

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

+ **O.M.P. (COMM) 17/2017**

Reserved on: 12.10.2018
Date of decision : 22.01.2019

TELECOMMUNICATION CONSULTANTS INDIA LTD

..... Petitioner

Through: Mr.Ratan Kumar Singh,
Ms.Priyanka Solanki & Mr.Suraj
Prakash, Advs.

versus

NEXT GENERATION BUSINESS POWER SYSTEMS LTD

..... Respondent

Through: Mr.T.S. Ahuja & Mr.Varun S.
Ahuja, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 23.08.2014 passed by the Sole Arbitrator (hereinafter referred to as 'Impugned Award').

2. The Impugned Award allowed the claims of the respondent *inter alia* towards amounts withheld by the petitioner as deductions, unpaid amount for the last quarter of the Contract period, dues for duration after the contractually stipulated date of completion as well as reimbursement for Bank Guarantee encashed and release of Assured Bank Guarantee, with interest @ 15.5% p.a.

3. The disputes between the parties are in relation to the Agreement dated 18.04.2002 for providing sub-consultancy to the petitioner for Third Party Inspection of the Gujarat State Wide Area Network ('GSWAN') including Performance Level Monitoring and Reporting.

4. The Government of Gujarat (GoG), to set up a State Wide Area Network so as to modernise the communication system of the Government as well as to improve Intra-Government and Government - Citizen interfaces, entered into a Concession Agreement dated 01.03.2001 with 'Gujarat Online Pvt. Ltd'. Clause 4.2 of the Concession Agreement provides for appointment of a Third Party Agency by the GoG to monitor the GSWAN during implementation, commissioning and operation.

5. In terms of the aforesaid Clause 4.2, the GoG entered into an Agreement dated 15.03.2002 with the petitioner for providing Third Party Inspection for its GSWAN Project. The petitioner thereafter, appointed the respondent as a sub-consultant for the Third Party Inspection of GSWAN vide Letter of Intent dated 11.04.2002 and formal Agreement dated 18.04.2002 (hereinafter referred to as 'Agreement'). The term of the Agreement was 8 years, till 14.04.2010.

6. In terms of the aforesaid Letter of Intent, the respondent furnished Performance Bank Guarantee dated 30.04.2002 for Rs. 14,00,000/- as well as an Assurance Bank Guarantee dated 09.05.2002 towards advance payment made to the respondent.

7. The Agreement provided for payment in form of Equal Quarterly Payment Charges of Rs. 35,00,000/- to be made for 32 quarters over the period of 8 years. 10% of the payment was payable to the respondent as advance, and was deductible on pro-rata basis every quarter, with 12% interest on reducing balance of advance.

8. Schedule 1 (Schedule of Remuneration) of the Agreement between the parties reads as under:-

“SCHEDULE-I : SCHEDULE OF REMUNERATION

M/s NGBPSL SERVICE CHARGES

M/s NGBPSL will charge the following as the sub-consultancy fee for Third Party Inspection of the Gujarat State Wide Area Network.’

A) *Equal Quarterly payment charges (for a period of 8 years or 32 quarters)*

<i>Amount in Figure (Rs.)</i>	<i>Amount in words (Rs.)</i>
<i>Rupees 35,00,000.00</i>	<i>Rupees thirty five lakhs only</i>

Terms and Conditions

- *10% advance payment to be adjusted on pro rata basis every quarter.*
- *TCIL will provide service Tax numbers and other details to NGBPSL.*
- *Payment will be governed as per clause 11 (payment terms) of this agreement.*
- *NGBPSL will commence the project with in 30 days from signing of the agreement.”*

9. Clause 11 of the Schedule IV (General Terms and Conditions) of the said Agreement pertains to the payment terms and is reproduced hereinbelow:

“11. PAYMENT TERMS

Guaranteed Revenue Payment as per schedule I

Bills shall be raised and sent to GGM (NW&TC), TCIL for certification and payments.

As consideration for implementing the terms of this agreement and providing satisfactory service to TCIL and its user organisations the NGBPSL shall be paid guaranteed Revenue on quarterly basis as specified in the schedule-I. At the end of each quarter after adjusting 10% advance payment on pro-rata basis in 32 (thirty two) quarterly instalments together with interest.

The advance paid in terms of schedule-I of this agreement shall bear an interest of 12% on reducing balance of advance.

The NGBPSL's request for payment shall be made at the end of each quarter on submission of invoices along with the following supporting documents and on receipt of payment by TCIL.

- a. Performance statistics*
- b. Log of network parameters along with Service Down time calculation and Uptime percentage.*
- c. Any other document necessary in support of the service performance acceptable to GoG.*
- d. As sub-consultant NGBPSL is not liable for service tax payment. The same shall be accounted by TCIL.*
- e. The TCIL would submit its bill based on sub-consultant quarterly bill to GOG with in a week and payment to NGBPSL shall be released with in a week of receipt of TCIL payment from GOG.*
- f. If TCIL fails to make the payment required by this Agreement when due, the underpayment shall bear Interest rate plus 350 basis points from the Due Date of Payment until the date of payment in full. If the Due*

Date of Payment falls on Sunday or holiday, the next business day shall be the last day on which payment can be made without interest charges being assessed.

- g. The currency of payment shall be Indian Rupees.*
- h. TCIL will bear the consequences of any change in taxes or laws if the same are admitted by GOG.*
- i. Income tax at source if deductible shall be deducted by TCIL and TDS certificate shall be provided to NGBPSL.”*

10. The Agreement in Schedule II provides for documents deemed to be forming part of the Agreement which included *inter alia* the Bid Document and the Concession Agreement of GSWAN, the relevant correspondence between the parties, as also the Agreement between the GoG and the petitioner dated 15.03.2002.

11. Schedule III thereof provides for the scope of work to be covered by the respondent. The same is reproduced below:

“SCHEDULE-III

SCOPE OF WORK

- 1. To assist TCIL in overseeing the Operational performance of the GSWAN in accordance with the technical and operational requirements prescribed in the Concession Agreement signed between GOG and the Operator. Suitable Software/hardware tools should be procured and commissioned for performing NETWORK PERFORMANCE SERVICE LEVEL MANAGEMENT.*
- 2. To assist TCIL in monitoring the network on regular basis and coordinate with the Operator for resolution in the event of any problem.*
- 3. To assist TCIL in co-ordinating with Telecom department to provide uninterrupted leased lines for proper communication.*
- 4. To assist TCIL in providing regular MIS reports relating to the uptime, downtime on weekly, monthly and Quarterly basis.*
- 5. To assist TCIL in Certifying the Network Availability for various activities based on the agreed parameters. This*

certificate has to be provided on Quarterly basis on which the Quarterly Guaranteed Revenue would be released to the Operator.

- 6. To assist TCIL in Designing /Procure, Supply, install, Commission and manage the NETWORK PERFORMANCE SERVICE LEVEL MANAGEMENT (NPSLM) software, including all programs needed to deliver all functionality as specified in the technical specifications in GoG's Bid Document No.GSWAN/TPI/2001-2/ITD/03 dt. 26/12/2001.*
- 7. The scope of work will focus on deploying establishing and managing (including reporting, certifying, etc.) a fully functional PMLM, TCIL/GoG should be able to utilize the above functionalities for:*
 - a) Discovering Elements*
 - b) Ensuring accurate element information*
 - c) Organizing elements into groups*
 - d) Scheduling regular reports on those elements*
 - e) Making available the reports to internal users as well as customers via its web interface.*
 - f) Ensuring reports generated would be able to address the needs of different level of users/audience.*
 - g) Ensuring that the Web interface would be able to provide a comfortable level of information access security.*
- 8. The sub consultant to Third Party Agency (TPA) shall also undertake Inspection, Verification & Acceptance of the Goods and services related to GSWAN/SCAN and SICN networks or any other IT Network belonging to the State and certify the invoices for the same as desired by the TCIL from time to time. TCIL shall provide the relevant documents.*
- 9. The sub consultant shall also be responsible for forecasting on the traffic congestion in the network and shall advice TCIL in time for undertaking necessary up-gradation of bandwidth in order to optimise the resources and services.*
- 10. Sub consultant shall also advice TCIL on human resource developmental requirement and advice on the training modules for various categories of the officials in the administration.”*

12. Schedule IV of the Agreement provides for the General Terms and Conditions, two of the relevant terms whereof are mentioned hereinbelow:

“9. NGBPSL shall fulfil the roles and responsibilities stated in the agreement signed between TCIL & GOG related to providing third party inspection for the GSWAN project in addition to the terms and condition stated above.

xxxxx

15. *Transfer of Title*

On termination of agreement/service or at the end of 8 years, the sub consultant will transfer, without any liability, all Hardware, Software, Manuals, titles and any other related works to TCIL.”

13. During the term of the Agreement, the respondent purchased and installed the Network Monitoring Software for GSWAN, namely “e-Health Suite System”, from M/s Concord, a company based in USA, and later upgraded/purchased software in 2007 from its successor M/s Computer Associates (CA).

14. For the services rendered by the respondent, full payments were received by it until the 20th quarter, however, from the 21st quarter upto the 31st quarter, that is, between 15.04.2007 to 14.01.2010, deductions were made by the petitioner from the amounts payable. The respondent was also not paid any amounts for the last quarter of the Agreement, the 32nd quarter.

15. The petitioner justified the deductions on the ground that the same were made due to penalty levied on the petitioner by the GoG and due to disputes with respect to failure to monitor the e-Health Suite Software,

conduct proper and sufficient field visits, satisfactory monitoring and supervision of network, provide sufficient manpower deployment, update the e-Health Suite Software and maintain the license thereof.

16. Upon the termination of the Agreement on 14.04.2010, another Third Party Agency, namely M/s PCS Technology Limited was appointed by the GoG to take over project work. Accordingly, in pursuance of a meeting held with the GoG on 23.04.2010, vide letter dated 30.04.2010, the petitioner directed the respondent to continue deploying technical members/existing staff to support M/s PCS Technology Limited until it takes up the assignment independently. The respondent thereafter extended its Bank Guarantee dated 30.04.2002 upto 29.07.2010.

17. The petitioner, vide letter dated 02.06.2010 wrote to M/s PCS Technology to take over a list of documents under acknowledgment, to facilitate transfer to the new Third Party Auditor. The contents of the letter are reproduced below:

*“Kindly refer to the issue of handing over & taking over of TPA operation from TCIL to PCS. In this context please find attached herewith list of documents along with DVD & 1 CD to be handed over the CD & DVD contain softcopy of all the documents and list of pending works is also attached herewith.
You are requested to kindly arrange for taking over of the said documents & CDs under acknowledgement.”*

18. The respondent thereafter raised its Invoice dated 14.07.2010 on account of sub consultancy charges of Rs.35,00,000/- for 33rd quarter

beyond the duration of the Agreement, for the period from 15.04.2010 to 14.07.2010, however, no payment in this respect was made to the respondent.

19. Disputes arose between the parties, with the petitioner contending lack of a proper handover by the respondent to the new Third Party Agency, in as much as the respondent did not transfer and/or surrender all software, hardware, manuals, titles and any other related work pertaining to the e-Health software. The respondent on the other hand, claiming that the handover formalities have been duly fulfilled, demanded payments for the work executed.

20. In this regard, the respondent vide its letter dated 26.07.2010 confirmed having transferred the title of software, manuals etc. in compliance with Clause 15 of Schedule IV of the Agreement. The letter is reproduced below:

“We thank you very much for the curtsy extended to us during visit to your office today in continuation to our letter dated 22.7.2010.

In terms of clause 15 of schedule IV of General Terms and Conditions of Agreement dt 18.4.2002 of GSWAN Project of Govt. of Gujarat we confirm that:

“NGBPS transfer all ownership titles of Computer Systems, Servers, Printers, Office furniture's, Air Conditions, Concord/CA E-health suite Software, all records, manuals, media etc to TCIL on completion of Eight years duration of contract which expired on 14.4.2010.

It may be once again mentioned here that Concord/CA e-health software licence was not issued in Physical form hard copy by CA India Technologies Pvt. Ltd. Same is part of the software

which can be checked. We had in the past given to you the print out of the same. This license is valid for indefinite period.”

21. The respondent sought release of its Performance Bank Guarantee and Assurance Bank Guarantee vide letter dated 26.07.2010 on the basis of averred successful takeover of the project by PCS Technology. However, the Performance Bank Guarantee was encashed by the petitioner on 29.07.2010.

22. Disputes having ensued, the respondent filed an Arbitration Petition, being Arb.P. No.282/2010, leading to appointment of the Sole Arbitrator on 09.02.2011, culminating in the Impugned Award.

23. The learned counsel for the petitioner, relying upon Clause 11 of Schedule IV to the said Agreement, submits that the payment was to be released by the petitioner in favour of the respondent only upon receiving the same from the GoG. He submits that this, therefore, was a ‘back to back Agreement’. He submits that admittedly, the GoG had made deductions in the quarterly bills from the 21st to the 31st quarter and withheld the entire amount for the 32nd quarter due to defaults on part of the respondent. As the petitioner did not receive such payment from the GoG, consequently, it could not have been made liable to make such payment to the respondent. Drawing reference to paragraph 18 of the Impugned Award wherein the Arbitrator has held that the words ‘on receipt of payment by TCIL’ in Clause 11 to be ‘apparently out of place’, he submits that the Arbitrator has acted contrary to the terms of the Agreement between the parties and has rewritten the Agreement for which reason the Impugned Award is liable to be set aside.

24. The learned counsel for the petitioner submits that in law, back to back contracts are recognized as valid contracts and in such contracts it is an accepted condition that in case the contractor does not receive payment from the principal employer, the sub-contractor would also not be entitled to claim payment for the work done from the contractor. He places reliance on the following judgments in this regard:

(i) *Siri Ram Syal and Sons (Engineers) Pvt. Ltd. vs. IRCON International Ltd. and Anr.* MANU/DE/1200/2008;

(ii) *S.S.Kapoor vs. National Building Construction Corporation Ltd.,* MANU/DE/0988/2012;

(iii) *Tim Lee Construction Engineering Co. Ltd. vs. KWong Wah trading as Super King Engineering Co.,* Judgment dated 20th April, 2012 passed by the Court of First Instance, High Court of the Hong Kong Special Administrative Region;

(iv) *Interpro Engineering Pte Ltd. vs. Sin Heng Construction Co. Pte Ltd.,* (1997) SGHC 297;

(v) *Timbro Development Ltd. vs. Grimsby Diesel Motors Inc.* 32 C.L.R. 32, Judgment dated 5th May, 1988;

(vi) *James E. Watts & Sons Contractors vs. Nabors* 484 So. 2d 373 (1985), Judgment dated 27.11.1985;

(vii) *DEC Elec., Inc. vs. Raphael Const. Corp.* 558 So.2d 427 (1990), Judgment dated 22.03.1990.

25. Counsel for the petitioner further submits that the Impugned Award having been passed in complete disregard of the terms of the Agreement, is liable to be set aside. For this proposition, he places reliance on the following judgments:

(i) *Rajasthan State Mines and Minerals Ltd. vs. Eastern Engineering Enterprises and Another* (1999) 9 SCC 283;

(ii) Rahtriya Chemicals and Fertilizers Limited vs. Chowgule Brothers & Ors. (2010) 8 SCC 563;

(iii) Amravati District Control Cooperative Bank Ltd. vs. United India Fire and General Insurance Company Ltd. (2010) 5 SCC 294; and

(iv) Steel Authority of India Ltd. vs. J.C.Budharaja, Government and Mining Contractor (1999) 8 SCC 122.

26. Learned counsel for the petitioner further submits that the Arbitrator has failed to appreciate that the amounts were being deducted from the quarterly bills of the respondent because of the failure of the respondent to perform its works in accordance with the terms of the Agreement. Relying upon the respondent's letter dated 27.05.2009, he submits that the respondent itself had agreed to the deduction made on a back to back basis in the quarterly bills for the 21st, 22nd and 24th quarters. The respondent cannot now agitate that no such back to back deduction could be made by the petitioner.

27. As far as the payment for the 32nd quarter is concerned, learned counsel for the petitioner submits that in terms of Clause 15 of Schedule IV of the Agreement, the respondent, on termination of the Agreement or at the end of the period of the Agreement, was obliged to transfer all software to the petitioner. Such transfer could not take place as the respondent had failed to take the Annual Technical Support (ATS) from the proprietor of the software. By the letter dated 17.11.2009, GoG had called upon the petitioner to obtain the ATS in the CA eHealth Suite Software. This was pursuant to the meeting held on 09.11.2009 between the petitioner and the GoG wherein the GoG had observed that in absence

of the ATS for the software, GSWAN Monitoring has been put under great risk. It was further agreed that the GoG will consider release of the withheld amounts subject to *inter alia* petitioner updating network monitoring software by taking ATS.

28. Learned counsel for the petitioner makes further reference to the letter dated 18.01.2010 from the GoG, again complaining about the lack of upgradation of the software and violation of clauses of the Agreement. GoG had also issued a Show Cause Notice dated 17.02.2010. The petitioner, by letter dated 28.01.2010 requested the respondent to take necessary action on the issues raised by the GoG. The respondent by its letter dated 28.01.2010 stated that it has already initiated action for taking the ATS from the proprietor of the software and the same shall be finalized soon.

29. In the meeting held on 23.04.2010, wherein the respondent was also present, it was again emphasized that the petitioner shall update and upgrade the software from 2007 version to the latest version in a week and transfer all the licences in the name of GoG, failing which, the GoG would be entitled to take appropriate action against the petitioner. Learned counsel for the petitioner submits that as the respondent failed to take the ATS and upgrade the software to the latest version, GoG did not release the payment in favour of the petitioner and in turn the petitioner did not release the said payment in favour of the respondent. He submits that the respondent being in default, therefore, was not entitled to the payment.

30. As far as the payment for the extended period is concerned, learned counsel for the petitioner submits that the Contract between the parties was a fixed sum contract and therefore, no additional payment was payable to the respondent. Further, relying upon paragraph 4 of the Minutes of Meeting held on 23.04.2010, he submits that the GoG had stated that it would make the payment for the extended period “subject to approval from TPC of GIL”, and once such payment was not made by the GoG, the same was consequently not paid to the respondent as well.

31. On the other hand, learned counsel for the respondent submits that Clause 11 of the Schedule IV provides for “Guaranteed Revenue Payment” on quarterly basis to the respondent. The same were not in any manner conditional on the petitioner receiving the same from the GoG. He further submits that Clause 11 of Schedule IV further provides that such payment, as a matter of timing, shall be made after receiving the same from the GoG. This stipulation was only regarding the time of making payment and was not meant as a condition for making payment. Relying upon the judgment dated 26.06.1997 of the Supreme Court of California in *WM.R. Clarke Corporation vs. Safeco Insurance Company of America* and the judgment dated 06.03.1996 of the United States Court of Appeals, Second Circuit in *West-Fair Electric Contractors and Anr. vs. Aetna Casualty & Surety Company and Anr.*, he submits that if the Agreement is to be read as providing for payment to the respondent only upon the same being received by the petitioner from the GoG, the said clause would be against the public policy of India. He further submits that in any case, the Arbitrator having interpreted the

Agreement, this Court cannot set aside the Award merely because it would prefer another interpretation and relies on judgment of Supreme Court in *H.P. State Electricity Board vs. R.J. Shah & Co.* (1999) 4 SCC 214 in support of the same.

32. As far as the ATS is concerned, learned counsel for the respondent submits that the petitioner had deducted an amount of Rs.14,64,203/- from the payment for the 31st quarter to the respondent. Having deducted the said amount, the petitioner cannot be heard to complain about the purported failure of the respondent to update the said software. He submits that it was the own case of the petitioner to the GoG that in terms of the Contract, it was not liable to take the ATS from the proprietor of the software. In this regard he makes a reference to the letters dated 03.03.2010 and 29.03.2011 addressed by the petitioner to the GoG. He submits that as far as the transfer of the software is concerned, the same was complete as recorded by petitioner in its letter dated 09.07.2010 and respondent's letters dated 22.07.2010 and 26.07.2010.

33. As far as the extended period is concerned, learned counsel for the respondent submits that the respondent having been made to work for the extended period, has rightly been held entitled to the payment for the same by the Arbitrator.

34. Before I deal with the rival contentions of the counsels for the parties, I deem it appropriate to first reproduce the findings of the Sole Arbitrator in the Impugned Award:

“18. As per letter of intent dated 11.04.2002 the petitioner has been selected as Sub-Consultant to perform Third Party Inspection of GSWAN/SCAN at the rate of quarterly guaranteed payment of Rs.35 lakhs as agreed upon after the negotiation and was called upon to sign the agreement immediately and to start deliverables immediately and also depute engineers for performance. Schedule I of agreement dated 18.04.2002 stipulates that the petitioner will charge Rs.35 lakhs for each quarter as Sub-Consultancy Fee for period of 8 years or 32 quarters and payment will be governed as per Clause 11 (Payment Terms) with the title Guaranteed Revenue Payment as per Schedule, stating the mannerism i.e. the NGBPSL's request for payment shall be made at the end of each quarter on submission of invoices alongwith the supporting documents namely performance statistics, log of network parameters alongwith Service Down time calculation and Uptime, percentage and any other document necessary in support of the service performance acceptable to GoG, on the basis of which TCIL will submit bill to GoG within a week and payment to the petitioner shall be released within a week of receipt of TCIL payment from GoG. Insertion of words "on receipt of payment by TCIL" in this fourth sub para of Clause 11 is apparently out of place, as this sub-para mentions about request to be made by the petitioner for payment on submission of invoices alongwith the supporting documents which are detailed thereunder. This nowhere says that payment to the petitioner is subject to receipt of payment by TCIL from GoG. The words “on receipt of payment by TCIL” cannot be read as ‘only on’ or ‘if only’ payment is received by TCIL.” Use of term "Guaranteed Payment" in letter of intent and the agreement specifies the intention of the parties and it is nowhere linked with, nor made subject to the payments to be received by TCIL from GoG, except laying down time limit within which TGIL is to release payment to the petitioner. One is not to read words which are not there in the agreement between the parties. Section 28(3) of the Indian Arbitration and Conciliation Act 1996 mandates that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract between the parties. The contract

dated 18.04.2002 entered into between the parties does not make release of guaranteed revenue payment to the petitioner subject to receipt of payment by the respondent from its principal. Adding the term 'Guaranteed' to the payment clause in the agreement between the parties has to be given its due meaning / import.

19. It is pertinent to note that the petitioner is not party to agreement between the respondent and its principal and though the agreement between them has been made part of agreement between the parties, despite that the agreement dated 18.04.2002 between the parties to this case lays down specific stipulations in this regard which will govern the rights and obligations between the parties and will have over-riding effect over terms on the point if any between the respondent and its principal.”

35. A reading of the above finding would clearly show that in the opinion of the Arbitrator, the words, ‘on receipt of payment by TCIL’ cannot be read as ‘only on’ or ‘only if’ payment is received by TCIL. The Arbitrator further holds that adding the term ‘Guaranteed’ to the payment clause in the Agreement between the parties has to be given its due meaning / import and specifies the intention of the parties and the same is not linked with nor made subject to payment to be received by TCIL from the GoG.

36. In ***Timlee Construction*** (supra), the High Court of Hong Kong was interpreting an Agreement providing for ‘back to back payment’. The Court held that the interpretation of any term used in a particular contract must depend on the circumstances in which the Agreement is made. ‘Back to back payment’ does not have a particular meaning commonly used in the trade and therefore, there is no applicable principle of law to

favour one interpretation over the other. Ultimately, the task of the Court is to ascertain, objectively, what the parties had meant by the use of that expression in the circumstances of the Agreement. Having said so, the Court thereafter interpreted the said term in the factual background of that case. This judgment clearly shows that there is no fixed interpretation to the terms used in the Agreement and, keeping in view the circumstances in which the Agreement is made and depending upon the intent of the parties, the words can mean either the time for payment or the entitlement to payment.

37. In *Interpro Engineering* (supra), the Court construed Clause 7 involved therein to mean that the plaintiffs therein are not entitled to any progress payments unless such payments are received by the defendants from the principal employer.

38. In *Timbro Developments Ltd.* (supra), the Court again interpreted Clause 8(a) involved therein to mean the condition governing the contractor's legal entitlement to payment and not merely the time of payment.

39. In *James E. Watts* (supra), a similar conclusion was reached by the Supreme Court of Alabama.

40. In *DEC Elec.* (supra), the Court again emphasised that if the issue of contract interpretation concerns the intention of the parties, that intention may be determined from the written contract. If a provision is clear and unambiguous, it is interpreted as setting a condition precedent to the general contractor's obligation to pay. If a provision is ambiguous,

it is interpreted as fixing a reasonable time for the general contractor to pay. In purported risk shifting provisions between a contractor and sub-contractor, the burden of clear expression is on the general contractor.

41. A reading of the above judgments that have been relied upon by the counsel for the petitioner would clearly show that though it is a matter of interpretation of a particular clause to determine whether the clause in the Agreement provides for a condition for payment to the sub-contractor or merely fixes a time for such payment, the clauses prescribing that the payment shall be made to the sub-contractor on receipt of the same from the principal employer have been interpreted as prescribing a sub-contractor's entitlement to receive payment and not the time for payment.

42. A similar interpretation has been accepted by this Court in *S.S.Kapoor* (supra) and *Siri Ram Syal and Sons* (supra) holding that in a back to back contract, unless it is shown that the contractor has received a claim from the principal employer, no claim of the sub-contractor could be awarded by the Arbitrator.

43. In the present case, Schedule I prescribed a fixed quarterly payment to be made by the petitioner to the respondent. It was in that light that Clause 11 of Schedule IV uses the term 'Guaranteed Revenue Payment as per Schedule I'. Clause 11, however, in no ambiguous terms further goes on to state that the petitioner would submit its bills based on sub-consultant (respondent) quarterly bill to GoG and payment to the respondent shall be released 'within a week of receipt of TCIL payment from GoG'. Such clause, therefore, can only mean that the respondent

would be entitled to receive payment from the petitioner only if and when the petitioner receives the payment from GoG.

44. It is to be noted that the respondent was to submit supporting documents like performance statistics, log of network parameters and any other documents necessary in support of service performance acceptable to GoG. Therefore, payment to petitioner was clearly dependant on the satisfactory services rendered by the respondent and, in turn, the payment to the respondent from the petitioner was dependant on the petitioner receiving such payment from GoG.

45. In terms of the above referred judgments, therefore, the respondent was not entitled to receive payment incase, for some dispute, the petitioner does not receive such payment from the GoG.

46. I cannot agree with the submission of the learned counsel for the respondent that any such clause would be against the public policy of India. In private realm, the parties have the freedom to contract and make bargains for themselves. As a matter of such bargain, one party may assume the risk of a particular situation. The same, however, would not make such contract contrary to the public policy of India or void on any other ground.

47. The submission of the learned counsel for the respondent that the Arbitrator having interpreted the Contract in a particular manner, this Court cannot interfere with the same, though is a correct principle of law, however, in the facts of the present case, cannot come to the aid of the respondent. The Arbitrator in reaching the above conclusion has held

that the words ‘on receipt of payment by TCIL’ are out of place. However, the Arbitrator fails to note that these words are used at two places in Clause 11 of the Schedule IV to the Agreement and, therefore, cannot be said to be superfluous. In construing a contract, all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus. In general, each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the document, with the result that there is a presumption against redundant words. **(paragraph 7.03 of the Interpretation of Contracts by Sir Kim Lewison).**

48. In *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Anr.* (2018) 11 SCC 508, the Supreme Court reiterated that normally a contract should be read as it reads, as per the express terms:

“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any “implied term” but from the collection of clauses, come to a

conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”

49. In ***Steel Authority of India Ltd.*** (supra), the Supreme Court had highlighted that in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the Arbitrator ignores it and awards the amount despite the prohibition in the Agreement, the Award would be liable to be set aside.

50. In ***Rajasthan State Mines & Minerals Ltd.*** (supra), the Court reiterated that where there is no question of interpretation as the language of the contract is absolutely clear and unambiguous, by ignoring such terms the Arbitrator would have travelled beyond his jurisdiction and the Award would be liable to be set aside.

51. In ***Rashtriya Chemicals and Fertilizers Ltd.*** (supra), the Court held that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties.

52. In ***Amrawati District Central Cooperative Bank*** (supra), the Supreme Court held where the interpretation put by the Arbitrator on the contractual terms is contrary to the expressed words of the contract, the Award would be liable to be set aside.

53. In the present case, apart from the unambiguous words used in the Agreement itself, even from the conduct of parties, it is evident that the parties considered Clause 11 to be a condition of payment and not merely

a time for payment. In this regard reference can be drawn to respondent's letter dated 27.05.2009, which is reproduced hereinunder:-

“This is further to our letter of 18th April, 2009 regarding wrongly deducted amounts from our bills. We would like to draw your attention that TCIL has deducted excess amount in contrary to our agreement Dt. 15.04.2002 provisions.

We find that GOG has with held amounts from 21, 22& 24 Quarter bills as under on Third party Inspection work. As our agreement with TCIL is back to back as per TCIL/GOG agreement same percentage of amount can be with held from us also as per our contract amount & therefore excess amount deducted may please be reimbursed to us.

<i>Quarter</i>	<i>Quarterly TCIL-GOG Contract Amt. Deducted (Rs.)</i>	<i>% With Held</i>	<i>Amount with Held A (Rs.)</i>	<i>NGBPS TCIL Contract Amount (Rs.)</i>	<i>% with held</i>	<i>NGBPS Amount with held B (Rs.)</i>	<i>Excess Deducted A-B(Rs.)</i>
21	44,18,450	4%	1,76,738	35,00,000	4%	1,44,000	36,738
22	44,18,450	4%	1,76,738	35,00,000	4%	1,44,000	36,738
24	45,22,770 (Inc. taxes)	5%	2,26,139	35,00,000	5%	1,75,000	51,139
						<i>Total</i>	<i>1,24,615</i>

We shall also request to reimburse interest of Rs.8,349/- wrongly deducted in part payment of Rs.10,00,000/- against 26th Quarter. It may be mentioned here that a TCIL has received the payment of 26th Quarter from GOG and deposited the cheque in TCIL's account on 18th March, 2009 itself. Therefore our full payment for the quarter has become due for payment on 18th March, 2009. The Payment should have been made in full by 25th March, 2009. But we were released Rs.10,00,000/- in part on 24th March, 2009.”

(Emphasis supplied)

54. The above letter is a clear acknowledgment of the respondent that the Contract was on a back to back basis and that the petitioner was entitled to withhold amounts payable to the respondent incase such amounts are withheld by GoG from the petitioner. The Arbitrator has clearly not made any reference to the said document while interpreting Clause 11 and has clearly misinterpreted the Contract between the parties as one prescribing the time for making of the payment as against the entitlement of the respondent to receive such payment.

55. Even otherwise, as far as the deductions made by the petitioner from the quarterly payments of the respondent from the 21st quarter till the 31st quarter are concerned, the same are spread over a period starting from 15.04.2007 to 14.01.2010. As noted above, in the letter dated 27.05.2009, the respondent had sought reduction in the deduction of the amounts made by the petitioner from its quarterly bills. It is not shown whether the respondent contemporaneously protested against the deductions made by the petitioner in the other quarterly payments. Even the Arbitrator has not referred to any such contemporaneous protest letters in his Award. In absence of such protest, the respondent is deemed to have accepted such deductions from the quarterly payments made to it. On the other hand, the counsel for the petitioner has drawn my reference to various letters addressed by the GoG to the petitioner making complaints on the performance of the work during the relevant period.

56. The Arbitrator has further held as under:

“22. In the case under consideration, though on receipt of show cause notices from its principal GoG, the respondent, has communicated the same to the petitioner for compliance and sometimes also issued show cause notice but it ultimately forwarded the explanation/justification given by the petitioner to GoG, meaning thereby it agreed with the same. Vide its letter dated 31.08.2009 written to GoG, the respondent has explained why deductions should not have been made from Quarters no. 21st to 28th, adopting the same stand which has been taken by the claimant, and requested for releasing all the deductions made from the quarterly payments. Similarly in reply to office order of GoG dated 17.07.2012 not to release the withheld amount, the respondent sent reply disputing the grounds for withholding/forfeiting the amount from Quarterly payments on the same grounds which is the case pleaded by the claimant. From the correspondence placed on record, it is evident that the respondent had adopted the stand taken by the claimant against show cause notices issued by GoG, which means that the respondent was satisfied with the services rendered by the claimant and accordingly informed its user organization. And it is also evident from its letter dated 29.03.2011 written to GoG even, after expiry of the contract period and even after disposal of ARB. P. 282/2010. The respondent never imposed any penalty or compensation on the petitioner and never sought to terminate its contract which ran its full length of 8 years and even beyond.

Sh. Raj Kumar Gupta A.R. of the respondent in his Additional Affidavit dated 08.05.2012 has testified that the contractual arrangement between the parties being back to back, the respondent had to and was playing a role of intermediary and was communication channel between the client i.e. GoG and the subconsultant claimant and used to write letters to the claimant to convey the issues/deficiencies in service raised by the client and reply to GoG based on and in line

with the replies sent by the claimant, as is evident from Ex. RW1/19 (Colly). Ld. Counsel for the respondent has argued that the respondent forwarded explanation of the petitioner to GoG to get the maximum amount from GoG as far as possible and in turn to release payment to the petitioner and it was a back to back contract. All this however will not entitle the respondent to withhold amounts from the Quarterly Payments Guaranteed to the petitioner without resorting to procedure stipulated in Terms 3, 4, 6 of Schedule-IV agreed to between the parties vide agreement reduced to writing on 18.04.2002.”

57. The Arbitrator, therefore, has held that the petitioner never invoked Clauses 3, 4 and 6 as also Clause 14 of Schedule IV of the Contract for purposes of levying penalty or terminating the Contract on account of the failure of the respondent to perform the work in accordance with the terms of the Agreement and is therefore, not entitled to make the deductions from quarterly payments due to the respondent. In my view the same was irrelevant inasmuch as the parties have clearly proceeded on the basis that the petitioner was entitled to make such deductions from the quarterly payments payable by it to the respondent and on account of the fact that the GoG had deducted the same from the payments due to the petitioner. However, at the same time, the deduction to be made from the Quarterly payments could not have exceeded the limit prescribed in Clauses 4 and 6 of Schedule IV to the Agreement. The Contract having provided for liquidated damages in form of Clauses 4 and 6 of Schedule IV, the deductions from quarterly payments cannot exceed the same.

58. The Arbitrator further placed reliance on the fact that the petitioner vide its letter dated 31.08.2009 and even in reply to GoG's order dated

17.07.2012 refusing to release the withheld amount, had written letter dated 30.08.2012 to the GoG making a representation for release of the said amount. In my view, the said reliance of the Arbitrator was completely unfounded. The counsel for the petitioner rightly submits that the petitioner in the present case was merely acting as a messenger between the GoG and the respondent. The allegations of breach made by the GoG were being forwarded to the respondent and the response of the respondent to such allegation was being forwarded to the GoG. This is the essence of a back to back Agreement. However, merely because the petitioner made efforts to have the payment released in favour of the respondent, the petitioner cannot be saddled with the liability to make such payment without having received the same from the GoG.

59. As far as the issue of ATS is concerned, the Arbitrator has held as under:

“24. Amount of last quarter has not been released for want of ATS/upgradation of e-health suite. On this aspect Sh. P.N. Jain, Director of the claimant has testified in his Affidavit dt. 22.01.2013 that it was nowhere in the contract that any contract of maintenance has to be entered into with OEM /CA; that the claimant company maintained it and e-Health suite worked satisfactorily during the entire contract period and even thereafter and there was no complaint whatsoever.

The respondent in its letter dated 03.03.2010 to GoG has also stated that the Annual Technical Support (ATS) was not a part of the Agreement. In its letter dated 29.03.2011 to PS/DST Gujarat State, the respondent has specifically mentioned that there was no responsibility on it under the agreement regarding ATS, however for releasing the legally

payable amount, GoG unilaterally raised the issue of Annual Technical Support for which representative of the respondent agreed under coercion and economic duress, the respondent never voluntarily agreed to provide ATS as it was not part of the contract. This finds support from Minutes of Meeting dated 09.11.2009 which show that GoG agreed to consider release of withheld amounts subject to updating the network Monitoring Software by taking ATS till the end of contract period. In these circumstances the respondent had agreed to obtain ATS and for this GoG issued S.C.N. dated 17.02.2010 to which the respondent sent reply dated 03.03.2010 stating, that ATS was not part of the Agreement but as required by GoG, action for taking ATS from M/s CA has been initiated. When the claimant wrote to M/s CA, it asked for huge amount on account of lapsed period since 2008 as well, while agreement period was near completion.

There is therefore force in the submissions of Ld. Counsel for the petitioner that though the petitioner may have agreed to obtain the ATS in the meeting dated 09.11.2009 but it was not its contractual obligation and asking for ATS in the last year of contract is not understood and was not binding on the petitioner and legally cannot be made ground for withholding its guaranteed dues. It is further worth noting that as per Minutes of Meeting dated 09.11.2009, GoG insisted for ATS stating that the respondent had put GSWAN monitoring under great risk, for instance, if there is software, failure, entire GSWAN monitoring would collapse, while it is nobody's case that any such eventuality ever occurred.

25. The agreement between the parties nowhere contains any obligation on the part of the petitioner to obtain ATS and this stand has also been taken by the respondent in its letter to GoG. The claimant had upgraded e-Health suite in year 2007 which was approved by the respondent and there is no dispute regarding the fact that it served satisfactorily till the end of the contract period and was being used by the

successor. In the circumstances withholding of amount of last quarters is not justified.”

60. I am unable to agree with the above findings. The correspondence exchanged between the GoG, the petitioner, and the respondent alongwith the Minutes of Meeting held on 09.11.2009 and 23.04.2010 clearly suggests that GoG was insisting on the software being upgraded for purposes of transfer to GoG. It is not disputed by the respondent, in fact, it is the submission of the respondent that the software was transferred to the GoG. In the letter dated 28.01.2010, the respondent had represented that it had already taken action for taking ATS from M/s CA, the proprietor of the software. The assertion of the counsel for the petitioner that the representative of the respondent was not only present in the meeting held on 23.04.2010 but also agreed to provide the update and upgraded licence of the software, has not been denied by the respondent. It is not the case of the respondent that the GoG did not insist on the upgraded version of the software at a later stage or released the payment to the petitioner.

61. In terms of Clause 15 of the Agreement, reproduced above, it was the obligation of the respondent to transfer all software in favour of the petitioner.

62. In a meeting held on 09.11.2009, wherein Sh.P.N. Jain, CEO of the respondent was also present alongwith representative of GoG and the petitioner, GoG insisted for the petitioner/respondent to take the ATS for the software as failure to do so can put the GSWAN monitoring under

great risk. The relevant quotations from the minutes of meeting are as under:

“The issue of Annual Technical Support (renewal, up gradation & support) of CA eHealth Suite products provided by TCIL as per the agreement was also discussed. Secretary DST informed that CA eHealth products purchased by TCIL in February 2007 has not been upgraded since last 2 years. In the absence of Annual Technical support from the Software provider of CA health suite, M/s TCIL has put GSWAN monitoring under great risk. For instance, if there is software failure, entire GSWAN monitoring would collapse and Government of Gujarat will not be able to monitor the SLA with BOOT operator. ED(T) TCIL therefore agreed to immediately obtain Annual Technical Support (renewal, up gradation & support) for CA e Health Suite products installed by TCIL to the latest version and maintain the same up to 15/4/2010.”

63. By the subsequent correspondence dated 17.11.2009, the GoG again reiterated its demand for an immediate ATS to be obtained in the following words:

“TCIL therefore is requested to immediately obtain Annual Technical Support (renewal, up gradation & support) for CA e Health Suite products installed by TCIL to the latest version under intimation to the department within 15 days time from the receipt of this letter and maintain the same up to 15/4/2010.”

64. GoG thereafter issued a show cause notice to the petitioner, which the petitioner immediately forwarded to the respondent on 28.01.2010.

One of the issues in the same was again the failure of the petitioner/respondent in taking the ATS.

65. The respondent vide its letter dated 28.01.2010 informed the petitioner that it had already initiated steps for taking the ATS. This is also evident from an e-mail dated 21.01.2010 addressed by M/s CA, proprietor of the software to the respondent informing it of charges payable by the respondent for taking the ATS. However, as the respondent did not take the ATS, GoG issued a show cause notice dated 17.02.2010 again calling upon the petitioner to take the ATS. Paragraph 3 of the said notice is reproduced hereinbelow:

“In view of the above it is once again requested to immediately obtain Annual Technical Support (renewal, up gradation & support) for CA e Health Suite products installed by TCIL to the latest version under intimation to this department within 7 days time from the receipt of this letter and maintain the same up to 15/4/2010, and if not carried out the State Government may take action as per para 10 of this department's letter no.BGT/2001/7-/ITD (Part II) dated 18/1/2010. You are requested to reply within 7 days of receipt of this notice.”

66. Thereafter in the meeting held on 23.04.2010, wherein again representative of the respondent was present, it was again decided that the petitioner shall update and upgrade the e-Health Software within a week from that date and shall transfer the licence in the name of GoG. It was agreed that the last payment shall be made only upon, *inter alia* the fulfilment of the above condition.

67. The respondent, however, did not take the ATS or get the software upgraded and instead, by the letter dated 26.07.2010 informed the petitioner that no physical form / hardcopy of the licence had been issued in favour of the respondent by M/s CA India Technologies Pvt. Ltd. and that the licence is part of the software itself.

68. It seems the petitioner thereafter, requested M/s CA to advise on the modalities of the transfer of the licence. M/s CA vide its e-mail dated 10.08.2010, however, refused to share any such information stating that the same can be answered only to the respondent, in whose favour the licence stood.

69. The learned counsel for the petitioner has also drawn my attention to Clause 4 of the License Agreement between CA(India) Technologies Private Limited (CA) and the respondent, which states that the license may be assigned by the licensee with CA's prior written consent. He submits that therefore, such license could not have been transferred without prior written consent of CA and in the form claimed by the respondent. The License Agreement further shows that the payment included maintenance of the software for one year period only and required annual payments for further maintenance.

70. From the above it is evident that not only did the respondent fail to take the ATS or get the software upgraded but also the software never got transferred in favour of the petitioner and ultimately in favour of GoG. As a result of such failure, GoG vide its letter dated 10.11.2010 encashed the Bank Guarantee of the petitioner.

71. From the above exchange of correspondence, it is further evident that though the petitioner had sought to advance the plea of the respondent that it was not liable to take the ATS for the software, GoG stoutly refuted such stand and insisted that in terms of the Agreement the upgraded version of the software had to be transferred in its name. No fault can be found in such insistence. The fact that no actual loss or breakdown was reported due to failure of the respondent to take the ATS or the upgraded software is not relevant. Once there is such obligation cast on the respondent, it could not have escaped such liability.

72. In view of the above, the direction of the Arbitrator to the petitioner to make the payment of the withheld amounts to the respondent, except so far as such deductions exceed the limits prescribed in Clause 4 and 6 of Schedule IV to the Agreement, cannot be sustained. The petitioner is further held entitled to retain a sum of Rs. 14,64,203/- deducted by it for the ATS for the Software.

73. It may be true that this would have a harsh effect on the respondent as the respondent has no privity of contract with the GoG, however, this is the effect of the bargain that it had entered into with the petitioner.

74. In ***Central Bank of India Ltd., Amritsar vs. Hartford Fire Insurance Co., Ltd.*** AIR 1965 SC 1288, the Supreme Court has held as under:

“7. The contention of the appellant is based on the interpretation of clause 10. Now it is commonplace that it is the court’s duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they

are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however it may dislike the result. We have earlier set out clause 10 and we find no difficulty or doubt as to the meaning of the language there used. Indeed the language is the plainest. The clause says "This Insurance may be terminated at any time at the request of the Insured", and "The Insurance may also at any time be terminated at the instance of the Company". These are all the words of the clause that matter for the present purpose. The words "at any time" can only mean "at any time the party concerned likes". Shortly put clause 10 says "Either party may at its will terminate the policy". No other meaning of the words used is conceivable."

75. The Arbitrator having held that taking of ATS was not the responsibility of the respondent, directed the petitioner to make full payment for quarter no.32 to the respondent. The office order dated 17.07.2012 of the GoG states that GoG had withheld the amounts for quarters upto Quarter no. 31 and for the 32nd quarter "for non performance as TPA for non handing over of custody of NMS-CA e-Health licenses, non deployment of staff as per SLA & responsibility towards missing equipments & non up-gradation of CA eHealth suit for GSWAN Project of State Government".

76. With regard to the issue of non-deployment of staff, the Arbitrator has held that the petitioner was responsible for non deployment of adequate staff as it had deployed only one person for the work. It is also evident from the e-mail dated 21.01.2010 from the proprietor of the software to the respondent that only an amount of Rs.14,64,203/- was required to be paid for obtaining the ATS. The said amount had already

been deducted from the payment due to the respondent for Quarter no. 31. It is also of relevance to note that the Arbitrator has found that the consultancy on Network element of work awarded by GoG was not further delegated to the respondent under the Agreement. The relevant finding of the Arbitrator in this regard is quoted hereinbelow:-

“23. The point of manpower being not sufficient also does not stand in way of claim of the petitioner. Ld. Counsel for the petitioner/claimant has pointed out that there is no proof on record that there was any implementation plan specifying time period within which inspections were to be completed so as to invoke Penalty Clause 6, and has further argued out that even the ground of shortage of manpower on the basis of which amounts have been withheld is not sustainable as per facts on record. In this connection, Ld. Counsel has referred to Section-A of Bid Document placed on record by the respondent, and which has been made part of contract of between the parties, as per which State of Gujarat has been divided in to six zones with maximum of six districts centres (DCs), requiring one manager and project head at State Centre and one inspector at all the remaining five zones, while as per list placed on record by the petitioner with Ex. P-27, number of employees deputed during 21st quarter to 30th quarter ranged between 15 to 26, had never been less than 15, giving names of the employees on job, and as regards separate manpower for Network (Planning), Network (expansion). Network (implementation) asked for by GoG vide letter dated 17.03.2008 and agreed to by the respondent as mentioned in the letter, this was the work under Clause 11 of agreement between the respondent and GoG which has not been made part of contract between the parties.. The respondent in its letter dated 21.04.2009 to the claimant says that the claimant was/is responsible for all scope of work on back to back basis except for the consultancy work of GoG on various networking issues. This is also, stand of the claimant in its letter dated 25.07.2009 that the Networking Issue is not in its scope of work and therefore cost of manpower deployed by the

respondent to carry out these work responsibilities cannot be recovered from the claimant and that additional Manpower being sought by GoG is for advising on various issues pertaining to Network Design, Planning etc. as per para 11 of the agreement between , the parties. On 10.06.2008, the claimant had written to the respondent that in last six years, with full implementation of GSWAN, work responsibilities have increased and accordingly the claimant has also increased its manpower; that GoG is demanding increase of TCIL officers as Sh. R.P. Nigam is overburdened to handle work on behalf of TCIL. In letter dated 25.07.2009, the claimant wrote to the respondent that in last 1 years of operations, work load had increased tremendously and it was not possible by Sh. R.P. Nigam, lone officer of TCIL since April 2002 to continue to handle the work and due to this GoG was consistently demanding additional manpower of TCIL. Hence payments guaranteed to the petitioner by the respondent cannot be withheld on this ground.”

77. The above being finding of fact recorded by the Sole Arbitrator, cannot be interfered with by this Court in exercise of its powers under Section 34 of the Act. However, at the same time, I have already held that the software was not transferred to the petitioner/GoG by the respondent. The Arbitrator, having held that the respondent was not in breach of the Agreement even on account of non-upgradation of software, has not quantified the loss suffered by petitioner/GoG on account of non-upgrading/transferring the eHealth Suite Software, which is stated to be one of the reasons for withholding the complete amount. Moreover, as all the exact reasons and amounts deductible as penalties/costs thereof for the forfeiture of the entire quarterly amount have not been separately dealt with by the Arbitrator, and this Court having limited jurisdiction under Section 34 of the Act, I deem it

appropriate to leave the issue of amount payable for the 32nd quarter open for the party(ies) to agitate in appropriate arbitration proceedings.

78. It must not be lost sight of that the Agreement between the parties herein provided for compensation to be paid and deductions to be made as penalties on account of breach of terms and failure to complete inspections within time by the respondent. Thus, the principle of a back to back payment cannot be applied dehors the Agreement, so as to deprive the respondent of the entire amount payable for the last quarter. In view of the above and as the petitioner had already deducted an amount of Rs. 14,64,203/- from the payment due to the respondent for the 31st quarter, the direction of the Arbitrator to pay the amount due to the respondent for the 32nd quarter is set aside, leaving it open to the parties to pursue the issue by way of appropriate proceedings.

79. The further claim of the respondent with respect to the work done by the respondent beyond the period of the Contract has also been allowed by the Arbitrator holding as under:

“27. As regards the extended period, admittedly the contract period was to expire on 14.04.2010. In response to letter of the respondent dt.19.11.2009, the claimant assured it vide letter dt. 09.12.2009 that all requisite steps and co-operation to it shall be given in handing over the TPA GSWAN project to GoG by 15.04.2010. Vide letter dt. 10.02.2010, the claimant asked the respondent to pursue GoG to start 'Take Over' the GSWAN TPI work to end on 14.04.2010 so that it was relieved on 15.04.2010. This negatives the plea of the respondent that because of default of the claimant in providing service as per contract, the process of handing over / taking over was completed only on 02.06.2010, which plea has not been substantiated on record.

28. The petitioner in its letter dated 10.02.2010 wrote to the respondent that in case it was asked to continue beyond 14.04.2010, it would charge Rs.11,50,000/-per month in advance for the period beyond 14.04.2010. A meeting was held between the respondent and PS / DST on 23.04.2010 (i.e. after expiry of the contract period of 8 years), minutes of which are Ex.RW1 /15 on record and on this point, it was concluded as under:-

3..... M/s TCIL shall continue the existing staff/technical persons to support the newly appointed Third Parity Auditor- M/s PCS, for smooth handover/takeover activities. This support will continue till the date both the parties i.e. M/s TCIL and M/s PCS reach to a comfort level and M/s PCS take up the assignment independently. M/s TCIL has also agreed to depute 7 members technical staff ADDITIONALLY for formation of 7 regional committee for smooth handing over / taking over process alongwith other vendors GOL/PCS/TULIP.

4. DST shall make payment to M/s TCIL only for this extension period”

(Emphasis supplied)

Accordingly the respondent vide its letter dated 30th April, 2010 asked the claimant that existing Staff/ Technical persons deployed on the project shall continue to support the newly appointed Third Party Auditor - M/s PCS for smooth hand over/take over activities. On 02.06.2010 the respondent writes to M/s PCS Technology Ltd. to take over its documents along with DVD and CD. It is common case of the parties that M/s PCS Technology Ltd. finally took over the project on 02.06.2010. GoG in its Office Order dt. 17.12.2012 mentions that the Agreement between the respondent and GoG dt. 15.03.2002 was completed on 14.04.2010 and thereafter it was extended up to 31.05.2010. GoG in its meeting dated 23.04.2010 had agreed to make payment to the respondent for

the extension period. In the circumstances there is no ground to deny the dues of the petitioner for continuing to render services after expiry of contract period which services were rendered at the instance of the respondent.

Before continuing services beyond contract period, the claimant had specified to the respondent that it would charge Rs.11,50,000/- per month for the period beyond 14.04.2010. This rate is in consonance with the amount of Guaranteed Quarterly Payment agreed between the parties, and no other figure is forthcoming. Hence the claimant is held entitled to recover dues for rendering services for the extended period of one and a half month at the rate of Rs. 11,50,000/- per month and thus Rs.17,25,000/-are found due to it for the extended period.”

80. Though it is correct that the Arbitrator has not fully quoted the Minutes of Meeting dated 23.04.2010, however, the same shall have no effect as the Arbitrator has placed reliance on respondent's letter dated 10.02.2010 whereby it had informed the petitioner that it would charge Rs.11.50 lacs per month for the period beyond 14.04.2010. The petitioner, vide its letter dated 30.04.2010, had asked the respondent to continue deploying the existing staff/technical persons to support the newly appointed TPA. The Arbitrator further held that the work was finally taken over by the new TPA on 02.06.2010. The Arbitrator has therefore, awarded a sum of Rs.17,25,000/- in favour of the respondent for the period from 15.04.2010 to 02.06.2010. The said direction cannot be faulted.

81. The next challenge of the petitioner is to the direction of the Arbitrator to refund an amount of Rs.14 lacs received by the petitioner on encashment of Performance Bank Guarantee of the respondent. The

Arbitrator has held that as the respondent had performed its duty till the end of the Contract without imposition of penalty/compensation or premature termination and as petitioner's stand regarding withheld amount was not being upheld, the petitioner was liable to refund the said amount.

82. I cannot find any fault with the above direction of the Arbitrator. The petitioner had withheld amounts from the quarterly payments payable to the respondent. The petitioner has by this order further been held entitled to retain an amount of Rs.14,64,203/- from the payment due to the respondent for the 31st quarter. The petitioner, therefore, cannot be held entitled to retain the amount received from encashment of the Bank Guarantee in addition to the amount withheld without alleging and proving additional losses caused to it. The learned counsel for the petitioner has been unable to show any such loss being suffered by the petitioner.

83. The Supreme Court in ***Kailash Nath Associates v. DDA and Anr.***, (2015) 4 SCC 136 has held as under:

“42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found *inter alia* in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes

place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

84. Though the petitioner, in its written submissions, challenged the direction of the Arbitrator allowing release of Assurance Bank Guarantee of Rs. 3,50,000/- furnished by the respondent, no argument has been tendered in support of its challenge before me. In any case, the Arbitrator has found there to be no reason not to release the same. Even before me, no reason has been forwarded by the petitioner for retaining the said Bank Guarantee. I, therefore, find no merit in the challenge made by the petitioner.

85. The petitioner further challenges the award of interest at the rate of 15.5% per annum in favour of the respondent. Relying upon Clause 11 of Schedule IV of the Contract, the learned counsel for the petitioner submits that the petitioner was entitled to interest at the rate of 12% per annum on the advance payment paid by it to the respondent. He submits that interest at the rate of 12% per annum could only have been awarded in favour of the respondent.

86. I am unable to agree with the above submission of the learned counsel for the petitioner. Sub-clause (f) of Clause 11 of Schedule IV of the Agreement reads as under:

“f. If TCIL fails to make the payment required by this Agreement when due, the underpayment shall bear Interest rate plus 350 basis points from the Due Date of Payment until the date of payment in full. If the Due Date of Payment falls on Sunday or holiday, the next business day shall be the last

day on which payment can be made without interest charges being assessed.”

87. The Arbitrator has considered the effect of above stipulation in the Agreement and has held as under:

“32. As regards claim for interest, Clause 11(f) of Schedule IV of the Agreement between the parties lays down that if the respondent fails to make payment when due, the underpayment shall bear interest rate + 350 basis points from the Due Date of Payment until the date of payment in full. In terms of this agreement, the respondent paid 10% advance payment which was to be adjusted on Pro-rata basis every quarter and the said amount was to bear interest @12% on reducing balance in advance, and in case of delay in making payment the respondent was liable to pay interest rate + 350 basis points from Due Date of Payment till payment. Ld. Counsel for the claimant has stated that based on these agreed terms he was claiming interest @ 15.5% p.a. on the dues of the claimant. There is nothing to the contrary in this regard on record. Hence the claimant is held entitled to recover interest @15.5% p.a. on the amount found due to it from the respondent.”

88. In view of the above and as Section 31(7) of the Act confers a discretionary power on an Arbitrator to award interest, the objection of the petitioner on the rate of interest awarded in the Impugned Award is liable to be rejected.

89. In view of the above, the Impugned Award insofar as it holds the respondent as entitled to a refund of the amount withheld for the quarters no. 21 to 24 and 26 to 31, except so far as is in excess of the amount that was deductible under Clauses 4 and 6 of Schedule IV of the Agreement

between the parties, and a further amount of Rs.14,64,203/- towards ATS for the software, is set aside. The Award allowing claim for quarter no.32 is also set aside, leaving it open to the parties to agitate the same through proper proceedings. The Impugned Award granting the balance relief in favour of the respondent is upheld.

90. The petition is disposed of in the above terms, with no order as to cost.

JANUARY 22, 2019
RV/RN/vp

NAVIN CHAWLA, J



नित्यमेव जयते