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

Order reserved on : 29.03.2022

Order pronounced on : 23.12.2022

+ **FAO (COMM) 19/2022 and CM APPL. 5021/2022**

BHARAT HEAVY ELECTRICALS LIMITED Appellant

Through: Mr Atul Shanker Mathur with Mr
Prabal Mehrotra, Mr Umang
Katariya and Mr Amlaan Kumar,
Advocates.

versus

ABB INDIA LTD. Respondent

Through: Mr Anirudh Bakhru with Mr
Ayush Puri, Ms Riya Basu, Ms
Tejaswini Chandrasekhar and Mr
Umang Taygi, Advocates.

+ **FAO (COMM) 28/2022 and CM APPL. 8084/2022**

BHARAT HEAVY ELECTRICALS LIMITED Appellant

Through: Mr Atul Shanker Mathur with Mr
Prabal Mehrotra, Mr Umang
Katariya and Mr Amlaan Kumar,
Advocates.

versus

M/S ABB INDIA LTD. Respondent

Through: Mr Anirudh Bakhru with Mr
Ayush Puri, Ms Riya Basu, Ms
Tejaswini Chandrasekhar and Mr
Umang Taygi, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE POONAM A. BAMBA

POONAM A. BAMBA, J :

1.0 These appeals are preferred by the appellant Bharat Heavy Electricals Limited under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act** ‘in short’) and Section 13 of Commercial Courts Act, 2015 against the common judgment dated 18.09.2021 (**impugned judgment** ‘in short’) passed by the Learned District Judge (Commercial-2), South District, Saket Courts, New Delhi, (**‘Ld. District Judge, Commercial-2’** in short) whereby **two petitions under Section 34 Arbitration Act bearing numbers [OMP (COMM) No. 54/2021 and OMP (COMM) No. 56/2021)] filed by the appellant herein** seeking setting aside of the consolidated award dated 02.06.2021 with respect of arbitration cases no. 02.03.2019 and 03.03.2019, **were dismissed;**

2.0 Briefly stating, facts relevant for disposal of these appeals are that the appellant BHEL placed two purchase orders on the respondent bearing no. PSNR/SCP/BOP-BHAWANA/AC/SUP/1926 dated 26.08.2019 for supply of air-conditioning system for 2x750 MW Units at Pragati/III,CCPP,BHAWANA (supply portion) and PSNR/SCP/BOP-BHAWANA/COMP-E&C/1927 dated 26.08.2009 for Erection and commissioning of equipment of air-conditioning system for 2x750 MW Units at Pragati/III,CCPP,BHAWANA (E&C portion). The supply portion of the purchase order was subject matter of Arb. Case No. 02/03/2019. The E&C portion of the purchase order being subject matter of Arb. Case No. 03/03/2019 envisaged erection and commissioning of the equipment. A performance Bank Guarantee No. 0002BG00060609 dated 25.08.2009 for the amount of Rs. 41,80,242/- for the supply portion of the purchase order and Bank Guarantee No. 0002BG00063509 dated 01.09.2009 for the amount of Rs. 4,64,315/- for the E&C portion of the

purchase order, respectively were submitted by the respondent in terms of clause 7 of the General Commercial Terms and Conditions of the agreement between the parties.

2.1 Disputes arose between the parties which came to be adjudicated upon by the Arbitrator. The respondent herein (claimant before the arbitrator) claimed that the delivery of materials for the supply portion of the purchase order was completed within the contractual final delivery period i.e. 25.05.2015 and AC system commissioning for the E&C portion was completed on 09.05.2016. Accordingly guarantee period came to an end on 08.05.2017.

2.2 It was the respondent's (M/s ABB India Ltd.) case that on expiry of warranty period in November 2016, when vide letter dated 30.01.2017, it sought discharge of the bank guarantee, the appellant vide its letter dated 20.02.2017 conveyed that the package AC's system was commissioned on 09.05.2016 and therefore, the guarantee period shall expire after one year as per clause 15.2 of Volume I, Part B of GCC of the Contract. Accordingly, the respondent extended validity of the bank guarantee till 20.08.2017 and 21.08.2017 for the supply portion and E&C portion, respectively. The same was further renewed under coercion for a further period expiring on 20.02.2018 and 21.02.2018. However, despite the same, bank guarantee was not released by the petitioner; and later on, in meeting between the officials of the appellant and the respondent held on 04.01.2018, the respondent was apprised that non release of the bank guarantee was due to ongoing arbitration between the parties in the separate contract at Anapara, Uttar Pradesh, which was distinct from Bawana contract. Withholding of Rs. 39,58,908/- in relation to the purchase order (supply portion) and Rs. 7,15,861/- in relation to the E&C

portion of the purchase order dated 26.08.2019 by the appellant herein, was absolutely illegal and arbitrary besides being contrary to the terms of the contract Bawana Project. The appellant could not have withheld the said amount.

2.3 It was further the case of the respondent that on account of certain disputes, the appellant herein had invoked arbitration clause in contract Anapara, Uttar Pradesh claiming damages from the respondent which proceedings are still pending adjudication and are being contested by the respondent.

2.4 In the aforesaid arbitral proceedings (Bawana Contract), a counter claim was filed by the (BHEL) appellant herein raising two claims ; claim no. 1 for recovery of Rs. 5,34,523/- towards failure of the Claimant/ respondent herein to supply 10 number of 3 TR split air conditioning systems thereby being in breach of the supply portion of the purchase order; and failure to erect and commission the said 10 number of 3 TR split air conditioning systems, being in breach of the purchase order. Because of which, the principal employer, M/s Pragati Power Corporation Limited ('PPCL') had to procure, erect and commission the said 10 number of 3 TR split air conditioning systems from elsewhere for an amount of Rs. 9,97,087/- at the risk and costs of the appellant herein. The appellant herein also pleaded that as per the measurement book (**MB**) at page 069 and measurement book at page 074 dated 30.01.2017, pertaining to the purchase orders, the claimant/respondent herein agreed that the differential cost of procurement of 10 number of 3 TR split air conditioning systems not supplied by them to be debited from their bills. The said MB has been signed by both the parties. PPCL deducted a composite amount of Rs. 9,97,087/- for the supply portion and Rs.

10,38,527/- for the E&C portion of the purchase order from the respondent's bills. After deducting the price of 10 number of 3 TR split air conditioning systems quoted in Billing break up (**BBU**) submitted by the claimant/respondent herein, a net amount of Rs. 5,34.523/- is due and payable by the claimant/respondent herein to the appellant. The appellant herein also claimed interest at the rate of 18% on the aforesaid amount.

2.5 On the pleadings of the parties, the following common issues were framed on 06.12.2019 in both the arbitration cases :

- a. Whether the claimant (respondent herein) is entitled to its claims as prayed for in the SOC? If yes to what extent and at what interest?
OPC
- b. Whether the respondent/counter claimant/appellant herein is entitled to counter claims as prayed? If yes, to what extent and to what interest? OPR.

3.0 It is not disputed that the principle employer of the appellant namely PPCL issued a notice of the completion of work by the claimant/respondent herein on 30.08.2016. The Arbitral Tribunal noted that in view of the stand taken by the appellant herein, the respondent's claim revolved around whether under clauses 9 and 22 of the present Bawana contracts, the appellant was entitled to recover or withhold or have lien over the amounts payable to the respondent under the present two contracts for the Bhawana project against the claim of the appellant raised in other two contracts for supply portion and E&C portion for the Anapara project pending adjudication before another Tribunal.

4.0 After considering the submissions made by both the sides and the case law referred to and relied upon by them, the Arbitral Tribunal

allowed the respondent's claim and dismissed the counter claim of the appellant/BHEL. The relevant portion of the Award reads as under :

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46. *It is submitted by learned counsel for the Claimant that clause 9 deals with 'recovery of the outstanding amount'. It states that in the event that any amount of money being outstanding at any point against the contractor due to excess payment or any other reason, either in the present contract or any other contract, the outstanding amount shall be recovered from the payment due to the contractor. According to him, the 'outstanding' amount is in relation to a 'claim' in presenti. This clause is intended to provide a mode of recovery of a claim against the contractor for payment of a sum of money arising out of or under the contract. It does not postulate a 'claim' for a sum that is not due and payable in presenti. He submits that the claims for damages raised by the respondent with respect to other contracts for the project at Anapara are still pending adjudication before another arbitrator and till it is finally adjudicated, the question of recovery or withholding of the admitted dues of the Claimant from the present contracts does not arise.*

47. *Clause 9 therefore does not come to the aid of the Respondent, which is the basis of their withholding the amounts due in the present contract and threatening to invoke the Bank Guarantee. In support of the said submission learned counsel for the Claimant relies upon the following judgements:*

- a. *Union of India vs Raman Iron foundry 1974(2) SCC 231.*
- b. *Gangotri Enterprises vs Union of India 2016(11) SC720.*
- c. *Intertoll ICS Cecons O&M Co. Pvt. Ltd. Vs National Highways Authority of India Ltd. 2013 SCC Online Del 447*
- d. *Lanco Infratech Ltd. Vs Hindustan Construction Company Limited 2016 SCC Online Del 5365.*

48. *The relevant extract of Raman Iron foundry (supra) is reproduced herein below:*

“7. That takes us to the second ground of challenge against the order of interim injunction. This ground of challenge is based on the proper interpretation of clause 18. The argument of the appellant was that what is required for attracting the applicability of

clause 18 is a mere claim for payment of a sum of money arising out of or under the contract against the contractor and it is not necessary that a sum of money must be actually due and payable from the contractor to the purchaser. If the purchaser has a claim for payment of a sum of money against the contractor, he would be entitled to exercise the right given under clause 18, even though such claim may not be for a sum due and payable but may be for damages and it may be disputed by the contractor and may not have been adjudicated upon in a court of law or by arbitration..... But the Court cannot and should not restrain the purchaser from exercising his right of appropriation merely because the claim against which appropriation is sought to be made by the purchaser is disputed by the contractor and is pending adjudication before a court of law or arbitrator. The respondent, however, disputed the validity of this construction placed on clause 18 by the appellant and contended that though the words used in the opening part of clause 18 are “any claim for the payment of a sum of money”, which are general words of apparently wide amplitude sufficient to cover even a claim for damages arising out of the contract,..... “

“8. It is true that the words “any claim for the payment of a sum of money” occurring in the opening part of clause 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is a well settled rule of interpretation applicable alike to instruments as to statutes that the meaning of ordinary words is to be found not so much in strict etymological propriety of language nor even in popular use as in the subject or occasion on which they are used and the object which is intended to be attained. The context and collocation of a particular expression may show that it was not intended to be used in the sense which it ordinarily bears.We must, therefore, read the words “any claim for the payment of a sum of money” occurring in the opening part of clause 18 not in isolation but in the context of the whole clause, for

the intention of the parties is to be gathered not from one part of the clause or the other but from the clause taken as a whole. It is in the light of this principle of interpretation that we must determine whether the words “any claim for the payment of a sum of money” refer only to a claim for a sum due and payable which is admitted or in case of dispute, established in a court of law or by arbitration or they also include a claim for damages which is disputed by the contractor.”

“9. The first thing that strikes one on looking at clause 18 is its heading which reads: “Recovery of Sums Due”. The heading of clause 18 clearly suggests that this clause is intended to deal with the subject of recovery of sums due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a “debt”, for a sum due is the same thing as a debt due. The classical definition of “debt” is to be found in Webb v. Stenton [(1883) 11 QBD 518] where Lindley, L.J., said: “...a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation”. There must be debitum in praesenti;

.....A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti, or in other words, which is presently payable. Recovery of such sums is the subject matter of clause 18 according to the heading. That is the dominant idea running through the entire clause 18.”

*“10. The language used in the body of clause 18 also supports the view that it is with recovery of sums presently due and payable by the contractor to the purchaser that this clause deals. It may be noted that clause 18 does not lay down the substantive rights and obligations of the parties under the contract. It is merely intended to provide a mode of recovery of “a claim for payment of a sum of money arising out of or under the contract”. **It, therefore, postulates a***

claim for a sum which is due and payable, that is, presently recoverable and may be recovered by the mode therein provided.It is important to note that clause 18 does not create a lien on other sums due to the contractor or give to the purchaser a right to retain such sums until his claim against the contractor is satisfied. If merely a right of lien or retention were given to secure payment of a claim, then even if the claim were for a sum not presently due and payable, the provision perhaps would not have been so startling or unusual. But here the right given to the purchaser under clause 18 is a right to recover the amount of his claim by appropriating other sums due to the contractor and, on the interpretation of the appellant, this can be done even if the claim is for a sum which is not due or payable in praesenti and the purchaser is otherwise not entitled to recover it. That would indeed be a highly extra-ordinary result which we would be loathe to reach in the absence of clear and compelling language. This interpretation, if accepted, would mean that as soon as a claim is made by the purchaser, it would immediately become recoverable and the purchaser would be entitled to sell off the securities of the contractor and appropriate the sale proceeds in or towards satisfaction of such claim and in case that is insufficient, recover the balance by appropriating other sums due to the contractor..... The only question before us is, what does clause 18 mean and that depends on the plain interpretation of its language in the context in which it occurs. Moreover, on a question of construction of clause 18, mere use of the word "claim" cannot be a decisive factor. clause 18 has to be read as a whole, each part throwing light on the other, without any undue emphasis on one word or the other. We cannot allow our interpretation of clause 18 to be hijacked from its true course by the use of a solitary word such as "claim", but we must arrive at the true meaning of the clause by construing it in all its parts and in its proper contextual setting. So viewed, it is clear that clause 18 applies only where the purchaser has a claim for a sum

***presently due and payable by the contractor.”
(emphasis supplied).***

49. ***The aforesaid view is also noted with approval in Gangotri Enterprises vs Union of India 2016(11) SC720.***

50. ***On the other hand, the learned counsel for the Respondent submitted that the view taken in Raman Iron foundry (supra) has been overruled by a larger bench of the Supreme Court in H.M Kamaluddin Ansari and Co. vs Union of India and Others (1983) 4 SCC 417.***

52. ***The learned counsel for the Respondent submits that the said view in H.M. Kamaluddin (supra) is also cited with approval in Sate of Gujrat through Chief Secretary and Anr. Vs Amber Builders (2020)2SCC540 which also holds that the judgement in Gangotri Enterprises(supra) is per in curium. He also relied upon Union of India vs Concrete Products and Construction Company and Ors. (2014)4 SCC 416 in support of this submissions.***

54. ***Relying on the following paragraphs of Union of India vs Concrete Products and Construction Company and Ors (supra), the Learned counsel the Respondent reiterates that it has a right to withhold and have lien over the dues in the present contracts in view of its claim in another contract which is pending adjudication.***

“17. Clause 2401 provides that the Railways shall be entitled to withhold and also have a lien to retain any amount deposited as security by the contractor to satisfy any claims arising out of or in the contract. In such circumstances, the Railways can withhold the amount deposited by the contractors as security and also have lien over the same pending finalisation or adjudication of the claim. In case, the security deposit is insufficient to cover the claim of the Railways, it is entitled to withhold and have lien to the extent of the amount claimed from any sum payable for any works done by the contractor thereafter under the same contract or any other contract. This withholding of the money and the exercise of the lien is pending finalisation or

adjudication of any claim. This clause further provided that the amount withheld by the Railways over which it is exercising lien will not entitle the contractor to claim any interest or damages for such withholding or retention under lien by the Railways.”

18. *Clause 2403 again provides that any sum of money due and payable to the contractor under the contract may be withheld or retained by way of lien by the Railway Authorities or the Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Railway Authority or the Government. Clause 2403(b) further provides that it is an agreed term of the contract that against the sum of money withheld or retained under lien, the contractor shall have no claim for interest or damages whatsoever provided the claim has been duly notified to the contractor.*

19. *We are of the opinion that the sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the aforesaid two clauses. We find merit in the submission made by the learned Additional Solicitor General that award of interest at least from the date when the amount was deposited in the Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator, in our opinion, have committed an error of jurisdiction in this respect. This view of ours will find support from the judgment of this Court in Sayeed Ahmed & Co. [Sayeed Ahmed & Co. v. State of U.P., (2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629] , wherein it has been held as follows: (SCC p. 33, para 16)*

“16. In view of clause (a) of sub-section (7) of Section 31 of the Act, it is clear that the arbitrator could not have awarded interest up to the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during

the pre-reference period, that is, up to 13-3-1997 but also during the pendente lite period, that is, from 14-3-1997 to 31-7-2001.”

55. Countering the submission of the **Learned Counsel for the Respondent**, Mr. Saket Sikri, Learned Counsel for the Claimant submits that Raman Iron foundry is overruled on another point. He relies upon **Intertoll ICS Cecons O&M Co. Pvt. Ltd (supra)** to show that the learned Single Judge of the Delhi High Court has **while examining the decision of Raman Iron foundry and H.M Kamaluddin Ansari held that the decision in Raman Iron foundry has been overruled in H.M Kamaluddin Ansari on another point i.e. “that the clause in the contract applied to a Claim itself and not only to an amount due”**. However, on the nature of the Claim of damages the decision in Raman Iron foundry has not been overruled and is good law. **In Intertoll ICS Cecons O & M Co. Pvt. Ltd. (supra), the learned Single Judge of the Delhi High Court deals with both the Judgments in Raman iron Foundry and H.M. Kamaluddin Ansari and holds as under:**

“25. The decision in Raman Iron Foundry was overruled in H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417 on another point “that the clause in the contract applied to a claim itself and not only to an amount due”. However, on the nature of the claim for damages the decision in Raman Iron Foundry has not been overruled and is good law.”

56. Similar view is expressed in **Lanco Infratech Ltd. Vs Hindustan Construction Company Limited 2016 SCC Online Del 5365** wherein the learned single judge of the Delhi High Court noticed with approval the decision in Raman Iron foundry (supra) to be still good law as regard to the nature of Claim of damages is concerned. Paragraph 19, 20, 21 and 28 and of the said judgements are reproduced herein below:

“19. It may be noted that the above decision in Iron & Hardware (India) Co. v. Firm Shamlal & Bros. (supra) was cited with approval by the Supreme

Court in Union of India v. Raman Iron Foundry (1974) 2 SCC 231 in the following manner:

“11...a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred...”

20. As noticed in ***Intertoll ICS Cecons v. National Highways Authority of India*** (supra), while the decision in ***Union of India v. Raman Iron Foundry*** (supra) was overruled subsequently in ***H.M. Kamaluddin Ansari & Co. v. Union of India*** (1983) 4 SCC 417 on the point that the clause in the contract applied to the claim itself and not only to an amount due, the decision in ***Union of India v. Raman Iron Foundry*** (supra) is still good law as regards the nature of the claim for damages.

21. In ***Intertoll ICS Cecons v. National Highways Authority of India*** (supra), the Court also discussed Order XXXVIII Rule 5 CPC and referred to the decision in ***Raman Tech. & Process Engg. Co. v. Solanki Traders*** (2008) 2 SCC 302 where the Supreme Court explained that the power of ordering attachment before judgment under Order XXXVIII Rule 5 CPC was drastic. The Supreme Court observed as under:

“The power under Order XXXVIII Rule 5 CPC is a drastic and extraordinary power. Such

power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt in to a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment. (Emphasis added).”

28. *In the present case, an analysis of the claims of the HCCL reveals that a substantial part of the claims is for losses sustained by it on account of the suspension of the contract. **In other words, a substantive portion of the claim is only in relation to speculative losses which are not quantified and in respect of which no sum can be determined till after the evidence is led by the parties.** Although it was sought to be pointed out by learned counsel for the HCCL that some of the claims included amounts wrongly determined as environmental cess, reimbursement of service tax and electricity charges, which cannot be said to be speculative, **the Court finds that that itself has not applied its mind to the distinction between the substantive claims** which are speculative in nature and those that are not. Therefore, the impugned order of the AT to that extent is erroneous.”*

57. *In order to examine the facts of the present case in relation to the judgments cited above, it is necessary to carefully read Clauses 9 and 22 of GCC of the contracts. **Clause 9 deals with the Recover of ‘Outstanding’ amount, while clause 22 deals with ‘withholding and lien in respect of sum claimed’.***

58. *Clause 9 of the GCC of the contracts reads as under:*

“9. RECOVERY OF OUTSTANDING AMOUNT

In the event of any amount money being outstanding at any point in time against the seller/contractor, due to excess payment or any other reason whatsoever in the present order/contract or any other order/contract the outstanding amount shall be recovered from the payment due to the seller/contractor or at any other appropriate time and manner/mode as deemed fit by the Purchaser at its sole discretion.”

Clause 22 of the GCC of the contract reads as follow:

“22.0 WITHHOLDING AND LIEN IN RESPECT OF SUM CLAIMED

22.1. Whenever any claim or claims for payments of a sum of money arises out of or under the Order/Contract against the Seller/ Contractor, the Purchaser shall be entitled to withhold and also have a lien retain such sum or sums in whole or sums in part from security, if any, deposited by the Seller/Contractor and for the purpose aforesaid, the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, finished as the case may be and also have a lien over the same, pending finalisation or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Seller/Contract, the purchaser shall be entitled to withhold and have a lien to retain to the extent of such claimed, amount or amounts referred to from any sum or sums found payable or which at any time, thereafter may become payable to the Seller/Contractor under the same Order/Contract or any Other Order/Contract with the purchaser or any other person contracting, pending finalisation or adjudication of any such claim.

22.2. It is an agreed terms of the Order/Contract that the sum of money so withheld or retained under the lien referred to above will be kept withheld or retained as such by the purchaser till the claim arising out of or under the Order/Contract is determined by the Arbitrator or

by the competent court, prescribed as the case may be and that the Seller/Contractor will have no claim for interest or retention under the lien referred to and duly notified as such to the seller. For the purpose of this clause, where the Seller/Contractor is partnership firm or a limited company, the Purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company as the case may be, whether in his individual capacity or otherwise.

22.3. It is an agreed term of the Order/Contract that the sum of money so withheld or retained under this clause by purchaser which will be kept withheld or retained as such by the purchaser or till his claim arising out of in the same Order/Contract or any other Order/Contract is either mutually settled or determined by the arbitrator or by the competent court, hereinafter; provided, as the case may be that the Seller/Contractor shall have no claim for interest or damages whatsoever on this account of or any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the seller."

59. Clause 9 of GCC of the present Contracts is differently worded from the clause that came up for interpretation in Raman Iron Foundry (supra) and Kamaluddin Ansari (Supra). Clause 9 of the instant contract does not refer to the 'claim'. It uses the word 'outstanding'. It states that 'in the event of any amount of money being outstanding at any point in time against the contractor, due to excess payment or any other reason whatsoever in the present contract or any other contract, the outstanding amount shall be recovered from the payments due to the contractor.' This contemplates that there must be an outstanding amount due against the contractor. 'Outstanding amount' means something that would be owed to someone or payable to someone. It is different from the word 'claim', which is yet to be determined.

60. Admittedly the amount claimed by the Respondent under the contract of Anapara project is yet to be established by adjudication as a debt payable and therefore cannot be said to be an outstanding against the Claimant/contractor in the context in which the word 'outstanding' is used in clause 9. Clearly, the outstanding amount

referred to in clause 9 has to be understood as a debt payable in presenti i.e. refers to an actionable claim. Only after the adjudication of the 'claim' can it be said to be 'outstanding amount'. It is clearly an amount payable in presenti.

61. *Furthermore, if the intention of the parties while entering into the contract was to also entitle the Respondent to recover the 'claimed' amount, then the drafters of the contract could have very well used the term 'claim' instead of 'outstanding' in clause 9 of the contracts as it used the word 'claimed' in clause 22. Consequently, the recovery of the amount which is yet to be determined through the adjudicatory process cannot be recovered from the admitted dues in the present contract.*

62. *The other argument of the learned counsel for the Respondent is that in terms of clause 22.1 whenever any claim or claims for payment of a sum of money arises out of another contract between the same parties, they are entitled to withhold or have lien in the amounts due from the contracts in question, is wholly misconceived.*

63. *Clause 22.1 provides in unequivocal term that the entitlement of the Respondent to withhold or have lien to retain the sum or sums in whole or in part only arises when the Respondent has a Claim in the present contract and not in another contract. Clause 22.2 and 22.3 also refer to such claims as are referred to in clause 22.1. The former portion of clause 22.1 clearly envisages that 'whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor.....', meaning thereby that the claim or claims need to arise in the contract in question and not in any other contract between the same parties.*

64. *There is yet another aspect of the matter. Admittedly the amount claimed in the Anapara project is still pending adjudication before another Arbitral Tribunal and the said claim is by way of damages for alleged breach of contract by the Claimant with respect to contracts pertaining to the Ananpra project. In the matter of Intertoll ICS Cecons O&M Co. Pvt. Ltd (supra), the Single Bench of the Delhi High Court has made a distinction between the judgement in Raman Iron Foundry and H.M. Kamaluddin (supra) case to hold that the decision in Raman Iron Foundry was overruled in H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417 was on another point i.e. "that the clause in the contract applied to a claim itself and not only to an amount due". However, on the nature of the claim for damages the decision in Raman Iron Foundry has not been overruled and is good law.*

65. Similar view has also been taken in another case by the learned single Judge in *Lanco Infratech Ltd. Vs Hindustan Construction Company Limited* 2016 SCC Online Del 5365.

66. The decision in *State of Gujarat's case (supra)* doesn't not deal with the distinction drawn by the Learned Single Judge in the aforesaid cases and the facts of that case are distinguishable from the facts of the present case.

67. In view of the aforesaid, **I am of the view that the Respondent (BHEL) does not have any right to withhold or recover the amounts which are admittedly payable in the present contracts pertaining to the Bhawana project in lieu of the amounts claimed and pending adjudication in respect of the contracts for the Anapara project.** Likewise, the Respondent does not have a right to withhold or encash the security deposited by way of Bank Guarantees furnished by the Claimant for the contracts relating to the Bhawana projects.

.....

71. For similar reasons, with respect to **claim no. 2** for the supply portion and E&C portion of the contracts, the **Respondent is not entitled to withhold the Bank Guarantees furnished by the Claimant for the two contracts in question. The work was successfully completed within time. The defect liability period is over.** There is no reason why the respondent should not release and discharge the Bank Guarantees furnished by the Claimant. However, since the expenses incurred for renewal of the Bank Guarantees have not been proved and no material has been placed on record, the claim for expenses is disallowed.

72. In respect of **Claim No.3**, in respect of both the supply portion and E&C portion of the contracts, **I hold that Since the Respondent has illegally and arbitrarily withheld the amounts due and payable to the Claimant, the claimant is entitled to simple interest at the rate of 10@ p.a., on the awarded amount, both pendente lite and future, till actual payment.**

COUNTER CLAIM

73. Now coming to the Counter claim of the Respondent

(BHEL), it is the case of the Respondent that for the supply portion of the contract, the claimant is in breach as it failed to supply 10 number of 3 TR split air conditioning systems and consequently failed to erect and commission the same thereby also committing breach of the E&C portion of the contract. It is also submitted that PPCL, the principal employer of the Respondent procured, erected and commissioned the 10 number 3 TR split air conditioning system from elsewhere for an amount of Rs.9,97,087/- at the risk and cost of the Respondent.

74. It is further submitted by Mr. Atul Shankar Mathur, Learned Counsel for the respondent that the claimant agreed that the differential cost of the procurement of 10 number of 3 TR split air conditioning system not supplied by the claimant would be reimbursed and therefore signed the Measurement Book at page 069 dated 30.12.2017 and the Measurement Book at page 074 for the E&C portion of the contract, agreeing to reimburse the differential amount by debiting from their bills. PPCL deducted a composite amount of Rs.9,97,087/- from the bills of the Respondent and recorded the same in the minutes of the meetings between PPC and the respondent held on 08.06.2019. Consequently, the Respondent is entitled to the differential cost being the amount deducted by PPCL and the price quoted in Billing Break up (BBU) submitted by the Claimant which comes to Rs.5,34,523/. Thus, the counter claim of Rs.5,34,523/-.

75. On the other hand the Claimant opposed the counter claim. The submission of the Claimant is that on 19.09.2014 at the meeting held between the parties, a memorandum of meeting was drawn up which was signed by both the parties.

.....

76. The claimant thereafter wrote a letter dated 24.08.2014 in continuation of the discussions held on 19.09.2014 stating that they have considered supply of 35 nos. 3.0TR split AC unit as final and which is also reflected in revised BBU (rev-2) dated 19.09.2014. The said letter also indicated that the quantity had gone up more than 583% with respect to the supply P.O. Annexure- I/tender enquiry no-PW/PE/MM/PRG/E-1647/09 dated 07.02.2009 i.e. 30 nos. as against 6 nos. and as against variation of +/- 30%. Thus the

claimant submitted that the variation in quantity from the original purchase order had exceeded far above the agreed variation of +/- 30%.

.....

78. *It is also submitted that on 04.10.2017, at the request of the Respondent, the Claimant issued a 'No Due Certificate' to the Claimant for both the supply portion and E & C portion of the contracts. Thereafter, Respondent approved the Memorandum of payments for the supply portion of the contract and the E&C portion of the contract on 10.10.2017 and 12.10.2017 respectively. Both the Memorandum of payments did not mention any deduction for alleged short supply of 10 nos. of 3 TR split AC systems. For the supply portion the amount payable was approved in a sum of Rs. 39,58,908/- and E&C portion in a sum of Rs. 71,58,61/-.*

79. *The learned counsel for the Claimant submits that the Memorandum of payments for the supply portion and E&C portion of the contracts duly approved by the Respondent on 10.10.2017 and 12.10.2017, clearly indicates that till October'2017 the Respondent did not raise any Claim for short supply as claimed now in the Counter Claim.*

80. *It is submitted that a perusal of the Minutes of the Meeting dated 08.06.2019 between the Respondent and PPCL shows that PPCL has made deductions on account of procurement of 10 nos. of Tower AC of 3TR capacity. It is the contention of the Claimant that the same is not for 'split' AC for which the work was awarded to the Claimant. Even otherwise, it is stated that the demand was for supply of additional quantity was beyond the scope of the contracts between the parties and thereby refused by the Claimant.*

81. *While it is undisputed that the 'No Due Certificates' were issued in October'17 by the Claimant and thereafter the Memorandum of payments were approved in October'17 without making any deduction for the 10 no. 3 TR capacity split AC unit, yet on 30.12.2017 the recording in the measurement books for both the contracts shows that the claimant has admitted and agreed to reimburse the differential costs of short supply of 10 nos. of 3TR capacity of split AC*

unit. The affidavit by way of evidence of CW1 states at para 44 as follows:

“.....I further say that the comments and on the measurement book on pages 69 and 74 were prepared unilaterally by the Respondent and signed by the Claimant under protest and coercion by the Respondent in as much as the Respondent stated that the contracts would not be closed till the same are signed by the Claimant and the same is evident from the fact that the Claimant time and again rejected the demand for the supply of 10 additional AC systems as the same was beyond the scope of the agreement.....”

82. Thus the plea taken by the Claimant during the course of arguments is that **this was under undue coercion as the payments were not being released and with the hope that the payment would be released, the Claimant signed the said noting in the measurement books.** Reliance is placed on *Sab Industries Limited vs. Gas Authority of India Limited* 2015 SCC Online Del 12752 passed by the Division Bench of the Delhi High Court to buttress the submission that conduct of the parties shows that the Claimant never agreed to supply the additional systems as alleged and in any event were not obliged to do so since the quantity from the original purchase order was varied much beyond the agreed threshold of variation provided in the contract.

83. Although admittedly, no immediate protest was made by the Claimant upon signing the measurement books or soon thereafter but the entire sequence of events leading to the issue of 'No Due Certificates' and approval of Memorandum of payments in October'17, it is unbelievable that an admission for reimbursement would have been made voluntarily, without any undue influence specially after the memorandum of payments were approved, without indicating any such deduction or reimbursement by the Respondent. Moreover in the ordinary course of business, the measurement book is always prepared prior to approving the final payment to be made. Why was the measurement book got prepare and signed after the approval of the final payment by the Respondent is unexplained. The Claimant had throughout been demanding its outstanding dues and release of Bank Guarantees but the requests were not acceded to by

the Respondent.

84. *Furthermore, it is evident from the perusal of clause 2.3.1.2 of the amended BBU that the variation in the scope of work was agreed to be +/- 30%. Despite the same, the Claimant supplied quantity far in excess of the original quantity agreed to. The Claimant had declined to supply any further additional ACs in its communication to the Respondent.*

85. *A perusal of the correspondence between the parties and the minutes of the meetings on record, it is quite plausible to infer that the measurement books were signed due to undue influence or coercion from the Respondent with the hope that the payments for at least the balance amount would be made.*

86. *Consequently, I have no hesitation in holding that the Counter Claim raised by the Claimant is an afterthought. No revised BBU for the said quantity was accepted or agreed to by the Claimant and thus there was no agreement to supply 10 no. 3TR capacity of split AC unit system as claimed arising out of the supply portion of the contract. The Counter Claim is thus rejected."*

5.0 The above Award rejecting its counter claim and allowing the claim of the respondent was challenged by the appellant under Section 34 Arbitration Act before the learned District Judge (Commercial-2).

6.0 Learned District Judge (Commercial-2), vide impugned judgment dismissed the appellant's petitions/arbitration cases dated 02.03.2019 and 03.03.2019.

7.0 Vide present appeal, the appellant has challenged the impugned judgment inter alia, on the grounds that :-

(i) Learned District Judge failed to appreciate that the impugned

award is solely based on the judgment of Supreme Court in **Gangotri Enterprises (supra)** which only dealt with clause 9 of the GCC of the Bawana Contract and it did not consider clause 22; and it also ignored the interpretation by the Hon'ble Supreme Court of similar clauses in the case of *Union of India Vs. Concrete Products and Construction Company* reported as (2014) 4 SCC 416, which were worded similarly to Clause 22 in Bawana and Anapara contracts ;

(ii) that the Ld. District Judge erred in appreciating the judgements in *Gangotri Enterprises vs. Union of India* 2016 (11) SCC 720 and *M/s H.M. Kamaluddin Ansari and Co. Vs. Union of India & Ors.* (1983) 4 SCC 417 and misapplied the law ;

(iii) the Ld. District Judge did not consider that as per clause 22 of GCC, the appellant has a right to withhold the amount claimed towards the Anapara contract as well as Bawana Contract from the amount payable to the respondent under Bawana Contract and exercise lien on the same to the extent of the amount claimed till such dues are finally adjudicated by the sole arbitrator. The appellant also had the right to retain the security furnished by the respondent under present Bawana contract ;

(iv) the Ld. District Judge erred in observing that only with respect to its claim raised under Bawana Contract, the appellant had a right to withhold the amounts payable to the appellant under the Bawana Contract or any other contract. It was also not appreciated that the relevant clause 22 of GCC in Anapara contract is *pari materia* to clause 22 of GCC of the Bawana Contract, which was placed on record. Therefore, the appellant had not to withhold the amount in question as the arbitral

proceedings under the Anapara Contract are yet to be concluded.

(v) the Ld. District Judge thus misconstrued the Clauses of GCC of Bawana Contract in such a way that no reasonable person could have arrived at such a decision as in impugned judgement ;

(vi) pendente lite interest could not be granted in terms of the clauses 2401 and Clause 2403 in the case of **Union of India v. Concrete Products and Construction Company and Others**, (2014) 4 SCC 416 which were pari materia to Clause 22 of the subject contract ; the Ld. District Judge did not take into consideration the recent judgement of the Hon'ble Supreme Court in **Garg Builders v. Bharat Heavy Electricals Limited** 2021 SCC OnLine SC 855 which also has reaffirmed the view taken in Concrete Products (supra) and held that the no pendente lite interest can be awarded if the parties to the contract had agreed to the same ;

(vii) the Ld. District Judge even failed to appreciate the settled law on the point as laid down in '**Associate Builder v. Delhi Development Authority** (2015) 3 SCC 49, **Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India** (2019) 15 SCC 131, **PSA SICAL Terminals Pvt.Ltd. v. Board of Trustees of V.P. Chidambranar Port Trust Tuticorin and Others** 2021 SCC OnLine SC 508.

(viii) the Ld. District Judge failed to appreciate that the plea of coercion is merely an afterthought and the same could not have been sustained in absence of any bonafide claim ; and also that at the time of preparation of the final bill, the respondent wilfully agreed that the differential cost for

the non-supply of 10 AC systems, would be debited to the respondent based upon the deductions made by the customer of the appellant i.e. M/s PPCL, being Ex. RW-1/3 and Ex. RW-1/4, which documents have also been admitted by the respondent ;

(x) the Ld. District Judge failed to consider that neither the respondent had protested against the aforementioned declarations at the time of signing the same nor did the respondent raise any protest thereafter. Reliance by the respondent on this court's judgement in M/s Sab Industries Limited vs. M/s Gas Authority of India Ltd. and Anr, was also misplaced as in para 20, the Division Bench of this Court had set aside the impugned judgment as the matter had not been considered on merits by the Ld. Single Judge.

8.0 We have duly considered the submissions made by both the sides.

9.0. Before examining the rival contentions, let us refer to the relevant provisions of law i.e. Sections 34 & 37 of the Arbitration Act, which read 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 1. — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, —

(i) *the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*

(ii) ***it is in contravention with the fundamental policy of Indian law; or***

(iii) ***it is in conflict with the most basic notions of morality or justice].***

[Explanation 2. — For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

*[2(A) **An arbitral award** arising out of arbitrations other than international commercial arbitrations, **may also be set aside** by the Court, **if the Court finds that the award is vitiated by patent illegality appearing on the face of the award**:*

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

(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.”

“37. Appealable orders.— (1) *[Notwithstanding anything contained in any other law for the time being in force, **an appeal** shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals **from original decrees of the Court passing the order, namely:—***

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

*(c) **setting aside or refusing to set aside an arbitral award under section 34.***

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

9.1 From the plain reading of the above provisions of law, it is clear that the scope of interference with the Arbitral Award is very narrow and is limited to arbitral award being in contravention with the fundamental policy of Indian law; or it being in conflict with the most basic notions of morality or justice; or suffers from patent illegality apparent on the face of the record. In this regard, reference with benefit may also be made to the recent judgment of the Hon’ble Supreme Court in **MMTC vs. Vedanta, (2019) 4 SCC 163** wherein, while examining the scope of interference with an Arbitral Award in India under Sections 34 & 37 of the Arbitration Act, the Hon’ble Supreme Court in paras 10, 11, 12, 13 & 14 of the judgment observed as under :

*“10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to **the scope of interference with an arbitral award in India**,**Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996** (for short, “the 1996 Act”). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.*

*11. As far as Section 34 is concerned, the position is well settled by now that **the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii)**, i.e. **if the award is against the public policy of India**. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and **the existence of patent illegality in the arbitral award**. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and*

Wednesbury reasonableness. **Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.**

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).

13. It is relevant to note that after the 2015 amendments to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub section (2A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the Court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the Court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the Court under Section 34 and by the Court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

9.2 Thus evidently, it is the settled position of law that the scope of

interference with arbitral award by the courts under Sections 34 & 37 of the Arbitration Act is very limited; courts cannot travel beyond the restrictions laid down under Section 34 of the Arbitration Act. The scope of interference under Section 37 is restricted to the situations where the findings of the Arbitrator or the court are blatantly arbitrary or perverse or patently illegal or are in conflict with the public policy of India. It has been made clear by catena of judgments as also referred to in **MMTC's case** (supra) that an arbitral award cannot be interfered with merely because there is another view possible in the facts. Hon'ble Supreme Court has reiterated that an Award shall not be set aside merely by re-appreciating the evidence. It has categorically laid down that the court cannot undertake an independent assessment of the merits of the Award; and that Section 34 of the Arbitration Act provides for interference primarily where there is a patent illegality appearing on the face of the Award. And also that, Court must limit its interference to ascertain that the exercise of power by the court under Section 34 of the Arbitration Act has not exceeded the scope of the said provision.

10.0. Let us now examine the rival contentions in the above backdrop. The issue involved in the matter is whether the appellant could have withheld the amount due to and securities/bank guarantee of the respondent in the present/Bawana Contract towards its claim for damages in the other contract i.e. Anapara contract, which is already a subject matter of adjudication in arbitration proceedings. It is the appellant's case that the appellant is entitled to withhold the respondent's dues/securities in the present/Bawana Contract in terms of clauses 9 and 22 of GCC in Bawana Contract. But the Ld. District Judge (Commercial-2), erred in accepting the interpretation given to those clauses by the Arbitral Tribunal.

10.1. Before proceeding further, it would be pertinent to refer here to the relevant portion of the impugned judgment, whereby the learned District Judge (Commercial-2) agreed with the Arbitral Tribunal while dismissing the appellant's petition under Section 34 Arbitration Act. Relevant portion of the impugned judgment reads as under :-

"47. This court is in agreement with the submissions advanced by the learned counsel for the respondent herein that Ld. Arbitrator was well aware of the judgments of HM Kamaluddin and subsequent judgments.

48. No fault can be found with the view taken by learned arbitrator that Clause 9 of the GCC is worded differently from the clause that came up for interpretation in Raman Iron Foundry and Kamaluddin Ansari. The clause in those cases used the word 'claim', whereas the present contract uses the word 'outstanding', which contemplated that there must be an outstanding amount due against the contractor, which would mean something that would be owed to someone or payable to someone and that amount claimed by the Respondent under the Anapara contract was yet to be established and therefore, cannot be said to be an outstanding against the contractor or that the outstanding amount referred to in clause 9 has to be understood as a debt payable in present or that only after the adjudication of the claim can it be said to be outstanding amount. It also seems to be true that if intention of the parties was to entitle the Respondent to recover the 'claimed' amount, the contract would have specified it. It is pertinent to reproduce the following observations in the award..

....."

10.2. After referring to paras 59 to 67 of the award as already reproduced hereinbefore, Ld. District Judge (Commercial-2) observed that :-

"49. Learned arbitrator has properly dealt with all the contentions of petitioner. This court finds that the present petition does not make out any grounds for interference with the arbitral award under Section 34 of A&C Act. This Court cannot

sit in appeal over the award passed by Ld. Arbitrator by reassessing and re-appreciating the evidence which is wholly impermissible as per settled tenets of law. The view taken by the Ld. Arbitrator after considering the material before him and after interpreting the provisions of agreement is a possible view and, therefore, the same does not warrants any interference.

*50. Ld. Arbitrator had done a detailed analysis as regards the factual matrix and has carefully read and examined not only clause 9 but also clause 22 of GCC Contract and the contention of petitioner raised herein have been considered and dealt with appropriately and this court cannot substitute its opinion in the place of opinion of Ld. Arbitrator ,when the view taken by Ld. Arbitrator appears to be a possible and reasonable view . This Court is in agreement with submissions advanced by Ld. counsel for respondent herein that impugned award is not based solely on the judgment of Gangotri. **The conclusions of Ld. Arbitrator that the respondent was not having any right to withhold or recover amount which were admittedly payable in the present contracts pertaining to the Bawana Project in lieu of the amount claimed and pending adjudication in respect of the contracts for Anapara Project and that respondent does not have a right to withhold or encash the security deposited by way of Bank Guarantees furnished by the claimant for the contracts relating to the Bawana projects are reasonable and can't by any stretch of imagination be observed as perverse or against the public policy or having patent illegality.***

11.0. In view of the above, the contest between the parties hinges on the interpretation of clauses 9 and 22 of GCC in Bawana Contract. Said clauses are reproduced above in para 58 of the Arbitral Award. From the plain reading of clause 9 of GCC, it is evident that it entitles the appellant to recover the amount 'outstanding' against the respondent herein, on account of excess payment or any other reason in the present order/contract or any other contract. The word 'outstanding' means an amount which has fallen due and remains to be paid.

11.1. Admittedly, the claim laid by the appellant in another contract

pertaining to the Anapara Project, is in the nature of damages, which is pending adjudication before the Arbitral Tribunal. The appellant's said claim is yet to be determined and therefore, cannot be said to have fallen due and outstanding. Suffice it to state that the claim for damages for breach of contract between the parties does not give rise to a debt until the liability is adjudicated and damages are assessed by a decree or order of a court or other adjudicatory authority. The Hon'ble Supreme Court in '**Raman Iron Foundry (supra)**' reiterated the settled position of law observing as under in para 11 :-

"11. The claim is admittedly one for damages for breach of the contract between the parties. Now **the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated** and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. **The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim** and this position is made amply clear by the amendment in Section 6 (e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred....."

12.0. The appellant's argument that the judgment in the case of '**Raman Iron Foundry(supra)**' has been overruled by a Three Judges Bench in **Kamaluddin Ansari (supra)**, has been rightly dealt with by the Learned Arbitral Tribunal as well as by the Ld. District Judge (Commercial-2) that the aforesaid proposition of law was not unsettled by the Hon'ble Supreme Court in **Kamaluddin Ansari (supra)**. But, it was on the other point, i.e. 'the clause in the contract applied to a claim itself and not only to an amount due, however, as regard the nature of claim of damages, the decision of '**Raman Iron Foundry**' has not been overruled and still holds

good. This position has been clarified in number of subsequent judgements by this Court including in *Intertoll ICS Cecons O&M Co. Pvt. Ltd. (supra)* and *Lanco Infratech Ltd. (supra)*. Even recently, in a judgment dated 07.06.2021, in O.M.P. (I) (COMM) No. 243/2020 in case titled as ‘**Thar Camps Pvt. Ltd. vs. M/s. Indus River Cruises Pvt. Ltd. & Ors.**, this Court in para 45.10 noted as under :-

“45.10 The points on which Kamaluddin Ansari overruled Raman Iron Foundry were, therefore, according to Amber Builders, the right of the Government to withhold payments, stated to be due from the contractor, against dues of the contractor under other contracts, and the power of the Court to grant an injunction in that regard. The findings in Raman Iron Foundry regarding the nature of liquidated and unliquidated damages, and the liability in that regard crystallising only when adjudicated by a court, continue, however, to remain undisturbed. Status quo, regarding the observations made in that context, by Muralidhar, J., in Intertoll and Lanco Infratech, therefore, continues to prevail. On all points that concern us, Raman Iron Foundry is still good law.

13.0. Thus, the appellant has failed to demonstrate any perversity or illegality in the interpretation accorded to the clause 9 by the Learned Arbitral Tribunal, which has not been interfered by the Ld. District Judge (Commercial-2). We thus find no force in the argument of the appellant that the Ld. District Judge (Commercial-2) has misapplied the law.

14.0. It has further been argued on behalf of the appellant that the Ld. District Judge (Commercial-2) failed to appreciate that the Ld. Arbitral Tribunal dealt with only Clause 9 of GCC of the Bawana Contract and did not consider Clause 22 of GCC, which entitled the appellant to withhold the respondent’s dues/securitiess in Bawana Contract. The said

argument is evidently incorrect as the Arbitral Tribunal has duly dealt with Clause 22 and has given reasons for arriving at the conclusion that the appellant could not have withheld the amount due to the respondent under Bawana Contract towards its claim for damages with respect to the Anapara Contract.

14.1. As far as the appellant's plea that in terms of clause 22 of GCC, it is entitled to withhold the respondent's dues under Bawana Contract is concerned, same is evidently misplaced. Careful reading of Clause 22 shows that the title itself talks about 'withholding and lien in respect of sums *claimed* ; it allows withholding of/have a lien to retain any amount due to the contractor, towards any *claim* of the appellant under '*the*' contract/order and to retain the said sums payable from the security if any deposited. The use of word '*the*' before contract in Clause 22 (1) of GCC signifies that it is with respect to any claim under *the* present/Bawana Contract, the appellant can withhold the sums due to the contractor under the said (Bawana) contract or any other contract, pending finalisation or adjudication of any such claim.

15.0. Thus, it is clear that if the appellant had *any claim for payment under the present/Bawana Contract*, it was entitled to withhold any amount due/security in the present/Bawana contract or in any other contract with the contractor. In view of the same, the appellant has failed to demonstrate any perversity or patent illegality in the view taken by the Arbitral Tribunal and confirmed by the Ld. District Judge (Commercial-2) in the impugned judgment, to the effect that under the above clause 22.1 GCC, the appellant did not have any right to withhold the amount payable to the respondent/security held in Bawana Contract towards its claim for damages for alleged breach of contract in Anapara Project,

which is pending adjudication before the Arbitral Tribunal. Suffice it to state that even otherwise, this Court can not interfere with the award/impugned judgment, merely because another view is possible in the matter. In light of the same, the case law relied upon by the appellant is of no assistance to the appellant.

15.1. Accordingly, the appellant does not even have any right to withhold or encash the security deposited by way of bank guarantee furnished by the respondent for the security relating to the Bhawana Project.

16.0. Other contention raised before this Court by the appellant viz. Ld. Arbitral Tribunal erred in accepting the plea of coercion taken by the respondent in absence of any protest made even subsequently and that the reliance on M/s Sub Industries Case was misplaced etc., were taken by the appellant before the Ld. District Judge (Commercial-2), which have been duly dealt with. Except for simply reiterating those contentions, the appellant has failed to demonstrate any illegality or perversity in the findings recorded in that respect in the impugned judgement.

17.0. The appellant has also contended that the Arbitral Tribunal could not have directed payment of interest, *pendente lite* and future, in the light of judgment in **Concrete Product & Construction Company and Others (supra)**, which concerned clauses 2401 and 2403, which are *pari materia* to Clause 22 of the Bawana Contract.

17.1. Suffice it to state that in **Concrete Product & Construction Company and Others (supra)**, the Railway Board on finding that excess payments had been made under the contract to the respondent

contractors, withheld payment of the respondent contractors in that contract in terms of clauses 2401 and 2403, which allowed withholding of the amount payable to the respondent contractors in the said contract or any other contract. That is, the Railways was entitled to withhold such payments. In that fact situation, the Hon'ble Supreme Court considering that the aforesaid clauses prohibited claim of interest by the respondent contractors with respect to the money so withheld or retained, observed that the Arbitrator could not have granted interest from the date when the recovery was made till the award was made ; however, interest would have been payable from the date when the award was made till the money was deposited in the court. Similar was the situation in the case of **Garg Builders (supra)** as relied upon by the appellant.

17.2. Thus, there cannot be any dispute that if the contract contains a specific clause which expressly bars payment of interest, then it is not open for the arbitrator to award interest, if the amount is rightfully withheld.

17.3. Whereas facts in the instant case are different. As already noted above, the appellant/BHEL was not entitled to and had wrongfully withheld the payment admittedly payable to the respondent in Bawana Contract towards the appellant's claim for damages for alleged breach of contract by the respondent in another project i.e. Anapara Project, which is pending adjudication before the Arbitrator. Clauses 22.2 and 22.3 bar claiming of interest by the respondent only with respect to money which the appellant was entitled to withhold, which is not the situation in the instant case.

17.4. It may be mentioned that the respondent by way of claim no. 3 in each of the proceedings, sought interest @ 24% pendente lite and future till actual payment of its dues wrongfully withheld by the appellant. It is seen that the Ld. Arbitrator after duly considering the contentions of the appellant as raised in the present appeal and case law including the judgement in Concrete Products and Construction Company and Others (supra), relied upon by the appellant in the present appeals, awarded simple interest @ 10% per annum pendente lite and future, till its actual payment, observing that the appellant had arbitrarily and illegally withheld the amounts due and payable to the respondent.

17.5. In view of the above, we find no perversity or illegality in the interpretation of clause 22 and its sub-clauses by the Ld. Arbitrator and his aforesaid findings.

18.0. As far as the matter concerning the rejection of the appellant's counter claim by the Ld. Arbitrator is concerned, Mr. Atul Shankar Mathur, learned counsel for the appellant submitted that the same is not pressed in the present appeals as these are founded on facts/material, which cannot be subjected to re-appreciation in the instant appeals, which finds recorded in the order dated 15.03.2022 of this Court.

19.0. In view of the above, we find that the appellant has failed to make out any case for interference with the award dated 02.06.2021 and the impugned judgment dated 18.09.2021 passed by the Ld. District Judge (Commercial-2) under Section 34 of the Arbitration Act.

20.0. The appeals are accordingly, dismissed.

21.0. Pending applications, if any, are closed.

(POONAM A. BAMBA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

DECEMBER 23, 2022/csc

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