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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment reserved on: 27.8.2018
Judgment pronounced on: 31.10.2018

+ **O.M.P. (COMM) No.193 of 2017**

MMTC LTD. Petitioner
Through: Mr. Sanat Kumar, Sr. Adv. with
Mr. Vikram Vipin Mehta, Mr.
Saurobroto Dutta, Mr. Vinayak
Batta, Advs.

versus

M/S KARAM CHAND THAPAR & BROS.
(COAL SALES) LTD. Respondent
Through: Mr. Rajeev K. Virmani, Sr.
Adv. with Mr. Jyoti Prakash
Sahu and Mr. Rishabh
Bhargava, Advs.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SHAKDHER
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RAJIV SHAKDHER, J.

1. This petition is directed against an unanimous award dated 7.1.2017. By virtue of the impugned award, the Arbitral Tribunal has allowed all three claims preferred by the respondent along with interest.

2. The details as to the nature of the claims, the amounts awarded against them and the interest directed to be paid against each of the claims along with the period for which interest is payable is set forth hereafter:

Claim	Nature of the Claim	Amount Awarded	Interest awarded along with period
1.	Services/handling bills	Rs.1,27,62,425/-	Rs.95,30,830.50 (9.9.2010 till 7.1.2017 @ 12% on Rs.1,27,62,425/- p.a.)
2.	Despatch earned	USD 2,42,445.03	USD 1,81,106.43 (9.9.2010 till 7.1.2017 @ 12% on USD 2,42,445.03)
3.	Bank Charges (extension of BG)	Rs.19,69,264.44/- (includes principal sum of Rs.17,46,576.27 + interest* Rs.2,22,688.44/- * @ 10% p.a. from 2.6.2009 till 9.9.2010	Rs.13,04,692.27 (9.9.2010 till 7.1.17 @ 12% calculated on Rs.17,46,576.27-

2.1 Besides the aforesaid, the respondent had lodged a fourth Claim *qua pendente lite* and future interest. The *pendente lite* interest awarded by the Arbitral Tribunal is shown in the table in paragraph 2 above. Insofar as the future interest is concerned, the Arbitral Tribunal awarded the same also at the rate of 12% per annum both on the total amount awarded in INR and the amount awarded in USD i.e. Rs.2,53,44,523.77 and USD 4,23,551.46 respectively.

3. In order to adjudicate the disputes, which have arisen between the parties herein, the following broad facts are required to be noticed.

4. The petitioner, it appears, entered into a contract dated 11.4.2005 (in short "April 2005 Contract") with the National Thermal Power Corporation Limited (in short "NTPC") for importing non-coking steam coal (hereinafter referred to as "coal").

4.1 For the purposes of importing coal to Indian ports and for arranging vessels and having them cleared so that it could be delivered to NTPC Thermal Power Stations, the petitioner engaged the services of the respondent. The respondent, who, is in the business of stevedoring, handling, storage, etc., entered into an agreement with the petitioner on 1.6.2005 (in short "June 2005 Agreement").

4.2 The scope of the respondent's work under the June 2005 Agreement involved stevedoring, handling and forwarding of coal, unloading vessels, handling and storage of coal at the port of discharge, arrangement of railway wagons, wagon loading and transportation of coal to NTPC Thermal Power Stations.

5. Coal in this case was supplied by a foreign supplier, that is, an entity by the name, Adani Global Pte. Ltd. The respondent, thus, over a period spanning between June, 2005 to May, 2006 handled 31 vessels for the petitioner.

6. In terms of the June 2005 Agreement, the respondent was entitled to earn despatch for a timely unloading of the vessels, while in the event of delay, it was required to pay demurrage. Concededly, out of 31 vessels, the respondent earned despatch qua 25 vessels. Insofar as the remaining 6 vessels are concerned, the respondent and the petitioner conceded before the Arbitral Tribunal that the respondent had incurred demurrage *vis-a-vis* two vessels, which, narrowed down the dispute to four vessels.

7. The respondent, thus, claimed that it was entitled to despatch in respect of three out of four vessels and insofar as the fourth vessel was concerned, there was Customary Quick Despatch (CQD) and therefore, no amounts were payable either by way of demurrage or to be earned by way of despatch.

7.1 The four vessels in issue over which dispute between the parties is centered, bear the following names: (i) MV Jia Xin Shan; (ii) MV Pacific Pioneer; (iii) MV Dubai Guardian; and (iv) MV Vancouver Victory.

7.2 Likewise, the amounts quantified towards despatch and demurrage by the respondent and the petitioner respectively *vis-a-vis* each of the aforementioned four vessels is detailed out hereafter:

Sl.No	Vessel	Respondent's Quantification (USD)	Petitioner's Quantification (USD)
1	MV Jia Xin Shan	16567.35 Despatch	76873.16 Demurrage
2	MV Pacific Pioneer	13656.125 Despatch	152288.54 Demurrage
3	MV Dubai Guardian	3277.20 Despatch	56036.50 Demurrage
4	MV Vancouver Victory	CQD Basis	163420.40 Demurrage

8. The record shows that, on 22.2.2006, the petitioner's Regional Office had forwarded lay time calculation sheets to the foreign supplier with regard to three vessels i.e., MV Jia Xin Shan, MV Pacific Pioneer, MV Dubai Guardian, (hereafter referred to as "subject vessels") in respect of which the respondent was claiming despatch.

8.1 It is, however, the petitioner's case that its Regional Office had committed an error in showing despatch against the aforementioned subject vessels, as it failed to take into account the pre-berthing delay, which as per Clause 2.2.8 of the June 2005 Agreement obtaining between the parties was to be on account of the respondent. In other words, had the pre-berthing delay been taken into account, the lay-time calculation sheets would have shown that demurrage had been incurred against the subject vessels and not despatch. It is the

petitioner's stand that this error was found out by its Shipping Department, once, the foreign supplier had refused to accept the lay time calculation sheets, which showed that despatch had been earned qua the subject vessels.

9. The record also shows that it is the petitioner's case that it held a meeting with the foreign supplier on 22.11.2006 and 23.11.2006 to resolve the issue of despatch and demurrage, amongst others, with regard to the NTPC Shipments including the subject vessels. The petitioner claims that at the meeting, it was agreed that the aforementioned four vessels had incurred demurrage. Furthermore, it is the petitioner's stance that insofar as the two out of four vessels are concerned, that is MV Jia Xin Shan and MV Pacific Pioneer, even demurrage had been quantified. Insofar as the other two vessels are concerned, namely, MV Dubai Guardian and MV Vancouver Victory, though it was agreed that demurrage would be levied, the amount to be paid had not been quantified.

9.1 It is also the case of the petitioner that at the said meeting, a decision was taken that insofar as MV Dubai Guardian was concerned, the petitioner would revert qua the same on 27.11.2006. The petitioner claims that via communication dated 28.11.2006, its Regional Office erroneously reiterated its earlier stand *vis-a-vis* the aforementioned four vessels, though, all that was required to be done, as agreed at the meeting dated 22.11.2006 and 23.11.2006, was to revert with its comment *vis-a-vis* MV Dubai Guardian.

10. It is in this background that the respondent vide notice dated 15.5.2010, triggered the arbitration mechanism. Via this notice, the respondent claimed a sum of Rs.3,53,45,960/- along with interest. Notice called upon the Indian Council of Arbitration (in short 'ICA') to appoint an Arbitrator in terms of Clause 2.15 of the June 2005 Agreement.

11. On 09.09.2010, the respondent filed its Statement of Claims (SOC). Since the petitioner's nominee Arbitrator declined to accept the appointment, ICA vide its communication dated 06.01.2012, informed the parties that it had constituted a fresh Arbitral Tribunal after appointing a substitute Arbitrator in place of the petitioner's nominee.

12. The petitioner was not happy about the appointment of a substitute Arbitrator by the ICA. This objection was raised by the petitioner in its letter dated 16.01.2012. Via the said letter, the petitioner sought an opportunity to nominate its own appointee and in line with its stand sought dissolution of the Arbitral Tribunal. The ICA having received the letter dated 16.01.2012, informed the respondent via letter dated 01.02.2012 that hearing in the matter had been cancelled and that it was being kept in abeyance till further orders.

13. Given these circumstances, the respondent moved this Court in February, 2012 via a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (in short '1996 Act'). The petition filed by the respondent was numbered as: Arb. P. No.116/2012.

14. This Court, vide order dated 30.04.2012, disposed of the petition after counsel for the ICA informed the Court that it had appointed a former Judge of this Court as an Arbitrator. The Court was further informed, something which is recorded in the very same order, that the two Arbitrators would decide as to who would be the Presiding Arbitrator. At this hearing, parties agreed that the arbitration proceedings would be conducted as per the rules of ICA.

15. Consequently, on 29.05.2012, the re-constituted Arbitral Tribunal held its preliminary meeting. In and about July, 2012, the respondent filed a fresh SOC. This SOC was at variance with the SOC filed by the respondent on 09.09.2010. The variation in the SOC was with regard to claims No. 2, 4 & 7. The details of variation are set forth below:

Claim No.	Particulars	Amount in SOC dated 09.09.2010	Amount claimed under SOC of July, 2012
Claim No.2	Despatch earned	Rs.1,16,83,876/-	USD 2,42,445.03
Claim No.4	Interest claimed for delayed release of amount	Rs.68,08,946/- (from 08.07.2006 to 30.04.2010)	Rs.1,06,84,702/- (from 08.07.2006 to 30.06.2012)

Claim No.7	Litigation Expenses	Rs.2 lacs	Rs.25 lacs.
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16. In and about September, 2012, the petitioner filed its Statement of Defence (in short 'SOD'). Pertinently, in the SOD no objection was taken that the respondent had earlier filed a SOC on 09.09.2010 which was substituted by another SOC in July, 2012 and that in the second SOC, the amounts claimed in respect of claim No. 2, 4 & 7 had been enhanced. The Arbitral Tribunal, thereafter, based on the pleadings and documents framed a singular issue which was "Whether the claimant (i.e., the respondent herein) is entitled to claims as enumerated in the Statement of Claim?"

17. Unfortunately, during the course of the proceedings, the Presiding Arbitrator resigned, which prompted the ICA to write to the other Arbitrators, on 09.04.2013, with a request to appoint another Presiding Arbitrator. This request was reiterated by the ICA vide its communication dated 30.04.2013, which resulted, once again, in the re-constitution of the Arbitral Tribunal.

18. The record shows that the respondent had produced two witnesses i.e. Mr. R. Chopra (CW-2) and Mr. P.K. Banerjee (CW-1), while the petitioner had produced one witness i.e. Mr. B.P. Mahapatra (RW-1). The record also shows that the respondent had served upon the petitioner at least three notices for production of documents. These notices are dated: 15.07.2013, 20.08.2013 and 07.09.2013.

19. Since the respondent did not obtain the desired response, an application was moved before the Arbitral Tribunal under Section 27 of the 1996 Act on 09.09.2013.

19.1 The Arbitral Tribunal disposed of the aforementioned application vide order dated 14.02.2014. Via this order, the Arbitral Tribunal directed the petitioner to produce original/office copies of the documents referred to in the application and those adverted to in the notices dated 15.07.2013 and 07.09.2013. Furthermore, the petitioner was also directed to file affidavits of its three officials referred to in paragraph 8 of the application and that the affidavits so filed would advert to the documents referred to in notice dated 15.07.2013 and letter dated 04.03.2010. The order, however, gave opportunity to the petitioner to rebut evidence.

20. On 30.05.2014, Mr. B.P. Mahapatra (RW-1), *inter alia*, stated that the communications dated 22.02.2006 were neither in existence nor did they seem to have been made or were available in its Bhuvneshwar office. Insofar as the communication with the foreign supplier was concerned, it was, curiously, stated that the same could not be produced on account of commercial secrecy and, in any event, upon a search being carried out, it did not contain any communication with the foreign supplier. A perusal of the record discloses that during cross-examination of the petitioner's witness i.e. RW-1, on 28.07.2014, the Arbitral Tribunal directed the petitioner to file a statement showing the despatch earned by the respondent qua 25 vessels with full details and supporting documents, together with the

amount, if any, paid to the respondent. This direction was required to be complied by the petitioner on or before 31.08.2014.

20.1 Evidently, on 16.09.2014, the Arbitral Tribunal took on record a statement of despatch earned by vessels as also the Minutes of Meeting dated 22.11.2006 and 23.11.2006. These were meetings, which were held between the representatives of the petitioner and the foreign supplier for settlement of account. On 20.02.2015, upon closure of cross-examination of the petitioner's witness i.e. RW-1, a direction was issued to him to file an affidavit with regard to the information sought from him during his cross-examination on 19.02.2015 and 20.02.2015. In and about April, 2015, the petitioner filed documents which were sought from its witness.

20.2 By an order dated 27.04.2015, the Arbitral Tribunal directed the petitioner to place on record a tabulated statement as regards the correct basis for arriving at demurrage in respect of the aforementioned four vessels. Compliance qua this order was made by the petitioner on 29.07.2015. Arguments were concluded before the Arbitral Tribunal on 18.05.2016, when, written submissions filed by the parties were received. The Arbitral Tribunal, on the said date, reserved the matter for pronouncement of the Award and directed parties to file their bill of costs within a period of two weeks. Pertinently, the respondent does not appear to have filed its bill of costs.

20.3 Consequently, on 07.01.2017, the Arbitral Tribunal pronounced its Award. Upon receipt of a copy of the impugned Award, the petitioner instituted the captioned petition.

20.4 In the meanwhile, the respondent served a legal notice dated 15.02.2017 on the petitioner demanding payments under the Award, which was replied to by the petitioner on 10.04.2017.

Submissions of counsel

21. Given this background, arguments on behalf of the petitioner were advanced by Mr. Sanat Kumar, Senior Advocate, instructed by Mr. Vikram Vipin while those on behalf of the respondent were advanced by Mr. Rajiv Virmani, Senior Advocate, instructed by Mr. Saurobroto.

21.1 The submissions of Mr. Sanat Kumar can, broadly, be paraphrased as follows:

(i) Firstly, the Arbitral Tribunal committed a grave error in relying upon the Statement of Facts (in short 'SOFs') and lay time calculation sheets dated 22.02.2006 without realizing that in terms of Clause 2.2.11 of the June 2005 Agreement, no finality can be attached to the same till such time the foreign supplier accepts the said document. The SOFs, ordinarily, would bear the signatures of the Master of the Vessel, the representative of the Seller (i.e. the foreign supplier) and the Receiver/Buyer. The respondent, who is the stevedoring and handling contractor is not involved in the exercise of preparing SOFs. In view of the fact that the foreign supplier had not accepted the SOFs,

the petitioner's Shipping Department located in its corporate office went over the calculation sheets and discovered that demurrage had been incurred *vis-à-vis* the aforementioned four vessels. The Arbitral Tribunal wrongly ignored the conclusion reached in this behalf by the petitioner's Shipping Department.

(ii) Secondly, the Arbitral Tribunal, while accepting the Minutes of the Meeting dated 22.11.2006 and 23.11.2006 *vis-à-vis* 27 vessels, proceeded to reject the same *vis-à-vis* the aforementioned four vessels. At the said meeting, it was agreed that four vessels had incurred demurrage, which, as a matter of fact *vis-à-vis* two vessels had actually been quantified. These are facts, which the Arbitral Tribunal ought not to have taken note of, and if, the demurrage quantified is taken into account, the petitioner ought to have been given a credit of USD 17000.

(iii) Thirdly, the Arbitral Tribunal wrongly placed reliance on the communication dated 28.11.2006. The reason for the same is that at the meeting held on 22.11.2006 and 23.11.2006, the petitioner was required to revert with information only with respect to one vessel i.e. M.V. Dubai Guardian, and not qua all four vessels. Furthermore, there was nothing on record to show that the foreign supplier had, in fact, accepted the suggestions made by the petitioner in its communication dated 28.11.2006.

(iv) Fourthly, the Arbitral Tribunal wrongly concluded that the account of the foreign supplier had been settled. There was nothing on

record, which could have led the Arbitral Tribunal to reach such a conclusion. The onus, in this behalf, lay on the respondent.

(v) The Arbitral Tribunal failed to factor in the pre-berthing delay, the burden qua which, as per Clause 2.2.8 of the June 2005 Agreement, lay on the respondent. The Arbitral Tribunal was required to also appreciate the fact that in terms of Clause 2.2.9, lay time commenced only 12 hours after Notice of Readiness (in short 'NOR') was tendered. Accordingly, if these factors were borne in mind, as were taken into account by the petitioner's Shipping Department, it would have discovered that in respect of each of the aforementioned four vessels, time had been lost and demurrage had been incurred. Pertinently, the petitioner's Regional Office had also made the same mistake, which came to fore, once, the foreign supplier refused to accept the calculations made by the Regional Office. It is to be borne in mind that as per the June 2005 Agreement whether despatch had been earned or demurrage had been incurred was an aspect which had to be settled between the petitioner and the foreign supplier. The consequences of the settlement were required to be borne by the respondent. Therefore, the contention advanced on behalf of the respondent that the petitioner had changed its stand had no basis. The Arbitral Tribunal wrongly applied the test, which is, that since in other cases, the petitioner's stand had been accepted and, therefore, the same circumstance ought to prevail in respect of four vessels in issue was misconceived as that could not be taken as a yardstick for concluding as to which of the two calculations were correct.

(vi) The Arbitral Tribunal erred in awarding claim No. 2 in USD. The Arbitral Tribunal ought to have taken note of the fact that in the first SOC filed before the ICA the respondent claimed money in INR and it was only when the second SOC was filed that the claim was made in USD. As a matter of fact, in the demand letter claiming despatch dated 11.11.2009 and the notice invoking arbitration dated 15.05.2010, the respondent had claimed despatch in INR and not in USD. The Arbitral Tribunal failed to notice the aforesaid facts.

(vii) The Arbitral Tribunal erroneously allowed interest qua claim No. 2 from 09.09.2010 when the first SOC was filed whereas the claim under this head in USD was made for the first time in July, 2012.

(viii) The Arbitral Tribunal failed to notice the fact that in terms of Clause 2.6.1, Clause 2.10.1 and Clause 2.12, payments had to be made in INR and not in USD. Besides this, it was required to be appreciated that the contract was entered into between the parties in India, the subject works were executed in India and payments had to be made to the respondent which is a company incorporated in accordance with the laws of India.

(ix) The Arbitral Tribunal failed to appreciate the fact that at the meeting held on 22.11.2006 and 23.11.2006 between the petitioner and the foreign supplier, it was settled that insofar as the aforementioned four vessels were concerned, they had incurred demurrage. Furthermore, at the very same meeting, insofar as the two

out of the four vessels were concerned, i.e. MV Jia Xin Shan and MV Pacific Pioneer, the quantum of demurrage was also finalized. Furthermore, insofar as MV Dubai Guardian was concerned, the petitioner was to revert with response as to whether or not there was shipping activity on 21st September of the concerned year. Thus, *vis-à-vis* MV Dubai Guardian and MV Vancouver Victory, it was agreed at the meeting that both had incurred demurrage though, the amount had not been quantified. The perversity in the impugned Award was apparent inasmuch as while it accepted the result with regard to 27 vessels insofar as the remaining four vessels were concerned, it did not accept the results.

(x) The Arbitral Tribunal also failed to take in account the fact that though, the petitioner was called upon to comment only with respect to MV Dubai Guardian, its Regional Office vide communication dated 28.11.2006 ended up taking a stand *vis-à-vis* five vessels which included the aforementioned four vessels. As the petitioner's Regional Office had committed an error inasmuch as it had not taken into account the pre-berthing delay the communication dated 28.11.2006 had not been accepted by the foreign supplier.

(xi) The Arbitral Tribunal committed a patent error in holding that the petitioner had not led evidence to show that the respondent had incurred demurrage *vis-à-vis* the aforementioned four vessels. The documents that were in the petitioner's possession, which included Minutes of Meeting dated 22.11.2006 and 23.11.2006 were placed on record. These minutes show that despatch had been earned only *vis-à-*

vis 25 vessels. In this behalf, reliance was placed on the testimony of the petitioner's witness (RW-1) which shows that in the cross-examination, he had indicated that there was no account struck *vis-à-vis* despatch/demurrage with the foreign supplier. In other words, in respect of the same, a dispute obtained between the petitioner and the foreign supplier. The Arbitral Tribunal, while awarding claim No. 2 in favour of the respondent, failed to notice that the claimant's witness (CW- 1) whose cross-examination was conducted on 29.06.2013 had stated as follows: "*It is correct that the delay was there between four to eight/nine days in clearing/discharging the ships.*" There, thus, admittedly, was a delay in discharging the ships.

(xii) The Arbitral Tribunal erroneously has awarded full costs to the respondent without taking the trouble of quantifying the same. Insofar as the costs are concerned, it is well settled that an Arbitral Tribunal can award reasonable costs. In this behalf, what is required to be noticed is that in its first SOC, the respondent claimed a sum of Rs.2 lacs towards litigation costs while in the second SOC its claim under the said head had been enhanced to Rs.25 lacs. In the notice dated 15.02.2017 served by the respondent on the petitioner, *albiet*, after the award had been rendered, a sum of Rs.1,10,89,470/- was claimed. Furthermore, though the respondent was directed by the Arbitral Tribunal, vide its order dated 18.05.2016, to file a bill of costs within a period of two weeks it had failed to do the needful. Therefore, for all these reasons, claim No. 7, which related to costs, ought to be set aside.

(xiii) The Arbitral Tribunal failed to appreciate that no amount towards extension of bank guarantee charges ought to have been awarded as there is no pleading in the SOC in that behalf and secondly, no material had been placed on record to show as to what were the charges incurred in that regard and that, the extension of bank guarantee was with mutual consent of the parties.

(xiv) The Arbitral Tribunal committed patent error in passing an order under Section 27 of the 1996 Act on an application for production of documents. This order could only be passed by a Court having jurisdiction in the matter.

(xv) The Arbitral Tribunal erroneously granted *pendente lite* and future interest at the rate of 12% per annum without adverting to any document or any business factors.

21.2 In support of his submission, Mr. Sanat Kumar has relied upon the following judgments: *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*, (2003) 5 SCC 705; *Associate Builders V. Delhi Development Authority*, (2015) 3 SCC 49; *Rajasthan State Industrial Development Vs. Diamond & Gem Corporation Limited & Anr*, (2013) 5 SCC 470; *K.P. Poulose Vs. State of Kerala & Another*, (1975) 2 SCC 236; *Sanjeev Kumar Jain Vs. Raghbir Saran Charitable Trust & Anr* (2012) 1 SCC 455 and *MMTC Vs. Al Bamar Company Ltd*, 159 (2009) Delhi Law Times 513 (DB).

22. As against this, Mr. Virmani relied upon the petitioner's communication dated 28.11.2006 to demonstrate that, in respect of the

four vessels in issue the petitioner had accepted that the respondent had earned despatch with regard to three vessels and that, in respect of the fourth vessel, no despatch/demurrage had been incurred i.e. it was on CQD basis.

(i) The petitioner, despite being served with the notices for production of documents and the order of the Arbitral Tribunal dated 14.02.2014, refused to produce the relevant documents and communications it had with the foreign supplier. The petitioner while taking the stand that it would not place the relevant information on record on account of commercial secrecy also incongruously indicated that the information was not available with it.

(ii) The objection taken by the petitioner that the respondent had filed a second SOC was sought to be repelled by bringing to my notice that in the SOD filed *vis-à-vis* the second SOC, the petitioner had taken no such objection. The circumstances in which the second SOC had been filed, were sought to be brought to my notice by referring to paragraphs 17 & 18 of the second SOC. It was stated that the first SOC had been filed with the ICA and upon the Arbitral Tribunal being re-constituted, it filed the second SOC. Accordingly, it was contended that there was no merit in the submission, which was raised for the first time before this Court.

(iii) As regards the contention that in the second SOC claim No. 2 had been quantified in USD, it was submitted, once again, that the petitioner in its SOD, had taken no such objection. It was indicated

that the claim was contested on merits and not on the ground that in the first SOC, the claim was made in INR and, thereafter, in the second SOC, the claim was made in USD. In order to support its contention that there was nothing wrong in quantifying claim No. 2 in USD, reliance was placed on the petitioner's letters dated 22.02.2006 and 28.11.2006 to the foreign supplier. It was pointed out that in both the communications despatch and demurrage were quantified in USD. Furthermore, it was submitted that the petitioner's statement dated 24.10.2014, filed pursuant to the Arbitral Tribunal's order, clearly, established that the despatch was earned in USD.

(iii)(a) Furthermore, it was submitted that the reliance placed on Clause 2.6.1 and Clause 2.12.1 of the June 2005 Agreement was misconceived as they relate to service charges that the petitioner had to pay and the bank guarantee which the respondent was required to furnish. In other words, these clauses could not be used by the petitioner to establish that the claim for despatch could only be made in INR and not in USD. Besides this, it was submitted that there was no bar in making a claim in USD and all that the petitioner was required to do was to convert USD into INR. Reliance in this behalf was placed on paragraph 13 of the judgment of this Court in ***Centravis Production Ukraine vs. Gallium Industries Limited***, (2014) SCC OnLine Del 6787.

(iii)(b) It was lastly contended that no such objection was taken on behalf of the petitioner before the Arbitral Tribunal.

(iv) As regards the submission made on behalf of the petitioner that the award under claim No. 2 had been made by the Arbitral Tribunal without appreciating the import of Clause 2.2.4, Clause 2.2.8, Clause 2.2.9(i) and Clause 2.2.11. The same were refuted by adverting to the petitioner's stand taken in the SOFs, the letters dated 22.02.2006 and 28.11.2006 addressed to the foreign supplier.

(iv)(a) It was contended that despite taking recourse to the RTI route and notices for production, the respondent was stonewalled. It was sought to be emphasized that it was finally the respondent's witness i.e. Mr. R. Chopra (CW-2), who with his affidavit of evidence had placed on record the letters dated 22.02.2006 and 28.11.2006. Since the petitioner's witness i.e. RW-1, had taken a stand in his affidavit that the letters dated 22.02.2006 and 28.11.2006 had not been exchanged with the foreign supplier, the respondent got issued notices for production of documents and also filed an application under Section 27 of the 1996 Act, on which, the Arbitral Tribunal passed orders dated 14.02.2014 and 30.05.2014.

(iv)(b) It was emphasized that pursuant to the aforesaid orders, an affidavit dated 30.05.2014 was filed on behalf of the petitioner wherein the existence of communication dated 22.02.2006 was denied and, at the same time, a stand was taken that the same communication to the foreign supplier could not be produced on account of commercial secrecy. It was also emphasized that the petitioner, for the first time, showed in the statement filed, which is dated 12.09.2014, that despatch had been earned and furthermore, along

with this statement produced the Minutes of Meeting dated 22.11.2006 and 23.11.2006. The fact that the petitioner's witness i.e. Mr. B.P. Mahapatra (RW-1), had accepted the factum of existence of letters dated 22.02.2006 and 28.11.2006 was sought to be demonstrated by relying upon the following part of his cross-examination held on 09.12.2014:

"Q.24- (Witness shown three communications all dated 22.02.2006 at page Nos. 151, 152 & 153 of the documents filed by the Claimant on 03.07.2012). I put it to you that you personally had addressed these three communications to Adani Global Pte. Ltd., Singapore.

Ans.- Please show me the original. Signatures can be identified by me only on going through the originals.

Per Tribunal:

Can you identify your signatures at pages 151 and 153 or not?

Ans. These might be my signatures.

Q.25- (Witness is shown a communication dated 28.11.2006 at page 149 and 150 from the documents filed on 03.07.2012 by the claimant). I put it to you that this communication was signed by Mr. P.K. Chaki of MMTC and sent to Mr. Tito Job of Adani Exports Ltd.?

Ans. Yes."

(v) Furthermore, the fact that demurrage had been incurred had not been shown to have been confirmed by the foreign supplier and that, no litigation had been initiated either by the petitioner or by the foreign supplier, this was sought to be established by referring to the

following part of the cross-examination of the petitioner's witness (RW-1) held on 19.02.2015:

"Q 35- Since you had never seen a Charter-Party Agreement for any of the 31 vessels in questions, you could not have confirmed the alleged demurrage as set out in the above mentioned Chart?

Ans.- The demurrage part is no confirmed with the foreign supplier and still it is in dispute.

Q. 36.- I refer you to your statement dated 24.10.2014, filed before the AT pursuant to order dated 16.9.2014, where you have stated "statement showing documents like NOR, SOF and detail calculations for dispatch or demurrage as confirmed in the minutes of meeting 22.11.2005 and 23.11.2005" is false to your knowledge, isn't it?

Ans.- No

Q. 37- I take it that MMTC has not paid any money to Adani for purchase and shipment of coal covered by 31 vessels in question. Isn't it?"

Ans.- MMTC paid the money to Adani for the cost of the coal covered by 31 vessels.

Q.38-Has Adani initiated any legal proceeding against MMTC for recovery of any money arising out of transactions relating to 31 vessels in question?

Ans.- I do not know.

XXXXXXXXXXXX

Q.40 Has MMTC initiated any legal proceeding against Adani for recovery of any money in respect of transactions covered by 31 vessels in question?

Ans.-I do not know. I can check with the corporate office and inform."

(vi) It was submitted that the argument advanced on behalf of the petitioner that the Arbitral Tribunal had not taken into account the Minutes of the Meeting dated 22.11.2006 and 23.11.2006 and, instead, relied upon the irrelevant evidence such as SOFs of other vessels and letters and fax dated 22.02.2006 and 28.11.2006 was untenable for the following reasons:

(a) That the petitioner itself had not relied upon the Minutes of Meeting dated 22.11.2006 and 23.11.2006.

(b) That the letters dated 22.02.2006, which were addressed by the petitioner to the foreign supplier would show that the four vessels in issue had earned despatch and there was no pre-berthing delay on account of the respondent.

(c) On 28.11.2006, the petitioner had written to the foreign supplier that the respondent had earned despatch qua three vessels and CQD in respect of the fourth vessel. This communication also did not attribute pre-berthing delays to the respondent. As a matter of fact, this communication showed that the petitioner was not wanting to act in terms of the Minutes of Meeting dated 22.11.2006 and 23.11.2006.

(d) Though the petitioner denied the existence of the letter dated 28.11.2006, its own witness admitted to its existence during cross-examination.

(e) The petitioner had failed to produce any document post 28.11.2006 to demonstrate that the foreign supplier had disputed the stand taken by it in its letter dated 28.11.2006. The petitioner's witness, Mr. B.P. Mahapatra (RW-1), who had dispatched the letters dated 22.02.2006 and signed the Minutes of Meeting dated 22.11.2006 and 23.11.2006 had admitted that his superior, one, Mr. P.K. Chaki had signed the fax dated 28.11.2006.

(f) The petitioner neither filed a counter claim nor demanded payment of demurrage from the respondent despite subsistence of Clause 2.2.11 in the June 2005 Agreement. The Arbitral Tribunal had decided the claim based on the best available evidence on record and was entitled to draw adverse inference on account of repeated refusal by the petitioner to produce its communications and accounts struck with the foreign supplier.

(g) The petitioner was not entitled to seek re-appreciation of evidence.

(vii) Furthermore, insofar as claim No. 1 was concerned, reliance was placed on the testimony of the petitioner's witness (RW-1) to show that a sum of Rs.1,28,23,183/- was lying as credit balance in respondent's books of account. Furthermore, in this behalf, reliance was also placed on the petitioner's affidavit dated 15.04.2015.

(viii) As regards claim No. 3, learned counsel submitted that the bank guarantee had been renewed eleven (11) times despite the contract having been performed. In this behalf, reliance was also placed on

Ex.CW-2/R-1 to Ex.CW-2/R-12. Furthermore, my attention was drawn to the averments made in paragraph 12 of the SOC which showed that the respondent had quantified the bank charges and commission at Rs.17,46,576/-. It was contended that in the affidavit of evidence dated 14.11.2012, these charges were adverted to by the respondent's witness i.e. Mr. P.K. Banerjee (CW-1). My attention was also drawn to the fact that no cross-examination of the respondent's witness with regard to quantum of bank charges was carried out.

(ix) Insofar as the submission made on behalf of the petitioner that interest ought to have been awarded on the basis of libor in respect of the claims awarded in USD was concerned, learned counsel submitted that no such ground is raised in the petition. Furthermore, as noticed above, it was argued that despatch was earned in USD and, therefore, at the time of payments/execution, the petitioner would be required to convert the same in INR and, accordingly, remit the money. It was stated that neither party had taken the stand that the petitioner was required to remit the despatch earned by the respondent to its overseas account. The rate of interest, according to the learned counsel, was reasonable and that, the Arbitral Tribunal, in that behalf, only exercised its power as vested upon it under Section 31(7)(a) & (b) of the 1996 Act.

(x) As regards the objection taken to the award of costs by the Arbitral Tribunal, it was contended that the aspect with regard to quantum of costs will be examined at the time of execution of the

Award. This objection, according to the learned counsel, could not form part of a petition under Section 34.

(x)(a) Furthermore, it was submitted without prejudice to its aforesaid stand *vis-a-vis* costs that since in its second SOC, the respondent had claimed costs of Rs.25 lacs, the said sum could be treated as full costs awarded by the Arbitral Tribunal.

Reasons & Analysis

23. I have heard the learned counsel for the parties and perused the record.

24. To my mind, the respondent had, basically, lodged three claims and also sought interest qua each of the claims. Claim No. 1 pertained to the payments of money towards service rendered by the respondent, while Claim No. 2 referred to amounts which, according to the respondent, were due to it on account of the despatch earned with respect to the subject vessels i.e. three vessels referred to above. Insofar as Claim No. 3 was concerned, it required the petitioner to reimburse the respondent qua the bank charges and commission paid by it to the bank for extension of the bank guarantees. The Arbitral Tribunal has awarded moneys to the respondent under each of the claims along with interest for the period referred to in the impugned Award, *albeit*, at the rate of 12% per annum.

25. Therefore, I would be discussing the arguments and counter arguments made on behalf of the parties herein claim-wise and also

my view with regard to the conclusions arrived at by the Arbitral Tribunal.

Claim No.1

26. Insofar as this claim is concerned, which relates, as indicated above, to reimbursement for services rendered, there is, in fact, no objection taken in the petition on behalf of the petitioner qua the same. The Arbitral Tribunal has noticed in the impugned Award that moneys towards service charges are payable to the respondent in terms of Clause 2.6 of the contract. These service charges were required to be paid on the basis of the quantity received by the Thermal Power Stations of NTPC with a right to the petitioner to adjust the same in respect of both quality and quantity. The fact that this amount is payable, as rightly argued on behalf of the respondent, is discernable from the following extract from the testimony of Shri B.P.Mahapatra (RW-1):

"Q.66- Books of Account of MMTC continue to show a sum of Rs.1,29,84,100/- as the amount due and payable to the claimant even after this communication, isn't it?"

Ans.-As per the record of F&A, an amount of Rs.1,28,23,183.00 is lying as credit balance in the Vendor Ledger of M/s KCT.

XXXXXXXXXXXXXX

Q. 82 - MMTC had approved/passed all the bills of the claimant for Rs.50,05,22,856/- isn't it?

Ans.-NTPC Limited had settled the MMTC's claim for Rs.49,48,45,659.00 for 31 vessels, out of which MMTC, Bhubaneswar had paid Rs.48,18,61,559/- to M/c KCT.."

27. Clearly, the aforesaid would show that the petitioner's witness (RW-1) had claimed that a sum of Rs.1,28,23,183/- was lying to the respondent's credit [i.e. Karam Chand Thapar (KCT)]. The respondent, however, appears to have restricted its claim on account of service charges to a sum of Rs.1,27,62,425/- in addition to the interest payable on the same. Therefore, I have no difficulty in concluding that the said amount has been rightly awarded by the Arbitral Tribunal in favour of the respondent.

Claim No.2

28. The foregoing discussion would show that out of 31 vessels, handled by the respondents at the Paradip Port during the period spanning between May-June, 2005 and January, 2006, the dispute centres around only the subject vessels. The subject vessels being: MV Dubai Guardian, MV Jia Xin Shan and MV Pacific Pioneer. The respondent's stand is that he had earned despatch qua the subject vessels whereas, according to the petitioner, the subject vessels have incurred demurrage. Insofar as the fourth vessel is concerned, the respondent's stand is that it attracts CQD and, therefore, has neither earned despatch nor has it incurred demurrage.

29. The Arbitral Tribunal has taken this aspect into account while holding that the net despatch earned by the respondent works out to

USD 2,42,445.03. The objection to this finding of the Arbitral Tribunal raised by the petitioner is pivoted on the following:

(i) The contents of Minutes of Meeting held between the representatives of the petitioner and the foreign supplier on 22.11.2006 and 23.11.2006 for settlement of despatch and demurrage on account of shipments to NTPC, included the vessels handled by the respondent.

(ii) The calculation made by the petitioner's Shipping Department, which showed that its own Regional Office had made a mistake in preparing the lay time sheets by not factoring in the pre-berthing delay, which in accordance with Clause 2.2.8 of the June 2005 Agreement was to be borne by the respondent. According to the petitioner, if the calculation of the Shipping Department was taken into account, then, it would be clear that the subject vessels (i.e. three vessels in issue), had incurred demurrage and not earned despatch. In support of the calculations made by the Shipping Department, it was sought to be argued that the Arbitral Tribunal had failed to take note of Clauses 2.2.4, 2.2.8, 2.2.9(i) and 2.2.11 of the June 2005 Agreement. In particular, emphasis was laid on behalf of the petitioner on the aspect that lay time commenced after expiry of 12 hours from the date when the Notice of Readiness (NOR) was served.

(iii) Under Clause 2.2.11, finality can be attached to the lay time calculation only when a foreign supplier accepts the same. Since, the foreign supplier had not accepted the lay time calculations dated

22.02.2006, the matter was referred to the Shipping Department located at the petitioner's corporate office, which noticed the error of pre-berthing delay not being factored in the calculation made by the Regional Office.

(iv) Though, the Arbitral Tribunal has accepted the Minutes of Meeting dated 22.11.2006 and 23.11.2006, insofar as the 27 vessels are concerned, it has rejected the same *vis-à-vis* four vessels which include the subject vessels. The said Minutes of the Meeting would show that four vessels had earned demurrage and in respect of two out of four, demurrage had been quantified.

(v) The reliance by the Arbitral Tribunal on the communication dated 28.11.2006 was flawed as the petitioner was required to revert only *vis-à-vis* one vessel i.e. MV Dubai Guardian, whereas it ended up taking a stand *vis-à-vis* five vessels which included the aforementioned four vessels.

(vi) Lastly, there is nothing placed on record, which would demonstrate, that the foreign supplier had settled its despatch/demurrage accounts with the petitioner, and therefore, the onus, if any, *vis-a-vis* this issue rested on the respondent.

30. The aforesaid objections taken on behalf of the petitioner, to my mind, are untenable for the following reasons.

30.1 Mr. B.K. Mahapatra's (RW-1) communications dated 22.02.2006, sent to the foreign supplier clearly establishes that in

respect of each of the subject vessels, despatch had been earned by the respondent. As per this communication, MV Jia Xin Shan had earned despatch amounting to USD 16567.35; MV Dubai Guardian earned despatch equivalent to USD 2891.78, while MV Pacific Pioneer had earned a despatch equivalent to USD 13656.125.

30.2 A perusal of the communications dated 22.02.2006, would show that it took into account the date when the vessel arrived at Paradip Port, the total quantity imported; the rate of discharge of coal per day in metric ton; the total time allowed; the date and time when the vessel arrived and berthed; the date and time when NOR was tendered and the date and time when NOR was accepted; the date and time when discharge commenced and the date and time when it was completed.

30.3 Furthermore, the SOFs prepared in respect of each of the subject vessels included the receiver's remarks (i.e. the petitioner's remarks) *vis-à-vis* the aspect pertaining to delay on account of pre-berthing.

30.4 The petitioner (i.e. the receiver) did not hold, for the reasons given in the SOFs, the respondent responsible for the delay.

30.5 Besides this, the Arbitral Tribunal looked at not only the Minutes of Meeting dated 22.11.2006 and 23.11.2006 but also at the communication dated 28.11.2006.

30.6 Mr. B.P. Mahapatra, it appears, represented the petitioner at the meeting held on 22.11.2006 and 23.11.2006. At that meeting, it

appears, a discussion was held with regard to settlement of accounts between the representative of the petitioner and the foreign supplier qua the NTPC shipments. The meeting, it appears, pertained to some 61 vessels, out of which 31 vessels were ones handled by the respondent. It is pertinent to note that the communication dated 28.11.2006 was addressed by, one, Mr. P.K. Chaki, DGM (MIN.) at the Regional Office of the petitioner.

30.7 The Arbitral Tribunal, faced with this material on record, was required to come to a conclusion as to whether or not in respect of the subject vessels i.e. the three vessels in issue, despatch had been earned by the respondent. The communications dated 22.02.2006, clearly, showed that the respondent had earned despatch. The SOFs also established that the petitioner had taken a stand in its capacity as the receiver that the pre-berthing delay, if any, was not attributable to the respondent.

30.8 The only blip was the Minutes of Meeting dated 22.11.2006 and 23.11.2006. It is the petitioner's case that its Shipping Department corrected the error, which was committed by its Regional Office, once, a red flag had been raised by the foreign supplier.

30.9 Undoubtedly, the communication that emanated from the petitioner's office on 28.11.2006, clearly, held that the respondent had earned despatch. This was in consonance with the position taken by the petitioner's Regional Office in its communications dated 22.02.2006. The only exception being that insofar as MV Dubai

Guardian was concerned, it held out that it had earned despatch equivalent to USD 3277.20 as against USD 2891.78 shown in the earlier communication dated 22.02.2006.

30.10 Since, the petitioner took the stand that the exercise undertaken on 22.11.2006 and 23.11.2006 was a result of the foreign supplier raising an objection, despite the respondent's effort before the Arbitral Tribunal, nothing was placed on record to show that either a settlement had been arrived at with the foreign supplier in line with the decision taken in the Minutes of Meeting dated 22.11.2006 and 23.11.2006 or that the foreign supplier had raised any claim or initiated any litigation against the petitioner.

30.11 As a matter of fact, as rightly pointed out on behalf of the respondent, the petitioner, in these circumstances, would have in the ordinary course, lodged a counter-claim before the Arbitral Tribunal. No steps, in this behalf, were taken by the petitioner. The Arbitral Tribunal, it appears, left with no choice proceeded to examine the position, which obtained in the SOFs in respect of all 31 vessels. The Arbitral Tribunal's analysis of the SOFs made it come to a conclusion that the receiver's (i.e. the petitioner's) remarks prevailed. Therefore, the Arbitral Tribunal came to a conclusion that the petitioner was not justified in taking a different stand, particularly, in the background of the fact that it had withheld relevant and vital information as regards the settlement of accounts with the foreign supplier. The observations of the Arbitral Tribunal made, in this behalf, for the sake of convenience, are extracted hereafter:-

“On analysis of SOF it is observed that despite remarks to the contrary by either the Master of the vessel or Supplier’s Agents, the remarks of MMTC have prevailed and despatch earned. Even where specific remarks/reasons have been given in SOFs by the Master or Supplier, similar to the remarks in the SOF for MV Dubai Guardian, the remarks of the receiver MMTC have prevailed.

The stand which the Respondent took prior to the dispute having arisen was the correct view on the analysis of the SOF and on that basis the accounts with the foreign suppliers were settled. It was rightly admitted that despatch has been earned by the Claimant on 28 vessels with one vessel on CQD basis and two on demurrage. After having correctly come to a rightful conclusion, the Respondent was not at all justified in taking a different stand on the basis of the remarks of higher authorities, particularly when the Respondent withheld the vital and relevant information as regards the account position with the foreign supplier.”

(emphasis is mine)

30.12 Thus, while the submission on behalf of the petitioner that the Arbitral Tribunal had taken the information contained in the Minutes of Meeting dated 22.11.2006 and 23.11.2006 with respect to 27 vessels is correct, the other submission that it had erroneously not taken into account the information contained in the very same minutes *vis-à-vis* the four vessels including the subject vessels, in my view, is misconceived. The reason is apparent from the discussion of the Arbitral Tribunal extracted hereinabove. It is the petitioner's officer who had carried out the analysis of the SOFs in the first instance. Therefore, in order to justify the turn around it was incumbent upon the petitioner to place on record the relevant information. The failure

on the part of the petitioner to produce relevant information left the Arbitral Tribunal with no choice but to analyze the material which was placed before it and reach a conclusion based on its appreciation of evidence.

30.13 I find nothing erroneous in view or the methodology adopted by the Arbitral Tribunal. The Arbitral Tribunal, in my view, was right in drawing an adverse inference against the petitioner, in view of the fact that it withheld vital information.

30.14 In my view, the initial onus lay on the petitioner to demonstrate that a settlement had been arrived at with the foreign supplier in terms of the Minutes of Meeting dated 22.11.2006 and 23.11.2006. Since, it failed to do so, it necessarily had to be held and which is what the Arbitral Tribunal held, that qua the subject vessels the respondent had earned despatch.

30.15 I must indicate that during the course of arguments it was sought to be suggested that something was amiss as Mr. P.K. Chaki, who had dispatched the communication 28.11.2006 had retired on 30.11.2006. This may have been coincidental and therefore, such suggestion would have to be rejected as it unnecessarily has the portents of besmirching an Officer's reputation without tangible evidence. Peculiarly, no such averment has been made in the petition filed under Section 34 of the 1996 Act.

31. While I am on claim No.2, I must deal with other objections raised with regard to the amount awarded under this claim. The first

objection taken is that the amount ought not to have been awarded in USD. The second objection raised is that the interest awarded qua this claim should have commenced from 02.07.2012, when the second SOC was lodged, in which, for the first time, a claim under this head was made in the USD. The third objection taken is that the interest should have been given on the basis of libor and not at the rate of 12% per annum.

32. Insofar as the first objection is concerned, in my view, a perusal of the material placed before the Arbitral Tribunal including the Minutes of Meeting dated 22.11.2006 and 23.11.2006 would show that despatch and demurrage were calculated in USD. The fact that the respondent in the first SOC had quantified the amount in INR would not, to my mind, prevent the respondent from claiming the amount in USD. Furthermore, a perusal of Clauses 2.6.1 and 2.12.1, referred to on behalf of the petitioner in support of this objection, would show that these clauses relate to the service charges payable by the petitioner and the bank guarantee to be given by the respondent. These clauses, as rightly argued on behalf of the respondent, have nothing to do with the calculation of despatch and demurrage. It is also important to point out that in the SOD, the petitioner did not raise this objection before the Arbitral Tribunal. The objection that claim No. 2 has been quantified in USD has been raised for the first time in the Section 34 petition. To my mind, as indicated above, this objection has no merit and is, accordingly, rejected.

33. Insofar as the payment of interest from 09.09.2010 is concerned, according to me, it is in consonance with what is stated above, which is that the Arbitral Tribunal was well within its power to grant interest from 09.09.2010, when the first SOC was lodged as surely cause of action had arisen on that date if not prior point of time. A perusal of Section 31(7)(a) would show that unless there is a contract to the contrary, the Arbitral Tribunal is empowered to grant pre-award interest, *albeit*, at a reasonable rate. Undoubtedly, the period spanning between 09.09.2010 and 02.07.2012, when the second SOC was lodged, would fall within the period prescribed under Section 31(7)(a). Therefore, this objection being without merit, in my view, cannot be sustained.

33.1 As regards the objection taken that the Arbitral Tribunal should have granted interest on the basis of libor and not at the rate of 12%, one can only say, this objection, if at all, had to be raised before the Arbitral Tribunal. What is even more surprising is that the petitioner has not taken this objection even in the grounds mentioned in the instant petition i.e., the Section 34 petition. Therefore, this objection, which is advanced across the bar, cannot be entertained by the Court while exercise powers under Section 34 of the 1996 Act.

33.2 While on the issue at hand, I may also advert to one other aspect (which was, once again, put forth across the bar by Mr. Sanat Kumar) as to the applicable exchange rate. In my view, this is an aspect which the Executing Court will examine, if it reaches that stage having regard to the applicable law on the issue. As correctly contended by

Mr. Virmani, the judgment debtor, if it happens to be the petitioner, could offer to pay the amount in Indian rupees and the conversion rate, which would apply would be the rate which is prevalent on the date of the decree.

Claim No.3

34. This is a claim where the Arbitral Tribunal has directed the petitioner to refund to the respondent the bank charges incurred for extension of bank guarantee to the tune of Rs.17,46,576.27-. The objection on behalf of the petitioner is that no material was put on record before the Arbitral Tribunal, which would have established that the respondent had, in fact, defrayed amounts to the extent awarded under claim No.3.

35. A perusal of Clause 2.12 would show that the respondent was required to furnish security-cum-performance bank guarantee in the sum of Rs.2.5 crores during the contract period. The record also shows that the contract was performed between the period spanning from May-June, 2005 till January, 2006. The record further indicates that the respondent did extend the subject bank guarantee eleven (11) times (see: Ex.CW-2/R-1 to Ex. CW-2/R-12). The first extension took place on 23.01.2007 while the last extension was obtained on 24.02.2009. A perusal of the second SOC would show that an assertion to the same effect has been made by the respondent in paragraph 12 of the second SOC. The respondent's witness, Mr. P.K. Banerjee (CW-1), in paragraph 10 of his affidavit of evidence had made a similar assertion. The petitioner in paragraphs 10 & 12 of its

SOD, apart from making a bald assertion that the quantum of the bank charges claimed by the respondent are disputed, took the plea that since it had furnished a counter bank guarantee to NTPC, the said bank guarantee would not be released till its counter bank guarantee is released. In other words, according to the petitioner, extension of the subject bank guarantee was necessitated on this score. Furthermore, a perusal of the cross-examination of the respondent's witness Mr. P.K. Banerjee (CW-1) on the issue of extension of subject bank guarantee would reveal that no question was put to him with regard to quantum of bank charges. The same is evident upon a perusal of the following extracts from the testimony:

"...I am aware of the fact that the respondent had given bank guarantees to NTPC. It is correct that NTPC was not releasing the bank guarantees initially but later on, NTPC has not only released bank guarantee but settled all dues of the MMTC. I cannot say when NTPC released the bank guarantee and settled the dues of the respondent. However, I can state that in one of the letters dated 4th March 2010, the Respondent admitted that all claims including the return of bank guarantee were settled with NTPC....."

35.1. The Arbitral Tribunal in respect of claim No. 3 has made the following observations:

"...The bank guarantee was furnished in accordance with the terms of the contract as provided in clause 2.12. The amount of the bank guarantee had to be released by the Respondent on conclusion of the contract by the Claimant. It is not disputed that the contract stood concluded. The amount ought to have been paid by 2nd June, 2009 but on the Respondent's direction the bank

guarantee had to be kept renewed by the Claimant from time to time, which it was not required to do. This resulted in the claimant incurring bank charges which otherwise were not payable. The Claimant is held entitled to recover this amount of the Bank charges...”

35.2 Given the fact that the respondent had made the necessary pleadings and followed it up with oral evidence with regard to the quantum which was not questioned in the cross-examination, the Arbitral Tribunal's conclusion in that behalf cannot be faulted with. The submission to the contrary, advanced on behalf of the petitioner is, consequently, rejected.

Claim No.4

36. This claim relates to grant of *pendente lite* and future interest by the Arbitral Tribunal. As noted at the beginning of my narration, the Arbitral Tribunal has granted interest at the rate of 12% per annum in respect of amounts awarded under claims No. 1 to 3. The period for which *pendente lite* interest has been awarded spans from 09.09.2010 till the date of the Award (i.e. 07.01.2017) at the rate of 12% per annum. As regards future interest, once again, the rate awarded is 12% per annum on the sum directed to be paid including the component of interest, *albiet*, from the date of Award till the date of payment. In this behalf, the Arbitral Tribunal has relied upon the judgment of the Supreme Court in ***Hyder Consulting U.K. Limited Vs. Governor of State of Orissa***, (2015) 2 SCC 189.

36.1 I find no error either, firstly, with regard to the period for which interest has been granted as the first SOC was lodged, *albeit*, with the ICA on 09.09.2010. As indicated above, the Arbitral Tribunal has the necessary powers vested in it to award pre-award interest under Section 31(7) (a) of the 1996 Act at a reasonable rate unless there is a contract to the contrary.

36.2 I have not been shown any provision obtaining in the June, 2005 Agreement which would prohibit the grant of interest or specify a rate of interest other than the rate at which the Arbitral Tribunal has awarded. As to whether 12% per annum is reasonable rate of interest, in my view, would draw the Court in a Section 34 petition into an area where discretion vests with the Arbitral Tribunal. The Arbitral Tribunal comprises persons who have had vast experience in the field of adjudication being former Judges. The rate of interest awarded is in no way usurious and, therefore, cannot be interfered with, except where a litigant is able to show that the rate of interest awarded was way beyond the rates which were generally granted by Courts during the period in issue. Nothing of this kind has been shown by the learned counsel for the petitioner.

36.3 Insofar as future interest is concerned, the same rationale would apply. Though, Section 31(7)(b) read with the Explanation says that unless the Award otherwise directs the sum directed to be paid by the Arbitral Tribunal shall carry interest at the rate of 2% higher than the current rate of interest prevalent on the date of the Award, nothing was placed before the Arbitral Tribunal or before me to demonstrate that

the interest awarded was beyond the rate prescribed under the said provision. As a matter of fact, no argument qua the rate of interest being unreasonable was raised before the Arbitral Tribunal. The respondent, in fact, had claimed in the second SOC both *pendente lite* and future interest at the rate of 24% per annum.

36.4 Given these circumstance, in my view, no fault can be found with the future interest awarded by the Arbitral Tribunal.

36.5 Notably, no objection *vis-à-vis* the rate of interest was taken by the petitioner in the SOD.

37. Insofar as the last aspect is concerned, which is award of Costs by the Arbitral Tribunal, the objection taken by the petitioner is that the Arbitral Tribunal without quantifying the costs, in paragraph 8 of the impugned Award simply concludes that the respondent is entitled to full costs of the arbitral proceedings.

37.1 It was argued on behalf of the petitioner that in the first SOC, the respondent had quantified the litigation expenses as Rs.2 lacs and that in the second SOC they were enhanced to Rs.25 lacs. Furthermore, it was pointed out that, though, the Arbitral Tribunal on 18.05.2016 (when it had reserved the matter for rendering the Award) directed the parties to file bill of costs, the respondent had not complied with this direction.

37.2 In sum, the argument advanced on behalf of the petitioner was that the Arbitral Tribunal could not have ruled that full costs should be

awarded to the respondent. On behalf of the petitioner, it was further pointed out that after the Award was reserved, the respondent, via the legal notice dated 15.02.2017, had demanded from the petitioner costs in the sum of Rs.1,10,89,479/-.

37.3 On the other hand, on behalf of the respondent, it was contended that the aspect of costs could be examined at the time of execution of the Award. The argument was that this aspect cannot form the subject matter of a Section 34 petition. Without prejudice to this contention, it was submitted that the Executing Court could award the full costs amounting to Rs.25 lacs as claimed in the second SOC by the respondent if the claim via legal notice dated 15.02.2017 was thought to be excessive.

37.4 In my view, on this score, the respondent's submission is flawed and cannot be accepted. The Arbitral Tribunal under Section 31(8) read with Section 31A was required to quantify the costs. It is precisely, for this purpose that the Arbitral Tribunal on 18.05.2016 had directed the parties to submit their bill of costs. The respondent, for some reason, chose not to submit its bill of costs. Therefore, the Arbitral Tribunal, to my mind, had no material, whatsoever, based on which it could have directed payment of full cost to the respondent. Ordinarily, I would have remitted the matter to the Arbitral Tribunal under Section 34(3) of the 1996 Act for dealing with this aspect of the matter, however, given the fact that the respondent chose not to file the bill of costs, despite opportunity having been granted in that behalf, I am not, at this stage, inclined to remit the matter to the

Arbitral Tribunal on this score. Therefore, qua this aspect, the petition is allowed. The Arbitral Tribunal's direction that full costs should be paid to the respondent is set aside.

38. Before I conclude, I must indicate that the judgment cited by the learned counsel for the petitioner in the matter of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., Associate Builders V. Delhi Development Authority, Rajasthan State Industrial Development Vs. Diamond & Gem Corporation Limited & Anr* and *K.P. Poulose Vs. State of Kerala & Another*, enunciate principles of law with which one cannot but agree. However, in view of the facts and circumstances obtaining in this case, I can only say that the Arbitral Tribunal has awarded claims in favour of the respondent bearing in mind the terms of the contract which defines, like in every other case, the periphery of its jurisdiction within which it is bound to operate contrary to what has been stated by the learned counsel for the petitioner. For the reasons given above, I am of the view that the Arbitral Tribunal has not ignored any material document or even taken into account irrelevant matters.

38.1 Insofar as the judgment in the case of *Sanjeev Kumar Jain Vs. Raghubir Saran Charitable Trust & Anr* is concerned, I have already taken into account the principles set forth therein.

38.2 Insofar as the petitioner's own case is concerned, that is, the judgment of the Division Bench of this Court in *MMTC Vs. Al Bamar Company Ltd.*, on the issue of grant of interest on the basis of *libor* I

can only say that in the instant case, the objection has been raised on behalf of the petitioner across the bar. The petition under Section 34 of the 1996 Act raises no such ground. The petitioner has not impugned the grant of interest *vis-à-vis* claim No.2 on the ground that it ought to have been awarded on the basis of libor and not at the rate of 12% per annum, as is awarded by the Arbitral Tribunal. Therefore, the said judgment in the facts of the instant case will not apply.

39. Section 34 petition is sustained only with respect to the objection *vis-à-vis* the grant of costs to the respondent. As regards all other aspects, the impugned award is upheld. The petition is disposed of in the aforesaid terms. There shall, however, be no order as to costs.

RAJIV SHAKDHER, J

OCTOBER 31, 2018
pmc/a