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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 20.08.2020

Pronounced on: 17.11.2020

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O.M.P. (COMM) 256/2017 & IA 3532/2019

M/S DHOOT DEVELOPERS PVT. LTD. (JV)

M/S. BENGAL SILVER SPRING PROJECT

LTD.

...PETITIONER

Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. S.K. Maniktala, Mr.
Vinod Kumar, Mr. Udit Maniktala
and Mr. Sheetij Chhillar,
Advocates

versus

TOTEM INFRASTRUCTURE LTD.

.....RESPONDENT

Through Mr. A.K. Thakur, Mr. R.K.
Mishra, Mr. Rishi Raj and Ms.
Kavita Singh, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for setting aside the impugned Award dated 04.03.2017 passed by the Arbitral Tribunal comprising of a Sole Arbitrator whereby the Tribunal allowed some claims of the Respondent herein and rejected all the counter claims of the Petitioner herein. The Petitioner herein was the Respondent before the Tribunal and is being referred to as the Petitioner

while the Respondent who was the claimant is being referred to as Respondent for the sake of convenience.

2. Before advertizing to the contentions of the parties, it is necessary to give a brief narrative of the facts. Petitioner is a Joint Venture of Dhoot Developers Private Limited and Bengal Silver Spring Project Limited and both are Companies incorporated under the Companies Act, 1956 and engaged in the business of executing Civil Construction Contracts.

3. Petitioner – JV was awarded a contract by the DG-MAP (Ministry of Defence) for the work of “Construction of Dwelling Units including Allied services for Officers, JCOs /ORs at Gandhi Nagar, Chiloda and Ahmedabad on 11.11.2010 with completion period being 25 months, commencing on 11.11.2010 and ending on 10.12.2012 (hereinafter referred to as ‘Master Contract’).

4. As per the case set out in the petition, Petitioner started the work immediately on award of the contract despite some hindrances encountered at the sites and executed preliminary mobilization work. The mobilization period was 60 days under the Master Contract. Petitioner engaged the Respondent as sub-contractor to execute the work at Chiloda and Gandhi Nagar sites and a Letter of Intent (LOI) dated 21.02.2011 was issued. Value of work was Rs.113,79,35,257.10p. Petitioner continued working at Ahmedabad site till 18.05.2011 when the work at the said site was also sub-contracted to the Respondent and second LOI dated 18.05.2011 was issued amending the first LOI, by enhancing the scope of work thereunder. The value of enhanced work was Rs.87,65,58,994.67 p.

5. Work executed by the Petitioner at the sites, before the same were handed over to the Respondent, was measured and the agreed amount was Rs.68 Lakhs. Agreement dated 25.05.2011 was executed and signed between the parties regarding both the LOIs and is being referred to hereinafter as 'Agreement'. The total value of the Agreement under both LOIs was thus Rs.205,04,89,860.66p (Gross value including Cess and WCT). Respondent furnished the following Bank Guarantees (hereinafter referred to as 'PBGs') towards performance of its obligations under the Agreement:

S.No.	BG No.	Date	Amount (Rs.)
1.	2521FGPER004011	01.03.2011	5,68,96,763/-
2.	25211GPER013511	02.07.2011	5,55,89,513/-
		Total	11,24,86,276/-

6. Respondent was entitled to interest bearing mobilization advance against Bank Guarantee equivalent to 10% of the Agreement value and was given the said amount. However, Respondent furnished BGs only for Rs.18,52,98,466/- as follows :-

S.No.	BG No.	Date	Amount (Rs.)
1.	2521GPER004111	01.03.2011	11,37,93,526/-
2.	2521GPER013111	02.07.2011	2,00,00,000/-
3.	2521GPER013211	02.07.2011	2,00,00,000/-
4.	2521GPER013311	02.07.2011	2,00,00,000/-

5.	2521GPER013411	02.07.2011	1,15,04,940/-
		Total	18,52,98,466/-

7. On the request of the Respondent, Petitioner gave additional advance to the tune of Rs.1.50 Crore in December 2011 / January 2012 and the Respondent furnished the following BGs for total value of Rs.3 Crores, towards additional advance.

S.No.	BG No.	Date	Amount (Rs.)
1.	52640001911	22.12.2011	1,00,00,000/-
2.	52640002011	28.12.2011	1,00,00,000/-
3.	52640002111	31.12.2011	1,00,00,000/-
		Total	3,00,00,000/-

8. The Respondent being conscious of the time lines as per the Master Contract as also the time that had already lapsed, agreed to complete the entire work under the Agreement, within the time frame originally stipulated i.e upto 10.12.2012. The Master Contract stipulated various internal Milestones to be achieved by the Respondent and envisaged penalties for failure to achieve them. The Milestones were as under :-

Phase-I	5 Months (Deadline : 10.04.2011)
Phase-II	8 Months (Deadline : 10.07.2011)
Phase-III	12 Months (Deadline : 10.11.2011)
Phase-IV	18 Months (Deadline : 10.05.2012)
Phase-V	21 Months (Deadline: 10.08.2012)
Phase-VI	25 Months (Deadline : 10.12.2012)

9. Petitioner avers that it had agreed to bear any penalty upto Milestone-IV that may be levied by the DG-MAP in respect of 'additional work under the second LOI and for the period already lapsed as on the date of the second LOI i.e. 18.05.2011. Relevant portion of the said LOI is as under :-

"The petty contractor had carried out work at 18 blocks as of now and penalty, if any, applied on this additional work upto milestone IV, shall be borne by us for the period as on date already lapsed."

10. As per the Petitioner the Respondent defaulted in completing the works under the Agreement in as much as the deployment of labour, material, machinery and utilization of financial resources was most inadequate resulting in inordinate delays. Respondent also diverted funds from the Project as is evident from the fact that against the total mobilization advance and the additional advance the total value of work executed was much less and this is substantiated from the 5th/Final RA Bill dated 31.01.2012 submitted by the Respondent and the evidence of the Respondent's witness CW-1, in cross-examination.

11. As a result of the defaults, lapses and breaches by the Respondent, project suffered huge delays and the milestones were not achieved. The bills for September 2011 were in negative and the Respondent stopped the work from September 2011 and abandoned the site amounting to repudiation of the Agreement. Despite notices, warnings and joint meetings at the site, Respondent neglected to continue the work and finally the Petitioner invoked the BGs (Performance/Mobilization

Advance/Additional Advance) on 31.01.2012 for a total value of Rs.31,77,84,749/- and terminated the Agreement on 06.02.2012.

12. To complete the narration, as per the Petitioner, the Petitioner thereafter undertook the execution of the work at the sites, but could not recover the lost ground as a result of which the Master Contract was terminated by DG-MAP on 29.01.2013 w.e.f. 31.01.2013. Petitioner's PBG for Rs.11,24,87,000/- was invoked by DG-MAP and the entire mobilization advance was recovered. The plant and machinery, building and construction material lying at the site was impounded by DG-MAP and was subsequently released only after furnishing a BG for the value of Rs.1,69,19,695/-, thus leaving the Petitioner to incur heavy Bank Guarantee charges.

13. Respondent thereafter invoked the Arbitration Agreement between the parties and raised several claims against the Petitioner. Vide order dated 03.02.2012 passed in Arbitration Petition No.90/2012 filed by the Respondent, this Court appointed a Sole Arbitrator. Respondent filed its Statement of Claims and the Petitioner filed the Statement of Defence as also raised certain counter claims. Evidence was led by both sides and finally, after hearing arguments the Tribunal pronounced the Award on 04.03.2017. The Tribunal allowed Claims Nos.1 and 2 of the Respondent and rejected Claim Nos.3, 4, 5 and 6. Against Claim Nos.7 and 8, the Tribunal awarded interest at the rate of 12% p.a. with effect from 31.12.2011 on the awarded amounts. Counter Claims of the Petitioner were rejected. The Claims and the Counter Claims raised by the parties are as under :-

Claim No.1 – an amount of Rs. 11,24,86,276/-along-with an interest of 18 % per annum compounded monthly towards wrongful encashment of the Performance Bank Guarantees must be paid to the Claimant.

Claim No.2 - an amount of Rs.22,37,93,526/-along with an interest of 18 % per annum compounded monthly towards wrongful encashment of the Mobilisation Advance Bank Guarantees must be paid to the Claimant.

Claim No.3 - an amount of Rs.11,27,88,524/- along with interest of 18 % per annum compounded monthly towards the work done as detailed in the Statement of Claim.

Claim No.4 – award of Compensation or Reimbursement of Cost for the inventory including material like steel, cement, electrical items, other major materials, wooden shuttering, Steel shuttering, Plant & Machinery and office furniture quantified by Claimant letter dated 2nd February, 2012 and submitted for the Respondent- Rs.18,06,66,594/-.

Claim No.5 - an amount as compensation to the tune of Rs. 37,37,67,679 for loss of profit which the Claimant would have made upon the completion of the work under the said Contract.

Claim No.6 - an amount as loss of business reputation to the tune of Rs. 5.0 Crores for loss of opportunity which the claimant lost by diverting its resources towards the present contract.

Claim No.7 - that interest at the rate of 18 % per annum compounded monthly be awarded in favour of the Claimant and against the Respondent from the date which has become due and payable , till the date of filing of the present Statement of Claim in respect to the above claims from (i) to (vi) herein above.

Claim No.8 – The pendent lite and future interest be granted in favour of the Claimant and against the Respondent @ 18% per annum till the date of payment thereof by the Respondent.”

“Counter Claim No.1 - Loss due to extra expenditure required to be incurred on materials and labour (escalation) for an amount of Rs.37,72,00,000/-.

Counter Claim No.2 – Outstanding liability of the claimant on site for an amount of Rs.2,25,84,449/-.

Counter Claim No.3 – Expenditure on overheads for an amount of Rs.5,06,00,000/-.

Counter Claim No.4 – Provision of new plant and machinery for an amount of Rs.5,62,00,000/-.

Counter Claim No.5 – Loss of escalation in extended period of contract for an amount of Rs.5,25,00,000/-.

Counter Claim No.6 – Extra expenditure on Bank Guarantee / Insurance Cover / other misc. Expenses for an amount of Rs.1 Crore.

Counter Claim No.7 - Compensation for delay as per Clause 44 of the General Conditions of Contract for an amount of Rs.22,50,00,000/-.

Counter Claim No.8 – Loss of Profit for an amount of Rs.10,12,00,000/-.

Counter Claim No.9 – Cost on account of loss of opportunity for an amount of Rs.37,50,00,000/-.

Counter Claim No.10 – Loss of reputation for an amount of Rs.2 Crores.

Counter Claim No.11 – Excessive claims made by M/s. Totem on account of labour escalation for an amount of Rs.20,63,931/-.

Counter Claim No.12 – Less recovery of steel consumed by the claimant from RA bills by the DG MAP for an amount of Rs.25,20,000/-.”

14. The issues framed by the Tribunal are as under :-

“RE: CLAIMS

1. Whether the claimant is entitled to claim from the respondents an amount of Rs.11,24,86,276/- towards wrongful encashment of the Performance Bank Guarantee?

2. Whether the claimant is also entitled to claim an amount of Rs.22,37,93,526/- from the respondent towards wrongful encashment of Mobilisation Advance Bank Guarantees?

3. Whether the claimant is also entitled to claim an amount of Rs.11,27,88,524/- towards the work done by the claimant as detailed in the Statement of Claim?

4. Whether the claimant is also entitled to receive an amount of Rs.18,06,66,594/- as compensation or reimbursement of cost as per the inventory as submitted to the respondent vide letter dated 2nd February, 2012 for the items specifically mentioned therein?

5. Whether the claimant is also entitled to claim an amount of Rs.37,37,67,679/- as compensation for loss of profit?

6. Whether the claimant is also entitled to receive any amount as loss of business reputation and if so, to what amount?

7. *If the aforesaid issues are answered in favour of the claimant, whether the claimant shall also be entitled to claim interest and if so, to what amount and what rate and which period?*

8. *Whether the claimant is also entitled to pendent lite and future interest. If so, at what rate?*

RE: COUNTER CLAIMS:

1. *Whether the respondent is entitled to claim from the claimant an amount of Rs.37,72,00,000/- as extra expenditure towards escalation?*

2. *Whether the respondent is entitled to claim from the claimant an amount of Rs.2,25,84,449/- towards expenditure allegedly incurred by the respondent being for the discharge of the liability of the claimant at site?*

3. *Whether the respondent is also entitled to claim an amount of Rs.5,06,00,000/- as compensation for the expenses incurred by the respondent towards the overhead at the time when no activity was actually carried out by the claimant at site?*

4. *Whether the respondent is entitled to an amount of Rs.5,62,00,000/- being depreciation, repair, running and maintenance of plant and machinery which is 5% of Rs.1,12,50,00,000/-?*

5. *Whether the respondent is entitled to claim an amount of Rs.5,25,00,000/- for alleged loss due to escalation for the extended period of the contract?*

6. *Whether the respondent would have to incur an expense of Rs.1,00,00,000/- towards extra expenditure on bank guarantee, insurance cover and other expenses and if so,*

whether the respondent can recover the same from the claimant?

7. Whether the respondent is entitled to claim any compensation for delay as per clause 44 of the General Conditions of Contract and if so, to what amount?

8. Whether the respondent is also entitled to be compensated by the claimant for the loss of profit of Rs. 10,12,00,000/-?

9. Whether the respondent is also entitled to claim any cost on account of loss of opportunity and if so, to what amount?

10. Whether the respondent is also entitled to claim any amount for the loss of reputation and if so to what amount?

11. Whether the respondent is entitled to recover an amount of Rs20,63,931/- which is allegedly excessive claim made by the claimant and paid to them?

12. Whether the respondent is entitled to any amount towards recovery of steel consumed by the claimant from RA bills and if so, to what amount?

13. Whether the respondent is also entitled to claim a sum of Rs.50,00,000/- for alleged rectification of the structural work to be done at the site?"

15. It is this Award, which is assailed by the Petitioner, in the present petition while there is no challenge to the Award by the Respondent.

16. Mr. Sandeep Sethi Learned Senior Counsel for the Petitioner raised various contentions and the same, as captured claim-wise are as follows :-

A. **Claim No.1**

17. The claim related to an amount of Rs.11,24,86,276/- towards wrongful encashment of the PBG. The contention is that the Tribunal has held that the PBG to be conditional, which is contrary to the terms of the PBG and the settled position of law. Perusal of the PBG itself shows that the same was payable merely on demand. Interpreting the identical terms of a BG, the Supreme Court in the case of *Mahatma Gandhi Sahakra Sakkara Karkhane v. National Heavy Engg. Coop. Ltd. & Anr. (2007) 6 SCC 470* and *Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd. (2016) 10 SCC 46* has held that such BGs are unconditional BGs. In the alternative, it is contended that even assuming that the BG was conditional, the conditions mentioned therein being non-performance of the Respondent and loss or damage suffered or caused or to be suffered/caused, were fulfilled resulting in invocation by the Petitioner. Non-performance was clear from the documents on record. Termination by the Petitioner of the Agreement was for abandonment of work for more than three months which was not denied or disputed by the Respondent in its Reply dated 07.02.2012 to the Termination Letter. Abandonment of work for more than three months clearly constituted non-performance and this fact was completely ignored by the Tribunal. Significantly, the termination of contract was never assailed by the Respondent. In so far as the loss suffered by the Petitioner was concerned, the Respondent had stopped executing work since September 2011 and DG-MAP had issued a Final Notice dated 04.01.2012, threatening termination of the Master Contract and invocation of Petitioner's PBG. The Master Contract was in fact

subsequently terminated on 29.01.2013 and PBG encashed. Thus, on the date of the Award, Petitioner had actually suffered loss due to non-performance of the Respondent. This was specifically pleaded, proved and argued before the Tribunal, as is evident from the documents on record as well as answers to Question Nos.54,91, 94 and 24, 25, 27 put to the Petitioner's witness in cross-examination. There is no finding despite sufficient evidence on record by the Tribunal that the Petitioner has not suffered any loss and despite this it was held that invocation of PBG was wrongful. Ignoring the material evidence makes the Award perverse and liable to be interfered.

18. It is also contended that once the termination of the Agreement was not challenged by the Respondent and it had accepted the same, this was enough to set aside the Award under Claim No.1. The Tribunal has also not given any finding that the termination was wrongful. Without prejudice to the said argument, it is contended that in about 11 and a half months between 21.02.2011 and 06.02.2011, Respondent only executed work worth Rs.8.94 Crores which is less than 5% of the Agreement value of Rs.201 Crores to be executed in 21 and a half months. The quantum of work done was admitted by the Respondent and also proved in evidence. The other error pointed out by the Learned Senior Counsel is that referring to the second LOI, the Tribunal held that the Petitioner had undertaken to bear the penalty, if any, on the additional work upto Milestone-IV. However, the expression 'this additional work' referred to the work executed by petty contractor at the site covered by the second LOI and not the entire work covered under both the LOIs. It was clearly for the period that had already lapsed as on the date of the LOI and

Petitioner never agreed to bear all penalties upto Milestone-IV for the entire Project Work. The interpretation given by the Tribunal is against the terms of the Agreement and not at all a possible/plausible view.

B. CLAIM NO.2

19. Claim No.2 was for refund of Mobilization Advance BGs and has been allowed in favour of the Respondent holding that the entire advance was never released by the Petitioner. The contention is that there is an incorrect computation of the BG amount. The Respondent had furnished 8 BGs for Rs.21,52,98,466/- but the Tribunal awarded Rs.22,37,93,526/-. Respondent in its Claim Statement had admitted that one BG for Rs.1 Crore was not invoked and thus the invocation amount was Rs.20,52,98,466/-. This error is apparent from the pleadings and the evidence on record.

20. The second contention is that the Tribunal has wrongly rejected the plea of the Petitioner that the entire mobilization advance was released to the Respondent including material worth Rs.12,65,15,392/- supplied against mobilization advance. The Tribunal rejected the plea holding that there was little evidence to substantiate the same and has completely ignored the documentary and oral evidence on record which constitutes a legal misconduct. The Learned Arbitrator according to Mr. Sethi has ignored various documents/evidence viz. RA Bill Nos.1/2/4/5 which show that the entire mobilization advance had been received by the Respondent and the interest liability has been computed on the entire advance and even the recovery has been worked out on the entire advance received. Reconciliation Statement has been erroneously rejected, terming it 'undated sheet' and for want of endorsement by the

Respondent, whereas the document shows that it was both dated and endorsed by both the parties. The statement was proved in evidence of the Petitioner's witness who was duly cross-examined by the Respondent. The finding of the Tribunal that the supply of material by the Petitioner to the Respondent as per the Statement is not established, is perverse in as much as it was admitted by the Respondent in his 5th RA Bill, which was signed by the Respondent and was on record as a vital piece of evidence. The Tribunal by referring to the letter dated 09.03.2011 held that only Rs.7,62,57,703/- were paid towards mobilization advance which is an incorrect finding from a bare perusal of the document at page 1766 of the record which indicated that the said amount of Rs.7,62,57,703/- was paid by cheque after adjusting the part amounts towards purchase of steel and deduction of TDS. The Tribunal has accepted part of a letter only without any reason for doing so. Importantly, prior to the filing of the claim Respondent never made any communication disputing the payment of the entire mobilization advance and even in its first communication after invocation of BGs on 02.02.2012, no grievance was raised on the said aspect. It is also argued that the Respondent itself stated that it had received mobilization advance in cash to the tune of Rs.9,05,82,503/- yet the Award in paras 23 and 26 records that only an amount of Rs.7,62,57,703/- was paid.

21. It was further argued that Respondent's stand was that the material was left at the site at the time of termination of contract thereby implying that the material was supplied against the advance. Pertinently, having admitted the receipt of material worth Rs.12.65 Crores, Respondent remained liable to account for the same and prove that the material was

lying at the site when the contract was terminated, which it failed to do. Respondent had raised Claim No.4 towards cost of material lying at the site, which was rejected and this part of the Award is not challenged by the Respondent and had attained finality. Once there was no material at site, the invocation of BG was fully justified.

C. COUNTER CLAIM NO.2

22. The said Counter Claim was for Rs.15,504,271/- paid by the Petitioner to unpaid vendors of the Respondent. Upon termination of the Master Contract, DG-MAP gave a list of unpaid vendors of the Respondent and the Petitioner notified the same to the Respondent and paid to the vendors after verification by the Respondent. Details of the payments were on record before the Tribunal and the Respondent did not point out any discrepancy therein and rather admitted the documents during admission/denial. Yet the counter claim was rejected holding that apart from the list, the Petitioner had not produced documents showing that the payments were made nor produced vendors to testify the said fact. No affidavits were filed by the vendors testifying the genuineness of the Petitioner's claim under this Head. This, according to Learned Senior Counsel, is a finding which is perverse and contrary to records since there were large number of documents including copies of request letters from various vendors and copies of cheques issued to various vendors alongwith receipts running into more than 100 pages, on record. In addition, there was sufficient evidence in the form of oral testimonies of RW-1, RW-2, RW-3, who were duly cross-examined by the Respondent herein. None of this evidence has been considered by the Tribunal.

D. COUNTER CLAIM NO.7

23. The counter claim was for Delay Compensation for Rs.20,50,48,986/- under Clause 44 GCC. Mr. Sethi contends that under Clause 44 GCC, Respondent was liable for Delay Compensation of 0.5% per week subject to maximum of 10% of Agreement value, for delayed completion. The counter claim was rejected wrongly on the ground that the delay was not solely attributable to the claimant as also that the Petitioner itself obtained extension of deadline from DG-MAP on 13.08.2012. Thus, the principle of Clause 44 cannot be applied by the Petitioner against the Respondent. It is argued that this part of the Award deserves to be set aside on the same premise as under Claim No. 1. The Tribunal completely ignored that termination of the contract was due to the Respondent abandoning the work and the Respondent neither disputed the abandonment nor assailed the termination of contract. Thus, by no stretch of imagination, the Tribunal could have held the Petitioner liable for delay along with the Respondent.

24. The Award also suffers from patent illegality as the Tribunal has held that the Petitioner adopted a simplistic and erroneous approach towards computation of the compensation payable as a proper course of action should have been to charge 0.5% of the value of 'specific works' delayed every week from the planned date of completion of that particular work. The argument is that this approach of the Tribunal is completely contrary to the terms and conditions of the Agreement and the actual work done by the Respondent. Admittedly, Respondent had stopped working from September 2011 till termination and against the Agreement value of Rs.205 Crores to be executed in 22 months, had

admittedly executed work worth Rs.8.95 Crores in 12 months. Work-wise computation of Delay Compensation computes to far more than 10% of the Agreement value while as per Clause 44 GCC, the Delay Compensation is restricted to a maximum of 10% of the Agreement value, which the Petitioner had claimed. Importantly, Respondent never objected to the method of computation.

E. **COUNTER CLAIM NO.11**

25. The counter claim was for refund of Rs.20,63,931/- paid in excess on account of Labour Escalation. It is contended that admittedly Rs.33,21,995/- was paid to the Respondent as 'on account payment' towards escalation and subsequently it was found that an excess amount had been paid which was recovered by DG-MAP from the Petitioner. The reasoning given by the Tribunal for rejection was that if the payment had been made without DG-MAP's approval then the Petitioner has itself to blame. This is clearly contrary to the Agreement in as much as according to Clause 54 GCC amounts paid during execution of the work were 'on-account' and subject to the final bill. The contractual stipulation has been ignored and it has been observed that it is inconceivable that any amount could be paid by the Petitioner at its own risk and consequence, before final bills were approved by the DG-MAP. The finding of the Learned Arbitrator that there is no document on record to substantiate that DG-MAP had approved only a sum of Rs.12,58,063.86/- paise against an amount of Rs.33,21,995/- billed by the Respondent, is contrary to evidence led by RW-3 who was extensively cross-examined by the Respondent.

26. Learned Senior Counsel for the Petitioner relies on the judgement of the Supreme Court in ***ONGC v. Western Geco International Limited, (2014) 9 SCC 263*** to support the argument that once the learned Arbitrator has failed to draw the correct inferences on the facts proved through extensive evidence or admitted by the Respondent, the Award can be interfered with and is liable to be set aside. Reliance is also placed on the judgement in ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49***, to argue that if an Arbitrator ignores the vital evidence, the same will render the Award wholly perverse and it is liable to interference and also constitutes a legal misconduct.

27. Mr. Thakur learned counsel for the Respondent opposes the petition firstly on the grounds that the Learned Arbitrator has passed the Award taking into account the relevant facts, documents and evidence and has come to a conclusion which is not only a possible but a plausible one and it is not permissible for this Court in its scope of judicial review to interfere in the well reasoned Award of the Tribunal. Mr. Thakur relies on the judgement in ***Ssangyong Engineering and Construct Co. Ltd. v. National Highway Authority of India, 2019 15 SCC 131*** to argue that the Supreme Court has reaffirmed and re-enunciated the proposition of law that an Award of an Arbitral Tribunal is beyond interference, if it is based on the understanding and interpretation of the Learned Arbitrator culled out from the evidence on record and it is not for this Court to substitute its view, even if an alternative view is possible. He therefore argues that the Award should be upheld and the objections be dismissed.

28. Without prejudice to the said contention Mr. Thakur defending the Award argues that it is not correct for the Petitioner to argue that the

delay in completion of the work was on the part of the Respondent. Petitioner's own letter dated 21.12.2011 to the DG-MAP would reveal that it sought extension of time due to hindrances and various other issues including scarcity of steel, lack of Labour License, strike by the sand suppliers, extra ordinary heavy rainfall etc. In the said letter Petitioner never attributed any delay to the Respondent. The Agreement was terminated without any reason or justification and none was spelled out in the termination letter. The schedule date for completion of Agreement was 10.12.2012 but the Petitioner terminated the same 10 months and 4 days prior to the said date, when the Respondent was at site only for a period of 7 months, out of a total of 25 months. The Learned Arbitrator passed the Award taking into consideration the pleadings, documents filed by the parties and the evidence of the witnesses and the Petitioner is trying to read portions of the Award out of context to show that there is perversity in the Award, when there is none.

CLAIM NO. 1

29. It is argued by Mr. Thakur that evidence has come on record that from 11.11.2010 upto February, 2011 Petitioner was fully in-charge of the site. Witness RW-2 in his evidence stated that it executed work worth only Rs. 68 Lakhs upto 2011 and after the termination, Petitioner had not done any work. During the period when the Respondent was awarded the Contract and was in-charge of the sites, it had executed work worth Rs. 18 crores and even RW-3 had admitted the execution of work worth Rs. 989,81,706/-. Thus, it is evident that the work executed by the Petitioner, prior to handing over the site to the Respondent and post termination was negligible as compared to the lesser period for which the site was with the

Respondent. It is argued that the Respondent is clearly entitled to the refund of entire PBG as it was the Petitioner who committed fundamental breach of the Agreement, by not taking prior approval of the principal employer in terms of Clauses 17 & 18 GCC. No document was placed on record to show any such approval. Letter dated 21.12.2011 reveals that there were hindrances at site which were not attributable to the Respondent and there was not a whisper of any alleged non-performance of the Respondent. The finding returned by the Tribunal is based on facts, documents and evidence. Even after termination it is not the case of the Petitioner that it had engaged some other sub-contractor to execute the work and thus there is no evidence that it had suffered any loss, due to the alleged non-performance.

30. In so far as the nature of the PBG is concerned, counsel for Respondent argues that whether the PBG was conditional or unconditional, there ought to have been a letter of invocation, in writing, stating that the amount claimed was by way of loss or damage caused or likely to be caused by reason of any breach by the Respondent. No such letter was placed on record which would reflect any breach allegedly committed by the Respondent. The judgements relied upon by the Petitioner are in relation to invocation of BGs which is not the case here as in the present case Respondent is only concerned about the realization of the BG amount by the Petitioner without any breach by the Respondent. The finding of the Tribunal after interpreting the Clause and the BGs is a plausible interpretation and not amenable to interference in exercise of jurisdiction under Section 34 of the Act.

31. Learned counsel submits that the contention of the Petitioner that termination was not disputed and was admitted by the Respondent is wholly incorrect. Letter dated 07.02.2012 written by the Respondent challenges the termination being illegal, arbitrary, unilateral and in violation of principles of natural justice. Even in the Statement of Claim the termination was challenged. Issues were framed by the Tribunal in presence of both the parties on 08.10.2012 and Petitioner never insisted upon framing of an issue on termination and neither raised any ground of challenge with respect to this in the present petition. It is further argued that Arbitration Proceedings are not governed by strict provisions of CPC and the Tribunal is not bound by it in terms of Section 19 of the Act. Secondly, it is a common practice that in arbitration issues are framed only on the basis of claims and in some cases, pleadings are also treated as issues.

CLAIM NO. 2

32. It is argued that the Respondent in terms of the Agreement initially furnished mobilization advance BGs for a sum of Rs. 18,52,98,466/- against which Petitioner paid a sum of Rs. 7,62,57,703/- in cash in terms of Clause 26.2 of the GCC, which is reflected in the letter dated 09.03.2011. Subsequently, the Respondent furnished additional BG of Rs. 3 crores against which the Petitioner released an amount of Rs. 1,43,25,000/-. A sum of Rs. 7,81,33,095/- was recovered by the Petitioner as reflected from RA Bill No. 5, which is an admitted document and is also evident from the pleadings. RW-3 had also admitted to the said recovery from the mobilization advance. In terms of Clause 26.2 GCC, mobilization advance was to be paid to the Respondent within 30 days of

acceptance of BG. With regard to the balance amount it is the case of the Petitioner that materials were supplied for which reliance is placed upon the running bills. It is contended that since mobilization advance was given only for mobilization of resources, therefore, even assuming, though not admitting, that apart from the cash, advance was given by supply of materials, what can be recovered by invocation of BG is only the amount in cash. The material stated to be given in lieu of cash is still lying at the site of DG-MAP and there is no allegation that the Respondent has lifted the material from the site. Therefore, the invocation of the BGs for the entire advance was bad in law as it amounted to unjust enrichment of the Petitioner and double jeopardy to the Respondent.

CLAIM NO. 3

33. In so far as the said claim is concerned the learned counsel submits that the Learned Arbitrator in his wisdom has rightly left the claim of work done to be decided after the arbitration proceedings between the Petitioner and DG-MAP end and no infirmity can be found with this part of the Award.

AWARD TOWARDS INTEREST

34. Mr. Thakur argues that the Petitioner has not argued against the Award of Interest under the said claims and even otherwise the Award of Interest is just and reasonable in the facts and circumstances of the case.

COUNTER CLAIM NOS. 2, 7 and 11

35. With regard to counter claim No. 2 counsel for the Respondent argues that the Petitioner is relying upon documents before this Court during the course of hearing, which were never put to the witnesses of the Respondent before the Tribunal and therefore the reliance is *per se*

impermissible and no arguments can be made based on the said documents. In so far as counter claim No. 7 is concerned, it is submitted that the Petitioner is not entitled to the said amount as there was no possibility for the Respondent to perform the Contract in view of the breach committed by the Petitioner. Petitioner cannot take advantage of its own wrong and claim any compensation for delay. The finding arrived at by the Tribunal is a finding of fact and is based on interpretation of the Agreement, and any interference by this Court is beyond the scope of its jurisdiction under Section 34 of the Act. The same argument is made by counsel for the Respondent with respect to counter claim No. 11.

36. I have heard the learned senior counsel for the petitioner and the counsel for the respondent.

37. Claim No.1 pertains to the claim of the respondent herein for an amount of Rs.11,24,86,276/- towards alleged wrongful encashment of Performance Bank Guarantees and the said amount is the net consolidated amount covered by two PBGs furnished by the respondent against performance of its obligations under the agreement. The Learned Arbitrator has allowed the claim of the respondent on two-fold grounds. The Learned Arbitrator has interpreted the clauses of the BGs and concluded that the bank guarantees in question were conditional and the prerequisite for their invocation was a breach of the Agreement by the respondent which occasioned or was likely to occasion loss or damage to the petitioner herein. Having held that the BGs were conditional, the Learned Arbitrator was of the view that the prerequisites of the invocation were not satisfied inasmuch as a letter dated 21.12.2011 placed on record by the respondent indicated that the petitioner had

written to DG-MAP seeking extension of deadlines stated in the time schedule and the document was admitted by the petitioner. In the said letter, there was no mention by the petitioner that the respondent was responsible for the alleged delay and the extension was sought on other grounds such as labour, site hindrances etc. The Learned Arbitrator also observed that the time interval between 11.11.2010 and 21.12.2011 was a period for which according to the petitioner no work had been carried out for 398 days after 410 days implying that the time was not the essence of the contract as the extension sought by the petitioner was granted by DG-MAP. The Learned Arbitrator also observed that the petitioner had expressly agreed to bear the penalty which could be imposed on slow progress of additional work up to Milestone-IV as in May 2011 and thus it was wholly inequitable for the petitioner to terminate the agreement and encash the BGs. The petitioner according to the Learned Arbitrator should have waited till 10.05.2012 or till the DG-MAP assessed whether the delay was solely attributable to the respondent as also for extension of time lines, which was later granted on 13.08.2012.

38. Insofar as the finding of the learned Arbitrator that the PBGs in question were conditional, in my view, the same cannot be sustained.

Relevant part of one of the bank guarantees is as follows:-

“We the Bank of Baroda, Corporate Financial Services Branch, Himayat Nagar, Hyderabad do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from the DDPL (JV) BSSPL stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the DDPL (JV) BSSPL by reason of any breach by the said Contractor(s) of any of the terms and conditions

contained in the said Agreement or by reason of the Contractor's failure to perform the said Agreement.”

39. A bare perusal of the BG shows that the bank had undertaken to pay the amounts due and payable under the guarantee, merely on demand from the petitioner stating that the amount claimed was due or likely to be due by way of loss or damage caused to it by reason of any breach of any of the terms of the agreement or failure to perform the agreement, without any demur. An identical clause in a bank guarantee came up for interpretation before the Supreme Court in ***Mahatma Gandhi (supra)*** and the Court after analyzing the provision, concluded that the Bank Guarantee was unconditional. Court observed that the Bank Guarantee being unconditional and irrevocable, it is not open to the Bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by an injunction in enforcing the guarantee on the pretext that the condition for enforcing the BG in terms of the agreement entered between the parties has not been fulfilled. The Supreme Court while distinguishing the earlier judgement of the Court in ***Hindustan Construction Co. Ltd. v. State of Bihar (1999) 8 SCC 436***, in the facts of the case before it, in fact also took support from a passage from the said judgement which is as follows:-

“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person

on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”

40. Finally the Court in ***Mahatma Gandhi (supra)*** held as follows:-

“28.What is relevant, therefore, is the terms incorporated in the guarantee executed by the bank. On careful analysis of the terms and conditions of the guarantee, we find the guarantee to be an unconditional one. The respondent, therefore, cannot be allowed to raise any dispute and prevent the appellant from encashing the bank guarantee.”

It would be relevant to extract for ready reference the terms of the bank guarantee involved in the said case as under:-

“1. In consideration of the above premises, the guarantor hereby undertakes to pay to the purchasers within 30 days of demand, without demur such a sum not exceeding Rs 92,40,000 (Rupees ninety-two lakhs forty thousand only), representing 3% of the contract price as the purchasers may demand upon the failure of the supplier to conduct the trial test of the sugar plant by 24th July, 2003 and also upon the failure of the sellers to commission the project (plant and machinery) before December 2003.

2. The guarantor shall pay to the purchasers on demand the sum without demur and without requiring the purchasers to invoke any legal remedy that may be available to them, it being understood and

agreed firstly that the purchasers shall be the sole judge of and as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach(es) of the terms and conditions of the said agreement and the extent of losses, damages, costs, charges and expenses caused to or suffered by or that may be caused to or suffered by purchasers from time to time shall be final and binding to the guarantor and secondly that the right of the purchasers to recover from the guarantor any amount due to the purchasers under this guarantee shall not be affected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that proceedings are pending before any Tribunal/arbitrator(s) or court with regard thereto or in connection therewith and thirdly that the guarantor shall immediately pay the aforesaid guaranteed amount to the purchasers on demand and it shall not be open to the guarantor to know the reasons of or to investigate or to go into the merits of the demands or to question or challenge the demand or to know any facts affecting the demand, and lastly that it shall not be open to the guarantor to require the proof of the liability of the sellers to pay the amount, before paying the sum demanded under Clause 1 above.

8. The invocation of this guarantee shall be by a letter as herein signed by the purchasers and countersigned by the Commissioner of Sugar, Bangalore, Karnataka State.”

41. The same issue again arose before the Supreme Court in ***Gujarat Maritime (supra)***. In the said case the terms of the Bank Guarantee were as follows:-

“(b) We, Yes Bank Ltd., do hereby undertake to without any reference to the lead promoter or any other person and irrespective of the fact whether any dispute is pending between GMB and the lead promoter or any court or tribunal or arbitrator relating thereto, pay the amount due and payable under this guarantee without any demur, merely on demand from GMB stating that the said lead promoter's failure to perform the covenants of the same. Any such written demand made by GMB on the Bank shall be conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee. However, Bank's liability under this guarantee shall be restricted to an amount not exceeding Rs.5,00,00,000 (Rupees five crores only).”

42. The contention raised by the guarantor in the said case was that the invocation of the BG depending on the cancellation of the contract and once the cancellation is not justified, the invocation also is not justified. The Supreme Court observed that the said contention cannot be appreciated. The Bank Guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the Bank Guarantee also, invocation is only against a breach of the conditions in the LOI, but, between the beneficiary and the bank it is stipulated that the decision of the beneficiary as to the breach shall be absolute and binding on the bank. The Court interpreted a similar Bank Guarantee to be clearly unconditional and irrevocable and held as follows:-

“13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the

Bank should honour it "... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be "... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee."

43. In my view, the said judgements squarely cover the present case and the bank guarantees in question are unconditional and the finding of the Learned Arbitrator runs contrary to the observations of the Supreme Court.

44. Thus, insofar as Claim No.1 is concerned the Award cannot be sustained as the basic premise on which the Learned Arbitrator had proceeded is that the bank guarantees were conditional and in the absence of proving the breach by the respondent and the loss/damage to the petitioner, the invocation was illegal. This premise cannot be accepted as

the bank guarantees are clearly unconditional. As held by the Supreme Court, once the BGs are unconditional or irrevocable, the bank is bound to honour and encash the BGs in favour of the beneficiary without any proof of breach or loss.

45. The issue can be looked at from another angle. As rightly argued by senior counsel for the petitioner, even if it is assumed for the sake of argument that the bank guarantee was conditional, the award to the extent it allows claim No.1 in favour of the respondent cannot be upheld in law. First and foremost, the finding of the Learned Arbitrator that it was wholly inequitable for the petitioner to terminate the agreement was beyond the jurisdiction of the Learned Arbitrator as termination was not even challenged by the respondent. In fact, a perusal of the issues framed would also substantiate the stand of the petitioner that the termination was not a subject matter of challenge before the Learned Arbitrator. Counsel for the petitioner had elaborately brought before the Court that between 21.02.2011 to 06.02.2012 respondent had executed work of Rs.8.94 crores which was less than 5% of the contract value of Rs.201 crores, to be executed in about 21½ months. Termination of the contract was for abandonment of the work for more than three months prior to the date of termination i.e. 06.02.2012 and this was not disputed by the respondent in its reply dated 07.12.2012 to the letter of termination. The petitioner had specifically brought out in its evidence the loss or damage suffered due to non-performance of the respondent and more importantly, the Learned Arbitrator has not only observed that there was significant disparity between the degree of work completed but the Learned

Arbitrator has nowhere observed that the petitioner has not suffered any loss and yet held that the invocation of bank guarantee was wrongful.

46. Learned Senior Counsel for the Petitioner is also right in his contention that the Learned Arbitrator has wrongly observed that the petitioner had undertaken to bear all penalties for delays up to Milestone-IV and was aware of the slow progress of the work in question. Perusal of the second LOI dated 18.05.2011 substantiates the stand of the petitioner that it had agreed to bear the penalty, if any, on “additional work” which referred to the work executed by the respondent covered by the second LOI and not the entire work covered under both the LOIs. Moreover, it was, as rightly contended, “for the period as on date already lapsed” on the date of the second LOI and the Petitioner had not agreed to bear all penalties up to Milestone-IV, for the entire project works. Relevant part of the LOI is as follows:-

“Date : 18th May 2011

No.: DDPL-BSSPL/DGMAP/PKG-25/11/188

M/s. Totem Infrastructure Ltd.,

6, Totem House,

Punjagutta,

Hyderabad-500 082

AMENDMENT TO LETTER OF INTENT NO.LOI/11/022

Kind Attn.: Devendra Jha (Head-Building Division)

*SUBJECT: CONSTRUCTION OF DWELLING UNITS
INCLUDING ALLIED SERVICES FOR OFFICERS,
JCOs/Ors. AT AHMEDABAD, GANDHINAGAR AND
CHILODA (SW AC(U), 258 SU & 857 SU).*

REFERENCE : OUR LOI NO.LOI/11/022 dated 21st February 2011

Dear Sir,

Further to our LOI No.LOI/11/022, vide letter No.DDPL-BSSPL/DGMAP/PKG-25/11/167 dated 21st February 2011, for the construction of dwelling units on turnkey basis for 3 Blocks of 72 DU at Gandhinagar, 26 Blocks of 793 DU at Chiloda (Pocket -1, 2) and 41 Blocks of Miscellaneous Structures like Guard Post, Garbage Bins, Car Garages, Scooter Garages & Service Centre with Toilet Block, etc. at Gandhinagar & Chiloda (hereinafter referred to as the "Work") amounting to Rs.113,79,35,257.10 (Rupees One Hundred Thirteen Crore Seventy Nine Lacs Thirty Five Thousand Two Hundred Fifty Seven and paisa Ten only) as per annexure attached.

The above work has been enhanced to Rs.201,44,94,251.77 (Rupees Two Hundred One Crore Forty Four Lacs Ninety Four Thousand Two Hundred Fifty One and paisa Seventy Seven only) from the existing value of Rs.113,79,35,257.10 by allocating additional work of our Ahmedbad and Gandhinagar sites, as per the attached "SUMMARY" sheet. However, there is some small work already carried out by other petty contractor on these additionally allocated sites, for which the amount shall be decided mutually between us and shall be debited to your account. The petty contractor had carried out work at 18 blocks as off now and penalty, if any, applied on this additional work upto milestone IV, shall be borne by us for the period as on date already lapsed.

All other terms and conditions of our LOI No.LOI/11/022 dated 21st February 2011 shall remain unaltered and applicable for the entire work.

You are requested to please submit the revised work plan, including these additional work in the original plan for our record.

The detailed work order / agreement shall be issued to you shortly on receipt of Performance Guarantee for the additional work. The mobilization advance shall be released on receipt of mobilization bank guarantee for the remaining value of work.

Kindly return one copy of this amendment to LOI, duly signed, in token of acceptance of all terms and conditions.

Thanking you,

Yours faithfully,

For

M/s. Dhoot Developers Private Limited (JV)

M/s. Bengal Silver Spring Projects Limited

Received & Accepted

M/s. Totem Infrastructure Ltd.”

47. It is no doubt a settled law that interpretation of a contract is in the domain of an Arbitrator and if the interpretation or the view of the Learned Arbitrator is not only a plausible but a possible interpretation, the Court in the scope of its judicial review under Section 34 of the Act shall not interfere. However, in my view, in the present case the perusal of the provisions of the LOI shows that the interpretation is opposed to the clear and unambiguous language of the letter and the parties never intended that the liability of penalty would be borne by the Petitioner for all works up to Milestone-IV. The Award thus calls for interference to this extent.

48. Even otherwise in the absence of a challenge to the termination it could not be held that the Respondent was not responsible for the delay. If the Respondent was aggrieved by the action of the Petitioner it should have challenged the termination on the ground that the Respondent had neither abandoned the work nor caused any delay. Acceptance of the termination can only imply that the Respondent accepted that it was responsible for non-performance of the contract within the timelines.

49. Claim No.2 of the Respondent was with regard to a claim for an amount of Rs.22,37,93,526/- towards wrongful encashment of Mobilization Advance BGs, being the net consolidated amount covered by 8 BGs furnished by the respondent against Mobilization Advance, provided by the Petitioner under the Agreement. Under the LOI dated 21.02.2011 Petitioner had agreed to provide a Mobilization Advance of 10% of the contract value against equivalent amount of irrevocable BGs. It was also the term of the LOI that the recovery of such advance shall be made from each RA Bill in equal installments and as per the Master Contract. Accordingly, proportionate to the contract value the petitioner was required to grant Mobilization Advance of Rs.20,50,48,986/- and the respondent had as per record furnished Mobilization Advance BGs to the extent of Rs.21,52,98,466/- over a period of time, from 01.03.2011 till 31.12.2011. It is undisputed that under clause 26.2 of the GCC in the Master Contract between the Petitioner and DG-MAP, payment of Mobilization Advance was in one installment within a 30 days period from the date of submission of the BGs. Petitioner received Mobilization Advance of Rs.17.10 crores from DG-MAP. While it is the case of the Respondent that it had received only a sum of Rs.7,62,57,703/- by cheque

in March 2011 and Rs.1,43,25,000/- by cash in December 2011 which is significantly less than the 10% contract value, the claim of the Petitioner was that it had paid Mobilization Advance worth Rs.20,50,48,986/- as per the Agreement. Learned Arbitrator observed that the Petitioner has set up a curious plea by asserting that it had paid the entire Mobilization Advance whereas its own witnesses had deposed that only an amount of Rs.7.85 crores was paid by cheque/cash, Rs.22,75,871/- was by way of TDS and Rs.12,65,15,392/- was in the form of material at the construction site. The Learned Arbitrator relied on the letter dated 09.03.2011 sent by the Petitioner to the Respondent to conclude that only a sum of Rs.7,62,57,703/- was paid by way of cheque and beyond that there was little evidence to suggest that material worth the balance amount was provided. Reliance was also placed on clause 26.2 whereby the Mobilization Advance was payable only in one installment and did not envisage the payment in the form of material supplies. The Learned Arbitrator also held that the Petitioner had recouped the amount of Rs.7,62,57,703/- in monthly installments from the RA Bills and for this placed reliance on the testimony of RW-3. Accordingly, the Learned Arbitrator held that the invocation of Mobilization Advance BGs was unjustified.

50. Respondent contended before this Court that the Learned Arbitrator has rightly allowed Claim No.2 inasmuch as the entire Mobilization Advance was never paid by the Petitioner. Respondent had initially furnished Mobilization Advance BG for a sum of Rs.18,52,98,466/- against which the Petitioner paid a sum of Rs.7,62,57,703/- in cash, in terms of clause 26.2, which is reflected in the

letter dated 09.03.2011. Subsequently, Respondent furnished additional bank guarantee of Rs.3 crores against which the Petitioner released an amount of Rs.1,43,25,000/- and therefore the total Mobilization Advance given to the Respondent was Rs.9,05,82,703/-. Out of the said amount sum of Rs.7,81,33,095 was recovered by the Petitioner as reflected from RA Bill No.5, which is an admitted document and even the Petitioner's witness RW-3 in answer to question 27 read with question 70 admitted this position. The alternate contention is that even assuming that apart from the cash amount of Rs.9.05 crores advance was given by supply of materials, since the advance was for mobilization of resources, the same cannot be recovered by invocation of bank guarantee as the same has to be restricted to the amount given in cash. The material, if any, is lying at the site of DG-MAP and there are no allegations that the Respondent lifted the material. Thus, the invocation of the entire BG amount of Rs.21,52,98,466/- was illegal and amounted to unjust enrichment of the Petitioner and double jeopardy of the Respondent and the claim was rightly allowed by the Learned Arbitrator.

51. Petitioner on the other hand firstly assails this part of the Award on the ground that there is an incorrect computation of the BG Amount. According to the Petitioner the invocation was only for Rs.21,52,98,466/- but the Learned Arbitrator has awarded Rs.22,37,93,526/- which is contrary to pleadings and evidence. At this stage I may note that during the course of the arguments counsel for the Respondent, on instructions, had candidly admitted this error of computation on the part of the Learned Arbitrator. It is true that initially the respondent had in the pleadings computed the amount towards BGs as Rs.22,37,93,526/- and

the issue was accordingly framed. However, one BG out of the eight, for Rs.1 crore was not invoked and therefore the total amount comes out to Rs.21,52,98,466/-.

52. Insofar as the total Mobilization Advance given by the Petitioner is concerned I find force in the contention of the counsel for the Petitioner that there was enough evidence to substantiate that the Petitioner had paid the entire Mobilization Advance. While it is the settled law that the Court cannot substitute its views for that of the Learned Arbitrator or arrive at an independent finding after re-appreciating evidence, but it is equally settled that in case the Learned Arbitrator ignores vital documents/evidence/admissions, the Award can be interfered with. In this context I may usefully allude to the judgement of the Supreme Court in *Associate Builders (supra)*, relevant paras of which are as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held: (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer

from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

53. I may also refer to relevant passages from the judgement of the Supreme Court in ***Ssangyong (supra)*** as under:-

“40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground

for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

54. The Supreme Court in a recent judgement in ***South East Asia Marine Engg. & Constructions Ltd. v. Oil India Ltd., (2020) 5 SCC 164*** interfered in the Award on the ground that the interpretation of the Arbitral Tribunal was not even a possible view and held as follows:-

“11. In order to answer the questions raised in this appeal we first need to delve into the ambit and scope of the court's jurisdiction under Section 34 of the Arbitration Act. Section 34 of the Arbitration Act provides as under:

*“34. Application for setting aside arbitral award.—
(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or (b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance

of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award.”

12. It is a settled position that a court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] laid down the scope of such interference. This Court observed as follows : (SCC pp. 11-12, para 24)

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by

various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1 : 2019 SCC OnLine SC 1656] observed as under : (SCC p. 12, para 25)

“25. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

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25. Having regard to the law discussed herein, we do not subscribe to either the reasons provided by the Arbitral

Tribunal or the High Court. Although, the Arbitral Tribunal correctly held that a contract needs to be interpreted taking into consideration all the clauses of the contract, it failed to apply the same standard while interpreting Clause 23 of the contract.

26. We also do not completely subscribe to the reasoning of the High Court holding that Clause 23 was inserted in furtherance of the doctrine of frustration. Rather, under the Indian Contract law, the effect of the doctrine of frustration is that it discharges all the parties from future obligations. In order to mitigate the harsh consequences of frustration and to uphold the sanctity of the contract, the parties with their commercial wisdom, chose to mitigate the risk under Clause 23 of the contract.

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31. The interpretation of the Arbitral Tribunal to expand the meaning of Clause 23 to include change in rate of HSD is not a possible interpretation of this contract, as the appellant did not introduce any evidence which proves the same.”

55. The petitioner has been able to bring out that the various RA Bills placed before the Learned Arbitrator being RA Bill No.1/2/4/5 indicate that the Respondent had admitted that the entire Mobilization Advance had been received. Respondent had computed the interest liability on the entire Mobilization Advance of Rs.20.50 crores and installments towards recovery of the advance had also been worked on the complete amount of Rs.20.50 crores. Petitioner is also right in its contention that the Learned Arbitrator rejected the reconciliation statement evidencing the receipt of the entire amount purely on the finding that the statement was an undated sheet and had no endorsement by the Respondent. The statement however

as shown by the learned senior counsel during the hearing shows that it was duly dated and endorsed/signed by the representatives of the parties. The statement was produced and proved in evidence by the Petitioner's witness as Ex.RW-1/5 and the witness was cross-examined by the Respondent with respect to the said document. Significantly the fifth RA bill is signed by the Respondent and was filed by the Respondent. This vital evidence and material documents, in my view, have been ignored by the Learned Arbitrator.

56. Learned Senior Counsel for the petitioner has also argued and in my view rightly so, that the letter dated 09.03.2011 clearly indicated that in fact Rs.11,37,93,526/- was paid as Mobilization Advance and not Rs.7,62,57,703/- as held by the Learned Arbitrator. The said amount comprised of payment of Rs.7,62,57,703/- by cheque, Rs.22,75,871/- as deduction on account of TDS and the balance amount paid to the vendors on behalf of Respondent for purchase of steel. The said letter was proved in evidence and Petitioner's witness RW-3 was cross-examined in the said respect. In fact, the Respondent never disputed the statutory deduction and the amount paid to the vendors for purchase of steel. The interpretation given to the letter dated 09.03.2011 and the conclusion drawn therefrom is not borne out from the evidence on record and cannot be sustained.

57. The finding of the Learned Arbitrator with regard to there being little evidence with respect to the material supplied is contrary to the documents placed on record being the RA Bills. There is also force in the contention of the Petitioner that prior to the filing of the Statement of Claim Respondent had never communicated regarding less Mobilization

Advance paid by the Petitioner. In case the amount was less, there was no reason for the Respondent to have furnished the Bank Guarantees for the entire amount. Even the letter dated 02.02.2012 being the first communication after invocation of BGs lays no grievance that the entire Mobilization Advance was unpaid.

58. Insofar as the material is concerned it is rightly argued that the Respondent had pleaded that material was given in lieu of Mobilization Advance but was left at site upon termination of the contract. Therefore, the finding of the Learned Arbitrator that no material was supplied is contrary to the pleadings of the Respondent. Admittedly, in December 2011 Respondent had furnished further BGs for Rs.3 crores for ad-hoc advances, which were released. If the Respondent had not paid the entire Mobilization Advance against the BGs submitted in July 2011 it would not have issued further BGs in December 2011. Therefore, in my view the finding that the entire Mobilization Advance was unpaid cannot be upheld. However, there is force in the contention of the Respondent that the Petitioner had recouped a sum of Rs.7,81,33,095/-and this is clearly reflected from RA Bill No.5 which is an admitted document. The Respondent has in its various letters placed before the Learned Arbitrator dated 09.03.2011 taken a categorical stand with respect to recovery of the said amount and significantly there is no denial in any of the communications by the Petitioner. Thus, the Petitioner is entitled to invocation of the Mobilization Advance BGs only for the balance amount.

59. As far as Claim No.3 is concerned the same was for an amount of Rs.11,27,88,524/- towards the work done by the Respondent as detailed

in the Statement of Claim. The Learned Arbitrator has observed that there is considerable confusion over the exact amount of work done by the Respondent. While the Respondent has stated that the total value of work done as on the date of termination was Rs.18,16,51,464/- but in cross-examination its witness CW-1 stated that the net value of the work done was Rs.8,26,69,758/-. Learned Arbitrator has further noted that as per clause 12 of the Master Contract pertaining to the payment, the bills raised by the Respondent have to be approved by the Project Manager and the DG-MAP, after which payments are to be released. This according to the Learned Arbitrator shows that the DG-MAP is the Authority to finally certify the bills and only then the payments are released. Under these circumstances, the Learned Arbitrator has observed as follows:-

“32. It is important to note that as per Clause 12 of the Master Contract pertaining to 'Payments', the Bills raised by the Claimant have to be approved by the Project Manager and the DG-MAP after which payments are released to the Claimant. Clause 12 mandates that the cheque issued to the Claimant can be encashed only after the amount is credited into the account of the Respondent. This shows that the DG-MAP is the authority to finally certify the Bills and payments are released on the basis of its certification. As regards the claim of the Claimant in relation to RA Bill No. 5 and the claims made in terms of letter dated 02.02.2012, any amount due and payable to the Claimant has to be first certified by the DG-MAP.

33. This is a term which binds all the parties viz., the Claimant, the Respondent as well as the DG-MAP (as per Clause 12 of the Master Contract) and cannot be lost sight of in these arbitration proceedings as well.

34. Under such circumstances, even though the Claimant cannot be entitled to unsubstantiated sums to the extent claimed under the Issue, the Claimant will be entitled to any amount received by the Respondent in lieu of work which is the subject matter of RA Bill No. 5 or the claims made by the Claimant mentioned at Schedule C to letter dated 02.02.2012. These amounts would have been paid to the Respondent by DG-MAP after due certification in terms of Clause 12 of the Master Contract and as such the Respondent cannot be entitled to unjust enrichment at the cost of any legitimate claim of the Claimant.

35. The Respondent and DG-MAP are already in the midst of arbitration proceedings on various issues including payments due to the Respondent. Any amount which is awarded to the Respondent for the above-mentioned heads will be payable to the Claimant and the claimant will be entitled to claim such amounts or any further amount if it could be so established from the respondents by initiating appropriate proceedings after award is passed in the other arbitration proceeding.”

60. While the respondent contends that this was the most plausible course of action followed by the Learned Arbitrator, the Petitioner contends that once the Learned Arbitrator has observed in the earlier part of the Award that at no point during the evidence or closing submissions, the Claimant elaborated how it has deduced the amounts claimed, this was sufficient to dismiss the claim and it was not open to the Learned Arbitrator to leave the dispute open for a second round of litigation. In fact, the Respondent had never pleaded that this claim could only be ascertained after the proceedings between the Petitioner and the DG-MAP are concluded.

61. The Learned Arbitrator has left the adjudication of claim No.3 to be decided after the culmination of the arbitration proceedings between the Petitioner and DG-MAP, which at the stage of passing of the award were pending. While the Learned Arbitrator has no doubt held that the Respondent cannot be entitled to unsubstantiated sums under the said claim but has also observed that it would be entitled to the amount received by the Petitioner in lieu of the work, which is subject matter of RA Bill No.5 or the claims made by the Respondent in schedule-C of letter dated 02.02.2012. The basis of the Award under Claim No.3 is Clause 12 of the Master Contract which reads as follows:-

“12. PAYMENT

Payment of Totem’s bills shall be made by way of cheque in advance based on the bills prepared and approved by DG MAP after receipt of details from site. The cheque shall be presented immediately on realization of that bill by DG MAP to the account of DDPL (JV) BSSPL. The stage wise payment shall be as per the schedule mentioned in the contract.”

62. Under the said clause which pertains to payments, the bills raised by the Respondent have to be approved by the Project Manager and the DG-MAP, only after which the payments can be released and in fact Clause-12 further mandates that the cheque issued to the Respondent can be encashed only after the amount is credited into the account of the Petitioner. The Learned Arbitrator has rightly observed that the DG-MAP is the Authority to finally certify the bills and on the basis of its certification, payments are to be released. Thus, there is no gainsaying that the claims of the Respondent in relation to RA Bill No.5 and under

the letter dated 02.02.2012, would also be subject to the said caveat. As a corollary the amounts would have to come first into the account of the Petitioner after due certification and depending on that the amounts, if any, can be released to the Respondent herein. As the arbitration was pending, it was uncertain as to the amounts to which the Petitioner would be entitled and therefore looking at the close connection between the two arbitrations, Learned Arbitrator left the claim to be decided after the proceedings between the Petitioner and the DG-MAP conclude. I find no infirmity with this finding of the Learned Arbitrator.

63. The second part of the challenge in the present petition by the Petitioner is to the rejection of its Counter Claim Nos.2, 7 and 11. Counter Claim No.2 of the Petitioner was for an amount of Rs.2,25,84,449/- towards expenditure incurred by the Petitioner for discharge of liability of the Respondent at the site, which it claims to have paid to the Respondent's unpaid vendors. The Counter Claim was rejected by the Learned Arbitrator on the ground that the Petitioner had only placed on record the list of vendors to whom the payments were to be allegedly made, but apart from this list, no documents were produced evidencing the actual payment to the unpaid vendors nor it produced any vendor as witness to testify the fact. No affidavits were filed by the vendors proving the genuineness of the claims under this head and the Petitioner never raised this issue with the Respondent in any letter or correspondence.

64. The stand of the Petitioner to challenge this portion of the Award is that upon termination of the contract DG-MAP gave a list of vendors of the Respondent whose outstanding payments were to the tune of

Rs.2,52,47,442/-. Petitioner notified this to the Respondent vide e-mail dated 22.11.2011 and paid Rs.1,55,04,271/-, after verification by the Respondent, which according to the Petitioner is a fact ignored by the Learned Arbitrator. The argument is that despite plethora of documents on record evidencing details of payments made by the Petitioner the Learned Arbitrator has rejected the counter claim contrary to the evidence and on this ground the Award is perverse.

65. I find force in the contention of the Learned Senior Counsel for the Petitioner that the Petitioner had placed on record various documents evidencing payments made to some unpaid vendors of the Respondent which was significantly admitted by the Respondent during admission/denial of the documents. These documents included request letters of various vendors, copies of the cheques issued to the vendors as well as receipts received from them in acknowledgment and ran into as many as 100 pages. In addition, there was evidence in the form of testimony of the Petitioner's witness RW-1 (questions 82-85) who was cross-examined as well as testimony of RW-2 and RW-3 who withstood the cross-examination by the Respondent. The finding that no documents were produced by the Petitioner in support of the payments made, therefore is in ignorance of the documentary and oral evidence on record and as held by the Supreme Court in *Ssangyong (supra)* would make the findings contrary to law. The Award to the extent it rejects the Counter Claim deserves to be set aside.

66. Counter Claim No.7 relates to delayed compensation amounting to Rs.20,50,48,986/- under Clause-44 of the GCC. Rejecting the Counter Claim the Learned Arbitrator has held that delay in progress of the work

was not solely attributable to the Respondent and that the Petitioner had itself obtained extension of deadline from DG-MAP on 13.08.2012. In view of this, the principle of Clause-44 cannot be applied against the Respondent. Clause-44 GCC is as follows:-

“44. Compensation for delay

If the Contractor fails to complete the Works and clear the site on or before the date(s) fixed for completion, he shall without prejudice to any other right or remedy of Government on account of such breach, be liable to pay compensation as under :-

Zero point five percent (0.5%) of the Contract value of the item or group of items of Work (excluding the Contract value of such individual items as are completed and taken over by P.M. on or before the date(s) fixed for completion, in terms of condition 43 hereof) for which a separate period of completion is given in the Contract, for every week that the whole of the work in respect of the item or group of item of work concerned remains uncompleted, even though the Contract as a whole be completed by the latest date specified in the Contract for any item or group of items of Works.

For the purpose of this condition the ‘Contract Value’ shall be the value at contract rates of the work as actually ordered including all deviation orders on the Contractor.

When the delay is not a full week or in multiples of a week but involves a fraction of a week, the compensation payable for that fractions shall be promotional to the number of days involved.

Provided always that the total amount of compensation to be paid under this condition shall not exceed ten percent of the Contract value.”

67. Reading of the award makes it clear that the rejection of the Counter Claim is essentially on account of the findings of the Arbitrator against the Petitioner in Claim No.1. I have already held under Claim No.1 that the Learned Arbitrator was not justified in adjudicating on the legality of the termination as the termination was never challenged before the Learned Arbitrator. Since the Respondent accepted the termination it was not open to argue that it was the Petitioner who was responsible for delay and that the Respondent had not abandoned the work. Thus the premise of rejecting Counter Claim No.7 in my view is incorrect. Moreover, the Learned Arbitrator has held that the Petitioner adopted a simplistic and erroneous approach towards computation payable under this head and the proper course of action would have been to charge 0.5% of the value of the “specific works” which has been delayed for every work from the planned date of completion of that “particular work”.

68. Learned Senior Counsel for the Petitioner has rightly urged that the Respondent had stopped working from September 2011 till termination and in 22 months had executed work worth Rs.8.94 crores only. Work-wise computation of delay compensation computes to more than 10% of the contract value and therefore as rightly contended it had to be restricted to a maximum of 10% of the contract value under Clause 44 GCC and which is what was claimed by the petitioner. In fact, the respondent never objected to the method of computation. It was thus not open to the Learned Arbitrator to reject the entire Counter Claim of the Petitioner assuming for the sake of argument that an error was found in

the methodology of computation. This portion of the Award in my view deserves to be set aside.

69. Insofar as Counter Claim No.11 is concerned, the same was for refund of Rs.20,63,931/- paid in excess on account of labour escalation. The case of the Petitioner is that admittedly Rs.33,21,995/- was paid to the Respondent as “on account payment” towards escalation. Subsequently however it was found that Rs.20,63,931/- had been paid in excess, which was recovered by DG-MAP from the Petitioner and therefore recoverable from the Respondent. The Learned Arbitrator while rejecting the counter claim observed that if the payment had been made without the approval of the DG-MAP then clearly the petitioner had itself to blame. Petitioner contends that under Clause 54 GCC the amount paid to the Respondent was “on account” payment, subject to adjustment in the final bill. The Arbitrator has referred to Clause 12 of the Agreement which provided the manner of payment of the Respondent’s bills, which significantly was relied upon by the Petitioner itself. The Arbitrator relying on Clause 12 has observed that the mechanism envisaged under the terms of the Agreement required the Petitioner to provide an advance cheque to the Respondent only after the Respondent’s bills had been approved by DG-MAP. The cheque was to be encashed only after DG-MAP paid the amount of that bill into the account of the Petitioner and therefore according to the Learned Arbitrator it is inconceivable that any amount could be paid by the Petitioner to the Respondent at its own risk and consequences before the bills were formally approved by DG-MAP. The Arbitrator also found that there was no document on record to

substantiate the Petitioner's assertion that DG-MAP had approved only a sum of Rs.12,58,063.86/- against an amount of Rs.33,21,995/- claimed by the Respondent. The fact that the Petitioner's Project Manager approved the bill was not denied by the Petitioner and if the payment had been made without the approval of DG-MAP, then the Petitioner had itself to blame.

70. I have considered the reasoning of the Arbitrator and also perused Clause 12 of the Agreement, which has been extracted in the earlier part of the judgement. It is obvious that Clause 12 envisages a mechanism that the bills of the Respondent were subject to final approval by the DG-MAP and only after the amount was credited into the account of the Petitioner, the payments were to be released to the Respondent. The Supreme Court in *SEAMAC (supra)* has reiterated the proposition of law that the Court in a judicial review, while deciding a challenge under Section 34 of the Act to an Award by the Arbitrator cannot interfere in the view of the Arbitrator unless there is patent illegality of the threshold envisaged under the Section. If the view of the Arbitrator is a plausible or a possible view the same has to be upheld. The view of the Arbitrator with respect to counter claim No.11 of the Petitioner in my view is a plausible view and a correct interpretation of Clause 12 of the Agreement and calls for no interference.

71. In view of the above the petition is partly allowed.

72. The Award dated 04.03.2017 is upheld with respect to Claim No.3 and Counter Claim No.11 as well as other portions not challenged before

this Court. Award is set aside with respect to Claim Nos. 1 and 2 and Counter Claim Nos.2 and 7 to the extent noted above. Petitioner is at liberty to agitate the said Claims and Counter Claims, in accordance with law.

73. Pending application also stands disposed of.

JYOTI SINGH, J

NOVEMBER 17th, 2020

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