IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1143 of 2014

NRP Projects Pvt. Ltd

Versus

Balmer Lawrie & Co. Ltd

Mr. Manoj Meno
Mr. Asif Kr. De
Mr. S. Das

.....For the Petitioner

Mr. Biswaroop Bhattacharyya
Mr. Avijit Bhowmick
Ms. D. Dhamali
Ms. Riya Ghosh

.....For the Respondent

Heard on : 12.07.2022

Judgment on : 28.07.2022

Krishna Rao, J.: This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award passed by the Ld. Sole Arbitrator dt. 28.04.2014.

The respondent was appointed by the Indian Oil Corporation Ltd (IOCL) as primary contractor for construction of proposed combined work of pump station building including design, tendering, contracting etc. erection and allied civil works at IOCL's Refinery in Paradip, Orissa.

On 26.07.2005, the respondents have issued work order to the petitioner for execution of Mechanical Erection and Piping Work for Pump Station at Paradip at Tank Farm Area of Indian Oil Corporation Limited (IOCL) at the total contract value of Rs. 5,91,49,908.36.

As per Clause 2.1 of the work order and clause 11 of the Special Condition of Contract, the work is to be completed within a period of six months from the date of receipt of Letter of Intent (LOI) i.e. on or before 03.09.2005.

The petitioner had completed the work in the month of April 2007 and final bill was submitted on 06.09.2007. As there was a delay in completion of work and accordingly in terms of clause 5.16 of the General Condition of Contract, the petitioner is liable to pay compensation to the respondent at 0.5% of the total contract value for every week of delay subject to maximum of 10% of the contract value.

On 23.02.2009, the respondents requested for Bank Guarantee in lieu of cash retention towards delay penalty and agreed to return Bank Guarantee on settlement of issue with IOCL. On 25.02.2009, the petitioner had furnished Bank Guarantee. Time to time on the request of the respondent, the validity of the Bank Guarantee was extended. Lastly on 20.06.2012, the petitioner has extended the Bank Guarantee on protest upto 31.12.2012. The respondent had threatened petitioner for invoking the bank guarantee if the petitioner failed to extend the period of Bank Guarantee and accordingly, the petitioner had invoked the provision of Arbitration in terms of clause 5.24 of the Agreement.

The Ld. Arbitrator while deciding the dispute has framed the following issues with respect of the claim made by the petitioner:-

1) *Whether the claimant is entitled for release of Bank Guarantee No. LG/50/2009 dt. 25.02.2009?*
2) *Whether the claimant is entailed for Bank Guarantee charges from 26.02.2009 till the date of award?*
3) *Whether the counter claims of the respondent are barred by limitation?*
4) *Whether the claimant is liable to pay VAT?*
5) *Whether the respondent is entailed to claim liquidated damage?*
6) *Whether the parties are entitled to interest on their respective claims? If yes, what would be rate and value?*

Issues with respect of the claim of the respondent:-

1) *Whether the respondent is entitled to a sum of Rs. 2,28,82,496.95/- (Interest calculated upto 01.03.2013 and further interest as to be accrued till the date of payment) being the amount of VAT arising out of non-production of VAT return by the Claimant?*
2) *Whether the respondent is entitled to a sum of Rs. 59,14,990.83 for compensation in terms of claim 5.16 (i) of the General Conditions of Contract owing to delay in completion of the work attributable to the claimant?*
3) *Whether the Respondent is entitled to a sum of Rs. 59,14,990.83p by liquidating bank guarantee No. LG.15/09 dated 25.02.2009?*

The Ld. Arbitrator had passed the following award:-

Reliefs as claimed by the Claimant	***Amount Claimant***	***Award***
A direction to release the instant bank guarantee	*0.00*	*The Claimant is not entitled to any such direction*
A direction upon the Respondent to pay BG	*Rs. 17,68,982*	*Rs. 0.00p*

extension charges with interest		
Costs	*As per actuals*	*Rs. 0.00p*
Other reliefs		*No other relief.*

Counter Claims	***Amount Claimed***	***Award***
No.1	*Rs. 2,28,82,496.95 with interest*	*To the extent which the Respondent actually pays on account of VAT on works contract for the works done by the Claimant and till then to have an to hold securities like the instant BG under question*
No. 2	*Rs. 59,14,990.00p*	*Rs. 0.00p*
No. 3	*Liquidation of BG*	*Limited to the extent the Respondent actually pays on account of VAT on works contract for the works done by the Claimant.*

Therefore, I make and publish this declaratory Award that

i) *the Respondent is entitled to hold the bank guarantee for its claims on account of VAT on works contract for the works done by the Claimant;*

ii) *the Respondent is entitled to recover only to the extent it pays such VAT on works contract for the works done by the Claimant upon settlement of its ongoing challenge against the order of the Assistant Commissioner.*

The question whether the Bank Guarantee was operating for limited purposes of Price Reduction or for the entire contract.

The Ld. Arbitrator while deciding the issue held that the Bank Guarantee furnished by the claimant can be retained or even en cashed, if, the respondent so chooses for all of its claim and not restricted to imposition of price reduction. To decide the said issue whether the Arbitrator has rightly held that the Bank Guarantee had furnished by the claimant is not restricted to imposition of price reduction, the Bank Guarantee is set out here:-

"BANK GUARANTEE

(In Lieu of Price Reduction by the Corporation in terms of Clause 4.4.0.0 of General Conditions of Contract)

Bank Guarantee No.	:	*LG 15/09*
Dated	:	*25.02.2009*
Amount Rs.	:	*59,15,000/-*
Valid Upto	:	*24.05.2009*

To

M/s. Balmer Lawrie & Col Ltd.

Projects Division

21, Netaji Subhas Road

Kolkata – 700 001

WHEREAS M/s. Balmer Lawrie & Co. Ltd. having its Head Office at 21, Netaji Subhas Road, Kolkata – 700 001 (hereinafter referred to as "the Corporation" which expression shall include its successors-in-interest and assigns) has awarded the work of "Pump Station, Piping & Equipment Erection work at Tank Farm Area of Refinery of M/s. Indian Oil Corporation Limited at Paradip Orissa to "M/s. Balmer Lawrie & Co, Ltd. "(hereinafter referred to as the Contractor" which expression shall include its/his/their successors-in-interest) in terms of a Contract bearing ***No. CPP/180/05/926 dated 26.07.2005*** *(hereinafter referred to as the "said Contract" which expression shall include any and all amendments thereto and/or modifications therein).*

AND WHEREAS in terms inter-alia of the said Contract, the Contractor was to complete the work by ***03.09.2005*** *(hereinafter referred to as the "Completion Date") unable to do so and consequently the Corporation has claimed Price Discount in terms of the said Contract @ 0.5% of the total Contract Value for each week or part thereof that the work remains incomplete beyond the Completion Date subject to a maximum of 10 % (Ten Percent) of the total Contract Value.*

AND WHEREAS the Contractor has requested the Corporation for the time being not to deduct the said Price Discount from its running bills, which request has been accepted by the Corporation on the condition that the Contractor shall furnish a Bank Guarantee from a Bank and in a form acceptable to the Corporation for the payment to the Corporation on demand of the amount claimed by the Corporation as Price Discount payable under the said Contract

Now, therefore, we ***Union Bank of India, 152, Mount Road, Chennai-600 002*** *a Bank having its registered/principal office at 239, Vidhan Bhavan Marg, Mumbai – 400 021 (hereinafter called the "Bank" which expression shall include its successors and assigns) do hereby irrevocably and unconditionally undertake to pay the Corporation at New Delhi forthwith on first demand in writing without protest or demur or proof or condition and without reference to the Contractor, any and all amounts from time to time claimed by the Corporation in writing from the Bank with reference to this Guarantee/Undertaking upto an aggregate limit of Rs. 59,15,000/- (Rupees Fifty Nine Lacs Fifteen Thousand Only) AND the Bank doth hereby further agree as follows :*

i) *This Guarantee/ Undertaking shall be a continuing undertaking and shall remain valid and irrevocable for all claims of the Corporation upon the Bank made upto the midnight of* ***24.05.2009*** *provided that the Bank shall upon the written request of the Corporation made upon the Bank at any time within 6 (six) months from the said date extend the validity of the Bank Guarantee by a further 6 (six) months so as to enable claims to be made under this Guarantee/ Undertaking by a further 6 (six) months from the said date with the intent that the validity of this Guarantee shall automatically stand extended by a further 6 (six) months upon such request by the Corporation.*

ii) *This Guarantee/Undertaking shall be in addition to any other undertaking or guarantee or security whatsoever that the Corporation may now or at any time have in relation to its claims or the Contractor's obligations/liabilities under and/or in connection with the said Contract, and the Corporation shall have full authority to take recourse to or enforce this Guarantee/Undertaking in preference to any other undertaking or security(ies) at its sole discretion, and no failure on the part of the Corporation in enforcing or requiring enforcement of any other undertaking or security shall have the effect or realising the Bank from its full liability hereunder.*

iii) *The Corporation shall have the fullest liberty without reference to the Bank and without affecting in any way the liability of the Bank under this Guarantee/ Undertaking at any time* *and/ or from time to time to take any other undertaking or security in respect of the Contractor's obligations and/or liabilities under or in connection with the Contract and/or to amend or vary the terms and conditions thereof or to grant indulgence to the Contractor or to reduce or to increase or otherwise vary the prices of the total contract value and/or to extend time for performance of the Contract in whole or part or to postpone for any time and/or from time to time any of the obligations of the Contractor and/or the powers or remedies exercisable by the Corporation against the Contractor and either to release or to forebear from enforcing all or any of the obligations or the remedies available to the Corporation or any of them and/ or other indulgence(s) or arrangement(s) with the Contractor or release or forbearance whatsoever shall have the effect of realising the bank from its full liability to the Corporation hereunder or of prejudicing rights of the Corporation against the bank.*

iv) *This Guarantee/Undertaking shall not be determined or affected by the liquidation or winding up, dissolution or change of constitution or insolvency of the Contractor or any change in the constitution of the Bank or the Corporation but shall in all respects and for all purposes be binding and operative until payment of all moneys payable to the Corporation in terms hereof.*

v) *The Bank hereby specifically waives all rights at any time inconsistent with the terms of this Guarantee/Undertaking and the obligations of the Bank in terms hereof shall not be any wise affected or suspended by reason of existence of any dispute or difference between the Contractor and the Corporation (whether or not pending before any arbitrator, tribunal or court), the Contractor and the Bank and/or the Bank and the Corporation (whether or not pending before any arbitrator, tribunal or court) or any denial of liability by the Contractor or any other instruction or communication whatsoever by the Contractor or any other person stopping or preventing or purporting to stop or prevent or defer payment by the Bank to the Corporation hereunder.*

vi) *Without prejudice to any other mode of service, a demand or claim or other communication may be transmitted by fax. It transmitted by fax, the transmission shall be complete and shall be deemed to have been acknowledged as soon as the "OK" facsimile transmission report for the facsimile message has been received.*

vii) Notwithstanding anything contained herein :

a) The Bank's liability under this Guarantee/Undertaking shall not exceed Rs. ***59,15,000/-*** *(Rupees Fifty Nine Lacs Fifteen Thousand Only)*

b) This Guarantee/ Undertaking shall remain in force upto ***24.05.2009*** *and any extension(s) thereof; and*

c) The Bank shall be released and discharged from liability under this Guarantee/Undertaking unless a written claim or demand is issued to the Bank on or before ***24.05.2009*** *or the date of expiry of any extension (s) thereof if this Guarantee/Undertaking has been extended.*

d) The Bank doth hereby declare that Shri D. Sivaguni who Chief Manager is authorized to sign this Guarantee/ Undertaking on behalf of the Bank and to bind the Bank hereby.

Dated at Chennai this ***25th*** *Day of February 2009.*

Yours faithfully,

UNION BANK OF INDIA

Manager Chief Manager"

Clause 8 of the Special Condition of the Contract reads as follows:-

"8. TAXES & DUTIES:

The quoted rates shall be inclusive of all taxes, duties, levies, octroi, cess etc. as applicable. The entire work shall be executed as work contract.

Orissa Government vide Gazette Notification S.R.O No. 298/2004 dated 07.6.2004 (copy enclosed) as exempted machinery, equipment and other schedule goods required for construction work of Paradip Refinery of IOC from payment of Orissa Entry Tax.

Under Section 35 HHH of Orissa Sales Tax, read with list A (copy enclosed), local sales tax is exempted on goods sold in the course of execution of work contract to the petroleum refinery unit located in the State of Orissa.

The Letter of Acceptance by IOCL to the prime contractor shall be issued "A/C PDRP Project" which will enable the prime contractor to avail the tax exemptions for Entry Tax and Orissa Sales Tax.

Sub Contractor may be allowed for non-deduction of sales tax on works contract at source. Sub-contractor shall have sales tax and Entry Tax registration under OST and Orissa Entry Tax Act. Sub contractor shall also have Service Tax Registration.

Sub Contractor shall mention Service Tax Registration number in all RA bills and will also mention that billed amount is inclusive of service tax. The supporting documents towards payment of service tax shall be forwarded to the prime contractor by the sub contractor."

Clause 6.02 (v) reads as follows:-

"6.02. Schedule of Rates and Payments

(v) No exemption or reduction of Customs Duties, Excise Duties, Sales Tax, Quay or any port dues, Royalties, Transport Charges, stamp duties or Government or Local Body or Municipal Taxes or Duties, Taxes or Charges (From or of any other Body), whatsoever, will be granted or obtained, all of which expenses shall be deemed to be included in and covered by Schedule of Rates, Sub-contractor shall also obtain and pay for all permits, or other privileges necessary to complete work.

Sub contractor should be a registered dealer under Orissa Sales Tax Act."

Clause 7.2 of General Conditions of Contract reads as follows:-

"7.2. Taxes, Duties, Octroi and other Statutory Payments

Sub contractor agrees to and does hereby accept full and exclusive liability for the payment of any and all taxes, duties, Octroi etc. now or hereafter imposed increased, or modified and all the sales tax, duties and hereafter increased, imposed or modified from time to time in respect of work and materials and all conditions and taxes for unemployment compensation insurance and old age pensions or annuities now or hereafter imposed by any Central or State Government Authorities which are imposed with respect to or covered by the wages, salaries or other compensations paid to the persons employed by Sub Contractor and Sub Contractor shall be responsible for compliance with the obligations and restrictions imposed by the Labour Law or other law affecting employer employees relationship and Sub Contractor further agrees to comply and to secure the compliance of all Sub-agencies, with *applicable Central, State Municipal and local laws and regulations and requirements of any Central, State or Local Employment Agency or Authority, Sub Contractor further agrees to defend, indemnify and hold harmless the Prime Contractor from any liability or penalty which may be imposed by the Central, State or Local Authorities by reason of any violation by Sub Contractor of such laws, regulations or requirements and also from all claims, suits or proceedings that may be brought against Prime Contractor arising under, growing out of, or by reason of work provided by this Contract, by third parties or by Central or State Government Authority or any Administrative sub-division thereof."*

The Ld. Arbitrator while considering the claim made by the respondent has considered the above mentioned clauses with regard to tax and payments. The Ld. Arbitrator has also considered with regard to Orissa Value Added Tax and has come to the conclusion that when the contract was entered between the parties Orissa Sale Tax Act was applicable and after issuance of the Letter of Intent in favour of the petitioner Orissa Value Added Tax came into force with effect from 01.04.2005.

In the said Bank Guarantee, it is mentioned that the contractor shall furnish Bank Guarantee from a bank and in a form acceptable to the Corporation for the payment to the Corporation on demand of amount claimed by the Corporation as Price Discount payable under the said contract.

The Ld. Arbitrator while deciding the said issue held that the guarantee was provided for:-

i) Because the claimant had requested the respondent not to deduct for the time being the Price Discount amount.

ii) Because the said request was acceded to by the respondent on the condition of furnishing Bank Guarantee in an acceptable form.

iii) For the amount which the respondent would claim for Price Discount.

In the said Bank Guarantee furnished by the petitioner in clause (i) it is stated that "this guarantee/undertaking shall be continuing undertaking and shall remain valid and irrevocable for all claims of the Corporation upon the bank made upto the midnight of 24.05.2009 provided that the bank shall upon the written request of the Corporation made upon the bank..............".

As per the contract, the petitioner has furnished Security Deposit of 2.5% of the contract value and subsequently, the validity of the said Security Deposit was not extended. As the petitioner has completed the work but due to delay in completion the work, the respondents have obtained fresh Bank Guarantee from the petitioner for an amount of Rs. 59,15,000/- vide Bank Guarantee No. 15 of 2009 dt. 25.02.2009.

The petitioner has relied upon the judgment reported in (2020) 5 SCC 164 Paras 25, 28 & 30 which read as follows:-

"25. *Having regards 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.*

28. *In this context, the interpretation of Clause 23 of the contract by the Arbitral Tribunal, to provide a wide interpretation cannot be accepted, as the thumb rule of interpretation is that the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. In the case at hand, this basic rule was ignored by the Tribunal while interpreting the clause.*

30. *From the aforesaid discussion, it can be said that the contract was based on a fixed rate. The party, before entering the tender process, entered the contract after mitigating the risk of such an increase. If the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal cannot be said to be possible one, as it would completely defeat the explicit* *wordings and purpose of the contract. There is no gainsaying that there will be price fluctuations which a prudent contractor would have taken into margin, while bidding in the tender. Such price fluctuations cannot be brought under Clause 23 unless specific language points to the inclusion."*

In the case reported in (2020) 7 SCC 167 Paras 22 & 24 which read as follows:-

"22. *The present case arises out of a domestic award between two Indian entities. The ground of patent illegality is a ground available under the statute for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.*

24. *In the present case, the High Court in para 60 has held that no reasonable person could have arrived at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. Any other interpretation of the above clauses would definitely be irrational and in defiance of all logic. The relevant extract reads:-*

> *"60. …Clause 33(iii) specifically provides that "if the rates for such items of work cannot be determined in the manner as specified in Clause 33(ii), the rates for such items to be executed shall be determined by the Engineer-in-Charge on the basis of actual and analysed cost taking the following into consideration the rates for such items of works as are required to be executed due to deviations as stated in sub-clause shall be payable in the manner as stated hereunder…..". We are of the firm view that this is the only possible interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. No reasonable person would arrive at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. Any other interpretation of the above clauses would definitely be irrational and defiance of all logic."*

In the case reported in (1998) 8 SCC 436 Paras 14 & 21 which read as follows:-

> ***"14.*** *This condition clearly refers to the original contract between the HCCL and the defendants and postulates that if the obligations, expressed in the contract, are not fulfilled by HCCL giving to the defendants the right to claim recovery of the whole or part of the "advance mobilisation loan", then the Bank would pay the amount due under the guarantee to the Executive Engineer. By referring specifically to Clause 9, the Bank has qualified its liability to pay the amount covered by the guarantee relating to "advance mobilisation loan" to the Executive Engineer only if the obligations under the contract were not fulfilled by HCCL or HCCL has misappropriated any portion of the "advance mobilisation loan". It is in these circumstances that the aforesaid clause would operate and the whole of the amount covered by the "mobilisation advance" would become payable on demand. The Bank Guarantee thus could be invoked only in the circumstances referred to in Clause 9 whereunder the amount would become payable only if the obligations are not fulfilled or there is misappropriation. That being so, the bank guarantee could not be said to be unconditional or unequivocal in terms so that the defendants could be said to have had an unfettered right to invoke that guarantee and demand immediate payment thereof from the Bank. This aspect of the matter was wholly ignored by the High Court and it unnecessarily interfered with the order of injunction, granted by the Single Judge, by which the defendants were restrained from invoking the bank guarantee.*
>
> ***21.*** *As pointed out above, bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the defendants. It is independent of the main contract between HCCL and the defendants. Since the bank guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the bank guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance guarantee" to the Executive Engineer."*

In the present case though in one of the paragraph, it is mentioned that the contractor shall furnish a Bank Guarantee from a bank and in a form acceptable to the Corporation for the payment to the Corporation on demand of amount claimed by the Corporation as Price Discount payable under the said contract and in clause (i) it is mentioned that this Bank Guarantee shall be a continuing undertaking and shall remain valid and irrevocable for all claims of the Corporation. The Ld. Arbitrator has considered both the clauses and has come to conclusion that the guarantee not operative for limited purpose. While deciding the said issue, the Ld. Arbitrator has considered the Bank Guarantee as well as the submissions made by the respective parties and thus this Court does not find any reason to interfere with the reason arrived by the Ld. Sole Arbitrator.

As regard the payments of Value Added Tax (VAT), the Ld. Sole Arbitrator held that the respondent would be liberty to realise for the claimant if any VAT is paid by the respondent as a result of failure on the part of the claimant but the Ld. Arbitrator has further held that with regard to payment of VAT is a subject-matter of the writ petition pending before the Hon'ble High Court of Orissa.

With regard to the said issue, the Counsel for the petitioner submits that the petitioner has applied an information under Right to Information Act to confirm whether any Works Contract Tax/ VAT was deducted from payment made to the respondent under the above contract and in answer to the said query the Indian Oil Corporation Limited has replied that no deduction was made against any Works Contract Tax. The Counsel for the petitioner also pointed out the query 10 of the Right to Information received by the petitioner wherein a query was made whether as per MOU between IOCL and Government of Orissa dt. 16.02.2004, Orissa Government has exempted IOCL from payment of tax on works contract or similar tax (Article – II – Package of incentives : Clause 2 (v) and in reference to the said query, the IOCL had answered that the copies of the notification issued by the Government of Orissa towards various exemption in Paradip Refinery Project of the IOCL in Orissa (to the extent of availability with the pipe lines division) are furnished at Annexure-C.

The contention raised by the petitioner before this Court was duly considered by the Ld. Arbitrator while deciding the issue. The Ld. Arbitrator had considered clause 8, clause 7.02 and clause 6.02 (v) of the General Condition of Contract as well as the information received by the petitioner under Right to Information Act and after considering the same, the Ld. Arbitrator has reasonably come to the conclusion that the information received by the petitioner IOCL under Right to Information Act will not help the petitioner as the notification under VAT Act pertains to much after completion of the works by the claimant. The Ld. Arbitrator has further taken into consideration that the IOCL has paid an amount of Rs. 1,00,20,851.00/- which in turn paid by the IOCL on cover of an equivalent Bank Guarantee. After considering all the aspects, Ld. Arbitrator come to the conclusion that the claimant is liable to pay the VAT subject to final decision by the Hon'ble High Court.

In the instant case, the Ld. Sole Arbitrator while deciding the issue has considered each and every documents referred by the parties, the clauses of the Bank Guarantee as well as the contract agreement and the submissions made by the parties and has passed a reasonable award and thus it cannot be said that the award passed by the Ld. Arbitrator is patent illegal or without any reason.

The Ld. Counsel for the respondents relied upon the judgment reported in (2007) 6 SCC 470 and submits that the Bank Guarantee furnished by the petitioner is an unconditional and irrevocable and the seller cannot raised dispute of whatsoever nature and prevent the purchaser from enforcing the Bank Guarantee by way of injunction except on the ground of fraud and irretrievable injury.

Ld. Counsel for the respondents relied upon the judgment reported in (2008) 1 SCC 544 and submits that the recital in the preamble in the deed of guarantee do not control the operative part of the deed. After careful analysis of the terms of the guarantee it is found that guarantee is an unconditional one and the petitioner cannot raised any dispute or prevent the respondent from en cashing the Bank Guarantee. The Ld. Counsel for the petitioner relied upon the judgment reported in (2022) 4 SCC 463 and submits that none of the grounds available under Section 34 of the Arbitration and Conciliation Act is applicable in the instant case for setting aside the award as claimed by the petitioner.

Ld. Counsel for the respondent relied upon the judgment reported in (2015) 3 SCC 49 and submits that this Court cannot act as a Court of Appeal and consequently errors of fact cannot be corrected. It is further submitted that the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he delivers his arbitral award.

Ld. Counsel for the respondent further relied upon the judgment reported in (2019) 20 SCC 1 and submits that there is no gain saying that arbitration proceedings are not per se comparable to judicial proceeding before the Court and under the Indian Arbitration Law, a party can opt for an arbitration before any person even those who do not have prior legal experience as well. It is further submitted that the intention of the legislature to provide for a default rule should be given rational meaning in light of commercial wisdom inherent in the choice of arbitration.

In the present case on 23.02.2009, the respondent had issued a letter to the petitioner under the subject – "Submission of Bank Guarantee in lieu of cash retention against delay penalty". Paragraphs 1 and 2 of the said letter reads as follows:-

> *"1. M/s. N. R. Patel shall submit a Bank Guarantee for 10 % of the contract value as per the format enclosed in lieu of cash retention towards delay penalty.*
>
> *2. The Bank Guarantee shall be kept valid till the settlement of the said issue of Balmer Lawrie with the end customer IOCL. Balmer Lawrie will take a considerate view on the same following settlement with IOCL."*

On the basis of the above mentioned communication, the petitioner has submitted Bank Guarantee No. 15/09 dt. 25.02.2009 for Rs. 59,15,000/- which does not reflect that the said Bank Guarantee is for Price Discount.

The Bank Guarantee in the instant case is unconditional, specific in nature and limited in amount. The terms of the guarantee categorically covered money i.e. 10 % of the contract value. The said guarantee covered in lieu of cash retention against delay penalty.

It is settled law that this Court cannot act as a Court of Appeal and consequently errors of facts cannot be corrected. In the instant case, the Ld. Arbitrator has considered the documents including the Bank Guarantee relied by the parties and has passed a reasoned award.

The contention raised by the petitioner that the award passed by the Ld. Arbitrator is patent illegal on the fact of record is not sustainable as the Ld. Arbitrator has considered all the legal aspects whether the Bank Guarantee furnished by the petitioner is only with regard to price reduction or for the whole contract as well as whether the petitioner is liable to pay the VAT to the respondent.

In view of the above, this Court does not find any reason to interfere with the award passed by the Ld. Sole Arbitrator dt. 28.04.2014.

AP No. 1143 of 2014 is thus **dismissed**.

(Krishna Rao, J.)