excluded from the time taken for repairs under downtime. The arbitral tribunal had jurisdiction to examine these issues and came to a finding as to whether the term relied upon by the petitioner provides for prohibition and to take a plausible view on that issue and more particularly when the petitioner had failed to furnish any credible evidence in support of its deductions. The person who had prepared the downtime statements admitted having no knowledge of the contract and was only concerned with the availability of the vessel of the petitioner. The respondent had submitted bills for 100% of the amount as per the contractual mandate under clause 20.1.

g) Reliance is placed on clause 20 of the contract in support of the submission that the respondent did not expect the operator to presume the deductions when the operator was never apprised of the deductions nor were the downtime statements shared with them by the petitioner. It is submitted that the respondent was not aware of the calculations made by the petitioner in the downtime statements.

h) In so far as the reliance placed by the petitioner on the earlier award in Sam-2 arbitration is concerned, it is submitted that the

respondent did not challenge the earlier award in Sam-2 since the powers of the Court under Section 34 are limited and only if it related to procedural defects in the award, the respondent could challenge the said award. It is submitted that the respondent did not think it necessary to file a cross appeal since the arbitration proceedings itself took 10 years. Reliance is placed on the judgment of this Court in the case of ***Pushpa P. Mulchandani Vs. Admiral Radhakrishin Tahlani, reported in (2001) 1 Bom C R 592.***

i) In so far as various deductions towards liquidated damages claimed by the respondent is concerned, it is submitted that the petitioner never shared the details of the time periods treated as non-compensable downtime and deducted manning fees mindlessly without appreciating the actual reasons for the non-availability of the vessel. The petitioner cannot be allowed to derive a benefit from one's own wrong. It is submitted that there is no provision for interest in this contract. The initial burden of proof lies on the party deducting to justify deductions after which the onus shifts on the other party to show how such damages are not leviable. The petitioner being a claimant had to prove the actual loss caused, if not the extent of such loss which the petitioner failed to prove.

j) Reliance is placed on the judgment of this Court in Arbitration Appeal No.11 of 2016 in the case of ***Raheja Universal Pvt. Ltd. Vs. B.E. Billimoria & Co.*** dated 31st March 2016 in support of this submission. Reliance is also placed on the judgment of the Supreme Court in the case of ***Kailash Nath Associates Vs. Delhi Development***

Authority, reported in (2003) 5 SCC 705 and also in the case of **ONGC Vs.Saw Pipes**. He also placed reliance on the judgment of this Court in the case of **Hindustan Petroleum Corporation Limited Vs. Offshore infrastructure Limited, reported in 2015 (6) Mh.L.J. 287**.

k) The arbitral tribunal has rendered a finding that the petitioner had deducted monies from the monthly lumpsum compensation of the respondent during all those days where the vessel was unavailable for work without enquiring into the reasons for such unavailability despite the onus of proof falling on the petitioner. The vessels were not given by the petitioner to the respondent in accordance with clause 3 of the contract and HOTO works were required to put them in a seaworthy condition. These allegations of the respondent were not properly rebutted by the petitioner.

l) Reliance is placed on the findings of the arbitral tribunal at paragraphs 45 to 50 of the impugned award and submits that though the arbitral tribunal had rejected the claim for repairs for Sam-2 arbitration, the tribunal was forced to revisit its earlier finding in Sam-2 award where all the deductions by the petitioner were upheld after careful reading and application of the provision into commercial practice. He also placed reliance on the judgment of the Supreme Court in the case of **Associates Builders Vs.Delhi Development Authority, reported in AIR 2015 SC 620** and in particular paragraph 20.

m) In so far as the submission of the petitioner that since there were no ambiguity in the terms of the contract and even otherwise

principle of “contra proferentem” does not apply to commercial practice is concerned, it is submitted by the learned counsel for the respondent that there was a patent ambiguity in the terms of the contract. The petitioner has foisted a huge liability on the respondent by limiting its operation the words “normal wear and tear” only to the time of delivery and redelivery of the vessel. The arbitral tribunal has held that the said distinction is artificial and interpretation of the petitioner is commercially impractical and will result in foisting a huge liability of improving a property on the respondent which it did not own and was completely disproportionate to the income it derived under the contract for operations and maintenance. The interpretation adopted by the petitioner was not in consonance with the statutory rules of the IRS and Classification Society. The wear and tear is a constant, applicable throughout the contract and cannot be restricted to a certain time. Clause 3 of the contract i.e. “Delivery/Redelivery of Vessel” must be read in its entirety and along with the contemporaneous laws in force viz. the IRS Rules and Regulations. Reliance is placed on evidence of its witness Col.Naik dated 20th October 2001 in Sam-2 arbitration.

n) Interpretation of the arbitral tribunal is a possible interpretation and cannot be interfered with by this Court. It is submitted that rule of “contra proferentem” would apply to the facts of this case. In support of this submission, reliance is placed on the judgment of Gauhati High Court in the case ***Nilkamal Ltd. Vs.Nanotech Pvt. Ltd., reported in 2010 (6) GauLR 31.*** Reliance is placed on the judgment of the Supreme Court in the case of ***G.Ramchandra Reddy & Co.Vs. Union of India & Anr., reported in (2009) 6 SCC 414*** in support

of the submission that the interpretation of the contract may fall within the realm of the arbitrator and cannot be interfered with unless such interpretation is found to be perverse or based on a wrong proposition of law. It is submitted that even if two views are possible, the Court cannot interfere with such possible interpretation. Reliance is placed on the judgment of the Supreme Court in the case of ***Pure Helium India (P) Ltd. Vs. ONGC, reported in (2003) 8 SCC 593.***

o) It is submitted that under Section 32 of the Indian Trusts Act, since the status of the respondent was a trustee or custodian in trust, the respondent had a right to reimbursement of any expenses undertaken by its in discharge of its responsibilities in that regard and thus there was no requirement for a clause in the contract to claim reimbursement. Reliance is placed on clause 18.1 of the contract which provides for indemnity clause in the contract. Even if the contract awarded to the respondent was on turnkey basis, the respondent was not obliged to carry out repairs at its own costs for an open ended liability which was not reflected in the tender document nor in the provision of remuneration. It is not reflected critically in the scope of works at clause 5.1. The words “spares” which were required to be kept on board the vessel by the National Maritime Board which forms part of the property of the vessel and thus belong to the petitioner and if such spares are consumed during a voyage, they were required to be replaced. It is submitted that Col.Naik did not admit the liability on the part of the respondent to pay for them as canvassed by the petitioner.

p) In so far as the submission of the petitioner that for the earlier period under a similar contract, the respondent had itself carried

out repairs at its own costs is concerned, it is submitted that from the period 1991 to 1994, the vessel was relatively young, only five years old and therefore the scale of repairs would not have been so significant. The evidence of Mr.Athaley examined by the petitioner was hearsay as he had admittedly no connection with the vessels in the 1991 to 1994.

q) The petitioner did not lead any oral evidence to prove that all other operators of about 24 vessels had also carried out repairs at their own costs. Reliance is placed on the answers to question nos.59 to 68 given by Mr.Athaley in his cross-examination in Sam-2 arbitration. Reliance is placed on the answers given by Mr.Athaley to question nos.502 to 506.

r) There is no requirement of a specific clause for recovery of cost of repair from the petitioner i.e. the necessary corollary of ownership of the petitioner in respect of the vessels. The petitioner was liable for the repairs to its own property. Reliance is placed on clause 20 of the contract in support of the submission that even the said clause provides that the operators shall also submit along with bill invoices towards any changes made for and on behalf of the owner, along with supporting documents, vouchers, receipts which clearly indicates that the respondent was entitled for reimbursement being a custodian in trust for the vessel.

s) In so far as the judgment of this Court in Sam-2 arbitration is concerned, it is submitted that the respondent has already filed an appeal (Company Appeal No.35 of 2016) which is admitted and was placed on board for hearing and final disposal. It is submitted that the

learned Single Judge of this Court in the said judgment setting aside the earlier award in Sam-2 did not deal with the issue of role of the operator as agent and custodian of the petitioner's vessels and as a custodian was entitled to reimbursement for any expenses incurred in discharging its responsibility. Under clause 3 of the contract, the petitioner was liable to deliver the vessels in good shipshape and seaworthy condition and that any work to be done to bring it into such condition would not be operator's liability under the contract nor would time taken in bringing vessel up to speed be treated as non-compensable downtime.

t) In so far as the submission of the petitioner that as a special case, the petitioner had agreed subsequently to reimburse all operators for the cost of expenditure incurred on five specific items arising out of normal wear and tear though the operators were responsible and liable for the same as per the terms of the contract is concerned, it is submitted by the learned counsel for the respondent that the very fact that the petitioner had given concession itself indicates that the petitioner had accepted that its interpretation of the contract was so commercially, unreasonable and unworkable that it could not possibly be proceeded with the parties.

u) It is submitted that it was not the case of the petitioner that the repairs were not carried out by the respondent. The petitioner had not produced the Daily Progress Report, Weekly Activity Report and Monthly Activity Report. The logbooks were also not produced which contained day-to-day positioning and whereabouts of the vessel were also not produced by the petitioner which would record any repairs

undertaken to the vessels. Reliance is placed on the oral evidence of Mr.Rajamani who had been examined as a witness by the petitioner who stated that the logbooks were supplied by the ONGC which must be regularly updated by the operator to be returned to the ONGC at the end of the contract. It is submitted that the respondent had produced invoices and debit notes to prove that the repair work was carried out by the respondent.

v) It is submitted that in Sam-2 arbitration, a finding was recorded that the respondent was entitled to payment for repairs arising from ordinary wear and tear and the argument of the petitioner on the basis of construction and the interpretation of the contract was rejected. In so far as the submission of the petitioner that the documents were not proved by the respondent is concerned, it is submitted that the respondent has sought to follow both the procedures and the evidence offered in Sam-2 arbitration in which there was express admission by a person in charge of the repairs and maintenance regarding the record which includes the new disputed compilations. It is submitted that it is not necessary for the persons who signed the document or received the document to depose about its correctness. In certain circumstances, the requirement as to primary proof of a document is liable to be dispensed with provided that two factors are present i.e. the record of the documents to be proved by a witness is of a voluminous nature which makes it difficult for each document to be proved and would render the process time consuming if each document was to be proved according to the orthodox rules of evidence and the qualifications of the person who is deposing as to the existence and contents of the allegedly disputed

evidence must tantamount to that of an expert.

w) It is submitted that Section 65(G) of the Evidence Act applies to the facts of this case which allows the respondent to prove the existence and contents of such compilations of documents on the basis of secondary evidence. Thus Col.Naik was a fit person to depose even though he may not have personal knowledge of these events in the same way that Mr.Satish Athaley had no personal knowledge of the events, but had examined the records of each vessel.

x) It is submitted that under Section 58 of the Indian Evidence Act, the admitted facts need not be proved. There was an admission that all the repairs conducted by the respondent to the five vessels arose out of ordinary wear and tear which testimony was given after seeing the material information and was the best proof of a claim. Reliance is placed on the judgment of the ***Ananda Lakshmi Vs. Deputy Commissioner, Mysore District, reported in AIHC 4846 (4852) (Kant)***.

y) Learned counsel placed reliance on Section 17 of the Indian Evidence Act and submits that Mr.Athaley who was in-charge of the repairs and maintenance division at Nhava had access to the records of each vessel at Nhava and that he volunteered to make this statement relating to all the repair bills arising out of the old contract covering all six vessels, this evidence amounted to an admission within the meaning of Section 17 of the Indian Evidence Act which evidence had been completely overlooked in relation to its ramifications.

z) Learned counsel for the respondent placed reliance on Section 31 of the Evidence Act and would submit that in view of categorical admission of Mr. Athaley relating not just to the existence and the correctness of the compilation, the respondent is entitled to argue under Section 31 of the Evidence Act that the petitioner is estopped from arguing to the contrary. Reliance is placed on the judgment of the Supreme Court in the case of ***Avadh Kishore Vs. Ram Gopal, reported in AIR 1976 SC 861*** in support of the submission that the admitted facts need not be proved. Learned counsel placed reliance on Section 115 of the Evidence Act and would submit that the said doctrine is applied to the conduct of the parties. Reliance is placed on the judgment of the ***National Insurance Co. Ltd. Vs. Mastan, reported in AIR 2006 SC 577*** and in particular paragraph 24.

aa) It is submitted that the respondent had given inspection of the compilation to the petitioner in the year 2000 but the petitioner did not raise any objection until August 2010 that those documents were concocted and were created for the this arbitration by the respondent. The petitioner cannot be allowed to approbate and reprobate as observed in passage of Halsbury's Laws of England, 4th Edn., Vol.16, para 1507, page 1012.

bb) In so far as the submission of the learned senior counsel for the petitioner that the respondent has not produced any proof of payment in respect of the claim for repairs made by the respondent is concerned, it is submitted by the learned counsel for the respondent that the respondent had not been able to produce all the bank statements

showing payments and its bank had destroyed the records of the period of 17 years ago. The respondent has found some ledger records and bank statements relating to these arbitrations, the proof of which has been deposed to by Mr. Ashok Gupta, Accountant of the respondent who had manually entered the ledger entries on a vessel basis. It is submitted that the said Mr. Gupta was not in a position to co-relate the entries in the ledger with the claims, as payments were made to the workshops and not on a vessel wise basis. His seniors Mr. Chaudhary and Mr. Tiwari had died or were untraceable, the events having occurred some 18 years earlier. It is submitted that a material part of the compilations concerning the vessel Sam-2 forming part of the first reference were admitted in the earlier arbitration and marked by common consent and thus the petitioner could not deny those documents. The said witnesses were not present during the tenure of the contract or came into picture at a later stage and had answered based on the knowledge they had received.

cc) In so far as the issue of admissibility of evidence raised by the learned senior counsel for the petitioner is concerned, it is submitted by the learned counsel for the respondent that the petitioner had been refusing to disclose relevant documents in their possession or was doing so selectively and without adequate explanation or any proof. The petitioner at the same time had been seeking at every stage to object to any reference by the respondent to documents long back produced and/or to shut the same out.

dd) It is submitted that on the application made by the

respondent seeking various directions in support of those documents, the arbitral tribunal had already passed an order and had indicated that in the final award, the arbitral tribunal would consider the weight to be placed upon such documents before it. There was thus no question of any further arguments on that issue before the arbitral tribunal or that the arbitral tribunal was not required to give any further ruling on the said application except in the final award. It is submitted that the petitioner thus could not deny the genuineness of such third party bills on the grounds that they were fabricated or tantamount to an allegation of fraud after several years. It is submitted that the arbitral tribunal had also the benefit of looking at the original third party bills themselves.

ee) Learned counsel for the respondent made an attempt to distinguish the judgments relied upon by the learned senior counsel for the petitioner in support of the case of the petitioner that the principle of natural justice and evidence were applicable even to the arbitration proceedings on the ground that third party document relied upon by the respondent were in possession of the petitioner since 2000 but were not disputed by the petitioner for last several years and thus those documents were deemed to have been proved. The petitioner had raised no objection to the marking of 250 invoices and supportings in Sam-2 arbitration but adopted to a different approach to the balance invoices relating to 5 vessels in these arbitrations and without assigning any reason in August 2010 with a view to derail these arbitrations.

ff) In so far as the submission of the learned senior counsel for the petitioner that the claims made by the respondent were made

belatedly and not in accordance with the contractual procedure agreed by the parties is concerned, learned counsel for the respondent submits that there were several letters addressed to the petitioner enclosing invoices for repair work undertaken which were either ignored or returned by the petitioner. Reliance is placed on Exhibit C-83 i.e. letter dated 24th March 1995 from the respondent to the petitioner and on Exhibit C-96 i.e. letter dated 4th August 1997 from the respondent to the petitioner in this regard. It is submitted that the arbitral tribunal has not allowed the claims of the respondent on the basis of the judgment of the Supreme Court in the case of Central Inland Water Transport case.

gg) In so far as the submission of the learned counsel for the petitioner that the petitioner was not obliged to guarantee profit to the respondent and the respondent could not resile from complying with its contractual obligations merely on the ground that the same were onerous nature of the terms is concerned, it is submitted by the learned counsel that the petitioner was making those provisions onerous by foisting the open-ended liability of repairing a decaying vessel from wear and tear at its own cost and by arbitrarily deducting its manning fees from its remuneration payable under the contract. The petitioner itself had in part acknowledged that the contract was onerous by making so-called concession of five items as otherwise the contract would drive any operator to bankruptcy which it had in several cases. Learned counsel for the respondent made an attempt to distinguish the judgment of the Supreme Court in the case of ***Continental Construction Co. Ltd. Vs. State of Madhya Pradesh (supra)***. He submits that it was not the case of the respondent that the contract was onerous but it was the case that the

petitioner had made it onerous by its construction and interpretation of the contract illegally.

hh) In so far as the submission of the learned senior counsel for the petitioner that the other operators were bearing the cost of the repairs in the earlier contracts is concerned, it is submitted by the respondent that the earlier contracts were outside the purview of the concerned arbitrations which had resulted in the impugned award and could not be relied upon by the petitioner.

ii) In so far as the submission of the learned senior counsel for the petitioner that the respondent could not have made any claim for reimbursement of cost of repairs arising out of the accidents is concerned, it is submitted that if the insurance company does not consider that the repairs were caused by the accident, or that it arises from latent defect and cannot be passed on to the operator. The respondent has no locus regarding a claim with the insurance company or loss adjusters.

jj) In so far as the claim for interest made by the respondent is concerned, it is submitted that the claim for interest is made at the statutory rate under Section 31(7) of the Arbitration and Conciliation Act, 1996.

kk) In so far as the issue of limitation raised by the petitioner is concerned, the respondent placed reliance on Exhibit C-108 dated 5th December 1997 where the respondent had alleged that the point of

dispute has not been raised. Reliance is also placed on Exhibit C-87 dated 29th January 1997 where the respondent had complained about Rs.10 lakh withheld by Sam-2 and III on account of some unfinished work. Existence of dispute is a condition precedent for invocation of the arbitration petition. Upto 1997, there was no clarity on the entitlement of the respondent to the deducted amounts and the reasons for such deductions were never shared with the respondent. It is submitted that the contract was ongoing and concluded in most cases in November 1996 which was within three years of the notice served by the respondent upon the petitioner. The bills were sent on a continuous basis as and when they were due to be paid.

II) The petitioner had raised first proper dispute in its letter dated 11th August 1998 annexed to the synopsis as Exhibit C-60. There has to be crystallized dispute for invoking arbitration agreement which arises only when the dispute arises. Before 11th August 1998, there was no letter in which the petitioner had set out the contractual reasons for non-payment. Reliance is placed on the judgments of the Supreme Court in the cases of ***Valcan Insurance Co.Ltd. Vs. Maharaj Singh, reported in (1976) 1 SCC 943, State of Orissa and Anr. Vs.Damodar Das, reported in (1996) 2 SCC 216 and S.Rajan Vs. State of Kerala, reported in (1992) 3 SCC 608.*** It is submitted that there was no serious dispute raised by the petitioner till August 1998. The commencement of limitation would be from August 1998 which commences the beginning of negotiations. Reliance is also placed on Exhibit C-146-149 Sam-2 arbitration.

mm) It is submitted that the petitioner had acknowledged in the written statement filed in Sam-2 arbitration that the respondent had addressed hundreds of letters to the respondent with voluminous bunches of annexures. There was no proper rebuttal given by the petitioner which would establish a date of accrual of cause of action. It is submitted that the arbitral tribunal had rightly placed reliance on the judgment of the Supreme Court in the case of ***Hari Shankar Singhania and Ors. Vs. Gaur Hari Singhania and Ors., reported in (2006) 4 SCC 658.*** Reliance is placed on clause 22 of the agreement which mandates that the parties shall negotiate for settlement before invoking arbitration.

nn) It is submitted that only in the month of August 1998, the petitioner refuted the claim of the respondent by referring to contractual provisions. He submits that the respondent could invoke arbitration agreement only after disputes and differences had arisen on unequivocal denial of the claim of one party by the other party. Reliance is placed on the judgment of the Supreme Court in the case of ***Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, reported in (1988) 2 SCC 338*** in support of the submission that a dispute arises where there is a claim and a denial and repudiation of the claim. Reliance is placed on Delhi High Court in the case of ***New Model Industries Ltd. Vs. Union of India, reported in 2000 (1) RAJ 29 (Del).***

oo) In so far as the submission of the learned senior counsel for the petitioner that some of the claims which were not included in the

arbitration notice were beyond the scope of reference to arbitration is concerned, it is submitted that there is a difference between a dispute and a claim. Reliance is placed on passage cited in Mustill & Boyd in this regard. Reliance is also placed on the judgment of the Supreme Court in the case of ***Visa International Ltd. Vs. Continental Resources (USA) Ltd., reported in AIR 2009 SC 1366*** in support of the submission that the application for arbitration can only be made when a dispute arises between the parties to the arbitration agreement and such disputes gives rise to a live issue. He also placed reliance on the judgment of the Madhya Pradesh High Court in the case of ***Dilip Construction Company Vs. Hindustan Steel Ltd., reported in AIR 1973 MP 261.***

pp) It is submitted that in the arbitration notice, the respondent had referred to the issues between the parties and in sum quantified the financial consequences at that particular time. But the qualification was not the issue the matter of liability was in issue. He placed reliance on the judgment of the Delhi High Court in the case of ***M/s. New Model Industries Ltd. Vs. Union of India, reported in 2000 (1) RAJ 29 (Del)*** on this issue. He made an attempt to distinguish the judgment of the Supreme Court in the case of ***Santokh Singh Arora Vs. Union of India & Ors., reported in (1992) 1 SCC 492*** and in the case of ***Orissa Mining Corporation Ltd. Vs. P.V. Rawley, reported in (1977) 2 SCC 535*** on the ground that both those judgments were delivered under Section 20 of the Arbitration and Conciliation Act, 1940. He also made an attempt to distinguish the judgment of the Supreme Court in the case of ***Indian Aluminum Cables Vs. Haryana State Electricity Board, reported in 1996 (5) SCALE 708.***

qq) In so far as the award of cost by the arbitral tribunal in favour of the respondent is concerned, it is submitted that the costs reflected in the arbitral award is the actual costs incurred by the respondent. The arbitral tribunal had called for a calculation of costs from both the parties which were submitted by the parties. It is submitted that the arbitral tribunal has followed the universal principle that costs follow the award i.e. the person who succeeds is entitled to costs. It is submitted that the reference to the inability to award interest is only an obiter observation and does not form the basis of the costs order.

18. Mr. Sawant, learned senior counsel for the petitioner in rejoinder placed reliance on clause 12 of the contract regarding downtime compensable which is three days in a quarter. He submits that no other compensable downtime is provided in the contract. The arbitral tribunal has decided contrary to clause 12(b) of the contract and has awarded prohibited claim. The objections raised in the written statement by the petitioner are totally overlooked. It is submitted that the claim for repairs was rejected in Sam-2. Though the arbitral tribunal had referred to the award rendered by the same arbitral tribunal in Sam-2 arbitration, the arbitral tribunal has decided contrary to their award in Sam-2 arbitration. He submits that though there is no estoppel against the arbitral tribunal to take a different view in the arbitration proceedings in question but since there was no change in circumstances and the facts being identical, the arbitral tribunal ought not to have taken a different view. He submits that the findings of the arbitral tribunal in Sam-2 are admittedly not challenged by the respondent by filing a separate arbitration petition.

He submits that this Court has already set aside the award in Sam-2 arbitration on the issue of repairs.

19. Learned senior counsel placed reliance on paragraph 4.1.7 of the written statement on the issue of marking of documents. He submits that initially the documents were marked as Exhibits by the arbitral tribunal subject to the proof. The respondent could not have applied for dispensation of proof and the arbitral tribunal could not have allowed such application in violation of principles of the natural justice. The documents were to be segregated in three categories which were admittedly not segregated by the respondent. The arbitral tribunal has itself given a finding that such documents were not segregated as directed by the arbitral tribunal and thus no procedure of admission-denial of those documents could be done by the petitioner. The arbitral tribunal, however, illegally dispensed with the proof of documents and admitted those documents illegally.

20. It is submitted that the claims for repairs were made by the respondent arising out of the alleged accidents and thus any such claims of repairs arise out of the accidents were to be borne exclusively by the respondent under clause 4.8.4.2. The arbitral tribunal has totally overlooked the admitted fact that some of such claims were rejected by the insurance company on the ground that the claims were not arising out of the accidents. He submits that the arbitral tribunal has not allowed the claims for repairs on the ground that the petitioner did not challenge the rejection of claim by the insurance company. The arbitral tribunal has allowed the claim on the ground that the insurance company had

rejected the claim not due to the accidents. It is submitted that the claims made by the respondent were not amended by the respondent and did not claim under any other heads of repairs.

REASONS AND CONCLUSIONS :-

21. This Court shall first decide whether the impugned award rendered by the majority of the arbitrators is in breach of violation of principles of natural justice, breach of the agreed procedure and thus deserves to be set aside on that ground.

22. There is no dispute that the arbitral tribunal had issued directions initially in respect of 12 references i.e. 6 references for 6 old contracts and 6 references for 6 new contracts. However, the arbitration continued only in respect of the old contracts relating to vessel Sam-2. The arbitral tribunal rendered an award in respect of the said vessel Sam-2 on 12th March 2009 and supplementary award on 24th February 2010. The arbitral tribunal which in the meanwhile was reconstituted continued with the other 5 references under the 5 old contracts. Both the parties agreed that the proceedings in respect of 5 references can be consolidated for the purpose of hearing.

23. It is not in dispute that on 14th December 2000, the arbitral tribunal directed that the respondent herein (original claimant) will furnish to the petitioner herein copies of the invoices in respect of the repairs carried out to the vessel Sam-2 on 23rd December 2000 and thereafter for each of the other 5 vessels at the end of each following week of each of such week and give further direction to the respondent

herein to give inspection of the original invoices and the supporting vouchers on request being made by the petitioner in that behalf. The arbitral tribunal directed that the invoices to be supplied by the respondent to the petitioner would be separately grouped according to the 5 items of repairs which according to the respondent herein fell within the 5 items in respect of which the petitioner had agreed to make payment and which were specifically referred to in the written statement, 2 items in respect of which according to the respondent herein, the petitioner had orally agreed to make payment but which agreement was disputed by the petitioner and the remaining items of repairs claimed by the respondent. It was directed that those invoices would be shown in separate Tabular statements relating to those various items. It was directed that on being supplied copies of the invoices by the respondent as directed, the petitioner would admit or deny the correctness and/or validity of the contents of such invoices within 4 weeks of receiving the same.

24. In the Minutes of Meeting dated 18th April 2001, the arbitral tribunal directed that the respondent herein shall group the invoices in respect of repairs alleged to have been carried out by them in several groups being one group in respect of each of 5 items in respect of which the petitioner had decided to make payment; one group in respect of each of 2 items in respect of which the claim was made by the respondent but disputed by the petitioner and the last group in respect of other repairs alleged to have been carried out by the respondent herein. The arbitral tribunal directed that the respondent herein would prepare those group of invoices and file them before the arbitral tribunal

after supplying the copies to the attorneys of the petitioner on or before 25th May 2001.

25. The arbitral tribunal further directed that the petitioner herein would furnish to the respondent its comments and objections in regard to the different groups of invoices given to them by the respondent specifying with sufficient particulars, comments or objections in respect of each invoice or group of invoices as the case may be. The petitioner was directed to file the same with the arbitrators with a copy thereof to the attorneys of the respondent on or before 22nd June 2001. The respondent was granted liberty to file affidavits of its witnesses on or before 31st July 2001 and was directed to supply copies thereof to the attorneys of the petitioner.

26. A perusal of the record indicates that the respondent, however, did not comply with those directions issued by the arbitral tribunal in respect of 5 vessels. The arbitral tribunal resumed the proceedings after making the awards dated 12th March 2009 and 24th February 2010 in Sam-2 arbitration. The substituted arbitrator was appointed on 14th January 2010 in place of Shri Justice A.P. Ravani, a former Judge as he declined to act as an arbitrator who was appointed by the petitioner. It is not in dispute that the parties agreed that hearing of 5 references would be consolidated in the meeting held on 6th February 2010. In the said meeting dated 6th February 2010, the arbitral tribunal issued further directions to the parties after discussion and with the consent of all the parties that if either party wanted to disclose any further documents then they would be at liberty to do so within three

weeks from the date of the said order and shall exchange copies thereof to the other side by the same date.

27. The arbitral tribunal directed the parties to submit statements admitting or denying the documents disclosed by the other side within two weeks clearly indicating (a) documents admitted with regard to the existence as also the correctness of the contents thereof, (b) admitted with regard to their existence but disputed correctness of the contents and (c) those documents not admitted on both the points recorded in (a) and (b).

28. In the meeting held on 8th April 2001, the arbitral tribunal finalised issues/points for determination in the reference to Sam-8 after discussion and with the consent of all the parties. In the said meeting, the parties agreed that the evidence was already on record in respect of the reference in arbitration for Sam-2 would also form part of the record for those 5 references. The parties, however, were granted liberty to adduce oral evidence in respect of each of the references and if they wished to adduce documentary evidence, the same was to be done at any time upto two weeks before the next hearing. The parties were also directed to exchange the copies of such documents disclosed among themselves by the same date. The respondent was directed to file a single affidavit of each witness in lieu of examination-in-chief in all the 5 references on or before 22nd July 2010 and furnish the copy thereof upon the petitioner's advocate.

29. It is not in dispute that the respondent forwarded the copies of 11 volumes of repair invoices along with covering letter of its advocate

dated 26th July 2010 to the advocates of the petitioner, however, without segregating them in the three categories as directed by the arbitral tribunal on 14th December 2000 and 18th April 2001. The petitioner, however, by its advocate's letter dated 7th August 2010 denied the existence and correctness of contents of all third party correspondence and other documents including the alleged supporting documents submitted with the invoices for the alleged repairs.

30. The respondent examined witness Mr.Col. Uday Naik whose evidence commenced and was concluded on 5th August 2010. The respondent sought to produce the documents forming part of those 11 volumes through the said witness. The petitioner raised an objection regarding the respondent producing those documents and compiling 11 volumes on various grounds. The arbitral tribunal recorded that the said documents were being marked as exhibits “subject to their veracity being established.”

31. It is not in dispute that the respondent, thereafter, filed two applications on 16th August 2010 and 28th August 2010 praying that the respondent should not be called upon to prove the documents relating to the repairs claims on the grounds of delay, waiver, estoppel, petitioner's conduct, as per the alleged agreed procedure in the earlier arbitration relating to vessel Sam-2 etc. The petitioner opposed the said applications by filing reply dated 30th August 2010 and 6th September 2010 respectively. The respondent had filed rejoinder to the said reply. Both the parties filed written submissions before the arbitral tribunal on those two applications.

32. The arbitral tribunal allowed those two applications filed by the respondent by an order dated 11th November 2010 and held that third party invoices for repairs be admitted in evidence without requirement of further proof.

33. A perusal of the impugned award indicates that the arbitral tribunal has discussed these issues in paragraphs 9 to 20 of the impugned award rendered by the majority arbitrators. The arbitral tribunal recorded that when the respondent sought leave of the arbitral tribunal to introduce 11 volumes of documents which the respondent had claimed had been only recently discovered for being exhibited as evidence. The petitioner herein had objected to production of those documents but the arbitral tribunal had ruled that the 11 volumes would be marked as Exhibits subject to their veracity being established.

34. The arbitral tribunal rejected the contentions of the petitioner that the documents admitted by the arbitral tribunal by an order dated 11th November 2010 should not be relied upon in the framing of a final award in the matter on the ground that the arbitral tribunal did not have intention to re-visit the issues raised in the two applications filed by the respondent. The arbitral tribunal had already decided that the invoices supporting the documents underlying them submitted by the respondent were admitted in evidence without the requirement of further proof.

35. Before the arbitral tribunal, the respondent had contended that those documents produced by the respondent were, in fact, exactly what the petitioner had asked for right from the start which documents

established the claims that repairs had been carried out and paid for at regular intervals to keep the vessels in ship shape condition. It is held that the documents related to payments made to the third parties for those repairs. The documents were introduced so late only because they had been found only recently when the respondent was going over records pertaining to the new contracts. It is held that if those documents would have been available earlier, the respondent would have definitely produced the same at the very beginning especially in the light of the arguments of the petitioner that there was no proof that repairs had taken place at all or whether if they had taken place, they had actually been paid for or not.

36. The arbitral tribunal observed that it was true that the time limit provided by the arbitral tribunal for producing the documents had been breached by the introduction of documents at a later stage. It is held that the procedure was for the arbitration to proceed by the exchange of documents that would form the basis for the arbitration and would help to establish or demolish any claim made in the course of the arbitration would be the bedrock of the entire matter. It is held that the arbitration would proceed on the basis of those documents, their veracity, their relevance and the evidentiary value to be attached to them. The procedure for arbitration would also include the examination and cross-examination of witnesses from each side and the weighing of that evidence by the arbitral tribunal in coming to its final conclusions.

37. It is held by the arbitral tribunal that the said procedure was being religiously followed. The only deviation from what was laid down

in the minutes of the meeting dated 6th February 2010 was the extension of the time limit within which those documents were supposed to have been exchanged. It is held that the arbitral tribunal did not see how that negated the procedure followed. It is held that merely because the documents were discovered after the expiry of those dates, it could still be considered. If the documents were relevant and there was good and sufficient reason why they could not be produced earlier, there was an ample justification for relaxing the time limits fixed to allow them to be considered. It is held that in all this procedure viz. reliance on documents relevant to the arbitration and on the evidence of witnesses from both the sides did not change.

38. It is held that it is only the time at which such documents were produced that has been adjusted. The arbitral tribunal held that it was beyond belief that the respondent would have deliberately hidden documents that would give immense support and backing to their claims. It is held that the late production was almost certainly because they were not available at the time when the documents were originally exchanged. The arbitral tribunal rejected the objection raised by the petitioner to the production of those documents in breach of the agreed procedure on these grounds.

39. A perusal of the award indicates that the arbitral tribunal considered all these third party documents in support of the claims for repairs made by the respondent by dispensing with its proof on flimsy and ex facie erroneous grounds and contrary to the agreed procedure recorded in various Minutes of Meetings held by the arbitral tribunal in

accordance with Section 19(2) of the Arbitration and Conciliation Act, 1996.

40. It is not in dispute that the respondent did not group the documents compiled in these 11 volumes in three parts as directed by the arbitral tribunal. The petitioner herein could have filed their statement of admission and denial in respect of such documents only if the respondent would have segregated those documents in three categories. Be that as it may, the petitioner had disputed all these documents. The respondent was thus required to prove the existence and contents of those documents by leading oral evidence. The initial directions in this regard were admittedly issued by the arbitral tribunal in the Minutes of Meeting dated 14th December 2000 itself. It was not the case of the respondent before the arbitral tribunal that those documents were not taken into consideration by the respondent in its statement of claim when filed before the arbitral tribunal. For a period of 10 years, the respondent did not make any application for recall of the agreed procedure recorded by the arbitral tribunal in the Minutes of Meetings dated 14th December 2000 and 18th April 2001. The claim was made by the respondent herein which was admittedly denied by the petitioner herein. The onus was thus on the respondent to prove not only its entitlement in respect of the said claim but also the quantification in respect thereof. In my view, though the arbitral tribunal is not bound by the provisions of the Evidence Act, the arbitral tribunal is bound to follow the principles of the Evidence Act and natural justice in the arbitration proceedings.

41. Be that as it may, admittedly in this case, the parties had agreed on the procedure to be followed by the arbitral tribunal in

conducting its proceedings in accordance with Section 19 (2) of the Arbitration and Conciliation Act, 1996 in various meetings. It is not in dispute that the directions issued by the arbitral tribunal on 14th December 2000 and 18th April 2001 were modified by the arbitral tribunal in subsequent meetings held by the arbitral tribunal on 6th February 2010 and 8th April 2010. Similar directions were issued by the arbitral tribunal for production of documents and filing of statement admitting or denying the documents disclosed by other side in the Minutes of Meetings held on 6th February 2010 and 8th April 2010.

42. A perusal of the applications filed by the respondent on 16th August 2010 and 28th August 2010 indicates that the respondent had prayed that it should not be called upon to prove the documents relating to the repair claims on the grounds, inter alia of delay, waiver, estoppel, conduct of the petitioner etc. It was not the case of the respondent in those two applications that the documents compiled in 11 volumes produced by the respondent along with its advocate letter dated 26th July 2010 were new documents or that the same were not traceable earlier. In my view, even if the said documents were new documents or the same were not traceable in the year 2000 when the arbitral tribunal had issued directions, the proof of such documents could not have been dispensed with by the arbitral tribunal by overlooking the agreed procedure between the parties and by committing the violation of principles of natural justice and the principles of Evidence Act which are required to be followed by the arbitral tribunal.

43. The agreed procedure for conducting the arbitration proceedings by the parties and recorded in the Minutes of Meetings

dated 14th December 2000 and 18th April 2001 were admittedly not modified by consent of the petitioner. Such agreed procedure could be varied or modified only by consent of both the parties and not at the instance of one of the parties or by the arbitral tribunal suo moto. In my view, the arbitral tribunal is thus bound to conduct the proceedings in accordance with the agreed procedure for proving the existence and contents of the documents. The arbitral tribunal thus could not have invoked the provision of Section 19(3) of the Arbitration and Conciliation Act, 1996 in view of the fact that the agreed procedure under Section 19(2) of the Arbitration and Conciliation Act, 1996 was already recorded by and between the parties after discussion and consent of the parties. In my view, the finding rendered by the arbitral tribunal that there was no breach of the agreed procedure is totally perverse, contrary to Section 19(2) of the Arbitration and Conciliation Act, 1996 and also to the minutes of meetings.

44. Supreme Court in the case of *M/s. Bareilly Electricity Supply Co. Ltd. (supra)* has held that the law requires that Tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a Court of Law. It is held that the application of principle of natural justice, however, does not imply that what is not evidence can be acted upon. It means that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. It is held that when a document

is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true? It is held that if a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. Both these aspects are in accord with the principles of natural justice as also according to the procedure under Order XIX of the Civil Procedure Code and the Evidence Act both of which incorporate these general principles.

45. In my view, the principles of law laid down by the Supreme Court in the case of *M/s.Bareilly Electricity Supply Co. Ltd. (supra)* squarely applies to the arbitration proceedings also. The impugned award rendered by the arbitral tribunal thereby rejecting the objection of the petitioner and allowing the application filed by the respondent not to call upon the respondent to prove the documents compiled in 11 volumes is contrary to the law laid down by the Supreme Court in the case of *M/s.Bareilly Electricity Supply Co.Ltd. (supra)* in violation of principles of Evidence Act and natural justice.

46. Supreme Court in the case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal & Anr. (supra)* has held that mere production and marking of a document as exhibit is not enough but execution has to be proved by admissible evidence. It is not in dispute that in the meetings held on 14th December 2000 and 18th April 2001, the parties had agreed and contemplated that the disputed documents will have to be proved by leading additional evidence. In my view, simplicitor production of the

documents which were admittedly disputed vehemently by the petitioner and marking of those documents by the arbitral tribunal was not sufficient and could not have been considered as proved by the arbitral tribunal in the absence of any admissible evidence. The arbitral tribunal has awarded substantial claim for repairs allegedly carried out by the respondent based on such disputed and unproved documents which was not permissible. The principles of law laid down by the Supreme Court in the case of ***Narbada Devi Gupta Vs. Birendra Kumar Jaiswal & Anr. (supra)*** squarely applies to the facts of this case. I am respectfully bound by the said judgment.

47. Division Bench of this Court in the case of ***Bi-water Penstocks Ltd. Vs. Municipal Corporation of Gr. Bombay (supra)*** has held that in blatant breach of the principles of natural justice, the Arbitrator had permitted the documents to be admitted in evidence, inspite of repeated objections raised by the respondent. By receiving such documents, therefore, amounts to a procedural error which can also be said to in breach of principles of natural justice. The learned Single Judge of this Court had interfered with the impugned award rendered by the learned arbitrator since the same was in breach of principles of natural justice and had allowed the claims made by the contractor without proving the disputed documents. Division Bench of this Court in the said judgment has applied the principles of law laid down by the Supreme Court in the case of ***M/s. Bareilly Electricity Supply Co. Ltd. (supra)*** and did not interfere with the judgment of the learned Single Judge. The principles laid down by the Division Bench of this Court in the case of ***Bi-water Penstocks Ltd. Vs. Municipal Corporation of Gr.***

Bombay (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

48. This Court has already held in catena of the decisions that though under Section 19 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal was not bound by the Code of Civil Procedure, 1908, Indian Evidence Act, 1872, the arbitral tribunal is still bound by the principles of Indian Evidence Act, Code of Civil Procedure, 1908 and also the principles of natural justice. In my view, the impugned award on this issue shows clear perversity and patent illegality.

49. In so far as the submission of the learned counsel for the respondent that no objection was raised by the petitioner until August 2010 though the respondent had given inspection of the compilation of the documents to the petitioner in the year 2000 alleging that those documents were concocted and were created for the this arbitration by the respondent is concerned, the petitioner had already disputed the third party documents. On the contrary, the applications filed by the respondent before the arbitral tribunal in the year 2010 were based on premise that the respondent shall not be called upon to prove those documents forming part of the 11 volumes on the ground of delay, waiver, estoppel etc. It was not the case of the respondent in those two applications that since no objections were raised by the petitioner at the time of inspection of the documents allegedly given in the year 2000, the petitioner had deemed to have admitted those documents. The arbitral tribunal had itself recorded the agreement between the parties that the respondent would bifurcate those documents in three categories and the petitioner was

directed to file statement of admission and denial only thereafter. The respondent was required to prove those documents by leading evidence and by filing affidavit in lieu of examination-in-chief. In my view, there is thus no merit in the submission of the learned counsel for the respondent that the petitioner has made any attempt to approbate and reprobate.

50. In so far as the submission of the learned counsel for the respondent that the respondent could not produce all the bank statements showing payment on the ground that its bankers had destroyed the records of the period of 17 years ago is concerned, no such plea was raised by the respondent before the arbitral tribunal. No application for leading secondary evidence was made by the respondent before the arbitral tribunal. The arbitral tribunal had issued such direction as far back as on 14th December 2000 and 18th April 2001. The respondent, however, did not comply with those directions till the respondent made applications dated 16th August 2010 and 28th August 2010 not to insist the respondent to prove those documents on various frivolous grounds. Be that as it may, the arbitral tribunal has not allowed those two applications on the ground that the bankers of the respondent had destroyed the records of the period of 17 years ago.

51. It is the case of the respondent itself that Mr. Ashok Gupta, Accountant of the respondent who had allegedly entered the ledger entries on a vessel basis manually was not in a position to co-relate the entries in the ledger with the claims, as payments were allegedly made by the respondent to the workshops and not on a vessel wise basis.

52. In so far as the submission of the learned counsel for the respondent that the petitioner had admitted some documents selectively and without adequate explanation or any proof and had raised objection in respect of large number of the documents produced by the respondent is concerned, it is not in dispute that all such documents which were sought to be relied upon by the respondent against the petitioner were third party documents and were not furnished to the petitioner earlier during the course of the execution of the work. The petitioner was entitled to dispute those documents and once having disputed those documents, the onus was on the respondent to prove those documents in accordance with the law. The respondent cannot raise an objection to the dispute raised by the petitioner about the admissibility of those documents on the ground that the petitioner ought not to have raised objection in respect of some of the documents selectively.

53. In so far as the submission of the learned counsel for the respondent that since the arbitral tribunal had already rejected the objection of the petitioner and had given a ruling that the arbitral tribunal would consider the weight to be placed upon such documents before it in the final award is concerned, since the arbitral tribunal has considered those disputed and unproved documents in the final award, in my view, the petitioner has rightly challenged the ruling given by the arbitral tribunal and also the consideration of such disputed and unproved documents in the impugned final award in the arbitration petition. Similarly, there is no merit in the submission of the learned counsel for the respondent that the petitioner had not allegedly raised any dispute in respect of the documents for last several years though the same were

allegedly in possession of the petitioner since 2000 or had adopted a different approach to the balance invoices in this arbitration though had raised no objection and had though allegedly not raised any objection to the marking of 250 invoices and supporting in Sam-2 arbitration.

54. In so far as the submission of the learned counsel for the respondent that under Section 34 of the Arbitration and Conciliation Act, 1996, the Court cannot re-appreciate the evidence or cannot interfere with the findings of facts rendered by the arbitral tribunal is concerned, in my view, if the findings rendered by the arbitral tribunal are totally perverse, are rendered contrary to the terms of the contract, are in violation of the principles of natural justice, are in conflict with the public policy and if contrary to several other grounds provided in Section 34 of the Arbitration and Conciliation Act, 1996, the Court has ample power to set aside the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996. There is no dispute about the principles of law laid down by the Supreme Court in the cases of *M/s. Sumitomo Heavy Industries Vs. ONGC (supra)* and *Associate Builders Vs. Delhi Development Authority (supra)* relied upon by the learned counsel for the respondent. Those judgments would not assist the case of the respondent but would assist the case of the petitioner.

55. In so far as the submission of the learned counsel for the respondent that it had maintained that the contract dated 22nd March 1995 awarded to the respondent was a Manning contract and in support of this submission had placed reliance on various provisions of the contract is concerned, the arbitral tribunal has not rendered any such finding in

favour of the respondent. Be that as it may, the provisions of the contract relied upon by the learned counsel for the respondent do not indicate that the contract was a Manning contract as sought to be canvassed by the learned counsel for the respondent.

56. In so far as the issue of jurisdiction raised by the petitioner before the arbitral tribunal that the respondent could not have made claim for higher amount than that was mentioned in the arbitration notice and the impugned award allowing the claim more than the amount mentioned in the arbitration notice was beyond the scope of reference is concerned, a perusal of the award and more particularly paragraph 59 of the award indicates that the learned arbitrator has rejected this plea on the ground that though a party cannot file a totally fresh claim or raise a fresh dispute in the statement of claim if neither of them was mentioned in the notice of arbitration, however, a mere change of figures based on the most recent information cannot be debarred. It is held that even if the party cannot quantify the amount sought by way of compensation in the notice of arbitration, this would not debar him from doing so in the statement of claim.

57. A perusal of the contract entered into between the parties and more particularly clause 22 which records an arbitration agreement indicates that the party desiring the settlement of dispute is bound to give notice of its intention to go in for arbitration and has to clearly state the point of dispute to be decided by the arbitrators and shall appoint its own arbitrators and call upon the other party to appoint its own arbitrators.

58. A perusal of the arbitration agreement clearly indicates that the no party was obliged to quantify the claim amount in the notice invoking arbitration but was only required to state the point of dispute. In my view, the arbitral tribunal has thus rightly exercised its jurisdiction to entertain the claims for higher amount than the claim mentioned in the notice invoking arbitration and has not entertained any claim beyond the scope of reference.

59. Supreme Court in the case of ***Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors, reported in (2006) 11 SCC 181*** has held that once a claim was made prior to invocation of the arbitration agreement, it became a dispute within the meaning of the provisions of the 1996 Act. It is further held that while claiming damages, the amount therefore was not required to be quantified. Quantification of a claim is merely a matter of proof. Under the provisions of the Arbitration and Conciliation Act, 1996, the term “disputes” is not defined. There is a difference between the term “dispute” and the term “claim.” In my view, there is thus no merit in the submission of the learned senior counsel for the petitioner that the arbitral tribunal has acted beyond the scope of reference by entertaining the claim for higher amount than what was mentioned in the notice invoking arbitration, since the arbitration clause did not contemplate any such notification of specific amount of claim by a party to another in the notice invoking arbitration or that only such amount which was claimed in the notice invoking arbitration agreement could be made in the statement of claim.

60. A perusal of the impugned award, however, indicates that in paragraph 59 of the impugned award, the arbitral tribunal has rejected

the plea of jurisdiction also on the ground that the petitioner ought to have raised a plea of jurisdiction on the ground that the enhancement of financial claims were beyond the scope of arbitration by filing an application under Section 16 before filing its defence and not having filed such application amount to waiver of its right to make such application. In my view, it was not mandatory for the petitioner to make an application under Section 16 for raising an issue before filing statement of defence but the said issue of jurisdiction could be raised by the petitioner under Section 16 even in the written statement. A perusal of Section 16(2) of the Arbitration and Conciliation Act, 1996 clearly indicates that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. In my view, this finding of the arbitral tribunal on the issue of jurisdiction is thus totally perverse and ex facie contrary to the plain language of Section 16(2) of the Arbitration and Conciliation Act, 1996 and thus deserves to be set aside.

61. The judgment of Calcutta High Court in the case of **Krishna Kumar Mundra Vs. Narendra Kumar Anchalia (supra)**, Judgment of the Division Bench of the Gauhati High Court in the case of **Union of India Vs. J.G. Engineers (supra)**, Judgment of Delhi High Court in the case of **Lalit Kala Accademi Vs. Svapan Constructions (supra)**, Judgments of the Supreme Court in the cases of **Southern Gas Ltd. Vs. Vishveswarya Iron & Steel Ltd. (supra)** and **M/s. Gas Authority of India Ltd. Vs. M/s. Keti Construction & Ors. (supra)** would assist the case of the petitioner and would apply to the facts of this case.

62. I shall now decide the issue whether the respondent was entitled to be reimbursed for scheduled repairs alleged to have been carried out on the vessels and also for the repairs allegedly carried out due to accident. The arbitral tribunal has allowed the claim for reimbursement of the repairs in respect of all the five vessels i.e. Samundrika-3, Samundrika-8, Samundrika-9, Sindhu-9 and Sindhu-11 totalling to amount of Rs.3,56,23,297/-. The respondent had made this claim under the heading “Manning Fees.”

63. It was the case of the respondent that the respondent was required to carry out major repairs including the repairs to rectify HOTO defects, steel renewal, overhauling of the engine and repairs to other equipments such as navigation equipment. It was the case of the respondent that the five vessels required substantial/major repairs, replacement and renewal of the machinery, equipment and steel plating. According to the respondent, the petitioner had neglected to repair and carry out steel repair work and other essential repairs in time resulting in extensive wear and tear of the vessels' machinery, steel plating and parts, which repairs were to be carried out at the cost and liability of the petitioner. The petitioner placed reliance on various provisions of the contract including the clauses 2.0, 2.1, 2.6, 3.0, 4.0, 5.0, 7.0, 7.2(iv) & (v), 8.0, 8.1, 8.2, 8.4.2, 9.0 and 10.0 (vi) of the contract.

64. According to the petitioner, it was the duty and responsibility of the respondent to repair the vessel at its own cost. There was no ambiguity of any nature whatsoever in the contract. It is not in dispute that the respondent in its letter dated 24th September 1993

had expressed its regret, considering the steep increase in wages, spares and inflation rates the rate offered by the petitioner was not workable. It is clear that the respondent had taken into consideration that it was the obligation of the respondent to bear the cost of spares and also the cost of repairs.

65. It is not in dispute that the respondent had made claim for repairs in Sam-2 arbitration on the ground that the said vessel was required to undergo repairs and the vessel was required to dry-dock on two occasions for such repairs and as a result thereof, the respondent had made necessary payment of costs incurred in carrying out such repairs. The petitioner had opposed the said claim on the similar grounds which were raised in the present arbitration proceedings before the arbitral tribunal. The issue of reimbursement of scheduled repairs was extensively dealt with by this Court in its judgment dated 13th March 2015 in Arbitration Petition No.459 of 2009 with Arbitration Petition No.1029 of 2010 and Arbitration Petition No.86 of 2012 filed by the petitioner herein against the respondent herein impugning the awards made by the arbitral tribunal in Sam-2 arbitration.

66. After interpreting various provisions of the contract in those arbitration petitions which are identical in this case, this Court has held that the arbitral tribunal had gone beyond the terms and scope of the contract which amounts to rewriting the contract and thus it could not be said that the arbitral tribunal had merely interpreted the terms of the contract. This Court has held that clause 7.2(iv) and clause 7.2(v) clearly provided that the liability of 'repairs' was that of the respondent. It is held

that the contract expressly provided that it was an obligation of the respondent to repair the vessels at its own costs and was even required to consume spares from the vessel's stock or from the stock of the petitioner. This Court has also held that clause 3.0 of that contract also clearly imposes the liability on the respondent for any survey or repairs that were required to be carried out at the time of delivery/re-delivery of the vessel, to bring the vessel fully operational and shipshape condition which repairs were to be carried out by the new operator at the cost of the outgoing operator as decided by the petitioner.

67. This Court has accordingly held that this Court was unable to agree with the views of the arbitral tribunal that the liability of the respondent for repairs would confine only to the time of delivery/re-delivery. This Court has also held that most of the invoices pertaining to repairs were submitted after expiry of the extended period of the contract and thus it could not be ruled out that the claim for repairs had been made by way of afterthought and after certain specified repairs were allowed by way of concession and as a special case without prejudice to the contentions of the petitioner. This Court has held that there is no clause in the contract which stated that the liability of repairs was that of the petitioner or of reimbursement by the petitioner of the repairs carried out by the respondent. This Court in the said judgment has held that the contract read as a whole would clearly show that the repair to the vessel was the liability of the respondent and there was no ambiguity as regards liability of the repairs.

68. In so far as the principles of “contra proferentem” applied by the arbitral tribunal is concerned, it is held by this Court that there

was no such plea raised by the respondent to invoke the rule of contra proferentem in the statement of claim or pleadings filed before the arbitral tribunal. There was no warrant at all for the arbitral tribunal to invoke the rule of contra proferendum for interpretation of contracts, which in effect resulted in alteration of the express terms of the contract in that case. It is held that the respondent had participated in the bid and had entered into the contract with open eyes and thus it could not be said that the respondent had no choice than to sign the contract and thus the rule of contra proferendum could not have been invoked to put the respondent in an beneficial or advantageous position as regards the terms of the contract in the facts and circumstances of that case.

69. This Court has also considered that the respondent had itself pleaded that it had been rendering the services to the petitioner in connection with their offshore operations for the past almost 25 years and had entered into various contracts/agreements with the petitioner. This Court considered the fact that the several other operators operating about 26 vessels on similar contracts had carried out repairs at their own costs.

70. In so far as the reimbursement of expenses incurred by the respondent under five specified heads allowed by the petitioner as a special case is concerned, this Court had noted that concession was made by the petitioner as a special case and without prejudice to its legal contentions and has held that it therefore could not be regarded as admissions of liability on the part of the petitioner for normal wear and tear. This Court has interpreted the terms of the contract and has held

that if the liability of any repairs was that of the petitioner, the contract would have expressly provided for the reimbursement of repairs and would have stipulated the procedure for the same including advance approval etc. This Court has held that in the present case, the contract was not merely a contract for manning the vessel Sam-2 of the petitioner but there were several liabilities imposed on the respondent under the contracts including expenses towards dry-docking as also other liabilities including liquidated damages in certain circumstances, which the respondent was well aware of even prior to the bidding for the contract.

71. It is held that the expression 'normal wear and tear' was interpreted completely out of context and beyond the scope of the contract. This Court has also considered the fact that though the respondent was given custody of Sam-2 as custodian in trust on behalf of the petitioner, however that could not absolve the respondent of their liability of repairs. It is held that under clause 7.2(viii) of the contract, it was stipulated that in the performance of its obligations under the contract, the respondent was deemed to be an independent Contractor. It is held that the arbitral tribunal fell in error in making a distinction in the responsibility for repairs and bearing the actual cost of repairs considering the terms of the contract and the contract read as a whole. Even if the terms of the contract were onerous, the respondent knew very well what it was going for. This Court has also considered that if the respondent was required to carry out repairs which were outside the contract, surely, the respondent would have insisted on a prior written commitment on part of the petitioner to reimburse the same or would have reassessed their position so far as continuance of the contract was

concerned. This Court accordingly has set aside the findings of the arbitral tribunal under the head viz. 'Reimbursement for Repairs' and has held that such findings could not be sustained.

72. A perusal of the impugned award indicates that it was observed by the arbitral tribunal itself that there was no serious dispute about the facts of the case as they pertain to all the vessels of the old contract. Though the claims in monetary terms in respect of each vessel are different, the logic behind the making of the claims was the same. The arbitral tribunal has observed that in the majority interim order issued on 11th November 2010, it was noted by the arbitral tribunal that the Sam-2 award could be considered as a sort of model or template for arbitrations in respect of the other 5 old contract vessels covered in the arbitration. It was observed that the pleadings exchanged were practically the same, the issues framed with the exception of various insurance claims remained the same, the documents and compilations regarding repairs and reimbursement followed the same format and the petitioner themselves while dealing with deductions from monthly stipends had treated all 6 vessels as being part of the same transaction.

73. It is held that the evidence was recorded on the basis of common to all 6 vessels. It is not in dispute that the claim in respect of 'Reimbursement for Repairs' awarded by the arbitral tribunal in Sam-2 arbitration has been set aside by this Court in the said judgment and order dated 13th March 2015. The appeal filed by the respondent before the Division Bench of this Court is admitted. The fact remains that the said judgment rendered by this Court with the identical facts is not set

aside by the Division Bench of this Court till date and the said judgment is binding on this Court as well as on both the parties. Be that as it may, for the reasons recorded hereinafter, in my view, the impugned award allowing the claim for 'Reimbursement for Repairs' deserves to be set aside on various grounds.

74. Clause 2.4 of the contract specifically provided that the monthly lump-sum compensation payable to the respondent included the entire cost of drydocking and was not a mere "Manning Fees." Clauses 3.0 and 16.0(e) of the contract provided that normal wear and tear did not apply for making claim for repairs. The said term is used in relation to condition of the vessel at the time of re-delivery. The said terms are to be read *ejusdem generis* with the words 'same shipshape condition as at the time of delivery' and would not include any repairs alleged to have been carried out by the respondent. The words "normal wear and tear" do not refer to repairs/replacements. Clause 3.0 of the contract provided that if any repairs/replacements are to be carried out, the operator shall pay any/all charges of repair and survey. Clauses 2.6, 3.0, 4.0, 5.0, 7.0, 7.2(iv) & (v), 8.0, 8.1, 8.2, 8.4.2, 9.0 and 10.0 (vi) of the contract expressly stipulate that it is the duty and obligation of the respondent to repair its vessels at its own cost. Clause 2.6 relating to "Reimbursements" and clause 10 relating to "Liability of Owner" do not refer to cost of repairs.

75. A perusal of the record indicates that most of the invoices for the cost of the alleged repairs had been submitted on 24th December 1998 in violation of the agreed procedure stipulated under clauses 20.0

read with clause 21.0(A) of the contract. The respondent never sought any approval from the petitioner for carrying out repairs if according to the respondent, the same was not the obligation of the respondent to carry out such repairs at its own costs. Merely because the petitioner had approved the reimbursement in respect of five heads of repairs as a special case not only to the respondent but also to all the contractors who had carried out such repairs, those five heads could not have been construed as modification of the present contract in respect of the other repairs alleged to have been carried out by the respondent. This issue has been extensively dealt with by this Court in the said judgment dated 13th March 2015.

76. A perusal of the impugned award on the issue of reimbursement indicates that the arbitral tribunal while allowing this claim of reimbursement has held that all the vessels were handed over to the respondent only for operation and remained in their custody in the capacity of custodians. It is held that it would be unreasonable to expect an operator to maintain several ageing vessels that belong to someone else for the entire life of the contract when he is being paid the amounts, essentially, to the minimum required to cover crew costs. It is held that the argument of the petitioner herein that all repairs were not merely the responsibility but also the liability of the respondent, it would surely put an intolerable burden on the operator.

77. It is thus clear that the arbitral tribunal has awarded the said claim based on equity and contrary to the terms of the contract. The arbitral tribunal could not have decided the matter based on equity in a

commercial contract. The respondent had been awarded several contracts of similar nature and was fully aware that the petitioner had not guaranteed any profit to the respondent in respect of these contracts. Merely because the respondent found the contract less profitable or non-profitable after execution of the contract, that could not be a ground for awarding any claim by the arbitral tribunal. The respondent was bound to comply with its obligation under the contract.

78. In paragraph 27 of the impugned award, the arbitral tribunal has held that at the relevant time, the petitioner herein was in a superior bargaining position since they were, to all intents and purposes, monopoly purchasers of the services being offered and therefore, the contractor had little choice available with him. To secure employment in the field of operation of vessels with another party was virtually impossible. It is held that in the instant case, the employment was being offered by an agency of the state from whom the operator had a right to expect fair treatment. It is clear that the arbitral tribunal has erroneously applied the principles of law laid down by the Supreme Court in the case of Central Inland Water Transport case which does not apply to a commercial contract. The respondent had submitted its bid with open eyes and being a contractor in the field for last several decades could not even raise such plea that the contract was one sided or that the respondent had no bargaining power while entering into a contract with the petitioner. The award shows total perversity on this issue.

79. A perusal of the award indicates that while allowing the claim for reimbursement for repairs, the arbitral tribunal also considered

the case of the respondent that the respondent was left with a small margin of about 5% which barely covers the expenditure incurred on crew costs, which could not be sufficient to undertake the costs of repairing and maintaining vessels that were more than 10 years old. In my view, the entire approach of the arbitral tribunal in allowing the claim for reimbursement on the ground that there was no surplus in the hands of the respondent left for carrying out repairs is totally perverse and is contrary to the terms of the contract. The arbitral tribunal cannot rewrite the contract and cannot decide contrary to the terms of the contract which is ex facie done by the arbitral tribunal in this case which is not permissible in law.

80. The arbitral tribunal has also considered the submission of the respondent about the alleged ambiguity in the contract and has applied the principles of “contra proferentem.” The arbitral tribunal has held that there were ambiguities in the contract and thus the principle of “contra proferentem” stood attracted. It was not the case of the respondent that there were ambiguities in the contract nor there was any such averment in any of the pleadings of the respondent that the principle of “contra proferentem” were attracted to the facts of this case. The case of the respondent, on the other hand, was that it was not the responsibility of the respondent to bear the costs of repairs. Be that as it may, the principle of “contra proferentem” does not apply to a commercial contract which is executed by and between the parties with open eyes. The respondent never alleged any ambiguity in the contract at any point of time at the time of execution of the contract documents nor at any point of time later during the execution of the work. The respondent also did

not seek any clarification about any provisions of the contract from the petitioner before execution of the contract nor sought any addendum to the contract on that ground or otherwise.

81. It has been held by the Supreme Court in the case of ***Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran, reported in (2012) 5 SCC 306*** that the principle of “contra proferentem” does not apply to the commercial contract. The findings of the arbitral tribunal is thus ex facie perverse and the impugned award thereby applying the principle of “contra proferentem” to a commercial contract shows patent illegality and is in violation of the principles of law laid down by the Supreme Court in the case of ***Rashtriya Ispat Nigam Ltd. vs. Dewan Chand Ram Saran (supra)***.

82. In so far as the findings of the arbitral tribunal that the arbitral tribunal is empowered to interpret the contract is concerned, in my view, since the provisions of the contract were absolutely clear and certain, the question of any other interpretation by the arbitral tribunal did not arise. Be that as it may, while interpreting the terms of the contract, the arbitral tribunal cannot decide de hors the terms of the contract and cannot rewrite the contract under the guise of the interpretation of contract.

83. In so far as the issue as to whether the arbitral tribunal could have considered the disputed and unproved documents in the final award is concerned, a perusal of the award indicates that the said issue is dealt with by the arbitral tribunal in paragraphs 39 to 43 of the

impugned award. The arbitral tribunal has held that it was not inclined to doubt the evidentiary value of those documents relied upon by the respondent merely because they were produced by the advocates for the respondent herein and not by the representative of the respondent. It is observed that the advocate for the respondent must be seen as the authorized representative of the respondent and as such, fully entitled to file applications and seek admission of documents on their behalf. The arbitral tribunal has held that at the commencement of this arbitration, the petitioner had asked for those very documents to be produced and the respondent had pleaded their inability to do so since records at that time were not available with them and even the bank to which a request for the provision of those documents had been made, came back with a reply that such old records were not maintained by them. It is held that the documents had finally been found and produced before the arbitral tribunal, it would be difficult to accept a plea from the petitioner that their relevance is in question. The arbitral tribunal accordingly held that those documents were of relevance to the dispute and must be considered.

84. The arbitral tribunal recorded that it was true that those documents were introduced after recording of evidence was completed. However, the arbitral tribunal erroneously did not find that it was an insuperable impediment in the determination of their evidentiary value.

85. In paragraph 43 of the impugned award, the arbitral tribunal has held that though it is true that neither of the witnesses testifying on behalf of the respondent herein had personal knowledge of the documents and what they contain and to that extent, primary proof of the document

was not available, however, primary proof of the document may be dispensed with if two factors were present; first that the documents were so voluminous that the process of primary proof would be too time consuming and second that the qualifications of the person deposing as to the existence and contents of the documents must be tantamount to that of an expert. It is held that both these factors were present in this case.

86. The arbitral tribunal held that accordingly under Section 65(G) of the Evidence Act dispensation for primary evidence may be given. It is held that since finding witnesses with personal knowledge to depose as to the veracity of each document would be virtually impossible and would lead to massive delays which would defeat the very purpose of arbitration, the need for personal knowledge is not mandated in each and every case by the Evidence Act. The arbitral tribunal rejected the plea of the petitioner on the ground that those documents forming part of 11 compilations were in possession of the petitioner since 2001 and during that period, they surely had the time and opportunity to examine all those documents. In my view, the entire findings of the arbitral tribunal while considering such disputed and unproved documents rejecting the objection of the petitioner is totally perverse and contrary to the principles of law laid down by the Supreme Court in the case of ***Bareilly Electricity Supply Co. Ltd. Vs. The Workmen & Ors. (supra)*** and other judgments already referred to aforesaid. The award shows total perversity and patent illegality on the face of it.

87. The compilation of 11 volumes was submitted by the respondent only on 26th July 2010 and not earlier. No application was made by the respondent for leading secondary evidence nor any case was made out before the arbitral tribunal. In my view, the entire claim for repairs allowed by the arbitral tribunal is based on no evidence and is in gross violation of principles of Evidence Act and the principles of natural justice. Though the arbitral tribunal itself has held that the documents were produced after recording of evidence is completed, the arbitral tribunal has allowed the entire claim after considering such documents contrary to the law.

88. A perusal of the oral evidence referred to in the earlier part of this judgment referred to and relied upon by both the parties clearly indicates that the witnesses examined by the respondent could not prove the factum of repairs as well as the amount, if any, alleged to have been incurred on such alleged repairs. The respondent could not substantiate payability of this claim under any of the provisions of the contract nor could substantiate and prove the quantum. None of the witnesses examined by the respondent had any personal knowledge about execution of the contract work and also as to whether any amount has been actually spent by the respondent or not. On the other hand, the evidence led by the witnesses of the petitioner was not shattered in their cross-examination by the respondent. The arbitral tribunal has, however, overlooked and ignored the material evidence on record and has allowed the entire claim for reimbursement of repairs contrary to their own findings and verdict in Sam-2 arbitration rejecting part of the claim for repairs and also contrary to the material piece of evidence on record produced by the petitioner.

89. A perusal of the record indicates that the witness examined by the respondent was not in the employment of the respondent when the payments for such alleged repairs were alleged to have been made by the respondent. He admitted that there was no prior approval in writing from the petitioner as per the documents available with him before deciding to carry out any repairs. He also admitted that there was no 'work done certificate' or repair verification issued by the petitioner in respect of such repairs. The witness examined by the respondent also admitted that the respondent did not co-relate or re-concile or gave any cross reference between eleven bundles of the invoices and the ledger and the bank statement. There was no opportunity to cross-examine the person who had alleged to have prepared the table which was forwarded by the respondent to the petitioner through its advocate's letter dated 20th February 2012.

90. In my view, whether the actual repairs were carried out by the respondent or not itself was not proved by the respondent though oral evidence was led and thus even otherwise no claim for such alleged repairs could have allowed by the arbitral tribunal. The claim for repairs made by the respondent was not in accordance with the contractual procedure agreed by the parties. The cost of invoices for the alleged repairs had been submitted after completion of the work in violation of the agreed procedure stipulated under clauses 20.0 read with clause 21.0(A) of the contract. In my view, the finding of the arbitral tribunal that there was no provision in the contract for carrying out the repairs by the respondent is ex facie perverse and shows patent illegality. The judgments of the Supreme Court in the cases of ***National Insurance***

Company Limited Vs. Boghara Polycab Private Limited (supra) and ***S.K. Jain Vs. State of Haryana & Anr. (supra)*** would assist the case of the petitioner on the issue as to whether the principle of “contra proferentem” applies to the commercial contract or not.

91. A perusal of the record indicates that though the respondent had not made any application for dispensation of primary evidence, the arbitral tribunal on its own applied the provision of Section 65 (G) of the Indian Evidence Act, 1872 conditions of which were not satisfied by the respondent.

92. In so far as the claim for repairs arising due to accident in the case of vessels Sam-8, Sam-9 and Sindhu-9 allowed by the arbitral tribunal is concerned, in my view, the said part of the award is ex facie contrary to clause 8.4.2 of the contract which clearly stipulated that all expenses for repairs arising due to accident were to be exclusively borne by the respondent. It is not in dispute that the petitioner had already paid the amount received from the Insurance Company to the respondent on the basis of the alleged accident on a back-to-back basis.

93. In so far as the claim for Sam-8 is concerned, though the witness examined by the respondent in reply to questions 38 and 39 had admitted that the amount of claim should stand reduced to Rs.1,07,203/-, the arbitral tribunal had allowed the said claim of Rs.4,05,000/- and that also contrary to clause 8.4.2 of the contract.

94. In so far as the claim for repairs for Sam-9 is concerned, it is not in dispute that the Insurance Company had rejected the said claim

lodged by the respondent itself on the ground that the respondent had not produced proof of proximity of cause of the accident before the insurance company. The Insurance Company had rejected the claim vide letters dated 19th September 2000, 12th February 2002 and 4th March 2003 on the ground that the damages and repairs had not arisen due to accident. In my view, the respondent thus could not have made this claim under the head of 'Cost of repairs' arising due to the accident. The claim on this ground itself was not maintainable and the award allowing such claim was dehors the terms of the contract. The arbitral tribunal has allowed this prohibited claim and has exceeded its jurisdiction. Admittedly the respondent had not amended the statement of claim.

95. It is not in dispute that under clause 12 of the contract which provides for 'Down Time Compensation,' maximum downtime was prescribed for contract upto six days in two quarters at any time. Under clause 12(b), there was express bar for payment of any daily charges. Under clause 2.1 of the contract, the respondent was entitled to the payment only for the period when the vessel was in operation. It is not in dispute that the respondent did not challenge the rejection of such claim by the arbitral tribunal in Sam-2 by filing a separate arbitration petition. The part of the award in Sam-2 arbitration by which certain claims of the respondent were rejected by the arbitral tribunal attained finality in view of the respondent not having challenged that part of the arbitral award by filing a separate arbitration petition. In my view, the arbitral tribunal thus could not have awarded the claim contrary to clause 12.1 which provided for three days down time payment in a quarter.

96. In so far as the submission of the learned counsel for the respondent that under clauses 3 and 16 of the contract, the operator was required to ensure that the offshore vessel remained in the same condition in which it was delivered and the respondent was at the most liable to bear the risk and responsibility of normal wear and tear is concerned, this submission is totally contrary to the terms of the contract. The judgments of the Supreme Court in the cases of ***Spun Casting & Engg.Co. Pvt. Ltd. Vs. Dwijendra Lal Sinha (supra)***, ***State of Orissa Vs.Titaghur Paper Mills (supra)*** and ***Economic Transport Organization Vs. Charan Spg. Mills Pvt. Ltd.(supra)*** would not assist the case of the respondent and are clearly distinguishable in the facts of this case. Similarly, the reliance placed on clauses 17.0 and 7.2 of the contract by the respondent also is misplaced and would not assist the case of the respondent.

97. In so far as the submission of the learned counsel for the respondent that the petitioner did not share the details of the time periods treated as non-compensable downtime and deducted manning fees mindlessly without appreciating the actual reasons for the non-availability of the vessel is concerned, this submission is contrary to the facts on record. No such finding is rendered by the arbitral tribunal in the impugned award. The petitioner had discharged the initial burden of proof and had justified the deductions made by the petitioner. The judgment of this Court in the Arbitration Appeal No.11 of 2016 in the case of ***Raheja Universal Pvt. Ltd. Vs. B.E. Billimoria & Co. (supra)***, judgments of the Supreme Court in the cases of ***Kailash Nath Associates Vs.Delhi Development Authority (supra)*** and ***ONGC Vs.Saw Pipes***

(*supra*) and the judgment of this Court in the case of ***Hindustan Petroleum Corporation Limited Vs. Offshore infrastructure Limited*** (*supra*) would not assist the case of the respondent on the ground that the arbitral tribunal has not allowed the claim for refund of the amount deducted by the petitioner on the ground that the petitioner had not proved any loss alleged to have been suffered by the petitioner. In my view, the finding of the arbitral tribunal that the petitioner had deducted monies from the monthly lumpsum compensation of the respondent during all those days where the vessel was unavailable for work without enquiring into the reasons for such unavailability is totally perverse and based on no evidence. The arbitral tribunal did not render any reason as to why the arbitral tribunal was forced to re-visit its earlier finding rendered in Sam-2 award where all the deductions by the petitioner were upheld after careful reading and application of the provision into commercial practice.

98. In so far as the submission of the learned counsel for the respondent that the interpretation of the arbitral tribunal is a possible interpretation and cannot be interfered with by this Court is concerned, the arbitral tribunal cannot decide contrary to the terms of the contract and cannot rewrite the contract under the guise of the interpretation of the contract which interpretation is an impossible interpretation. There is no dispute about the proposition of law that if the interpretation of the arbitral tribunal is a possible interpretation, the said possible interpretation cannot be substituted by another interpretation by this Court under Section 34 of the Arbitration and Conciliation Act, 1996. The judgment of the Supreme Court in the case of ***G.Ramchandra***

Reddy & Co.Vs. Union of India & Anr. (supra) and the judgment of Gauhati High Court in the case ***Nilkamal Ltd. Vs.Nanotech Pvt. Ltd. (supra)*** thus would not assist the case of the respondent.

99. In so far as the submission of the learned counsel for the respondent that in the similar contract, the respondent had carried out the repairs at its own costs but those vessels were relatively young and only five years old is concerned, there was no exemption in the contract for carrying out repairs by the contractor depending upon the age of the vessel is concerned, there is thus no merit in the submission of the learned counsel for the respondent. The obligation of the respondent to carry out repairs would not depend upon the age of the vessel.

100. In so far as the submission of the learned counsel for the respondent that there was no requirement of a specific clause for recovery of cost of repair from the petitioner or in the alternative, reliance placed on clause 20 of the contract by the respondent is concerned, various provisions referred to aforesaid clearly provided that the respondent was liable to carry out repairs at its own costs. In view of such prohibited clauses imposing obligation upon the respondent to carry out repairs at its own costs, there was no other provision in the contract permitting the respondent to carry out repairs at the costs of the petitioner.

101. In so far as the submission of the learned counsel for the respondent that the judgment of the learned Single Judge of this Court in the judgment in Arbitration Petition No.459 of 2009 and other companion

matters dated 13th March 2015 is distinguishable on the ground that this Court had not dealt with the issue of role of the operator as agent and custodian of the petitioner's vessels is concerned, a perusal of the said judgment indicates that this Court has also dealt with the said issue and has rejected the said contention of the respondent. The said judgment is binding on the parties and on this Court on that issue also.

102. In so far as the submission of the learned counsel for the respondent that the petitioner itself had given concession in respect of five items which would indicate that the petitioner had accepted that its interpretation of the contract was so commercially, unreasonable and unworkable is concerned, it is not in dispute that the petitioner had sanctioned payment in respect of those five items as a special case and without prejudice to the rights and contentions of the petitioner not only to the respondent but also the other contractors who were similarly situated and the same would not modify the rights and obligations of the parties prescribed under the contract in respect of the other items. This issue is already dealt with by this Court in the said judgment dated 13th March 2015 in arbitration petition arising out of Sam-2 award.

103. In so far as the submission of the learned counsel for the respondent that the petitioner had not produced any Daily Progress Report, Weekly Activity Report, Monthly Activity Report and logbooks or that the respondent had produced invoices and debit notes to prove that the repair work was carried out by the respondent is concerned, the onus was on the respondent to prove its entitlement to make any claim for repairs of vessels and also the quantification thereof and not was on

the petitioner. Be that as it may, the arbitral tribunal has not drawn any adverse interference against the petitioner for not allegedly producing documents as canvassed by the learned counsel for the respondent.

104. In so far as the submission of the learned counsel for the respondent that it is not necessary for the persons who signed the document or received the document to depose about its correctness and in certain circumstances, the requirement as to primary proof of a document was liable to be dispensed with is concerned, it is clear that the respondent did not prove any such documents as and by way of primary proof of documents or by way of secondary evidence in accordance with law. No application was made by the respondent to lead secondary evidence before the arbitral tribunal.

105. In so far as the submission of the learned counsel for the respondent that the admitted facts need not be proved under Section 58 of the Indian Evidence Act on the ground that there was an admission that all the repairs conducted by the respondent to those five vessels arose out of ordinary wear and tear is concerned, there is no dispute about the propositions of law that the admitted facts need not be proved. However, the facts on record clearly indicates that the petitioner had not only disputed the factum of the repairs alleged to have been carried out by the respondent but also the quantification thereof. Reliance thus placed on Section 58 of the Indian Evidence Act by the respondent is totally misplaced. The judgment of the Karnataka High Court in the case of *Ananda Lakshmi Vs. Deputy Commissioner, Mysore District (supra)* thus would not assist the case of the respondent.

106. In so far as the evidence of Mr.Athaley relied upon by the learned counsel for the respondent in support of his submission that his evidence amounted to an admission within the meaning of Section 17 of the Indian Evidence Act is concerned, a perusal of the oral evidence of Mr.Athaley clearly support the case of the petitioner and not the respondent. Reliance thus placed on Section 17 of the Indian Evidence Act by the respondent is totally misplaced. The judgment of the Supreme Court in the case of ***Avadh Kishore Vs.Ram Gopal (supra)*** thus would not assist the case of the respondent and is clearly distinguishable in the facts of this case. Section 115 of the Indian Evidence Act also is not attracted to the facts of this case and thus reliance placed thereon is totally misplaced. Reliance placed on the judgment of the ***National Insurance Co. Ltd. Vs. Mastan (supra)*** would not assist the case of the respondent.

107. In so far as the submission of the learned counsel for the respondent that the petitioner had approbated and reprobated is concerned, a perusal of the record indicates that it was the respondent who had approbated and reprobated at the same time and not the petitioner.

108. In so far as the submission of the learned counsel for the respondent that the claim of the respondent cannot be rejected on the ground that in the earlier contracts, the respondent had carried out repairs at its own costs is concerned, merely because in the earlier contracts, the respondent had carried out repairs at its own costs or that the other operators were bearing the costs of repairs in the earlier contracts

cannot be considered for rejection of claim made by the respondent. However, the same can be definitely considered to ascertain that the parties were ad-idem on the interpretation of the similar terms of the contract.

109. In so far as the submission of the learned counsel for the respondent that the respondent had no locus to make any claim with the insurance company or loss adjusters is concerned, it is not in dispute that that part of the claim was made by the respondent for repairs arising due to accident. Admittedly part of the claims made with the Insurance Company for such repairs arising due to accident were rejected by the Insurance Company. The petitioner has not objected to this claim only on the ground that the claims were rejected by the Insurance Company but on various other grounds. It is not in dispute that the respondent in any event, did not challenge the rejection of the claim made with the Insurance Company or loss adjusters on the ground that the respondent could not prove any accident.

110. In so far as various deductions made by the petitioner from the bills of the respondent on the ground that vessel was not available for some time beyond the specified period prescribed under the contract is concerned, the arbitral tribunal has dealt with this issue in paragraphs 45 to 50 of the impugned award. It is held by the arbitral tribunal that though the arbitral tribunal had upheld the deductions made by the petitioner on account of non-compensable downtime in Sam-2 arbitration, the arbitral tribunal took a contrary view in respect of these 5 vessels for perverse reasons. It is held that since the respondent was carrying out

repairs to the vessels by taking them to a work shop or a dry dock, the petitioner could not have deducted any amount from the bills of the respondent towards the liquidated damages.

111. The arbitral tribunal has erroneously held that without going into the merit of this claim, it was clear that the vessel required extended stay in workshops or dry docks and the responsibility for this must rest with the way in which the vessels were maintained prior to hand over to the respondent for operation. It is held that using the contractual provisions regarding non-compensable downtime to cut monies from the monthly stipend for legitimate acts of repair mandated by the contract itself and carried out by the respondent as part of their contractual obligations cannot be allowed.

112. It is not in dispute that the respondent had not impugned the part of the award in Sam-2 arbitration upholding the deductions made by the petitioner from the bills of the respondent on the ground that the vessels were not available beyond permissible limit. I am not inclined to accept the submission of the learned counsel for the respondent that the respondent did not challenge that part of the award on the ground that the respondent could not have challenged as the same would not have been permitted under the provisions of the Arbitration and Conciliation Act, 1996. In my view, this part of the award is also contrary to the terms of the contract. The respondent had admittedly not made available the vessels for operation beyond permissible limit and thus the arbitral tribunal could not have declared the deductions made by the petitioner illegal and could not have allowed this claim.

113. Under clause 12.0(b) read with clause 14 of the contract, if the vessel is in-operative and is not made available for the use beyond thirty days, the petitioner was entitled to deduct the liquidated damages from the payment due to the respondent @10% of pro-rata daily rate as agreed between the parties as provided under those provisions. A perusal of the award indicates that the arbitral tribunal has not allowed the said claim made by the respondent for refund of the deductions made by the petitioner on the ground that the said amount deducted by the petitioner was by way of an ascertained and agreed liquidated damages and was not by way of penalty or that the same was not proved by the petitioner. The fact that vessel was not made available for the use beyond thirty days and was in-operative has not been disputed by the respondent. The arbitral tribunal thus could not have allowed the claim for refund of deductions made by the petitioner.

114. In so far as the issue raised by the petitioner that certain claims were made beyond the scope of reference and not were made in the statement of claim and/or made with the enhancement figures in the statement of claim is concerned, in my view, the respondent has rightly placed reliance on the notice invoking arbitration agreement and the averments made in the statement of claim along with the prayers and also placed reliance on the judgments of the Supreme Court in the cases of *Valcan Insurance Co.Ltd. Vs. Maharaj Singh (supra)*, *State of Orissa and Anr. Vs.Damodar Das (supra)* and *S.Rajan Vs. State of Kerala (supra)* which would assist the case of the respondent. In my view, there is no merit in this submission of the learned senior counsel for the petitioner. Leaned counsel for the respondent has rightly

distinguished the judgments of the Supreme Court in the cases of ***Santokh Singh Arora Vs. Union of India & Ors. (supra)***, ***Orissa Mining Corporation Ltd. Vs. P.V. Rawley (supra)*** and ***Indian Aluminum Cables Vs. Haryana State Electricity Board (supra)*** which were relied upon by the learned senior counsel for the petitioner on the issue of the claim beyond the scope of reference raised by the petitioner.

115. In so far as the issue of limitation raised by the petitioner in respect of the claim made by the respondent is concerned, the plea of the petitioner in the written statement on the issue of limitation was vague and without particulars. Be that as it may, clause 22 of the contract which provides for arbitration agreement clearly indicates that the dispute which cannot be mutually resolved by the parties shall be referred to arbitration. The judgments of the Supreme Court in the cases of ***Hari Shankar Singhania and Ors. Vs. Gaur Hari Singhania and Ors. (supra)***, ***Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority (supra)***, ***Visa International Ltd. Vs. Continental Resources (USA) Ltd. (supra)***, judgment of the Delhi High Court in the case of ***New Model Industries Ltd. Vs. Union of India (supra)*** and judgment of the Madhya Pradesh High Court in the case of ***Dilip Construction Company Vs. Hindustan Steel Ltd.(supra)*** on the issue of limitation relied upon by the respondent would assist the case of the respondent.

116. A perusal of the record indicates that the parties were negotiating for settlement. The payment for repairs in respect of five specific items was sanctioned by the petitioner much later and the said

issue was pending. The respondent has produced various letters on record before the arbitral tribunal showing that the negotiation between the parties was pending which negotiation was contemplated under the terms of the contract before invoking arbitration agreement. In my view, the arbitral tribunal has thus rightly rendered the finding on the issue of limitation and has rightly rejected the plea raised by the petitioner. This Court has also dealt with the issue of limitation raised by the petitioner in Sam-2 arbitration in the said order and judgment dated 13th March 2015 and has rejected the said plea. The petitioner has admittedly not challenged that part of the order by filing a separate appeal. In my view, the finding of the arbitral tribunal on the issue of limitation raised by the petitioner is not perverse and thus cannot be interfered with by this Court.

117. In so far as the claim for interest is concerned, a perusal of the award indicates that the arbitral tribunal has awarded interest @ 12% p.a. on the sum of Rs.6,49,81,790/- from the date of the award till payment. In my view, since the award in respect of the principal amount itself is perverse and is contrary to the terms of the contract and is in conflict with the public policy, the claim for interest also does not survive and deserves to be set aside. There is thus no merit in the submission of the learned counsel for the respondent that the claim for interest is made as per the statutory rate provided under Section 31(7) of the Arbitration and Conciliation Act, 1996.

118. In so far as the claim for arbitration cost awarded by the arbitral tribunal is concerned, a perusal of the arbitral award indicates

that the arbitral tribunal has awarded cost in favour of the respondent in the sum of Rs.2 crores and also sum of Rs.7 lakh towards cost of cancellation of various meetings. The arbitral tribunal has also considered that under the provision of the contract entered into between the parties, the interest was not payable under the contract and the value of money has seriously depreciated over the last 18 years and thus whatsoever monies were awarded in favour of the respondent would be a fraction in value of what the respondent had spent.

119. In my view, the claims made by the respondent were contrary to the terms of the contract and the findings and conclusions in the impugned award are also being not only perverse but also contrary to the terms of the contract, the arbitral tribunal could neither allow the claim for principal amount nor for payment of interest and cost. Be that as it may, the arbitral tribunal has not allowed the claim based on evidence but has considered the said claim basically on the ground that there was no provision for payment for interest for past period of contract. In my view, the claim for arbitration cost could not have been allowed by the arbitral tribunal so as to compensate the respondent against the claim of interest which the respondent was not granted upto the date of award in view of there being no provision for interest till the date of award. I am thus inclined to accept the submission of the learned senior counsel for the petitioner that the claim for award of cost is also illegal and deserves to be set aside.

120. In so far as the submission of the learned counsel for the respondent that the arbitral tribunal had allowed the said claim on the

basis of the actual costs incurred by the respondent is concerned, no such evidence was produced by the respondent before the arbitral tribunal. In any event, the respondent was mainly responsible for gross delay in conclusion of the arbitral proceedings on various grounds. The petitioner cannot be made to suffer and to pay exorbitant cost of arbitration because of gross delay on the part of the respondent.

121. In my view, the arbitral tribunal has not decided the payment of costs in accordance with unamended Section 31(8) of the Arbitration and Conciliation Act, 1996 which was applicable to the arbitral award when the same was rendered. The impugned award in respect of the arbitration cost also thus deserves to be set aside.

122. I therefore pass the following order :-

- a) The impugned award dated 16th November 2012 rendered by the majority arbitrators is set aside except findings on the issue of limitation and jurisdiction;
- b) The minority award dated 30th November 2012 rejecting the claims made by the respondent is upheld excluding the cost awarded in the minority award;
- c) The Arbitration Petition No.549 of 2013 is disposed of in aforesaid terms;
- d) There shall be no order as to costs.

R.D. DHANUKA, J.