

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

% **Reserved on : 13th February, 2023**
Pronounced on: 18th April, 2023

+ O.M.P. (COMM) 481/2019 and I.A. Nos. 15916/2019 and 15919/2019 and I.A. No. 2732/2023

M/S. TELECOMMUNICATIONS CONSULTANTS INDIA
LIMITED (A GOVT. OF INDIA ENTERPRISE) Petitioner
Through: Mr. P.K. Bansal, Advocate

versus

M/S. VISTA INFORMATION SYSTEMS PRIVATE LTD.
..... Respondent
Through: Mr. Saurav Agrawal, Mr. Aditya
Malhotra, Ms. Divya Hirawat, Ms.
Manpreet Kaur and Mr. Anshuman
Choudhury, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

FACTUAL MATRIX

1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "The Act, 1996") has been filed on behalf of petitioner seeking the following reliefs:-

"a) set aside the impugned award dated 1.7.2019 passed by Shri. Rakesh Kumar Agarwal, the Ld. Sole Arbitrator in the arbitration matter between M/s. Vista Information Systems Private Ltd. and Telecommunications Consultant India Ltd;

b) summon the record of the Arbitral proceedings of Arbitration between M/s. Vista Information Systems Private Ltd. and M/s. Telecommunications Consultants India Ltd in which the impugned award has been passed;

c) Award the cost of these proceedings in favour of the petitioner and against the respondent;

d) Pass any other or further order(s) and/or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case in favour of the petitioner and against the respondent."

2. The brief facts of the case are that the petitioner is a 100% owned Government of India enterprise with its principal office at TCIL Bhawan, Greater Kailash- 1, New Delhi - 110048, India ("TCIL"). The respondent is a company incorporated under the Companies Act, 1956 with its registered office at M-23, Hemkunt Chambers, 89 Nehru Place, New Delhi - 110019, India ("Vista").

3. One Nortel Networks Singapore PTE. Ltd. entered into a Supply Contract dated 28th September, 2004 ("Supply Contract") with TCIL concerning the Supply of Hardware and Software for Mobile Train Radio Communication System on Howrah-Pradhankunta Section of Eastern Railway (the "ER Network"), on the terms and conditions contained therein. Further another contract dated 30th September, 2004 for the Services ("Services Contract") was entered into between Nortel Networks (India) Private Limited and TCIL for providing services in connection with its deployment of Mobile Train Radio Communication System on Howrah- Pradhankunta Section of Eastern Railway, on the terms and

conditions contained therein.

4. As per Clause 14 of the Supply Contract, the supplier shall furnish a Performance Bank Guarantee to the buyer for a sum equaling 5% of the contract value of the equipment. It is further provided in Clause 14 of the Supply Contract that on expiry of the warranty period and the issue of certificates for Final Acceptance, the security deposit will be returned/refunded or the Bank Guarantee be released to the supplier after adjustment of any dues payable by the supplier to the buyer.

5. Subsequent to the completion of the maintenance supervision period and the warranty period, the Final Acceptance Certificate was issued by the Eastern Railways on 12th March, 2009. However, certain obligations of the Nortel entities remained under the contract which included (i) entering into an Annual Maintenance Contract ("AMC Contract") with TCIL for a period of three years and (ii) to supply and guarantee the availability of maintenance spare parts for the ER Network. When the ERP system "FACT" was discontinued in 2011 to a new accounting system, no data with regard to the contracts in question was transferred.

6. Vide letter dated 23rd August, 2017, the arbitration clause was invoked by the respondent.

7. In the meanwhile, in January 2009, the parent company of Nortel India and Nortel Singapore, Nortel Networks Corporations (a Canadian Corporation) together with Nortel Networks Ltd., Nortel Networks Inc., filed voluntary petitions for insolvency protection in various jurisdictions. In the light of this, Nortel India entered into discussions with Kapsch and its partner in India. Subsequent thereto, Nortel Networks India Pvt. Ltd.,

Nortel Networks Singapore Pvt. Ltd. and TCIL and Vista Information Systems Pvt. Ltd. jointly entered into an Agreement dated 2nd May, 2012, for completion of the residual obligations by the respondent herein on the terms and conditions as provided in the said Agreement dated 2nd May, 2012. As per Clause 5.2 of the said Agreement, it is provided as under:-

"5.2 Retention/Release: The Nortel Entities agree that any final amounts payable to the Nortel entities by TCIL in respect of the delivery, installation, commissioning, final acceptance and warranty completion of the TCIL Network Contracts including without limitation, amounts withheld by TCIL in lieu of the Performance Bank Guarantee (10% of total project value) and Security Deposit (5% of total project value) shall not be paid to the Nortel Entities and shall be retained by TCIL as collateral against the obligations of the Nortel Entities pursuant to clause 2.4 above and/or as additional security in respect of the performance of Vista as of the effective date (the retention). Such amount shall be retained by TCIL for a period of twelve (12) months from the effective date and the balance of any amount remaining at such time, after any applicable deductions by TCIL, shall be paid to Vista after successful completion of AMC for one year and Nortel Entities will have no claim on that whatsoever."

8. The petitioner, vide its letter dated 16th January, 2014, informed the respondent that since some networking work was required to be done it may take another three months to start the work on residual obligations. After some time, it was conveyed to the respondent that no AMC will be executed. Vide letter dated 23rd August, 2017, the respondent demanded certain amounts on the basis of a mere allegation that the petitioner had deducted @ 5% of project value as security deposit and 10% of project value as performance guarantee from the running bills of Nortel

Networks India Private Limited and Nortel Networks Singapore Private Limited and also on the basis that certain bills of Nortel were still pending payments. Thereafter, the respondent, vide its letter dated 21st November, 2018, invoked the arbitration clause and pursuant to which Sh. Rakesh Kumar Agarwal was appointed as a Sole Arbitrator on 19th December, 2018 by the CMD of the petitioner Company.

9. Subsequent thereto the respondent herein filed its Statement of Claim in January 2019. Thereafter, the petitioner herein filed its Statement of Defense dated 26th April, 2019. Subsequently, the rejoinder was filed by the respondent herein before the learned Arbitrator on 3rd May, 2019. After completion of the pleadings, the learned Arbitrator had passed the award dated 1st July, 2019 ("Impugned Award") which was forwarded to the petitioner under letter dated 8th July, 2019 by the learned sole arbitrator. Hence, aggrieved by the findings of the learned Arbitrator, the petitioner invoked Section 34 of the Act, 1996 by way of filing the instant petition.

SUBMISSIONS

(on behalf of petitioner)

10. Learned counsel appearing on behalf of petitioner submitted that the claims made by the respondent before the learned Arbitrator were vague and unclear. It is submitted that the entire claims of the respondent/claimant were based on Clause 5.2 of the Agreement dated 2nd May, 2012. No explanation in respect of the claim in Para 19 of the Statement of Claims was produced, despite a specific assertion that the said charts were prepared as per the records of the respondent/claimant. It

is submitted that the learned Arbitrator has awarded 25% of the value of both the contracts i.e. the Supply Contract value as well as Services Contract value. It is further submitted that the entire findings of the award are self-contradictory and have been reached on the basis of assumptions and in the absence of any pleadings/evidence led by the respondent/claimant.

11. Learned counsel appearing on behalf of petitioner submitted that it is a well settled position of law that no sum can be awarded for which there were no pleadings/prayers/evidences and such an award is, therefore, liable to be set aside under Section 34 of the Act, 1996. In this regard, learned counsel appearing on behalf of petitioner has relied upon the following judgments:-

- i. ***M/s Trojan & Company vs. RM N.N Nagappa Chettiar - AIR 1953 SC 235.***
- ii. ***DDA vs. M/s Krishna Construction Co.- 2011 SCC OnLine Del 4134.***
- iii. ***Universal Land - (2018) 5 AD (Del) 679.***
- iv. ***Press Council of India vs. Union of India- (2012) 12 SCC 329.***
- v. ***State of Rajasthan vs. Ferro Concrete Construction (P) Ltd.- (2009) 12 SCC 1.***
- vi. ***Kadobtree - AP No. 212/2017.***
- vii. ***Monarch Erectors Pvt. Ltd. vs. Bhiwandi Nizampur City Municipal Corporation- 2011 SCC OnLine Bom 1102.***

12. It is submitted by learned counsel appearing on behalf of petitioner that the impugned award made by the learned Arbitrator is directly contrary to and in contravention of the terms of Agreements between the

parties. In this regard, it is submitted that the learned Arbitrator has based its award on Clause 5.2 of the Agreement dated 2nd May, 2012 and Clause 14 of the Supply Contract. It is submitted that Clause 5.2 of the Agreement states about 'any final amounts payable'. The learned Arbitrator completely lost sight of the fact that no evidence of any nature whatsoever was produced by the respondent/claimant to show as to what constituted 'any final amounts payable'. It is further submitted that the said clause only stated above Performance Bank Guarantee of 10% and Security Deposit of 5%, which was also incorrect since Clause 14.2 of the Supplies Contract stated only about Performance Bank Guarantee and that too only of 5% of the purchase order value. Further, no such guarantee was provided under the Services Contract. Hence, it is submitted that the award of 25% of the entire value of Supplies and Services Contract is directly contrary to the terms of the Agreement between the parties and hence, unsustainable and liable to be set aside by this Court.

13. Learned counsel appearing on behalf of petitioner submitted that the learned Arbitrator failed to appreciate the fact that the respondent/claimant had failed to produce any evidence of any nature whatsoever, including its statement/books of accounts, to prove that any amount was due to it. It is a well settled position of law that it is the claimant who has to first prove its statement of accounts and if it fails to produce its books of accounts, adverse inference should be drawn against it. In support of his arguments, learned counsel appearing on behalf of petitioner has relied upon the following judgments:-

I. *Naresh K. Aggarwala & Co. v. Canbank Financial Services Ltd.-*

(2010) 6 SCC 178.

II. *Ramdas Oil Mills v. Union of India (Military Deptt.)- (1977) 1 SCC 592.*

III. *Bharat Aluminium Co. Ltd vs. Maharashtra Aluminium Corporation, 2009 SCC OnLine Del 1209.*

14. Learned counsel appearing on behalf of petitioner submitted that the learned Arbitrator has wrongly and erroneously shifted the *onus* of proving the case of the claimant on the petitioner herein, by holding that there is nothing on record from the petitioner to show it the paid the complete amount to the claimant/respondent. It is a well settled position of law that the *onus* is always on the claimant to positively establish its case on the basis of the material available and the claimant cannot succeed by relying on weakness or absence of defense of the respondent. For strengthening his argument, learned counsel for the petitioner has relied upon the following judgments:-

I. *Rangammal vs. Kuppuswami- (2011) 12 SCC 220.*

II. *Directorate of Small Savings and Lotteries Govt. of NCT of Delhi vs. Nirmal Lotteries – 2014 SCC OnLine Del 1532.*

III. *Facebook India Online Services Pvt. Ltd. vs. Mufty Aijas Arshad Qasmi, 2013 SCC OnLine Del 3284.*

15. Learned counsel appearing on behalf of petitioner submitted that the impugned award has been passed in complete non-application of mind and in violation of principles of natural justice, since the learned Arbitrator has failed to consider and advert to any of the submissions made on behalf of the petitioner. It is further submitted that the learned

Arbitrator wrongly and erroneously awarded interest under the provisions of the MSMED Act, by receiving a copy of registration certificates at the fag end of hearing and after making his own enquiries and without giving any opportunity to the petitioner to make its submissions in that regard. The learned Arbitrator failed to appreciate that the provisions of MSMED Act, were inapplicable in the facts and circumstances of the present case. Hence, in view of the above, it is prayed that the instant petition may be allowed and the impugned award may be set aside.

(on behalf of respondent)

16. Learned counsel appearing on behalf of respondent submitted that the instant petition is nothing but an abuse of the process of law. It is submitted that it is the settled position of law that a Court shall not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating evidence of the arbitral proceeding. It is also submitted that an award can be challenged only under the grounds mentioned in Section 34(2) of the Act, 1996. Therefore, in the absence of any such ground, it is not possible to re-examine the facts or evidence on the record. In support of his arguments, learned counsel appearing on behalf of respondent has relied upon the following judgments:

- i. ***Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd., (2010) 11 SCC 296***
- ii. ***Kawality MGF. Corporation Vs. Central Warehousing Corporation, (2009) 5 SCC 142***
- iii. ***P. R. Shah, Shares & Stock Broker (P) Ltd. Vs. B.H.H Securities (P) Ltd., (2012) 1 SCC 594***

iv. Associate Builder Vs. Delhi Development Authority, (2015) 3 SCC 49

17. Learned counsel appearing on behalf of respondent submitted that one of the Clauses in the Agreement related to the retention and release of entities of respondent to receive the 'amount withheld' by the TCIL which the Nortel entities would have been entitled to, had they finished their obligation in terms of their original contracts. He has referred to Clause 5.2 of the said Agreement which is reproduced as under:-

"5.2 Retention/Release: The Nortel Entities agree that any final amounts payable to the Nortel entities by TCIL in respect of the delivery, installation, commissioning, final acceptance and warranty completion of the TCIL Network Contracts including without limitation, amounts withheld by TCIL in lieu of the Performance Bank Guarantee (10% of total project value) and Security Deposit (5% of total project value) shall not be paid to the Nortel Entities and shall be retained by TCIL as collateral against the obligations of the Nortel Entities pursuant to clause 2.4 above and/or as additional security in respect of the performance of Vista as of the effective date (the retention). Such amount shall be retained by TCIL for a period of twelve (12) months from the effective date and the balance of any amount remaining at such time, after any applicable deductions by TCIL, shall be paid to Vista after such time, after any applicable deductions by TCIL, shall be paid to Vista after such time after any applicable deductions by TCIL shall be paid to Vista after successful completion of AMC for one year and Nortel Entities will have no claim on that whatsoever."

It is submitted that thus, in view of the above contents of the Clause 5.2, the Nortel entities assigned their right under the Agreement to the respondent to receive the residual payment/proceeds. It is further

submitted that the aforesaid Agreement clearly establishes the fact that the TCIL was under obligation to pay to the respondent/claimant as on the date of the Agreement dated 2nd May, 2012 which was duly sent by TCIL to ER vide letter dated 7th May, 2012.

18. Learned counsel appearing on behalf of respondent submitted that as duly noticed by the learned Arbitrator, the whole controversy revolves around the Clause 5.2 of the said Agreement and in particular the phrase "Amount withheld" by the TCIL in lieu of the 10% of the total project value being Performance Bank Guarantee and Security Deposit 5% of the total project value shall not be paid to the Nortel entities and shall be retained by the TCIL as collateral against the obligation pursuant to Clause 2.4 of the Agreement and as in addition security in respect of the Performance Bank Guarantee. The learned Arbitrator further took the note of Clause 5.3 of the same Agreement which also specifies '*in consideration of the above mentioned retention and in the light of the undertakings given by the Vista*' TCIL has released the Nortel entities from their obligations. Though, the TCIL was supposed to retain the 10% of the progressive bills towards Performance Bank Guarantee till it reaches 5%. However, it is further submitted that the TCIL continued to deduct 10% of all the bills and that is why Clause 5.2 of the Agreement dated 2nd May, 2012 relates to 10% of total project value in relations to Performance Bank Guarantee. The TCIL, being signatory of the said Agreement have acknowledged the fact that the 10% deduction of the total project value was withheld by it. The learned Arbitrator noticed the same as admission by the TCIL while concluding that the Agreement itself specifies the retention made by the TCIL due to Nortel entities.

19. Learned counsel appearing on behalf of respondent submitted that the learned Arbitrator, while looking into the documents categorically asked the TCIL/petitioner that if the amount has been paid to the respondent or to the Nortel entities prior to 12th March, 2009, then, where was the need for them to sign the subsequent Agreement dated 2nd May, 2012 and in particular, mentioning of 10% and the 5% of the 'amount withheld' under the contract. To which, counsel for the TCIL replied that the same has been wrongly mentioned and mistake on the part of the TCIL. It is submitted that in the present petition, the TCIL has again taken the strange defense to say **"the above clause were erroneously stated by mistake since no amount was withheld by TCIL in lieu of any performance bank guarantee."**

20. Learned counsel appearing on behalf of respondent submitted that the contention of the TCIL *qua* the 10% towards the payment due to the respondent/claimant on account of final acceptance of the contract, is completely erroneous. It is submitted that the respondent/claimant have raised their claim for the balance 10% amount which has to be paid after the issuance of final acceptance certificate. The learned Arbitral Tribunal has duly noticed that the TCIL has not produced any documents that this amount has been paid to the respondent/claimant. As per the Clause 5.2 of the Agreement dated 2nd May, 2012, any final amount payable to the Nortel by the TCIL in respect of the delivery, installation, commissioning, final acceptance and warrantee completion of the TCIL Network including without limitation amount withheld TCIL in lieu of Performance Bank Guarantee and security deposit shall be retained by the TCIL as collateral against the obligations mentioned in Appendix 1 of the

Agreement. The said amount is also not paid by the respondent/claimant. It is submitted that therefore, the learned Arbitrator was justified to take that as an admission of the amount payable to the respondent/claimant as TCIL failed to prove any payment to the respondent/claimant after the agreement dated 2nd May, 2012.

21. Learned counsel appearing on behalf of respondent submitted that it is an admitted position that the respondent/claimant herein is registered as MSME Unit, which was duly verified by the learned Arbitrator. It is further submitted that in view of the Order XLI Rule 5 read with Section 19 of the MSME Act, 2006, the respondent would be under obligation to deposit the 75% of the amount of the award as a condition precedent before challenging the same. Accordingly, in absence of any deposit, the present petition under Section 34 of the Act, 1996 cannot be entertained.

22. Learned counsel appearing on behalf of respondent submitted that under the Agreement dated 2nd May, 2012, certain obligations of the Nortel entities remained under the TCIL contract, such obligations principally pertains to the AMC contract for the period of 3 years and the supply and guarantee of maintenance spare parts of ER Networks, which were transferred/assigned to respondent/claimant herein under the said Agreement. There are various e-mails/letters referred and relied upon by the claimant, wherein the Eastern Railway has asked the TCIL for upgradation existing BSS System and subsequently, the TCIL has responded to the claimant that the core equipment for Nokia Siemens with which the Nortel equipment is to be integrated is not ready, therefore, the project is at a standstill and may take further time to which the TCIL shall confirm in future. The similar letters were issued on 26th

January, 2014, 16th March, 2015 and 6th December, 2016. The TCIL admitted the aforesaid letters and the present arbitration was invoked on 21st November, 2018. Accordingly, the present proceedings are well within the period of limitation as decided by the learned Arbitrator. Therefore, there are no grounds available to the petitioner herein for challenging the instant award on the ground of limitation. In view of the facts and circumstances, the instant petition is *de hors* of any merit and deserves to be rejected outrightly.

FINDINGS AND ANALYSIS

23. I have heard learned counsel for the parties at length, who have taken me through the award passed by the learned Arbitral Tribunal, provisions of the contract executed between the parties and the correspondence exchanged between them as well as other relevant documents.

24. The claimant/respondent had made a claim for an amount to USD 3,12,719.77/- and INR 91,91,988.55/-, being the amount withheld by TCIL. Further, the claimant/respondent had also made a claim for interest due on outstanding amount for an amount to USD 1,261,586 and interest for INR 37,082,689/- It has also claimed for damages to the extent of INR 2 Crores over and above the aforesaid claim. The respondent had filed a statement of defense and the preliminary defenses before the learned Arbitrator were:-

- I. The claim of the claim petition is barred under law of limitation.
- II. The alleged claim of the claimant is due in the year 2009 and

that is the reason the claimant is claiming the interest on the alleged amount from 1st April, 2009. It is also stated by the respondent that the claimant ought to have initiated the arbitration proceedings in respect of the alleged claims within a period of three years from 1st April, 2009, in terms of Article 113 of the Limitation Act, 1963 i.e. before 31st March, 2012.

25. By giving the reference of Clause 5.2 of the Agreement, the respondent further stated in his Statement of Defense that it is an admitted position that no AMC was entered into the present case and therefore the right to sue accrued in favor of the claimant in respect of any alleged amounts due under the Agreement, on expiry of a period of twelve months from the effective date i.e. on 1st May, 2013. It is also stated before the learned Arbitrator that the claimant had invoked the arbitration clause on 21st November, 2018, which was much later to the expiry of the period of limitation.

26. It is also challenged that the petitioner herein was under obligation to pay claimed amount on the plea that no such amount was stated in the Agreement dated 2nd May, 2012. It was also denied that details of the alleged outstanding dues of the claimant were verified by the officials of the claimant company through ERP system "FACT" of the respondent. The claimant had also filed the rejoinder to the said Statement of Defense.

27. The learned Arbitrator has framed the issues with mutual consent of the parties which are as follows:-

I. Whether the present claim petition filed by the claimant is

barred under limitation?

- II. Whether the claimant is entitled for a sum of amount of INR 91,91,988.55/- and amount to USD 3,12,719.77/- in terms of Clause 5.2 of the Agreement dated 02.05.2012?
- III. Whether the claimant is also entitled for *pendent lite* and future interest? If yes, at what rate of interest?
- IV. Whether the claimant is also entitled for damages as claimed in para 19 and 20 of the claim petition?

28. The instant arbitration award was challenged by the petitioner mainly on the three grounds. *Firstly*, the conclusion on which the learned Tribunal reached only on the basis of assumptions and in absence of any pleading and evidence lead by the respondent. *Secondly*, the award made by the learned Tribunal is contrary to the terms of the Agreement between the parties. *Thirdly*, the impugned award has been passed in complete non-application of mind and in violation of principle of justice. The learned Arbitrator, on the pleadings of the parties, framed mainly four issues which have already been mentioned in Paragraph 27.

29. I may, at this stage, deal with the contention urged on behalf of the respondent that due to the jurisdiction of the Court to set aside an arbitral award limited to grounds set out in Section 34 of the Act, 1996, this Court ought not to interfere with the same. It was contended that none of the grounds on which a Court is authorized to interfere with an arbitral award are present in the case at hand. Alternatively, it was contended that even if a contrary view is possible on the facts proved before the Arbitral Tribunal, the Court cannot, in the absence of any compelling reason,

interfere with the view taken by the arbitrators as if it was setting in appeal over the award made by the Tribunal.

30. Section 34 of the Act, 1996 reads 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 [establishes on the basis of the record of the arbitral tribunal 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 reappraisal 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.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"

31. It is a settled law that there are essentially three broad areas in which an arbitral award is likely to be challenged under Section 34 of the Act, 1996. Firstly, an award may be challenged on jurisdictional grounds- for example, the non-existence of a valid and binding arbitration Agreement on grounds that go to the admissibility of the claim determined by the Tribunal. Secondly, an award may be challenged on what may broadly be described as procedural grounds, such as failure to give a party an equal opportunity to be heard. Thirdly and most rarely, an award may be challenged on substantive grounds on the basis that the Arbitral Tribunal made a mistake of law.

32. In the case of ***PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others, 2021 SCC OnLine SC 508***, the Hon'ble Supreme Court held as under:-

"41. It will be relevant to refer to the following observations of this Court in the case of MMTC Limited (supra):

"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 [Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223 (CA)] 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445]; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment 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 (2-A) 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.”

42. In Ssangyong Engineering and Construction Company Limited (supra), this Court after considering various judgments including the judgment in Associate Builders (supra) observed thus:

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco

International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western

Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate

Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. Given the fact that the amended Act will now apply, and that the “patent illegality” ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.”

43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappraise the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of “public policy of India”, which has been held to mean “the fundamental policy of Indian law”. A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of

challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

The interpretation of Contract/Agreement

33. It is a settled law that there is a limitation on the powers of this Court while examining its jurisdiction under Section 34 of the Act, 1996, however, at the same time, if the interpretation put forward by the Arbitral Tribunal, on the face of it, is incorrect, rendering a Clause in the Agreement to be redundant, such interpretation cannot be sustained.

34. In the case of ***SAIL vs. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63***, the Hon'ble Supreme Court held as under:-

"16. In ONGC Ltd. [(2003) 5 SCC 705] , while dealing with the aspects of liquidated damages, this Court considered the aforesaid Constitution Bench decisions in Chunilal V. Mehta & Sons [AIR 1962 SC 1314] and Fateh Chand [AIR 1963 SC 1405] and after reference to relevant parts of Sections 73 and 74 of the Contract Act held thus: (ONGC Ltd. case [(2003) 5 SCC 705] , SCC p. 733, para 46)

"46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from

such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.”

17. In Tarapore & Co. [(1994) 3 SCC 521] , a two-Judge Bench of this Court considered few decisions of this Court including the decisions in Sudarsan Trading Co. v. Govt. of Kerala [(1989) 2 SCC 38 : AIR 1989 SC 890] , Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93 : AIR 1992 SC 232] and J&K Handicrafts v. Good Luck Carpets [(1990) 4 SCC 740] and held that where an arbitrator travels beyond a contract, the award would be without jurisdiction and the same would amount to misconduct and such award would become amenable for being set aside by a court. In Sudarsan Trading Co. [(1989) 2 SCC 38 : AIR 1989 SC 890] this Court held that an error by the arbitrator relatable to interpretation of the contract is not amenable to correction by courts.

18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award

would become amenable for being set aside by a court.

(ii) *An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.*

(iii) *If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.*

(iv) *An award contrary to substantive provision of law or against the terms of contract would be patently illegal.*

(v) *Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.*

(vi) *If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.*

(vii) *It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."*

35. Keeping these principles in mind, I will now examine the present case.

36. While deciding the issue No. 1- Limitation, the learned Arbitrator has given elaborated reasons. The relevant portion of the reasons given by the learned Arbitrator is also reproduced hereinbelow:-

Issue No. 1-Limitation

"Counsel of the respondent has submitted that since the FAC was issued by the Eastern Railway on 12.03.2009, therefore, the claim of the claimant could be filed within the period of

three years from the said date. Respondent also stressed his arguments to say that once final certificate was issued, the respondent or the Nortel ought to have lodged their claim from the said period accordingly the present petition is hopelessly barred by limitation.

Respondent further argued that even if May 2012 is taken as date of agreement, Clause 5.2 of the agreement says that amount is retained for 12 Months. Then on May 2013, cause of action will start. That means claim should have been filed by May 2016. He further argued that limitation will stop only when you seek arbitration which they have asked in 2018. None of the meetings, writing letters will increase the limitation period.

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Claimant further referred to letter dated 14.07.2014 written by Eastern Railway to respondent TCIL and asking for the upgradation of existing BSS system. The said letter is also marked to the claimant company. Subsequently the letter dated 17.06.2015 is also written to the claimant company by Eastern railway asking for the budgetary quotation for new MTRC system.

Claimant has also drawn my attention to appendix -1 whereby defining the residual obligations in terms of long term availability of spares and system supports as well as the AMC& also upgradation of the system. The said appendix -1 is attached to the agreement dated 02.05.2012 and finds mention in clause 5.1 of the agreement. In terms of the said Appendix Clause 14.2, the claimant had undertaken to provide the spare parts for the system for minimum of 8 years. As per him, the obligation of claimant or the erstwhile Nortel continued to remain valid for eight years i.e. till 11.03.2017, even if the date of FAC is taken into consideration. It is also further submitted by the counsel of Claimant that the claimant were conveyed by the respondent in respect of AMC vide their letter dated 11.07.2013 16.03.2015 and 06.12.2016. The respondent has admitted the letter dated 11.07.2013 and 06.12.2016. All these letters relate to the AMC obligations of the claimant and finally the

claimant has made his claim for the balance amount in 2017. The claimant has invoked the present arbitration vide their letter dated 21.11.2018. In terms of letter dated 21.11.2018, respondent TCIL appointed me as sole Arbitrator. If the letter dated 06.12.2016 is taken as last communication by the respondent and the same has been admitted by the respondent and the spares obligations is till 11.03.2017, therefore, the present proceedings are well within the period of limitation. Accordingly, the present is decided against the Respondent."

37. After looking into the reasons given above by the learned Arbitrator, it is crystal clear that the learned Arbitrator has taken into account of the submissions made by the parties as well as the documents which were referred by them, and after considering them, has reached to the conclusion that there was no delay in the arbitral proceedings. In view of the above facts and circumstances, I do not find any reason to interfere in the findings given by the learned Arbitrator *qua* the issue No. 1.

38. While deciding issue No. 2, the learned Arbitrator has analyzed Clauses 5.2 and 5.3 of the Agreement dated 2nd May, 2012. The learned Arbitrator has also analyzed Clause 14 of the same Agreement. While analyzing the relevant Clauses of the Agreement, he has taken into consideration the evidences and documents which have been produced before him by both the parties. While deciding the aforesaid issue No. 2, the learned Arbitrator has recorded the detailed and elaborated reasons. The relevant portion of the same is reproduced hereinbelow:-

ISSUE No.2

"Counsel for the Claimant, on a para-wise basis had also

explained me that how Claimant i.e Vista came into the picture and certain obligations were handed over/ assigned to the claimant after the Nortel Entities became insolvent. Firstly, he took me at page 101 of the claim petition which is letter dated 16.03.2009 (Annexure C-4) wherein respondent had sent letter to the Nortel Networks (INDIA) Ltd attaching the final acceptance issued by ER dated 12.03.2009 . In the letter dated 16.03.09, in which TCIL confirmed the Final Acceptance to Nortel, instead of releasing the 10% payable at the Final Acceptance, TCIL asked Nortel that it may be required to give BG for its corresponding payment. This shows that the final payments were due and TCIL intended to secure the final payment by a Bank Guarantee to secure the outstanding commitments of AMC as this letter talks about the requirement to immediately close the case for AMC. Then he takes me to the letter dated 22.03.2012 (Annexure C-4A). In the said letter, proposal of TCIL i.e Respondent to transfer M/s Nortel's AMC obligations to M/ s Vista was acceptable to the railways, subject to condition that M/s TCIL enters into AMC agreement for the AMC work done by the M/ s Vista i.e claimant and also on the letter dated 07.05.2012 (pg.101 B) , respondent company has given letter to the Chief Signal & Telecommunication Engineer (CSTE) confirming that agreement has been signed with M/s Vista i.e claimant will be the technology partner for the AMC work.

*According to the counsel for the claimant, the whole controversy revolves around the agreement dated 02.05.2012 which has been entered between Nortel Networks India Pvt Ltd, Nortel Networks Singapore Pvt Ltd and TCIL and Vista. Information Systems Pvt Ltd. He straightway took me to clause 5.2 of the said agreement in which the whole dispute between the parties involved. He emphasized on the word "**amount withheld**" by TCIL in lieu of performance bank guarantee (10% of total project value) and Security Deposit (5% of total project value) shall not be paid to the Nortel Entities and shall be retained by TCIL as collateral against the obligations of the Nortel Entities pursuant to*

clause 2.4 above and /or as additional security in respect of the performance of vista as of the Effective Date (the "Retention"). He further took me to clause 5.3 of the same agreement which also says that TCIL has 'In Consideration of retention of aforementioned amount and undertaking given by Vista' has allowed to exit the Nortel entities from their obligation under the agreement.

Counsel for the Claimant further argued that in terms of clause 5.2 and 5.3 of the agreement dated 02.05.2012, there is a retention of the amount by the TCIL being 10% of the Project Value and 5% of the project Value respectively, Which shows the 'admission' by the respondent company as well as signatory of the said agreement. He further put reliance on the Appendix-1 at page 110 which shows the Residual obligations in terms of the Annual Maintenance contract. He further submitted that on 12.07.2012, respondent company wrote letter to CSTE that the claimant's team would like to do the audit before the start of the AMC on : spares inventory at Eastern Railway for GSM-R and BSS audit. He also invited my attention of the audit report at page 101D of the claim petition.

Counsel for the claimant further relied at page 101 E of the claim petition which shows letter dated 14.07.2014, sent by Eastern Railway to the Respondent company. He drew my attention to specifically at point no.1 & 2 of the said letter which stated that the up-gradation of existing BSS has been considered which he explains to me that the obligations of the claimant company have not been over, therefore they have not claimed the outstanding amount.

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Counsel of Claimant has also invited my attention to Clause 14 of the same agreement, which relates to the PBG and reads as under :

14 PERFORMANCE BANK GUARANTEE

14.1 "Supplier shall provide a PBG (performance Bank Guarantee) to the Buyer for a sum equaling five (5%) percent of the contract value to the Equipment, CIF value".

14.2 "Supplier will provide initially Buyer with a performance bond in an amount equivalent to Rupees 2,25,000(Rupees Two Lakhs and Twenty Five Thousand Only) within 21 days of signing of this agreement from Buyer and balance will be deducted from progressive bills of the Supplier @ 10% till it reached 5% of the Purchase Order value. The performance bond will remain valid until the expiration the warranty period of Equipment delivered under the Purchase order ("Expiry Date"), provided that Nortel Networks may provide performance bond valid for a period of twelve (12) months, which shall be renewed or replaced from time to time with another performance bond seven (7) days prior to then current expiry date so that the performance bond (including any replacement thereof) remains valid at all times until the Expiry Date".

It was further argued by the counsel of the claimant that though the respondent was supposed to deduct 10% of the progressive bills till it reaches 5% of the total project value in terms of clause 14.1 of the agreement, but the respondent continued to deduct 10% of all the bills and that is why clause 5.2 of the agreement dated 02.05.2012 relates to 10% of total project value in relations to PBG. I find substantial merits in his submissions as the 10% of the total project value relating to PBG was actually the deduction made by the TCIL from all the bills. Since the respondent is also signatory to the agreement dated 02.05.2012, therefore, they have acknowledged and admitted the 10% of the deduction of the total project value withheld by the respondent company.

My attention was also drawn to the contract between Nortel Networks (India) Private Limited and TCIL for services. Total contract value without AMC is INR 25,539,444 (Indian Rs Twenty Five Million Five thirty Nine Thousand Four Hundred and Forty Four Only)

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Per contra, Counsel for the Respondent has argued that there is no evidence filed by the claimant to support the claim. The major stress of his argument was that it was for the claimant to prove their case in terms of section 101 of the Evidence Act. The whole emphasis of the counsel of Respondent's argument was that the claimant has not filed their invoices or statement of account to show that alleged payment has not been received or assurances from the respondent that payment will be cleared shortly. They should have attached LCs through which payment has been made.

Respondent also argued that the claimant has not asked for the so called pending payments till 2017. First letter asking for payment is 23.08.2017 for the outstanding which became due in 2009 i.e more than 5 years from the 2nd may 2012 agreement and 8 years after they became due in 2009.

Respondent argued that if pending amount was crystalised in 2009 after issue of FAC then it should have been specifically mentioned in clause 5.2 of the may 2012 agreement. He also emphasised on the word 'Final amount mentioned in the clause.

On the query from Tribunal as to why in the agreement (Which was also signed by the respondent), with held amount of 10% PBG and 5% security amt is mentioned and not the exact amount. To which Counsel for the Respondent replied that if they have wrongly mentioned then we have to see genesis of it from the main agreement

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CONCLUSION

I have considered the facts in light of the documents and the respective arguments by the Ld. Counsels of both the parties. It is admitted fact that original agreements dated 28.09.2004 were executed between Nortel India, Nortel Singapore and TCIL. The said agreements provide the total contract value as USD 1,245,837/- for the contract for supplies and Rs 25,539,444/- for services without AMC. The PBG is also specified in terms of Clause 14.3.

After the Nortel entities went in liquidation / Bankruptcy, parties executed subsequent agreement dated 02.05.2012

whereby parties to the agreement acknowledge pending obligations inter se between them. Nortel entities found Vista i.e claimant to perform their residual obligations which were specified in Appendix -1 of the agreement and TCIL duly acknowledged the claimant as successor in place of Nortel. From the agreement dated 02.05.2012, it is apparent that claimant replaced Nortel for the consideration of residual payment to be received from the respondent company/ TCIL. I find force in the argument of the counsel of Claimant while reading Clause 5.2 & 5.3 where it refers to the phrase '**amount withheld**' and '**such amount**'. The amount withheld relates to 10% of the total project value viz- a- viz performance bank guarantee and 5% of the total project value viz-a viz security deposit and 10% towards the payment due on Final Acceptance. Whereas, the same clause further specifies that such amount shall be retained by the respondent.

During the course of arguments the counsel for the claimant has also submitted that the respondent has not shown or filed document in support of their submissions that respondent owe nothing to the claimant as all amount has been paid. I have also asked the respondent that there is no document filed by them to show that respondent has paid all outstanding or claimed amount to the claimant after the agreement dated 02.05.2012. However, there is no response to the query asked by the Tribunal. I have also asked the respondent that if they claim to have paid everything at the time of FAC i.e 12.03.2009 then where was the need for them to sign the subsequent agreement dated 02.05.2012 and in particular mentioning the 10% and 5% of the withheld amount of the contract value. The only answer which Counsel of Respondent has been saying that it is for the claimant to prove the case. I do not subscribe to the said argument as there is nothing on record from respondent to show that they paid the complete amount to the claimant.

On Argument of Respondent that why payment was not claimed till 2017, Claimant responded that they could not have asked for withheld payment till their obligations as per

annexure -1 of the 2nd May 2012 agreement regarding AMC and supply of spares were completed. as per the obligation, Spares were to be supplied till 8 years from 2009 and this obligation was over in 2017. Also no AMC was forthcoming even after repeated requests to ER by respondent as late as 2016.

I also find force in the argument by Counsel of Claimant that no invoice was to be raised for getting the withheld payment as the same was a part of invoices raised earlier for the full amount and this amount was withheld out of the invoices already raised

Regarding why the exact amount outstanding was not mentioned in the May 2012 agreement , It is quite clear that total project value was known, therefore percentage of this contract value was mentioned in clause 5.2 for withholding the amount towards PBG and security deposit. This agreement was signed by the Respondent which means that they agreed with this.

I do not agree with the argument of the counsel of respondent that if something is wrongly mentioned in the agreement dated 02.05.2012 then we have to see the genesis of it from the main agreement. It is a known fact that agreements in PSU s are framed after due diligence in various departments

I am satisfied with the argument of Claimant that LCs were opened by the Respondent for the net amount to be paid after deducting the retention amount for PBG and security deposit There was no response to the query asked by the tribunal that when change over to new system of ERP was done in 2011 then all the old data must have been transferred then why respondent is not able to produce the record from old "FACT" when the obligations with ER were still pending

*The claimant have also raised their claim for balance 10% of the amount in terms of Annexure 5 at page 69. This amount was to be paid after issue of Final Acceptance certificate. Respondent has not produced any document showing that this amount has been paid to the Claimant. As per clause 5.2 of the agreement dated 02.05.2012, Any **final***

amounts payable to the Nortel Entities by TCIL in respect of the delivery, Installation, commissioning , final acceptance and warranty completion of the TCIL network Contracts including without limitation amounts withheld by TCIL in lieu of PBG and security deposit shall be retained by TCIL as collateral against the obligations mentioned in appendix 1 of the agreement. The said amount is also not paid by the Respondent.

Since the agreement dated 02.05.2012 has been admitted by the respondent and I find no documentary proof to show that the respondent has made the payment of the final 10% amount after F AC and withheld amount towards PBG and security deposit as stated in clause 5.2 of the said agreement. Therefore, I allow the claim of the claimant and this issue is decided in favor of the claimant and against the respondent."

39. After looking into the reasons given by the learned Arbitrator while deciding the issue No. 2, I do not find any reason to interfere in the findings given by the learned Arbitrator *qua* the issue No. 2.

40. The learned Tribunal, while deciding issue no.3- the rate of interest, has taken note of Section 16 of the MSME Act, 2006 and also recorded the finding that claimant is an MSME unit on the ground that the respondent has not denied the fact/claim that the claimant is an MSME company, while filing the Statement of Defense. It has also taken into consideration of Order VIII Rule 5 of CPC to say that unless there is specific denial, it would be read admission. Since the respondent has not denied that the claimant is an MSME company, therefore, the learned Arbitrator held that the claimant is an MSME company and decided the rate of interest while taking into consideration of Section 16 of the

MSME Act, 2006. The relevant portion of the same is reproduced hereinbelow:-

ISSUE No.3

"Rate of Interest

The claimant has claimed in para 1 of the claim petition to be an MSME company. The Respondent has replied to said paragraph as matter of record: The counsel for the claimant has referred to Order 8 Rule 5 of the CPC to say that unless there is a specific denial it would be read as admission. On my asking, the claimant has provided the copy of registration certificate as small enterprise registered with the Govt. of India under Ministry of Micro, small and Medium enterprises with Udyog Aadhar registration certificate No. DL08E0007150. The same has also been verified by me online on the govt portal and found same to be correct.

Since the claimant is an MSME unit therefore, the counsel of the claimant claimed interest in terms of section 16 of the MSME Act, 2006. The said section is reproduced hereinbelow:

16. Date from which and rate at which interest is payable

where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

Accordingly, I award the interest in terms of section 16 of the MSME act to the claimant three times of the bank notified rate by the RBI with monthly compoundable rests. As on the date of signing of the present award the rate of interest is 6%

<https://m.rbi.org.in/lhome.aspx>accordingly, the claimant would be entitled to 18% with monthly rests."

41. After taking into consideration the aforesaid reasons given by the learned Arbitrator, I do not find any reason to interfere with the award passed by the learned Arbitrator *qua* issue No.3.

42. While deciding the issue No. 4, the learned Arbitrator has rejected the claim after giving appropriate reasons.

43. While deciding the relief in issue No. 6, the learned Arbitrator has given the following reasons:-

ISSUE No. 6

"Relief

It is clear that TCIL deducted 10% of the total contract value towards PBG and also 5% of the contract value towards Security Deposit. It is also clear that TCIL withheld 10% of the Final payment due at the Final Acceptance. 25% of Supply contract. value (USD 1,245,837/-) works out to USD 3,11,459.25. Also 25% of Services contract value without AMC (INR 25,539,444) works out to INR 63,84,861/-, whereas the Claimant claim is USD 312,719.77 and INR 91,91,988.55.

AWARD

Therefore, this Tribunal awards the value of claim as 25% of contract value of Supply and services i.e USD 3,11,459.25 & INR 63,84,861 respectively. This Tribunal also awards INTEREST with monthly compoundable rests @ 18% w.e.f 11.03.2017 till 1st July 2019 i.e the date of award which works out to USD 1,59,105.39 & INR 32,61,633.06 at three times the prevailing bank rate as per the RBI.

<https://rn.rbi.org.in/home.aspx>

Total Value of award to the claimant including Interest is USD-4,70,564.64 (US Dollar Four seventy Thousand Five Hundred and Sixty Four and cents Sixty Four Only) and INR 96,46,494.06 (Indian Rs Ninety Six Lac Forty Six Thousand

Four Hundred Ninety Four and Paisa Six Only).
USD shall be paid in equivalent INR at the USD to INR rate of RBI prevailing on the date of the payment.
This payment shall be made within 30 days of the date of the order and in case of delay on payment, interest will be charged @ three times the bank rate at monthly rest as applicable to MSME classified as Small, which is 18% P.A at monthly rest..."

44. After taking into consideration the aforesaid reasons given by the learned Arbitrator, I do not find any reason to interfere in the award passed by the learned Arbitrator *qua* issue No. 6.

CONCLUSION

45. In the instant case, the learned Arbitrator has gone into the issues and facts thoroughly, applied his mind to the pleadings and evidences before him, as well as the terms of the Contracts, and then passed a duly considered award and no ground for setting aside the award within the four corners of Section 34 of the Act, 1996, has been made out. I have no justifiable reason to take a different view. As noticed above, the grounds which were urged before me by learned counsel for the petitioner in assailing the award have no force.

46. In what I have already discussed above, the view of the learned Arbitrator while awarding the impugned award is a plausible view. Consequently, the instant petition has no merit and must fail. Accordingly, the same is dismissed with no cost.

47. Pending applications, if any, also stand dismissed.

48. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 18, 2023

dy/ms

