

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 10.02.2021

+ **O.M.P. (COMM.) 507/2020 & IA Nos. 9398/2920 & 11539/2020**

**TELECOMMUNICATION CONSULTANTS
INDIA LTD.**

.... Petitioner

versus

M/S MBL INFRASTRUCTURE LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Ratan K. Singh and Mr. Nikhilesh
Krishnan, Advocates.

For the Respondent: Ms. Anusuya Salwan, Advocate.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A&C Act') impugning an arbitral award dated 20.01.2020 (hereinafter the 'impugned award') passed by the Arbitral Tribunal comprising of three Arbitrators, Mr. O.P. Gaddhyan, Mr. Vipin Kumar and Justice (Retd.) Reva Khetrapal as the presiding arbitrator. Whilst Mr. O.P. Gaddhyan and Justice (Retd.) Reva Khetrapal delivered the impugned award by majority, Mr. Vipin Kumar entered a dissenting opinion on 23.01.2020.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to an agreement dated 17.09.2008, as amended by an agreement dated 31.10.2008.

3. By the impugned award, the Arbitral Tribunal has partly accepted the claims preferred by the respondent. The Arbitral Tribunal has accepted that the total amount payable to the respondent in respect of its claim would be ₹5,91,36,814. The Tribunal further allowed interest at the rate of 12% per annum, as per normal banking norms on the said amount calculated from 24.12.2013 (i.e. the date of filing of Statement of Claim) till the date of making and publishing the award. The Tribunal further directed that the said payment be made within a period of 30 days failing which a further interest of 12% per annum is to be applicable from the date of the Award till the date of payment. The Arbitral Tribunal also awarded cost quantified at ₹58,48,927/- along with simple interest at the rate of 12% per annum.

4. The petitioner (hereinafter 'TCIL') assails the impugned award to the extent as noted hereafter, as being patently illegal and contrary to the fundamental policy of Indian Law.

5. Briefly stated, the relevant facts that are necessary to address the controversy are as under:-

6. Haryana State Roads & Bridge Development Corporation Ltd. (hereafter 'HSRDC') invited tenders for "*Construction of 144 nos. Type V and 24 nos. Type VI houses with parking in basement (C+7 Storey)*

in the campus of Rajiv Gandhi Thermal Power Project at Khedar in Hissar District” (hereinafter ‘the project’).

7. The petitioner (TCIL) submitted its tender for executing the project works on 22.07.2008. TCIL’s bid of ₹32,29,49,824/- was accepted by HSRDC and the contract for implementation of the project was awarded to TCIL by a letter dated 21.08.2008.

8. In the aforesaid letter of acceptance, TCIL was directed to furnish a Performance Security as per Clause 34 of Section I- Instructions to Bidders, for an amount equivalent to 5% of the contract price i.e. ₹1,61,47,491/-, within 21 days of the receipt of the letter dated 21.08.2008. The same was duly furnished by TCIL.

9. Thereafter, TCIL approached the respondent (hereinafter MBL) to execute the said project as a sub-contractor and on 18.08.2008, MBL agreed to the terms and conditions. It was agreed that the contract would be executed on back to back basis with TCIL retaining a margin of 2.5% and disbursing the balance 97.5% to MBL. In addition, TCIL agreed to depute three engineers for co-ordination between MBL, TCIL and HSRDC and MBL agreed to bear the cost of the aforesaid at the rate of ₹40,000/- per month for each engineer.

10. Thereafter, on 17.09.2008, an agreement was entered into between TCIL and MBL (hereinafter ‘the Agreement’). MBL agreed to complete the project within a period of eighteen months. TCIL agreed to release the payments received from HSRDC, after deducting 2.5% margin, immediately on receiving the same.

11. In terms of the Agreement dated 17.09.2008, MBL furnished a Performance Security in the form of a Bank Guarantee for the sum of ₹1,61,47,491 and an invoice payment Bank Guarantee for ₹60 lacs on 06.10.2010, in favour of TCIL.

12. On 31.10.2008, the parties agreed to an amendment to the said Agreement and the terms and conditions of such amendment were reduced into writing. Essentially, the clause for Procurement of Material was amended.

13. The works as originally agreed were completed within the stipulated period, that is, 11.03.2010 for the tender amount of ₹32,29,49,824/-. However, the actual date of completion was extended on account of extra work executed by MBL and also delay arising on account of various decisions taken by HSRDC. The work was finally completed to the satisfaction of TCIL on 30.11.2011.

14. Certificates dated 01.02.2010, 29.12.2020 and 27.04.2013 were issued by TCIL indicating that MBL's performance on various parameters was "very good".

15. HSRDC issued the Completion Certificate on 04.06.2013. HSRDC also granted extension of time for execution of project up to 30.11.2011 without any levy of liquidated damages by its memo dated 13.02.2017.

16. On 06.06.2013, MBL submitted the aforesaid Completion Certificate to TCIL. It is averred that MBL was also awarded an

Excellence Award for the aforesaid project and the said Excellence Award was also submitted by MBL to TCIL along with the Completion Certificate and a cheque of ₹10 lacs drawn in favour of TCIL by HSRDC. MBL further requested TCIL to release their payments withheld by it and also to release their security deposit at the earliest.

17. In the meanwhile, since the Performance Security (in the form of a Bank Guarantee) was expiring on 04.07.2013 and the Certificate of Satisfactory Completion of the Project from HSRDC was awaited, MBL extended the Performance Security from 04.07.2013 up to 04.10.2013 and apprised TCIL of the same vide a letter dated 03.07.2013.

18. On 19.07.2013, HSRDC issued a certificate to the effect that the work had been successfully completed on 30.11.2011 and the defect liability period had also expired on 25.06.2013. On 22.07.2013, MBL addressed a communication to TCIL enclosing Completion Certificate, Defect Liability Certificate, cheque issued by HSRDC and also the original Performance Bank Guarantees released by HSRDC in favour of TCIL and requested TCIL to release the original Performance Bank Guarantee furnished by it. It also requested TCIL to release the outstanding dues along with interest at the rate of 18% per annum.

19. TCIL instead of releasing the Performance Bank Guarantees sent a communication to the bankers of MBL seeking encashment of the Performance Bank Guarantees furnished by MBL. Aggrieved by the same, MBL approached this Court under Section 9 of the A&C Act

(OMP No. 782/2013 captioned as MBL Infrastructures Ltd Vs Telecommunication Consultants India Ltd & Anr.) seeking a stay order. This Court, by an order dated 12.08.2013, restrained TCIL from encashing the bank guarantees issued in its favour till the next date of hearing, that is, 25.09.2013. However, in the meantime the bank had prepared a demand draft of ₹1,61,47,491 and therefore, this Court had directed TCIL to not encash the said instrument.

20. On 25.09.2013, this Court directed TCIL to deposit the money with respect to Performance Bank Guarantee with the Registry of this Court and further directed that the money deposited be invested by the Registry in an interest-bearing fixed account maintained with a nationalized bank.

21. Since disputes had arisen between the parties, MBL by a letter dated 24.09.2013 invoked the Arbitration Clause. TCIL failed to appoint an Arbitrator in time and therefore, MBL approached the Court by way of a petition under Section 11 of the A&C Act (OMP No. 996/2013). Eventually, both the parties appointed their nominee Arbitrators, but the two nominee Arbitrators failed to appoint a presiding Arbitrator and accordingly this Court, by an order dated 18.11.2013, appointed Justice (Retd.) J.K. Mehra as the presiding Arbitrator. However, Justice (Retd.) J.K. Mehra, expired prior to conclusion of the arbitral proceedings, and Justice (Retd.) Reva Khetrapal was appointed to fill the vacancy caused due to his demise.

22. The claims made by MBL in the Statement of Claims are summarized as under:-

Claim No. 1	Payment against Revised 17th Running Account Bill ₹5,53,47,958/- revised to ₹5,14,48,210/-
Claim No. 2	Towards 18 th RA and Final bill of ₹4,37,19,302/- revised to ₹2,03,82,492.51
Claim No. 3	Sales Tax, VAT Deduction at source wrongfully made by the respondent amounting to ₹31,43,111/-
Claim No. 4	Deductions wrongfully made with respect to the Man Power employed amounting to ₹40,20,000/-
Claim No. 5	Claim towards encashment of Performance Bank Guarantee ₹1,61,47,491
Claim No. 6	Release of Bank Guarantee No. 507941 OBG0003499 dated 06.10.2010 for ₹60 lacs towards invoice payment issued from State Bank of Patiala = ₹60 lacs
Claim No. 7	Claim on account of losses incurred due to nonfulfillment of reciprocal obligations by TCIL, due to prolongation of the contract, losses and damages caused due to invocation of the bank guarantees, losses and damages caused due to non confirmation of the Completion /Performance Certificates etc = ₹15 Crores

Claim No.8	Cost of Proceeding = ₹50 Lacs revised to ₹79,33,827/-
Claim No. 9	Claimants claim Interest at the rate of 18% per annum pre-suit, pendent elite and future.

23. TCIL also made counter-claims. The counter-claims made by TCIL are summarized as under:-

Counter Claim No. 1	Direction to the Claimant that the amount of ₹ 1,32,15,493/- with interest claimed by HSRDC in the certified 18th and Final Bill as excess payment made up to the 17th RA / 18th RA Bill be borne by the Claimant
Counter Claim No. 2	Direction to the claimant to furnish C-Forms and E-1 for the financial years 2010-2011 & 2011-2012 and in the alternative pay ₹3,40,790 and also pay ₹41,863/- due to late submission /non-submission of E-1 and C Forms by the claimant for the financial years 2009-2010, with interest at the rate of 18% per annum.

Counter Claim No. 3	Claim on account of Legal Expenses.
---------------------	-------------------------------------

24. By an order dated 08.01.2014, this Court directed MBL's petition under Section 9 of the A&C Act to be treated and considered by the Arbitral Tribunal as an application under Section 17 of the A&C Act.

25. As noticed above, Justice (Retd.) Reva Khetrapal and Mr. O.P. Gaddhyan rendered the impugned award on 20.01.2020 partly allowing the claims made by MBL and TCIL. Mr. Vipin Kumar rendered a separate and dissenting opinion on 23.01.2020.

26. The Arbitral Tribunal allowed Claim No. 1, 4, 5, 6 and 7 raised by MBL and Counter Claim No. 2 raised by TCIL. It awarded a sum of ₹5,14,48,210 against Claim No. 1- ; ₹8,00,000/- against Claim No. 4; and ₹72,71,257 against Claim No. 7. The Tribunal further awarded a sum of ₹3,82,653 against Counter Claim No. 2 of TCIL and on adjusting the said amount against the amount awarded to MBL, the total amount payable by TCIL to MBL was ₹5,91,36,814. The Tribunal further allowed interest at the rate of 12% per annum computed on the basis of the banking norms, from the date 24.12.2013 till the date of making and publishing the award. The Tribunal further directed the said payment be made within a period of 30 days failing which TCIL would be liable to pay further interest of 12% per annum, on banking norms, be paid till the date of payment. The Tribunal also awarded costs for the

proceedings quantified at ₹58,48,927/- along with simple interest at the rate of 12% per annum.

27. In addition to the above, the Arbitral Tribunal held MBL to be entitled (against Claim no. 5) to release of ₹1,61,47,491/- lying in a Fixed Deposit before this Court along with the interest accrued on the said amount, and with respect to Claim No. 6, it has directed TCIL to release the bank guarantee of ₹60,00,000/-, within thirty days from the date of passing of the award. Mr. Kumar, also concurred with the said view.

28. Mr. Vipin Kumar in his opinion entered on 23.01.2020 held that, MBL was entitled to ₹1,99,03,393/- against Claim No. 1 less the expenditure incurred by TCIL in defending the civil suit in Hissar till date; release of the amount of Performance Bank Guarantee for a sum of ₹1,61,47,491/- in a Fixed Deposit by the Registry of this Court plus accrued interest on the same with regards to Claim no. 5; release of Bank Guarantee dated 06.10.2010 of ₹60 Lacs with regards to Claim No. 6; 10% simple interest on Claim No. 1 as on August 2017 subject to the adjustment of Counter Claim of TCIL, with regards to Claim No. 9. He also held that in case, HSRDC recovers any amount from TCIL as per the orders of Hissar Courts, MBL will contribute its share plus legal expenses borne by TCIL with effect from the date of the award. And, in the event HSRDC has to pay any amount to TCIL as per the orders of Hissar Courts, TCIL will pay to MBL its share less legal expenses borne by TCIL with effect from the date of the award. According to him, MBL was liable to bear the expenses incurred by

TCIL till date in defending the suit of HSRDC to be adjusted against Claim No. 1 of MBL. He held that TCIL was entitled to ₹3,40,790 plus ₹41,863/- with simple interest at the rate of 10% per annum with effect from 01.4.2010.

29. On 04.02.2020, TCIL filed a petition under Section 33 of the A&C Act and by an order dated 25.06.2020, the Arbitral Tribunal allowed corrections regarding non-inclusion of declaratory relief granted in paragraph nos. 165 & 171 of the award and in the final reliefs mentioned in paragraph no. 175. However, majority Arbitrators held that there was no merit in the plea as no such statement was made by the counsel for the petitioner during the course of arguments as noted in paragraph nos. 92 & 101 of the impugned award and further, the same did not fall within the purview of Section 33 of the A&C Act.

30. Aggrieved by impugned award, TCIL has filed the present petition.

Submissions of counsels

31. Although the petition mentions several grounds, Mr. R.K. Singh, learned counsel appearing for TCIL, assailed the impugned award only to the following extent.

32. First, he submitted that the Arbitral Award in respect of Claim No.2 is patently erroneous inasmuch as, the Arbitral Tribunal had not considered that a sum of ₹1,32,15,493/- was erroneously disbursed by the principal employer (HSRDC) on inflated measurement of the work done. He submitted that there was no dispute that the measurement of

the work performed was in excess of the work executed, resulting in disbursal of an excess amount of ₹1,32,15,493/- till the 17th RA Bill. He submitted that HSRDC had deducted the said amount from the 18th RA and Final Bill. Therefore, this was necessarily to be taken into account. He submitted that although TCIL had filed a counter claim against HSRDC in a suit filed by HSRDC, TCIL had not disputed the aforesaid amount and had accepted that excess payment had been disbursed by HSRDC to the extent as stated above. He contended that the Arbitral Tribunal had erred in treating the 17th RA Bill and 18th Bill separately, resulting in the said patent error.

33. Second, he submitted that the Arbitral Tribunal had erroneously proceeded on the basis that MBL had received payments to the extent of ₹21,84,99,001/- from TCIL. However, TCIL had, in fact, made payments amounting to ₹22,13,17,609/- to MBL. The difference of ₹28,18,608/- was on account of excess withheld by TCIL on account of Works Contacts Tax (hereinafter 'WCT'). He stated that the same had been paid by TCIL to MBL and this was admitted by MBL's witness (CW-1) in response to Question No. 199. The Arbitral Tribunal had noted the same, however, had not accounted for the same on the ground that the said amount of ₹28,18,608/- was merely a refund made by TCIL out of a sum of ₹59,61,715/- withheld by TCIL from RA Bills No. 1 to 7. He submitted that notwithstanding the amount that was refunded from the sum of ₹59,61,715/- withheld by TCIL, it was still required to be accounted for.

34. Third, he submitted that admittedly a sum of ₹31,43,111/- had been deposited by TCIL towards WCT and there was no dispute that MBL was liable to bear the WCT. However, the Arbitral Tribunal had not taken that into account while computing the amount payable under Claim No.1.

35. Fourth, he submitted that admittedly MBL was liable to pay for the manpower employed by TCIL. TCIL had deducted a sum of ₹40,20,000/- on that account and the same was claimed by MBL as Claim No.4. The Arbitral Tribunal had found that the amount withheld by TCIL on account of the project supervision charge was in excess of what was justified, as TCIL had not deployed the necessary manpower resources as claimed by it. The Tribunal held that out of the aforesaid sum, a sum of ₹28,20,000/- related to bills that were processed till 30.10.2010 (up to 13th RA Bill) and MBL's claim to the said extent was time barred, being beyond a period of three years. Out of the remaining amount of ₹12,00,000/-, ₹8,00,000/- had been charged in excess and, therefore, the Arbitral Tribunal awarded MBL a sum of ₹8,00,000/- against its Claim No.4. However, the Arbitral Tribunal did not give TCIL any credit with respect to the sum withheld on account of the project supervision charges while computing the amount payable against Claim No.1. Mr. Singh contended that this was a patent error on the face of the award.

36. Fifth, MBL had claimed that it had suffered an annual loss of ₹3,48,75,000/- on account of increased commission, from 0.5% per annum to 1.25% per annum, paid for the bank guarantees. However,

the Arbitral Tribunal found that the said claim was bereft of any particulars and MBL had failed to prove the said losses, if any, incurred by it. He drew the attention of this Court to paragraph no. 136 of the impugned award, where finding to the aforesaid effect was recorded. He submitted that having found that there was no evidence to prove the losses, the Tribunal erred in awarding ₹10,00,000/- as compensation for wrongful and illegal invocation of the Bank Guarantees by TCIL. He contended that awarding damages, in the absence of any evidence, would be patently illegal and opposed to the fundamental policy of Indian Law.

37. Sixth, he contended that the Arbitral Tribunal had erroneously awarded ₹60,00,000/- against MBL's claim for a sum of ₹1,00,00,000/- as compensation for loss allegedly suffered by it on account of non-confirmation of completion/ performance certificate. He submitted that the respondent had not confirmed the certificate of performance issued to MBL on account of disputes that had arisen and TCIL could not be faulted on that ground. Further, no evidence of suffering any loss had been led by MBL and therefore, the amount of ₹60,00,000/- as awarded, was unsustainable.

38. Lastly, Mr. Singh submitted that the award of interest was also in excess of the claim made by MBL. He submitted that MBL had claimed interest at the rate of 18% per annum. However, the Arbitral Tribunal had awarded 12% per annum "as per banking norms" on the awarded amount from the dates of filing of the Statement of Claims till the date of making of the award and further interest at the rate of 12 % per annum

“as per banking norms” from the date of making the award till the date of receipt of actual payment. He submitted that the expression “as per banking norms” is being construed as compound interest with monthly rests. He submitted that since simple interest was claimed by TCIL, the Arbitral Tribunal could not award compound interest. He relied on the decision of the Supreme Court in *State of Haryana and Ors. v. S.L. Arora and Company: (2010) 3 SCC 690*, in support of his contention.

39. The written submissions filed on behalf of TCIL mentions a few more grounds, but the same were not urged and therefore, it is not necessary to advert to them.

40. Ms. Anusuya Salwan, learned counsel appearing for MBL countered the aforesaid submissions. She submitted that there was no error on the part of the Arbitral Tribunal in not taking into account an amount of ₹1,32,15,493/-, which HSRDC claims was excess payment. She submitted that admittedly the contract was on back to back basis and MBL was entitled to receive 97.5 % of the amount paid by HSRDC. Since there was no dispute as to the amount disbursed by HSRDC, MBL was entitled to 97.5 % of the same. She stated that as far as the disputed amount is concerned, the same was subject matter of the suit filed by HSRDC and the Arbitral Tribunal had held that MBL would also be bound by the results of the said suit. She also stated that MBL has filed an application for being impleaded in the said suit and would comply with any decree that may be passed in the said suit.

41. Next, she submitted that there was no dispute that the amount of ₹59,61,715/- was withheld by TCIL. TCIL had deposited a sum of ₹31,41,111/- towards WCT and had refunded the balance amount of ₹28,18,608/-. Since the said funds belonged to MBL, TCIL should neither claim the amount of WCT deposited (₹31,43,111/-) nor the amount of ₹28,18,608/- refunded by it. She submitted that the Arbitral Tribunal had rightly excluded the said amounts from its computation.

42. Next, she submitted that the conduct of TCIL was reprehensible. It had encashed the Bank Guarantees furnished by MBL despite the contract having been duly performed and no claim had been made by HSRDC. She submitted that it was merely on account of animosity on the part of certain officials of TCIL. She stated that the work performed by MBL had been appreciated and acclaimed by various bodies. Nonetheless, certain officials of TCIL had, with the view to harass MBL, encashed the Performance Bank Guarantee and caused immense loss to it. The Arbitral Tribunal had found that encashment of the bank guarantees was *mala fide* and illegal and had thus, awarded ₹10,00,000/- as reasonable damages. She submitted that award of such damages was not illegal and therefore, the impugned award was not liable to be interfered with.

43. Next, she submitted that TCIL had issued a certificate of performance and MBL had furnished the same as evidence of its experience and performance to bid for other contracts from other entities. As a matter of due diligence, the employer (RITES Ltd.) had sought confirmation as to the issuance of the certificates as the tender

submitted by MBL was to be considered on that basis. TCIL had refused to confirm the said certificate and the same had resulted in a direct loss to MBL as it failed to qualify for the tender submitted by it to RITES Ltd. In view of the above, the Tribunal had awarded damages to the extent of ₹60,00,000/- to MBL.

44. She referred to the decisions of this Court in *M/s. Kirti Associates (Pvt.) Ltd. v. Pramod Kumar Mittal and Anr.: O.M.P. (COMM) 203/2016 decided on 03.06.2016* and *Sushil Kumar Jain v. Gajender Chopra: RSA 75/2019 decided on 03.12.2019*, in support of her contention that punitive damages could be awarded in given cases and it was not necessary to lead detailed evidence as to the quantum of damages.

45. Lastly, Ms. Salwan submitted that the interest awarded by the Arbitral Tribunal is less than the interest claimed. She handed over a chart showing the computation of the interest at the rate of 12% per annum compounded with monthly rests, and simple interest at the rate of 18% per annum on the net claim amounting to ₹5,91,36,814/- from 24.12.2013 to 28.09.2020. On the strength of the said calculation, she submitted that if interest at the rate of 18% per annum as claimed by MBL, was awarded, the total awarded amount payable by TCIL would be higher than claimed.

46. According to the said calculation, 12% interest compounded with monthly rest works out to ₹6,81,90,727/- and with 18% simple interest works out to be ₹7,20,33,500/-. She submitted that this Court had in

various cases accepted that the Arbitral Tribunal could award compound interest. She relied upon the decisions of this Court in ***Roentgen Oncologic Solutions Pvt. Ltd. and Ors. v. Dr. Kirti Jain: 2016 (234) DLT 388; NNR Global Logistics (Shanghai) Co. Ltd. v. Aargus Global Logistics Pvt. Ltd.: O.M.P. 61/2012 and O.M.P. 201/2012, decided on 04.10.2012; and Novelty Power and Infratec Ltd. and Ors. v. S.E. Investments Ltd.: O.M.P. 775/2014, decided on 20.07.2017.***

47. She also referred to the decision of the Supreme Court in ***Reliance Cellulose Products Ltd. v. Oil and Natural Gas Corporation Ltd.: (2018) 9 SCC 266***, in support of her contention that interest awarded by the Arbitrators could not be arbitrarily reduced.

Reasons and Conclusion

48. The first and foremost issue to be addressed is whether the Arbitral Tribunal has erred in not accounting for the adjustment of excess payment of a sum of ₹1,32,15,493/-, which according to TCIL was made by HSRDC on account of the inflated measurement of the work performed. As noted above, according to Mr. Singh, the Arbitral Tribunal had committed an error in treating the amount payable under the 17th RA Bill as independent of the 18th and Final Bill under which such deduction had been claimed by HSRDC.

49. This Court finds no infirmity with the approach of the Arbitral Tribunal. There is was no dispute that the contract between TCIL and MBL was on back to back basis with the contract awarded by HSRDC

to TCIL. Admittedly, MBL was entitled to 97.5% of the amount disbursed by HSRDC to TCIL. The Arbitral Tribunal had noted that a sum of ₹44,86,11,636/- had been accepted by HSRDC till the 17th RA Bill.

50. Mr. Singh did not dispute that the said amount had been disbursed till the 17th RA Bill. Concededly, MBL was entitled to 97.5% of the said disbursement. Accordingly, the Arbitral Tribunal had rightly concluded that till the 17th RA Bill, MBL was entitled to 97.5% of the amount of ₹44,86,11,636/- and TCIL was entitled to a margin at the rate of 2.5% of the said amount. Thus, TCIL was entitled to retain a sum of ₹1,12,15,291/- and was required to pay the balance amount of ₹43,73,96,345/- to MBL.

51. There was some dispute regarding the amount payable under the 18th and Final Bill. It appears from the record that HSRDC had sought to recover an amount of ₹1,32,15,493/- as excess payment. According to TCIL, the said amount is computed in the following manner: ₹1,32,08,868.08/- on account of excess measurements plus ₹32,44,430/- as excess payments on account of payments for certain non-scheduled items, totaling ₹1,64,53,298/-, less ₹32,37,807/- being the correct payment for certain non-schedule items.

52. HSRDC has filed a suit (being C.S. 54 of 2018) before the Additional Civil Judge (Senior Division), Hissar claiming recovery of an amount of ₹59,36,671/- along with interest. Whilst HSRDC claims that an amount of ₹1,32,15,493/- was overpaid to TCIL up to the 17th

RA Bill; it accepts that a sum ₹72,78,822/- (₹50,00,000/- plus ₹22,78,822/- withheld from the 17th RA Bill) is payable to TCIL. HSRDC has accordingly sought recovery of only ₹59,36,671/- . Thus, even if the claim made by HSRDC is sustained, MBL would be liable to pay 97.5% of the said claim of ₹59,36,671/- and the interest that may be decreed. MBL would not be required to pay its share of ₹1,32,15,493/- as that is not the amount sought to be recovered by HSRDC. It is essential to bear in mind that the Arbitral Award is based on the undisputed premise that MBL is required to receive 97.5% of the amounts paid by HSRDC to TCIL.

53. In addition to the above, it is also necessary to note that TCIL has also preferred a counter claim of ₹1,09,81,043/- against HSRDC. Paragraph 20 of the said counter claim is relevant and is set out below:-

“20. Thus, applying the rate submitted on behalf of TCIL for N.S. items for cold TMT bar which is much lower than the contract rate i.e. HSR rate, and the quantities certified in the 18th and Final Bill by HSRDC and after considering amount already paid upto 17th RA Bill, amount still outstanding and payable by HSRDC for N.S. items other than cold TMT bar (Civil Works) comes to Rs. 9,45,128/-; Cold TMT bar comes to Rs. 1,24,07,706/-; unpaid amount against public health of Rs. 21,76,956/-; and electrical works of Rs. 10,60,851/- in 18th and final bill, totalling Rs. 32,37,807/- (public health + electrical works); amount payable by HSRDC against deducted/with held amount from 6th, 13th & 17th RA Bill amounting to Rs. 24,78,822/-; amount of Rs. 1,27,060/- towards unpaid amount of NS items of PH works as nor paid as per NS rates of public health works submitted by TCIL; & refund of retention/security amount of Rs. 50,00,000/- from HSRDC.

Thus total amount payable to counter claimant at the time of finalization of 18th and Final Bill comes to Rs. 2,41,96,536/- and on adjustment of alleged excess payment by HSRDC upto 17th RA Bill of Rs. 1,32,15,493/- out of the same, amount payable by HSRDC to the counter claimant/TCIL comes to Rs. 1,09,81,043/- on correct finalization of 18th and Final Bill. Counter claimant is attaching herewith calculation of the above outstanding amount payable by HSRDC and chart in support thereof.”

54. Thus, according to TCIL, HSRDC is required to pay to it a sum of ₹1,09,81,043/- after adjusting the sum of ₹1,32,15,493/-. If TCIL prevails in its counter claims, then it would be entitled to 2.5% of the amount decreed in its favour and would have to handover the balance to MBL.

55. In the aforesaid context, it is clear that the Arbitral Tribunal had rightly treated the disbursement made by HSRDC till 17th RA Bill separate from the disbursements that are required to be made by HSRDC (or refunded to HSRDC) under the 18th and Final Bill. The said payment would necessarily be in accordance with the outcome of the suit filed by HSRDC against TCIL and TCIL’s counter claims in that suit. Therefore, the Arbitral Tribunal had also stated in unambiguous terms that MBL would be bound by the conclusion of the said suit.

56. It is also relevant to note that TCIL had made a counter claim for a sum of ₹1,32,15,493/- against MBL. The Arbitral Tribunal had disposed of the said counter claim by noting that the same was a flipside of Claim No.2 made by MBL, which related to the 18th and Final Bill.

In conformity with its award in respect of MBL's Claim Nos. 1 and 2, the Arbitral Tribunal had reiterated that the judgment in the suit between HSRDC and TCIL, would also bind MBL.

57. In view of the above, the contention that the impugned order suffers from a patent illegality on account of not considering the overpayment to the extent of ₹1,32,15,493/- is without any merit and, is accordingly, rejected.

58. The next issue to be examined is with regard to the payment of WCT amounting to ₹31,43,111/- made by TCIL to the Assessing Officer, VAT/WCT and the amount of ₹28,18,608/- paid to MBL from the amounts of ₹59,61,715/- withheld by TCIL on the aforesaid account.

59. There is no dispute that TCIL had withheld a sum of ₹59,61,715/- which was due and payable to MBL. The said amount had been withheld on account of payment of WCT. The Contract dated 27.12.2005, entered into between TCIL and MBL, expressly included a clause requiring MBL to bear the applicable taxes including WCT. The said clause reads as under:

“(v) M/s MBL undertakes that it shall adhere to the laws pertaining to all types of taxes including but not limited to income tax, VAT, CST and LST, WCT, labour, insurance etc. Further, MBL agrees that VAT, CST and LST, WCT as payable on TCIL's contract value shall be the M/s MBL from any dues of any other contract whatsoever of any nature entered into by TCIL with M/s MBL as a set off.”

60. In view of the above, MBL was liable to pay WCT in respect of works sub-contracted to it. TCIL had produced a payment voucher dated 24.04.2009, evidencing a deposit of ₹31,43,111/- with the Assessing Officer, VAT/WCT. In addition, it had also produced a payment voucher dated 14.10.2009, evidencing the payment of ₹28,18,608/- to MBL. It had, thus, accounted for a sum of ₹59,61,715/- withheld by it. MBL does not dispute that it was liable to pay WCT and had, accordingly, withdrawn its Claim No.3. The sum of ₹31,43,111/- deposited by TCIL being payment against WCT was, thus, on account of MBL.

61. There is no real dispute that the amount of ₹28,18,608/- was refunded to MBL and the amount of ₹31,43,111/- was deposited by TCIL against WCT; essentially, the controversy arises as the Arbitral Tribunal has not accounted for the said amounts while computing the amount payable to by MBL to TCIL up to the 17th RA Bill (Claim No.1). This is clearly a patent error on the face of the award.

62. Ms. Salwan had earnestly contended that the amount of ₹31,43,111/- deposited by TCIL as WCT and ₹28,18,608/- paid by it to MBL was from the amount of ₹59,61,715/- payable to MBL which was withheld by TCIL and therefore, there was no error in the impugned award. The said contention does not address the point in issue. There is no dispute that TCIL had withheld ₹59,61,715/- from the payments due to MBL and had partly used the said sum to pay WCT

(₹31,43,111/-) and had refunded the balance. Thus, indisputably, TCIL was required to be provided the necessary credit for the same while calculating the amounts payable by TCIL to MBL as determined under Claim No.1. This would become apparent if one examines the manner in which the amount claimed under Claim No.1 was determined by the Arbitral Tribunal.

63. The Arbitral Tribunal had noted that the amount disbursed up to 17th Running Bill was a sum of ₹44,88,11,636/-. TCIL's margin at the rate of 2.5% worked out to ₹1,12,15,291/- and, MBL was entitled to receive the balance amount of ₹43,73,96,345/- (being 97.5% of ₹44,88,11,636/-).

64. The Arbitral Tribunal also held that MBL was liable to bear certain charges / amounts aggregating ₹4,73,04,188/- [(i) WCT ₹1,79,44,465/-; (ii) Labour Cess ₹44,86,116/-; (iii) Testing Charges ₹1,68,394/-; (iv) Deductions towards steel other than RINL/ Steel ₹36,99,150/-; (v) TDS ₹87,47,927/-; (vi) Insurance Charges ₹8,22,372/-; (vii) TCIL Sales Margin (a) at the rate of 0.25% on materials ₹3,17,199/- and b) Interest on materials, Mobilisation Advance and Invoice Payment less TDS ₹86,39,753/-; and (viii) Withheld by HSRDC towards steel etc. ₹24,78,812/-].

65. In addition to the sum of ₹4,73,04,188/-, MBL was also liable to pay for the material supplied by TCIL, which was valued at ₹12,08,81,304/- less ₹7,36,358/-, refunded by Birla Cement Corporation Ltd. towards material.

66. Admittedly, MBL had received ₹21,84,99,001/- (which did not include ₹28,18,608/-). The Arbitral Tribunal had, thus, computed the amount payable by TCIL to MBL at ₹5,14,48,210/- as under:

	Amount payable up to the 17 th RA Bill	₹43,73,96,345/-
Less :	Deductions	₹4,73,04,188/-
Less:	Amount payable for materials adjusted By refund from Birla Cement (₹12,08,81,304 less ₹7,36,358/-)	₹12,01,44,946/-
Less:	Amount received from TCIL (according to MBL)	₹21,84,99,001/-
	Total	₹5,14,48,210/-

67. Admittedly, the amount of ₹31,43,111/- paid as WCT is over and above the amount payable towards Sales Tax / WCT of ₹1,79,44,465/- which is included in the sum of ₹4,73,04,188/- as mentioned above. Thus, TCIL was also entitled to credit for the said amount, which has been omitted by the Arbitral Tribunal while computing the deductions liable to be paid by MBL. The amount of ₹28,18,608/- received by MBL has also been accounted for in the above calculation. Either the Arbitral Tribunal was required to give TCIL the credit for the entire amount of ₹59,61,715/- (₹31,43,111/- plus ₹28,18,608/-) in the above calculation as deduction on account of amount payable by MBL or in the alternative, add the amount of WCT of ₹31,43,111/- to the amount of deduction on account of charges payable by MBL and also add the figure of ₹28,18,608/- to the amount admittedly received by MBL.

Either way, the amount of Claim No.1 would necessarily be reduced by the said amount of ₹59,61,715/-. In view of the above, Claim No.1 awarded to MBL to the extent of ₹59,61,715/- has to be set aside and consequently, the said amount awarded under Claim No.1 is required to be reduced to ₹4,54,86,495/- (₹5,14,48,210/- less ₹59,61,715/-)

68. There is also merit in TCIL's contention that the aforesaid amount of claim is required to be further reduced as the Arbitral Tribunal had not considered the Project Supervision Charges liable to be paid by MBL (which formed a part of Claim No.4). Admittedly, in terms of the contract, TCIL was required to depute three Engineers for coordination between TCIL, MBL and HSRDC. The salaries of the said TCIL employees at the rate of ₹40,000/- per month, per Engineer were required to be borne by MBL. There is no dispute that this was over and above TCIL's margin of 2.5% of the disbursement, for the execution of the contract. During the course of the contract, TCIL had withheld a sum of ₹40,20,000/- from the amounts payable to MBL. MBL claimed that the said deductions were unjustifiable as TCIL had not engaged or posted any Engineer at the site.

69. The Arbitral Tribunal considered the said claim (Claim No.4) and held that MBL's claim for deductions made on account of the salaries of Engineers prior to 13th RA Bill (which was till 30.10.2010) was time barred. TCIL had withheld a sum of ₹28,20,000/- till 13th RA Bill. Thus, to this extent MBL's claim was rejected as time barred. Out of the remaining amount of ₹12,00,000/- withheld by TCIL, the Arbitral Tribunal found that MBL's claim to the extent of ₹8,00,000/- was

merited as TCIL had not deputed the Engineers, as claimed by it. In other words, the amount of ₹4,00,000/- (that is, ₹12,00,000/- less ₹8,00,000/-) withheld by TCIL was held to be justified. Thus, in all, MBL's claim to the extent of ₹32,20,000/- (being ₹28,20,000/- plus ₹4,00,000/-) out of the total sum of ₹40,20,000/- withheld by TCIL, was rejected and balance of ₹8,00,000/- was awarded in favour of MBL. None of the parties have disputed the reasoning of the Arbitral Tribunal in sustaining MBL's claim to the extent of ₹8,00,000/- and rejecting it to the extent of ₹32,20,000/- (₹28,20,000/- on account of being time barred and ₹4,00,000/- as being justified). The controversy is limited to the question of not accounting for this amount in the amount as computed to be payable to MBL under Claim No.1. The Arbitral Tribunal had expressly noted that it was not considering the claim regarding the salaries of Engineers (Project Supervision) under Claim No. 1 as it was examined separately as Claim No. 4. There can be no cavil with that. Plainly, after having rejected MBL's claim to the extent of ₹32,20,000/-, the Arbitral Tribunal ought to also have credited TCIL with the said amount, while determining the amount payable to MBL as determined. Thus, the amount payable to MBL as determined under Claim No.1 is required to be further reduced by a sum of ₹32,20,000/-. Or, in the alternative by ₹40,20,000/- but sustaining the award of ₹8,00,000/- under Claim no.4.

70. In view of the above, the amount determined as payable to MBL under Claim No.1 is required to be reduced by a sum of ₹59,61,715/- as discussed above and a further sum of ₹40,20,000/-.

71. Accordingly, the amount awarded against Claim No.1 to the extent of ₹99,81,715/- (₹59,61,715/- plus ₹40,20,000/-) is set aside. Claim No.1 to the extent of ₹4,14,66,495/- requires no interference by this Court.

72. This Court also finds merit in the contention that an amount of ₹10,00,000/- awarded to MBL for damage on account of wrongful invocation of the Bank Guarantee is not sustainable (Claim No.7).

73. MBL had submitted two Bank Guarantees to TCIL. A Performance Bank Guarantee in the sum of ₹1,61,47,490/- (hereinafter 'PBG') and a Bank Guarantee in the sum of ₹60,00,000/- to secure payments of invoice (hereinafter 'IBG'). MBL contended that TCIL had illegally and arbitrarily invoked the said Bank Guarantees, resulting in a loss of ₹3,48,75,000/- per annum. MBL had premised the said claim on the basis that it had been granted non fund based limits (bank guarantee/LCs etc.) to the extent of ₹465/- crores and as a result of invocation of the Bank Guarantees, the bank had increased the commission charges from 0.5% per annum to 1.25 % per annum. Thus, resulting in an additional cost of ₹3,48,75,000/- per annum. In addition, MBL also claimed that there was an additional cash outflow of ₹23.5 crores on account of the banks demanding cash margin for the non-fund based limits of Bank Guarantees/LC of ₹465/- crores granted to MBL. Apart from the claim of damages, MBL also claimed that it had incurred a cost of ₹12,63,202/- towards the extension of two Bank Guarantees: ₹9,91,945/- for extending the PBG and ₹2,71,257/- for extending the IBG.

74. The Arbitral Tribunal found in favour of MBL that TCIL had illegally and arbitrarily failed to release the PBG. It held that TCIL was obliged to release the PBG (Performance Bank Guarantee) after the defect liability period had expired. The Arbitral Tribunal reasoned that HSRDC had issued a certificate to TCIL clearly recording that defect liability period had expired on 25.06.2013 and had, accordingly, released the Performance Bank Guarantee issued by TCIL. TCIL was, therefore, under a corresponding obligation to release the PBG submitted by MBL. The Tribunal also found in favour of MBL that TCIL was required to release the IBG as there was no dispute regarding payment of the invoice amounts. Accordingly, the Tribunal held that MBL was entitled to receive the bank charges for the extension of PBG after expiry of the defect liability period plus 28 days as envisaged in the PBG. The bank charges from 28 days from the expiry of defect liability period (23.07.2013) till the date it was invoked (04.10.2013) was computed at ₹18,318/-. In addition, the Tribunal held that MBL was also entitled to receive bank charges for extension of IBG which was subsisting, as on the date of the award. The same was computed for the period 04.07.2013 to 04.01.2019 at ₹2,71,257/-. Accordingly, the Tribunal awarded a sum of ₹2,89,575/- (₹18,318 plus ₹2,71,257) as bank charges for extension of Bank Guarantees. This Court finds no infirmity with the said decision.

75. Insofar as the remaining claim is concerned, the Tribunal found that there was no material on record to show that MBL had availed of the Bank Guarantee limits to the extent of ₹465 crores. On the contrary,

the evidence on record indicated that MBL had utilised the limits only to the extent of ₹90 crores. MBL could also not establish the additional cash outflow of ₹23.5 crores by way of cash margin increased on account of wrongful invocation of the Bank Guarantees. Similarly, the Arbitral Tribunal also did not find sufficient evidence to support MBL's claims of a pay out of increased commission of ₹3,48,74,000/- per annum. The Tribunal held that MBL's claim that it had lost its creditworthiness was also unsubstantiated as the letters from State Bank of Mysore placed on record indicated that State Bank of Mysore had enhanced the cash credit limits available to MBL. Accordingly, the Tribunal also held that the said claim for increased commission was "not tenable". Having held the above, the Arbitral Tribunal also found in favour of MBL that TCIL had wrongfully, illegally and arbitrarily invoked the Bank Guarantees (PBG and IBG). And, such invocation was, wholly without any justification. The Arbitral Tribunal also noted that whereas TCIL's counsel had contended that TCIL had no objection if the award is made by the Tribunal for releasing the PBG and the amounts lying with this Court in favour of MBL, but in the written submissions TCIL had taken a contrary stand. Considering the wrongful conduct on the part of TCIL, the Arbitral Tribunal awarded ₹10,00,000/- in favour of MBL, as it was the view of the Arbitral Tribunal, that the same was a "just and fair compensation" to MBL for wrongful and illegal invocation of the Bank Guarantees by TCIL.

76. The said award is, plainly, unsustainable. After the Arbitral Tribunal had examined MBL's contention and had found that MBL had

not substantiated its claims for the losses allegedly incurred by it, it could not proceed to award any amount as fair compensation for the wrongful invocation of the Bank Guarantees. This Court is of the view that the impugned award is patently illegal to the aforesaid extent. There is no evidence on record to establish the measure of damages. Thus, the award of ₹10,00,000/-, is without any basis and is patently illegal.

77. This Court is also unable to sustain the Arbitral Award to the extent it awards a sum of ₹60,00,000/- against TCIL for its failure to confirm the certificate of performance issued by it to MBL. Admittedly, TCIL had issued a certificate certifying that MBL's performance was very good on parameters of technical proficiency, financial soundness, mobilisation of adequate T & P, mobilisation of manpower and general behaviour. It had also certified that the quality of the work performed by MBL was very good. The said certificate had been furnished by MBL to M/s RITES Ltd., in connection with another bid. However, TCIL failed to confirm to RITES Ltd. that it had issued the said certificate. Mr. Singh contended that TCIL was right in not confirming the said certificate as disputes had arisen between TCIL and MBL. The said contention is, plainly, unmerited. TCIL was merely to confirm the authenticity of the said certificate to RITES Ltd. Since, there is no dispute that it had issued the certificate in question, there was, thus, no reason for it not to confirm the same. The Tribunal had noted the conduct of TCIL and found that despite being put to notice that failure to confirm the said certificate would result in a substantial loss to MBL, TCIL had not submitted the certificate in question. The Tribunal found

that the conduct of TCIL was *mala fide* and it had not confirmed the certificate for ulterior motives resulting in a loss to MBL. This Court finds no infirmity with the said view. There is ample evidence on record, which indicates that TCIL's conduct has been less than fair. This Court finds no reason to interfere with the conclusion of the Arbitral Tribunal.

78. Having stated the above, this Court is unable to sustain the award of ₹60,00,000/- as compensation for "*the loss and damages caused to MBL due to non-confirmation of the performance certificate issued by TCIL*". This is because, there was no evidence on record to establish that MBL had suffered a loss to the aforesaid extent. The impugned award to the aforesaid extent is, accordingly, set aside.

79. The next issue to be examined is whether the interest awarded by the Arbitral Tribunal is liable to be interfered with.

80. The Arbitral Tribunal had awarded interest on the awarded amount (other than costs) at the rate of 12% per annum "as per banking norms" from the date of filing of the Statement of Claim till the date of the award. In addition, the Arbitral Tribunal also awarded post-award interest at the rate of 12% per annum "as per banking norms" from the date of the award till the date of the payment, in the event, the impugned award is not paid within the period of thirty days from the date of the award.

81. MBL had produced unimpeachable evidence to show that State Bank of Mysore Ltd. had sanctioned financial facilities to MBL at

12.75% per annum compounded with monthly rests. Ms. Salwan had referred to a letter dated 21.11.2012 from State Bank of Mysore, which indicates the terms on which working capital facility was extended to MBL.

82. TCIL's grievance is that the said interest is not simple interest but payable "as per banking norms", which is being construed as compounded with monthly rest. It was contended on behalf of TCIL that the said claim is beyond the claim made by MBL as MBL had not claimed compound interest but only simple interest. The said contention fails to take into account that MBL had claimed 18% simple interest and the amount payable on that basis would be higher than the interest computed at the rate of 12% per annum with monthly rests.

83. This Court must also note that after some arguments advanced on this issue, Mr. Singh had sought to withdraw the same, thus, it is not necessary for this Court to deal with this contention in further detail.

84. The relief awarded by the Arbitral Tribunal is noted in sub-paragraph (a) to paragraph 175 of the impugned award. There is an obvious error in the amount reflected against Claim no. 7, it is ₹72,71,257/- instead of 72,89,575/- (₹18,318 plus ₹2,71,257 as bank charges; ₹10,00,000/- as loss on invocation of Bank Guarantees; and ₹60,00,000/- as damages for not confirming the certificate of good performance).

85. For the sake of clarity, the figures given in sub-paragraph (a) of paragraph 175 of the impugned award are re-cast as under:

(a) The Respondent/TCIL is liable to pay to the Claimant / MBL, the following sums of money:

		Amount (₹)
(i)	Against Claim No.1	₹4,14,66,495/-
(ii)	Against Claim No. 4	₹8,00,000/-
(iii)	Against Claim No. 7	₹2,89,575/-
	Total	₹4,25,56,070/-
Less :	Counter Claim No. 2 of the Respondent	₹3,82,653/-
	Total	₹4,21,73,417/-

86. The petition is allowed to the aforesaid extent. The pending applications are also disposed.

FEBRUARY 10, 2021
RK

VIBHU BAKHRU, J