

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

% **Reserved on : 6th February, 2023**
Pronounced on: 8th May, 2023

+ **O.M.P. (COMM) 50/2021 & I.A. 1863/2021**

SHIGA ENERGY PVT LTD Petitioner

Through: Appearance not given

versus

GE POWER INDIA LTD Respondent

Through: Mr. Anish Kapur and Ms. Nikhita
K. Suri, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

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

"(i) Set aside the Award dated 14th October, 2020 passed by the Hon'ble Arbitral Tribunal comprising of Justice (Retd.) A. K. Sikri (Presiding Arbitrator), Justice(Retd.) Usha Mehra (Co-Arbitrator) and Mr. Gopal Jain (Co-Arbitrator) in the matter of arbitration GE Power India Ltd and Shiga Energy Pvt. Ltd.

(ii) Grant a Stay on the operation/execution/enforcement of the impugned arbitral award.

(iii) Pass such other/further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

FACTUAL MATRIX

2. The petitioner, Shiga Energy is a private limited company incorporated under the laws of India, having its Registered Office at 207, Chiranjeev Tower, 43 Nehru Place, New Delhi. The petitioner operates as hydro energy generating company. The company specializes in the generation, distribution, management, construction and transmission of hydro-electric power project. The respondent, GE Power (erstwhile Alstom Projects India Ltd. and thereafter Alstom India Ltd.), is a Limited Company, *inter alia*, engaged in the business of manufacture and supply of Hydro Turbines, Generator, Electro-Mechanical equipment and parts thereof and has its manufacturing unit situated at ERDA Road, Maneja, Vadodara 13, Gujarat. The respondent regularly bids for various power projects in India as well as outside India for supply of plants, equipment, parts, etc. for such projects.

3. The petitioner is a Special Purpose Vehicle for the implementation of Tashiding Hydro Electric Power Project (THEP) located in West Sikkim. The petitioner, after floating tender and inviting bids from various contractors, in which respondent had also participated and succeeded, awarded the contract to the respondent. Accordingly, the Contract Agreement dated 21st May, 2010 was entered into between the parties whereby respondent was engaged for supply of plants, equipment and mandatory spares from abroad on C.I.F.-Indian Port Entry basis and from Ex-Works (India) basis for Electro-Mechanical Package for

Tashiding Hydro Electric Project, Sikkim, India.

4. The contract has been duly executed and there are no disputes in respect thereof. The dispute, however, which has arisen between the parties pertains to the payment on account of Excise Duty and Central Sales Tax (CST). The contract stipulated that all applicable taxes and duties will be paid/reimbursed by the respondent to the claimant at actual.

5. The petitioner, in order to execute the aforesaid contract, had manufactured certain items/components of plants, equipments etc. of its own and some such equipments were got manufactured from third parties/sub-contractors, which the claimant was authorised to do as per the contract. The petitioner had reimbursed the respondent's Excise Duty and CST which had been paid by the respondent on the goods manufactured by it and supplied to the petitioner. However, for the goods which were got manufactured from the third parties, known as Bought Out Products (BOP) i.e., materials, parts and equipments, etc. procured for the project by the claimant from the approved sub-contractors, the petitioner refused to reimburse the Excise Duty and CST on the ground that in terms of the contract, the petitioner was under obligation to reimburse the Excise Duty and CST payable by the respondent only and it has no obligation to reimburse the Excise Duty and CST which has been paid by the sub-contractors on BOP items. The respondent, on the other hand, contends that the petitioner is contractually liable to pay Excise Duty and CST on BOP as well. Since the petitioner did not paid the said amount, the respondent made a claim of Rs. 3,92,92,680/- (Rupees Three Crores Ninety Two Lakhs Ninety Two Thousand Six Hundred and Eighty Only) on account of Excise Duty and CST on BOP along with interest

and cost.

6. Since the disputes could not be resolved between the parties by the mechanism provided under Clause 6.1, the respondent invoked arbitration vide letter dated 18th February, 2019, nominating its Arbitrator. The petitioner appointed its nominee Arbitrator vide letter dated 22nd March, 2019. Vide letter dated 26th March, 2019, the learned Arbitrator was appointed as the Presiding Arbitrator which was accepted on 27th March, 2019. The Tribunal was, thus, constituted on 27th March, 2019 with the acceptance of the assignment by the Presiding Arbitrator. The parties were directed to file affidavits of their witnesses by 1st August, 2019 and the date of recording the evidence was fixed. The respondent produced one witness namely Mr. Ankur Vinodchandra Nesdi (CW-1) whose affidavit in evidence was filed. He was thoroughly cross examined by the counsel for the petitioner. The petitioner examined two witnesses in support of its case namely Mr. Bimal Agrawal(RW-1) and Ms. Sonia Varma(RW-2). These two witnesses were cross examined by the counsel for the respondent. On the conclusion of evidence, which was completed on 7th October, 2019, the matter was taken up on 22nd October, 2019 and 6th December, 2019. After completion of the submissions on behalf of both the parties, the award was reserved. The parties filed the written submissions on 27th August, 2020. The impugned award was pronounced on 14th October, 2020.

7. The instant petition is filed under Section 34 of the Act has been filed for setting aside the aforesaid impugned award dated 14th October, 2020 (hereinafter “the impugned award”) passed by the learned Arbitral Tribunal.

SUBMISSIONS

On behalf of the petitioner

8. Learned counsel appearing on behalf of the petitioner submitted that the respondent was under a contractual obligation under Clause 14.3 of General Conditions of Contract (GCC) to extend benefit of all tax savings to the petitioner. In the instant case, CENVAT credit has been availed by the sub-contractor, a tax adjustment/reduction to that extent must be extended to the petitioner. However, no such benefit was extended and this fact has also not been considered by the learned Arbitral Tribunal. He has also referred the relevant Clause 14.3 of the GCC which is reproduced hereinbelow:

“Clause 14.3 of GCC

Clause 14.3 - If any tax exemptions, reductions, allowances or privileges may be available to the Employer in the country where the Site is located, the Contractor shall extend all help to enable the Employer to benefit from any such tax savings to the maximum allowable extent.”

9. It is submitted that there was no agreement between the parties for any further tax liability/burden upon the petitioner/employer. It is submitted that there is no Schedule similar to Schedule 7 of DEPL Contract which details the amount of taxes to be reimbursed. If the contention of the respondent, that it is entitled to the reimbursement of taxes on BOP items, is to be considered then, in light of the absence of a schedule similar to Schedule 7 of DEPL Contract, the amount actually deposited by the sub-contractors becomes a vital record for determining the petitioner's liability. The learned Arbitral Tribunal failed to consider the aforesaid facts, contentions as well as provisions of the contract while

deciding the impugned award. Learned Arbitral Tribunal also failed to consider Clause 14.2 and Clause 14.4 of the GCC. The Clause 14.4 read with Clause 14.2 clearly indicates that only those taxes which are assessed on the respondent are liable to be reimbursed by the petitioner. Since taxes on BOP are assessed on third parties, the same is not the liability of the petitioner.

10. It is submitted that learned Arbitral Tribunal has incorrectly interpreted the term “actual” and “applicable taxes”. In para 8.6 of the impugned award, the observations of the Tribunal are fallacious and wrong because they presuppose that the petitioner/employer would have got CENVAT credit with respect of taxes and duties paid by it and therefore, it would not have been at a loss while reimbursing those taxes. It is an admitted fact that no deemed exports benefits were availed by the petitioner/employer in view of the specific withdrawal of the Policy by the Government.

11. It is submitted that as per Article 2 (Contract Price and Terms of Payment) of the Contract and Clause 14 of GCC, the price of the product was to be exclusive of all applicable taxes and duties and levies. It further provides that all taxes and duties as applicable at the time of dispatch, will be reimbursed by the petitioner to the respondent, at actual.

12. The impugned award also failed to correctly interpret the abovementioned clauses, specifically “All taxes and duties applicable”. As per the Contract, the reimbursement of applicable taxes, duties and levies which was agreed between the parties, was only applicable on the underlying transaction being the output of the business transaction of respondent and not on the input of the business transaction. In this regard,

learned counsel for petitioner submitted that on reading the above clauses, it is apparent and evident that the petitioner is in no way liable to pay taxes, i.e. Excise Duty and CST, on the goods procured by the respondent from the approved sub-contractors for delivery to the petitioner.

13. It is submitted that the terms of the Contract cast an obligation in terms of Clauses 11.4 and 11.5 of Special Conditions Contract (SCC) that the respondent would provide specific documents namely (i) Copies of supply invoices (ii) Copies of sub-supplier invoices (iii) Central Excise attested copy of the ER-1 showing details of duty paid (iv) Disclaimer Certificate (v) CENVAT declaration. These documents especially Central Excise attested details of duty paid would have shown that the duty was actually paid. It is further submitted that in reply to the statement of claim, the petitioner took a wide defence stating that it was not liable to reimburse taxes on BOP items at all, however, in its written submissions filed before the Tribunal, the petitioner took a limited stand that it was liable to reimburse the taxes on BOP items only if the respondent produced all the above mentioned documents, which included the Central Excise attested ER-1 which showed the actual payments made to the excise authorities.

14. Learned counsel appearing on behalf of the petitioner submitted that the Tribunal has also confirmed the above position on supply of documents by recording a finding to the effect that the deemed export benefit pertains to all the supplies in respect of the project and were not limited to those which were manufactured by respondent alone.

15. It is submitted that the Tribunal has erred while awarding the taxes and duties on BOP items without insisting/ensuring that the same amount has been deposited/actually paid by the sub-contractors of the respondent to the concerned authorities. The respondent has not supplied these documents to the petitioner nor has made the same a part of the record before the Tribunal. It is an admitted position that none of the contractually specified documents had been filed by the respondent before the Tribunal.

16. Learned counsel appearing on behalf of the petitioner vehemently submitted that even if the respondent's submission is to be accepted that he is entitled to the reimbursement of taxes on BOP items, then the aspect on proofs of such payments actually deposited by the Sub contractors is vital to determine the liability of the petitioner in this regard as the same has to necessarily be reimbursed on "Actuals", which is not possible without supply of the aforementioned document as a proof.

17. Learned counsel appearing on behalf of the petitioner submitted that as per Section 28(3) of the Arbitration Act, the tribunal was bound by the terms of the Contract i.e. Clauses 2.1 of the Contract read with Clauses 14.1 and 14.4 of the GCC read with 11.4 and 11.5 of the SCC and hence, the Tribunal had to necessarily decide the present dispute on the basis of the provisions of the contract. The Tribunal did not take into account the above clauses and their stipulations and simply ignoring the above clauses awarded the claims in favor of the respondent. Hence, the respondent's claim could not have been awarded by the Tribunal except after verifying strict compliance with the above clauses of the contract.

18. It is submitted that when material evidence is not considered in the award, which would go to the root of the matter, the award cannot be allowed to stand, and has to be set aside. In the present case as well the award allows the claim without considering the vital submissions made by the petitioner and without insisting on proofs of payments made by the sub-contractors with the concerned authorities on “Actual” basis. This aspect would also go to the root of the matter, as without the proofs of payments the liability of the petitioner cannot be determined in the present case.

19. Learned counsel for the petitioner submitted that in view of the foregoing submissions, the impugned award is liable to be set aside.

On behalf of the respondent

20. Learned counsel appearing on behalf of the respondent submitted that the petitioner is attempting to make an entirely new case before this Court. It was never the case of the petitioner before the learned Tribunal that the respondent had not furnished the requisite documents/evidence for the payment/reimbursement of taxes, duties and levies on BOP. It is submitted that on the contrary, the case set-up by the petitioner in its Statement of Defence before the learned Tribunal as follows:

“a. The term "actuals" in the Contract has to mean taxes, duties and levies payable by the Respondent to the exchequer and not by the Subcontractors to the exchequer. Since the taxes, duties and levies on BOP were paid by the subcontractors of the Respondent to the exchequer and not by the Respondent, the Petitioner was not liable to pay/reimburse the same to the Respondent. The actual amount of taxes, duties and levies evidenced by the Tax Invoices on record, however, was not disputed.

b. The taxes, duties and levies paid by the subcontractors to the exchequer, and in turn paid by the Respondent to the subcontractors, were included by the Respondent in its contract price. Allowing the Respondent to recover the same again from the Petitioner would amount to double recovery and hence unjust enrichment.”

21. It is submitted that the petitioner never disputed its obligation to pay/reimburse the taxes, duties and levies on BOP on the ground that it had not been provided proof of payment to the exchequer or that it was unaware of the "actuals". This was not even pleaded by the petitioner in the arbitral proceedings.

22. It is further submitted that the learned Tribunal has returned a factual finding on the basis of materials on record that the petitioner had, in fact, paid/reimbursed to the respondent the taxes, duties and levies on BOP at actual. These tax invoices are admitted documents and reflect the actual amount of taxes, duties and levies which the petitioner is obligated to reimburse to the respondent. It is also an admitted position that the petitioner had issued C-Forms acknowledging the actual amounts of taxes, duties and levies on BOP. It is vehemently submitted that this finding has not been challenged by the petitioner.

23. It is trite law that a party is precluded from raising mutually destructive pleas. Before the learned Tribunal, it was argued that the taxes, duties and levies have been deposited by the sub-contractor with the exchequer and the respondent has included these costs. Before this Court, the petitioner has argued that the evidence of payment of these taxes, duties and levies has not been furnished as per Clause 11.4(c) of

SCC. Learned counsel for the respondent submitted that both these pleas, being mutually destructive, are impermissible in law.

24. It is submitted that the petitioner's reliance on SCC Clause 11 is erroneous. Clause 11 of the SCC does not deal with the obligation of the petitioner to pay/reimburse tax, duties and levies on BOP at all. This obligation, as correctly held by the Tribunal, is provided in Clause 14 of the GCC which deals with "Tax and Duties". Under Clause 14 of the GCC, there is no such requirement of furnishing the documents as mentioned in Clause 11.4 (c) of the SCC for the payment/reimbursement of taxes, duties and levies on BOP by the petitioner to the respondent.

25. It is submitted that Clause 11 of the SCC only provides for the mechanism to enable the petitioner to obtain deals with "Deemed Export Benefits". The documents listed in Clause 11.4(c) were only required to be furnished by the respondent to assist and enable the petitioner to claim Deemed Export Benefits. This was not an issue or dispute between the parties.

26. Learned counsel appearing on behalf of the respondent submitted that the same clauses of the Contract deal with both BOP as well as manufactured goods. The claimant never asked the respondent to provide the documents stipulated in Clause 11.4 (c) of the SCC for either BOP or manufactured products, yet it paid/reimbursed the respondent for the taxes, duties and levies on manufactured products.

27. It is submitted that it is settled law that no new case can be put up without there being any factual foundation for the same in the pleadings. There was no dispute between the parties regarding the actual amounts of taxes, duties and levies on BOP deposited with the exchequer. There

were no factual averments or documents on record of the Tribunal in this regard. The petitioner cannot be allowed to make out a new case before this Court at this stage.

28. It is further submitted that there is no patent illegality in the award even on this ground. Learned Tribunal has, by way of a detailed and well-reasoned award, returned a finding on merits and on the basis of evidence before it.

29. It is submitted that the petitioner had, on the basis of the sub-contractors' tax invoices and debit notes issued by the respondent, paid/reimbursed Rs. 28,55,489/- (Rupees Twenty Eight lakhs Fifty Five Thousand Four Hundred Eighty Nine Only) towards taxes, duties and levies on BOP to the respondent in four tranches from February 2015 to August 2015 and thereafter was making on-account payments towards taxes, duties and levies on BOP.

30. The Hon'ble Supreme Court has in the case of *Associate Builders v. DDA (2015) 3 SCC 49* held that findings on merits are within the domain of the arbitral tribunal and courts exercising jurisdiction under Section 34 of the Act do not act as courts of appeal. The arbitrator is the ultimate master of the quantity and quality of evidence before him. Findings on merits, even if based on little evidence or evidence which does not measure up to the legally trained mind, cannot be interfered with by courts under Section 34 of the Act. It is submitted that the award is unanimous and does not suffer from any patent illegality. Therefore, this Court may not interfere in the impugned award.

31. Learned counsel for the respondent further submitted that the unanimous award is detailed, well-reasoned and based on evidence. The

Award does not suffer from any patent illegality or any infirmity whatsoever which would warrant interference therewith under Section 34 of the Act. Hence, the instant petition is devoid of any merit and is liable to be dismissed.

FINDINGS AND ANALYSIS

32. I have heard the learned counsel appearing on behalf of the parties and gone through the material on record as well as the arbitral award.

33. Before proceeding further, I find it necessary to briefly revisit the existing position of the law with respect to the scope of interference with an arbitral award in India.

34. As far as, Section 34 of the Act is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may not interfere on merits. The Court may only interfere on the limited ground provided under Section 34(2)(b)(ii) of the Act i.e. of the award is against the public policy of India. As per the legal position clarified through decisions of this Court that violation of Public Policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of justice of India, conflict with justice or morality and existence of patent illegality in the arbitral award. 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 reasonableness.

35. It is only if one of the above conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii) of the Act but 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 plausible view based on the facts.

36. The impugned award dated 14th October, 2020 has been challenged by the petitioner on the following grounds:

(a) Firstly, learned Arbitral Tribunal has proceeded and passed an award without recording the taxes, duties and levies and without any evidence on record. Therefore, the impugned award was passed “without any evidence”.

(b) Secondly, the non-consideration of vital submissions made by the petitioner.

(c) Thirdly, the learned Arbitral Tribunal has failed to consider Clause 14.2 and Clause 14.4 of the GCC. The said Clauses spell out the nature of the applicable “taxes” under the Contract.

37. The respondent vehemently opposed the instant petition and submitted that in the Statement of Defence, the petitioner has admitted to the knowledge that the taxes on BOP were in fact paid by the sub-contractors to the Exchequer. It is also argued that Statement of Defence (SOD) only clarifies about the onus of payment and not about the actual proof of payment. It is also argued that it is not the case of the petitioner that it was not aware that sub-contractors had to deposit the taxes to the Exchequer. It is the case of the petitioner that proof of actual payment of taxes by sub-contractors on BOP sales was not examined by the Arbitral Tribunal while affixing the contractual obligation on the petitioner to

reimburse these taxes. This argument has not been taken by the petitioner before the learned Arbitral Tribunal.

38. Before I proceed to deal with the merits of the present case, I find it convenient to refer, in brief, to the principles elucidated in the case laws cited by the learned counsel appearing on behalf of the parties. In my view, the difficulty does not lie so much in gathering or enunciating the principles, but in applying them to a particular situation in hand. The ground on which an award can be challenged and constrained is Section 34 of the Act.

39. There are essentially three areas in which the arbitral award is likely to be challenged before this Court or the Hon'ble Supreme Court.

- (i) Firstly, an award may be challenged on jurisdictional grounds.
- (ii) Secondly, an award may be challenged on what may broadly be described as “procedural, close grounds, such as failure to give a party an equal opportunity to be heard”.
- (iii) Thirdly, and most rarely, an award may be challenged on substantive grounds on the basis that the Arbitral Tribunal made a mistake of law.

40. The grounds for successfully challenging an award under Section 34 of the Act are elaborated hereinunder:

- (a) Adjudicability:- An Arbitral Tribunal is empowered to decide for itself whether or not it has jurisdiction over a particular dispute under the doctrine of “competence-competence”. If its jurisdiction is challenged, the Arbitral Tribunal may decide the point as preliminary issue in an interim award or as part of its award on the merits. In the United States, the standard depends on whether the jurisdictional decision was based on compliance with procedural

pre-conditions, in which case differential review applies or consent to arbitrate at all.

(b) Another ground for challenge is that the Arbitral Tribunal has exceeded its power in the decision that it has rendered. This ground of challenge contemplates a situation in which an award has been made by the Tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with claims that had not been submitted to it.

(c) Arbitrability:- The concept of Arbitrability which provides another ground to challenge the award. If any arbitration arises, it is necessary to have regard to relevant law of the State. These are likely to include the law governing the party involved where the agreement is with a State or State entity, the law governing the arbitration agreement, the law of the seat of arbitration and the law of ultimate place of enforcement of the award. Whether or not a particular type of dispute is “arbitrable, close under a given law is, in essence, a matter of public policy for that law to determine.” “Against the public policy the determination of any dispute is not permissible under the law”.

Procedural Grounds

41. It is broad category of grounds for challenging arbitral awards relating to deficiency in the way in which the Arbitral Tribunal was appointed or the Arbitral procedure was conducted. As per Section 34 of the Act, an award can be challenged when 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.

(a) Lack of due process:-procedural irregularity: Certain minimum procedural standards may be observed in the fair and proper conduct of arbitration. These procedural standards are designed to ensure that the Arbitral Tribunal is properly constituted that the arbitral procedure is in accordance with agreement of the parties, and that the parties are given proper notice of the proceedings, hearings and awards. In other words, the aim is to ensure that the parties are treated with equality and are given fair hearing with proper opportunity to present their respective cases.

(b) Further Procedural Issues: An award is also at risk of challenge where the composition of the Arbitral Tribunal and the procedure adopted in the arbitration are not in conformity with the agreement of the parties or failing such agreement, with the law.

Substantive Grounds

42. If the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award i.e. good, bad or indifferent is final and binding on the parties. It matters not that the Tribunal erred in its review of the evidence or misapplied the applicable law. The question, arises as to whether there should be a great degree of judicial review of the merits or is it enough to ensure that the correct procedures have been observed as the law requires or is something more needed to ensure that the learned Arbitral Tribunal has reached the correct decision.

43. As per the Section 34 of the Act, the award of the learned Arbitral Tribunal can be challenged on the ground if the award is contrary to the public policy, patent illegality and passed without any evidence. In the instant case, the main ground for challenging the award is that the learned Arbitral Tribunal while passing the award has not taken into consideration any evidence led by the parties, particularly, by the petitioner.

44. I may now proceed to summarise the conclusions reached by the learned Arbitral Tribunal. The relevant extract of the impugned award is reproduced as under:

“6. POINTS OF DETERMINATION

6.1 Following points of differences were formulated by the Tribunal, which needed determination:

(i) Whether the respondent is liable to pay to the claimant the taxes and duties on Bought Out Products (BOP) items under the contract dated 21.05.2019?

(ii) Whether the respondent had made payments towards taxes and duties on Bought Out Products (BOP) items under the contract dated 21.05.2019?

(iii) Whether the claims as raised by the claimant towards taxes and duties on Bought Out Products (BOP) items are barred by law of limitation?

(iv) Whether the claimant is entitled to the claims preferred by it? if so, to what extent?

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7.17 The Ld. Counsel pointed out that the Claimant in its oral arguments referred to the Statement filed by the Respondent along with its Statement of Defence as Annexure A [marked in evidence of RW-1 as Ex. RW-1/2) to submit that payments reflected in the said Statement were towards Taxes and Duties on BOP. In this

regard, Claimant specifically referred to the entry at Row No. 6 of Annexure A/Ex. RW-2 to submit that the Claimant had failed to show the corresponding Invoice (for Taxes on Manufactured goods) for an amount of Rs. 1,45,331/ (Rupees One Lac Forty Five Thousand Three Hundred and Thirty One Only). As per the claimant, the said payment corresponded to the Tax Invoice for BOP at Pages 143 & 144 of Volume I of the Statement of Claim. In this regard, the Claimant sought to project that since the sum total of the Tax figures appearing in the last row at Page 144, added up to Rs. 1,45, 331, it should be taken & assumed that the said payment was made towards taxes on BOP. Further, for another entry appearing at Page 54 of Annexure A/Ex-RW2, being entry dated 31.10.2016 for an amount of Ra. 17,00,000/-

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7.26 According to Mr. Khurana, the aforesaid evidence clearly reflected that the respondent had not made any payments of taxes towards BOP at any stage. From that he endeavoured to submit that the parties clearly understood that taxes regarding BOP were not to be reimbursed so far as this contract is concerned, as a result of specific omission of Schedule 7 in the instant contract, the contra-distinct with DANS contract. He submitted that these few factors viz, deletion of Schedule 7 and making of reimbursement of taxes on BOP at all from the very beginning would make it clear that the judgments in DANS case were also not applicable. He extensively read out from those judgments to argue that the conclusion reached by the Arbitral Tribunal as accepted by the courts was influenced by the fact that in the said case, DANS had initially made the payments of taxes towards BOP and later on started denying the same.

7.27 On the aforesaid foundation, i.e, no part payments were made for reimbursing taxes on BOP, Mr. Khurana submitted that part of the claim for taxes on BOP was also barred limitation. He pointed out that the contract in question was entered into on 21.05.2010 pursuant to which the claimant supplied equipment etc, including BOP items. As far as respondent is concerned, since the very

commencement of the works of supply under the contract, it neither acknowledged nor paid taxes on BOP items. The claimant had raised the dispute and invoked arbitration vide communication dated 18.02.2019 According to Mr Khurana, the period of.....

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7.43 Last submission of Mr Khurana was that the claim as raised in the present proceedings had not been correctly computed. On this aspect, he submitted that the Claimant's claim of Rs. 3,92,92,680/- as raised in the present Arbitral proceedings, is based upon the working furnished at Page 930 of Volume III of the Statement of Claim. However, a perusal of the amounts mentioned at Page 930 vis-à-vis the amounts mentioned in the corresponding documents filed by the Claimant itself in the present Arbitral proceedings, shows that the amounts mentioned at Page 930 and the computation thereof is incorrect. In this respect, the respondent relied upon a tabulated chart reflecting the said position.

8. ANALYSIS AND CONCLUSION OF THE TRIBUNAL

8.1 We have considered the respective submissions of the counsel for the parties with reference to the pleadings as well as documentary and oral evidence on record. The moot question which needs decision is as to whether Clause 14 of the Agreement puts an obligation on the part of the respondent to pay/reimburse taxes and duties even in respect of BOP supplies. As noted above, there is no dispute between the parties that Excise Duty and CST on the manufactured items were to be reimbursed as provided in the contract and the said sum, in fact, has been paid by the respondent to the claimant. This issue/dispute of payment of Excise Duty and CST is to be decided on the interpretation of Clause 14 of GCC. The other peripheral issues viz, whether respondent in fact initially made payment towards taxes on BOP or the effect of the judgment in DANS Energy in incidental and pressed into service by the claimant as supporting factors. Therefore, the Arbitral Tribunal is of the view that since Clause 14 of GCC, which is the

relevant clause to decide this issue, needs to be interpreted in the first instance to find an answer to the main issue.

8.2 Though this clause has already been reproduced in the beginning while taking note of the relevant clauses of the agreement as well as GCC and SCC, for the sake of continuity in discussion, we would like to reproduce the clause once again, which reads as under:

14. Taxes and Duties: (Page 503 (Volume 2A-GCC))

14.1 All Taxes and Duties (Excise Duty, Central Sales Tax, Customs Duty and Service Tax) applicable are indicated in Schedule 7 and will be paid/reimbursed by the Employer at actual. All State and local (State Government, Municipal, etc., such as Entry Tax/Octrol/VAT/Works Contact Tax/any other local taxes, duties, levies, etc. which are not Included in Schedule 7, if levied on the Contract, shall be paid/reimbursed by the Employer on actual. However, the Income Tax, whenever applicable on the contractor or the Expatriates deputed by him for the Project, under the purview of this contract shall be borne by the contractor

14.2 Notwithstanding GCC Sub-clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties, imposed on the Plant and Equipment and mandatory spare parts specified in Price Schedule No. 1 and that are to be incorporated into the Facilities by the law of the country where the Site is located. Essentiality Certificate/Project Authority Certificate for the claim of Concessional rate/Exemption of Customs Duty as applicable for Project Import Advance Authorisation shall be provided by Employer.

As per Import Export Policy (2008-2009), as applicable of Government of India, goods supplied for the project where procedure of International Competitive Bidding (ICB) has been followed, same shall be eligible for Deemed Export

benefits. The Employer shall be solely responsible for obtaining such Deemed Export Benefits.

For the Material/Items purchased outside the State of Sikkim, Road Permit and Form-C and other relevant statutory requirements to avail the Concessional Rate of CST shall be issued by the Employer.

The above payment/reimbursement of taxes, duties as defined in Schedule 7 i.e. Excise Duty, Customs Duty, Central Sales Tax and Service Tax shall be restricted to the extent of Grant Total amount mentioned in Schedule No. 7 subject to GCC Clause 14.4 and 36.

If any material/item as per the nomenclature mentioned in Bill of Quantities and invoiced by the contractor, are coming directly from the works of his duly approved sub-contractor to the employer's site in a state different from the state wherein Sub-contractor's work are located, the contractor shall effect 'Sale in Transit' for such transaction. For effecting 'Sale in Transit', the contractor shall ensure that his Sub-contractor raises invoices in the Contractor's name and obtains GR/LR/RR in the name of Contractor and the Contractor further endorse the GR/LR/RR in the name of Employer during transit of the equipment before the delivery of equipment is taken over the Employer. Such transaction shall also be treated as direct transaction between Employer and the Contractor.

14.3 If any Tax exemptions, reductions, allowances or privileges may be available to the Employer in the country where the Site is located, the Contractor shall extend all help to enable the Employer to benefit from any such tax savings to the maximum allowable extent.

14.4 For the purpose of the Contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the Form of Contract Agreement is based on the taxes, duties, levies and charges prevailing on

the date of signing of Contract (hereinafter called 'Tax' in this GCC Sub-clause 14.4). If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Contractor, in connection with performance of the Contract, an equitable adjustment of the Contact Price shall be made to fully take into account any such change by addition to the Contract Price or deduction therefrom, as the case may be, in accordance with GCC Clause 36 (Change in Laws and Regulations) hereof.

8.3 It is trite position in law, which position is accepted by both the parties that by Agreement, the parties may agree as to which party is to bear the burden of taxes and duties. Excise Duty and CST were payable to the Department by the claimant. Vide aforesaid clause, it was agreed that such taxes and duties will be reimbursed by the respondent. Clause 14.1 of GCC in this behalf mentions about 'all' taxes and duties which are applicable, shall be reimbursed by the respondent "at actual". It specifically mentions Excise Duty and CST. This clause also states that even State and Local taxes levied on the contract shall be paid/ reimbursed by the respondent on actual. As far as Income Tax is concerned i.e., specifically excluded by mentioning that the same shall be borne by the claimant. Thus, apart from Income Tax i.e., the direct tax, all indirect taxes and duties were to be reimbursed by the respondent. Pertinently, this clause does not distinguish between the taxes and duties payable on manufactured items, the products which were manufactured by the claimant itself or BOP, i.e., the products which were got manufactured from sub-contractors. It is of some significance to note that, as per the contract, the claimant was not only permitted to get certain items manufactured from its sub-contractors, even the names of those sub-contractors are specifically mentioned in the contract. Therefore, it was agreed between the parties that certain items would be manufactured by the sub-contractors which are given the nomenclature of "Bought Out Products" (BOP). Notwithstanding the same, Clause 14.1 talks

of "all" taxes and duties and does not exclude from its ambit taxes and duties payable on BOP. It will also be pertinent to point out that the contract in question was for lumpsum amount and the prices were mentioned in Appendix X to the contract which contains Schedule of rates and prices. It gives the description of plant, equipment and specified spare parts and indicates Ex-Works (India) prices thereof. Total price agreed was Rs.97,52,50,853/-. There are three "notes" appended to this Annexure which appear at the bottom of the Annexure and are material for deciding the controversy at hand. These are:

- "1. All the above prices are exclusive of taxes, duties and levies;*
- 2.The above prices include cost of imported raw material:*
- 3. The above prices are considering the Deemed Export Benefit Status of the Project and Project Authority Certificate for same shall be made available by customer."*

8.6 Being a Deemed Export project, the employer was entitled to get benefit of such taxes and duties paid by it to the claimant by virtue of Import Export policy 2008-2009. There is a specific mention about this policy in Clause 14.2 of GCC and not without the purpose. It is stated therein that the employer shall be eligible for Deemed Export benefits because of the said policy; albeit, the responsibility for receiving such benefits is cast on the employer. In the form of these Deemed Export benefits, the employer would have got CENVAT credit in respect of taxes and duties paid by it and was therefore, not to be a loser while reimbursing these taxes and duties to the contractor. The obligation to pay/reimburse all taxes and duties was, thus, devised keeping in view the aforesaid scheme and that is more than obvious.

8.7. Clause 11 of the SCC specifically deals with Deemed Export Benefit. Clause 11.1 thereof, mentions that the contract is for "supply" of power generation equipment and the term "supply" includes all supplies for the contract i.e., manufactured as well as BOP. Further, Clause 11.2 puts an obligation on the claimant as the contract to maintain all documents to enable the employer/respondent to claim excise/custom duty paid on the

inputs to the project. We are of the opinion that the expression "inputs to the project" which would qualify for Deemed Export benefits would include BOP as well. The argument of the respondent to the contrary has no substance.

8.9 The Ld. Counsel for the respondent had argued, as noted above, that the expression "applicable" in respect of taxes and duties would mean those taxes and duties which are applicable in law and on that basis, detailed submissions are made that insofar as Excise Duty is concerned, it is payable by the manufacturer and therefore, would have reference to the items manufactured by the claimant only as claimant is not manufacturer of the items which are produced by the sub-contractors. He also referred to the provisions of CST Act to contend that in respect of BOP, no CST was paid by the claimant and it was paid by the sub-contractors. It is difficult to accept these contentions constructed by the respondent around the expression "applicable". The moment taxes and duties become applicable in respect of supplies to the respondent, they are reimbursable under Clause 14.1. That clause does not state that such taxes and duties were to be payable by the claimant directly to the Government. The expression "applicable" is to be understood in the context of manufacturing of the goods and not with reference to the person. It cannot be denied that on the supplies effected by the claimant to the respondent in respect of the said project, whether these were manufactured by the claimant itself or were got manufactured through the sub-contractor, Excise Duty was paid. The sub-contractor, while paying the Excise Duty, had passed on the burden to the claimant, and the claimant therefore, became entitled to the payment/reimbursement thereof from the respondent. Ld. Counsel for the claimant is right in contending that the respondent has sought to include an artificial definition of the term "applicable" to create a distinction between the taxes levied on transaction between the sub-contractor and the claimant and the transaction between the claimant and the respondent. There is no such distinction created in the contractual provisions. It is stated at the cost of repetition that the contract specifically recognised that part of the supplies would be made through sub-contractors. In spite thereof, Clause 14.1 of GCC did

not exclude the payment of taxes and duties in respect of BOP, which makes the intention of the parties very clear.

8.10 Same reasoning would apply in respect of Central Sales Tax as well and the contention of the respondent predicated on the provision of CST Act cannot be countenanced. In view of the aforesaid interpretation given by us to Clause 14.1 of GCC (when read in conjunction with other clauses of the contract), judgment of Guwahati High Court in Pradip Kumar Roy's case cited by the respondent would be of no avail. That apart, the judgment of the Guwahati High Court was rendered in altogether different fact situation. Admittedly, in the said case, the tendered rates were to be inclusive of all taxes and levies payable under the respective statutes. Position herein is just the opposite as the bids were to be submitted exclusive of taxes and duties. DHC judgment

8.11 Ld. Counsel for the respondent had also taken umbrage under the term "at actual" to contend that this term signified the taxes actually paid by the claimant and does not refer to the taxes paid by the sub-contractors. This again has to be rejected in view of our aforesaid detailed analysis. It is stated at the cost of repetition that none of the contractual provisions qualify for the respondent's obligation as confining to manufactured products only. On the contrary, the language is wide and all encompassing and includes BOP as well. The expression "actual" in this context refers to the taxes, duties and levies actually paid to the Exchequer. It cannot be said that the taxes in respect of BOP were not payable in law. Clause 14.2 of the GCC deems the transaction of purchase of the BOP goods from the sub-contractors to be a transaction between the claimant and the respondent. This deeming fiction is created only for the purpose of taxes and duties.

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8.13 The Respondent has sought to suggest that the use of the term 'sub-supplier' in clause 11.4(c) refers to the suppliers of raw materials to suggest that the clause is not at all applicable to BOP. Such a suggestion is contrary to the plain language of Clause 11 of

the SCO It is of significance that Clause 11.2 uses the term 'supplier' for the Claimant (contractor), and thus, the term sub-supplier can only mean the subcontractors listed in Appendix 5. Even Appendix 5 to the Contract uses the term 'supplier' for the subcontractors. Further, any additional burden of excise duty upon the Respondent due to failure of the Claimant to fulfil its obligations in Clauses 11.1 to 11.4 and to provide the requisite documents to enable the Respondent to avail Deemed Export Benefits, is cast upon the Claimant in terms of Clause 11.5.

8.14 At this stage, it would be necessary to deal with the effect of the omission of Schedule 7 in the present contract. Clause 14.1 of GCC States that all taxes and duties applicable are "indicated in Schedule 7 and will be paid/reimbursed by the employer at actual". It further states that State and local taxes which are not included in Schedule 7 shall also be paid/reimbursed by the employer on actual. Though Clause 14.1 of GCC makes reference to Schedule 7. Schedule 7 was not made part of the contract. There was a lot of debate as to whether it was an inadvertent omission or a conscious omission. However, it is not necessary to discuss the same. Fact remains that Schedule 7 has not found its place in the contract. This Schedule was part of the contract between the claimant and DANS (We may mention that except this difference, the present contract and contract between the claimant and DANS are identical. Therefore, Schedule 7 of DANS contract also has been produced on record and the parties agreed that reference to Schedule 7 in Clause 141 is about this very schedule. This schedule contains Estimated Tax Sheet/Supply". It mentions estimated taxes relating to Custom Duty, Excise Duty, CST, etc. There are four notes appended to the Schedule which are as under:

“a) Zero Customs Duty indicated above is based on the basic assumption that Deemed Export benefits will be available for the project and the Purchaser shall make available to the contractor Project Authority Certificate or relevant documents to avail the Advance License Benefits and import of raw materials under zero Custom Duty. In case of non-availability of the above mentioned

documents the full custom duty on merit rate basis shall be charged for the imported items.

b) The taxes and duties are as per the Notification Nos. (1) 4/2009-Central Excise, Dated: February 24, 2009 and (ii) 8/2009 - ST Dated: February 24, 2009,

c) The above taxes and duties and levies are only indicate as applicable as on 1 April 2009. However, the taxes and duties shall be reimbursed as per actual at time of dispatch or execution. Any change in taxes and duties or introduction of new taxes and duties and levies shall be borne by or reimbursed by Purchaser.

d) This tax note needs to be read along with the GCC Clause No. 14 (Taxes and Duties) and BCC Clause No. 11 (Deemed Export Benefit) and interpreted accordingly."

8.15 As is clear from the schedule which gives only estimates of taxes which were payable. Otherwise, it is made clear in the notes that these taxes and duties are only indicative as applicable as on 01.04.2009 and insofar as reimbursement of taxes and duties are concerned, the same shall be as per actual at the time of despatch or execution. This is in tune with Clause 14. Even in the absence of Schedule 7, the interpretation given by us to Clause 14 of GCC would not make any difference. It may be mentioned that if at all cap to reimbursement as provided in Schedule 7 also goes in the absence of such Schedule. It is a matter of record that on realising that Schedule 7 was missing. Amendment No. 4 dated 21.10.2014 to the contract was carried out in Clause 11 of GCC, which mentioned about existing clause as well as the amended clause and reads as under:

S.No.	Clause Reference	Contract Clause	Amendment Required
	CONTRACT AGREEMENT		
01	Volume 1 (i) to chapter 1, Contract Agreement Supply Article 2, Clause 2.1, Contract Price and Terms of payment.	(Reference GCC Clause 11) The Employer hereby agrees to pay to the contractor the contract	(Reference GCC Clause 11) The Employer here by agrees to pay to the contractor the contract price in

		price in consideration of the performance by the contractor of its obligations hereunder. The contract price shall be the aggregate of:	consideration of the performance by the contractor of its obligations hereunder. The contract price shall be the aggregate of:
		I. Plant, Equipment and Mandatory spares supplied from outside India, mainly from Europe. USA and Canada on CIF basis: CIF (Indian part of Entry) price -	I. Plant, Equipment and Mandatory spares supplied from outside India, mainly from Europe. USA and Canada on CIF basis: CIF (Indian part of Entry) price -
		II. Plant, Equipment and Mandatory spares supplied from India, (Employer's country) on Ex-Works basis:	II. Plant, Equipment and Mandatory spares supplied from India, (Employer's country) on Ex-Works basis:
		INR 975,250,853 (INR Nine hundred seventy five million two hundred fifty thousand eight hundred fifty three only).	INR 1,206,301,023 (INR One thousand two hundred six million Three hundred One thousand Twenty three only)
		As per the Price	As per the Price

		<i>Schedule annexed as Appendix 10 and/or such other sums as may be determined in accordance with the terms and conditions of the contract. The above prices are excluding all applicable and duties and levies. All taxes and duties and levies as applicable at the time of dispatch are to be paid (reimbursed by Employer to the contractor at actual, as per the contract/refer indicative taxes and duties annexed as Appendix 10, Schedule 7, Estimated Taxes & Duties)</i>	<i>Schedule annexed as Appendix 10 and/or such other sums as may be determined in accordance with the terms and conditions of the contract. The above prices are excluding all applicable and duties and levies. All taxes and duties and levies as applicable at the time of dispatch are to be paid/reimbursed by Employer to the contractor at actual, as per the contract.</i>
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8.17 We therefore, conclude that on the plain interpretation of Clause 14 of GCC, in conjunction with other provisions of the

contract, the respondent was obligated to pay/reimburse all taxes and duties including Excise Duty and CST in respect of items manufactured by the claimant itself as well as in respect of BOP.

8.18 Once we have arrived independently at the aforesaid conclusion on the interpretation of the contractual provisions that the respondent is liable to reimburse the claimant in respect taxes and duties in respect of BOP as well, it is not even necessary to go into the question as to whether the respondent had initially made: payments towards taxes on BOP or not. However, as the issue of limitation is raised, this aspect will have to be decided as it has bearing on the said question of limitation.

8.19 Whether payments were made by the respondent towards taxes on BOP? We have already taken note of the arguments of both the counsel on this aspect. In nutshell, the respondent argued that the claimant has itself set up a cane for an amount of Rs. 3,92,92,680 towards Excise Duty and CST on BOP and has even led evidence to this effect. If this was the amount which is worked out by the claimant towards Excise Duty and CST, and entire claim is raised, this shows that claimant is itself impliedly accepting that no such payments towards Excise Duty and CST on BOP has been paid to it. In case it has not received a sum of Rs. 1,45,331 plus Rs. 17,00,000, it ought to have deducted these amounts from Rs. 3,92,92,680.

8.20 As per the respondent, the claimant has failed to discharge the burden of proving any payment in this behalf. It is also argued that the oral argument of the claimant on the aspect of payment is unconvincing. Insofar as amount of Rs. 1,45,331 and Rs. 17,00,000 is concerned, the respondent had failed to show corresponding invoice. The respondent has sought to counter this in a number of ways with the main contention that payments were made on ad-hoc basis. The claimant, on the other hand, has relied upon the payments made by the respondent, which are shown in Ex. CW-1/5, that is the statement prepared on the basis of amounts received by the claimant, there is no dispute insofar as receipt of these amounts is concerned. The dispute only pertains to the issue as to whether

the payments were towards BOP or manufactured items. We may reproduce the relevant portion of CW-1/5 again, reflecting these payments:

Month	BOP DB note raised	Product DB note raised	Total DB note raised	Payment received	Receipt Date
Feb '15	1,73,375	16,45,560	18,18,935		
Mar '15				18,31,441	4-Mar -15
Apr '15		2,61,797	2,61,797		
May '15				2,49,291	4-Mar -15
Total			20,80,732	20,80,732	
June '15	1,45,114	13,27,500	14,72,614		
July '15	24,78,000	40,41,500	65,19,500	14,72,614	01.07.16-Rs. 292614 and 27.07.15 Rs. 11,80,000
Aug '15	59,000	61,06,500	61,65,500	65,19,500	19.08.16 Rs. 65,19,500

8.21 The above table reflects that the total amount of taxes, duties and levies for the months of February 2016 till April 2016, i.e., Rs. 20,80,732, was paid by the respondent in two tranches of Rs. 18,31,441 (on 4 March 2015) and Rs. 2,49,291 (on 16 May 2016). It is not in dispute that this was against Debit Note raised in February for a sum of Re. 18,18,935 and in the month of April for Rs. 2,61,797. These include taxes for BOP in a sum of Rs. 1,73,375. Therefore, it can be inferred that the payment of Rs.

20,80,732 include BOP as well as manufactured products. It would be of interest to mention that along with the statement of defence, the respondent has filed Annexure-A which is a chart depicting payments that were made by the respondent. Though it is claimed that these payments are made only towards taxes on goods manufactured by the claimant itself, there is an entry dated 11.02.2015 which gives a figure of Rs. 1,45,331. The respondent could have produced invoices in respect of this payment to show that the same was towards taxes on goods manufactured by the claimant. That has not been done. On the other hand, the claimant has produced on record the invoices from pages 143 to 167 of its documents. At page 143 is the invoice dated 20.02.2015 which is for a sum of Rs. 6,22,316. Annexure to this contains the break-up of the invoice. Last item in the said Annexure pertains to Drait Tube Embedded parts - Part-B, Basic value of these items is shown as Rs. 8,62,420, which is supplied on 30.04.2014 and 02.05.2014. Three invoices each (i.e., total six invoices) for these two dates were issued in this behalf. The Excise Duty and CST payable thereon is reflected in the table and total thereof comes to exactly Re 1,45,331. Six invoices raised which are mentioned therein are also filed at pages 157 onward. A perusal thereof clearly reveals that those were BOP supplies. Thus, in respect of payment of Ra. 1,45,331, which is made by the respondent as per its own showing, the claimant has been able to demonstrate that the said payment of taxes were made against BOP.

8.22 Similarly, the total amount of taxes, duties and levies for the month of June 2015 viz, Rs. 14,72,614 was paid by the respondent in two tranches of Rs. 2,92,614 (on 1 July 2015) and Rs. 11,80,000 (on 27 July 2015). Equally, the total amount of taxes, duties and levies on BOP and Manufactured Products for the month of July 2015 viz., Ra. 65,19,500 was paid by the respondent on 19 August 2015.

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8.24 In Annexure A to the statement of defence, the respondent had shown payment of Rs. 17,00,000 made on 31.10.2016. Though it is argued by the claimant that no supporting invoice is produced

by the respondent to show that it was on account of manufactured items only, even the claimant has not filed any document. Therefore, it is not possible to come to a definite conclusion that payment of Rs. 17,00,000 made on 31.10.2016 was on account of reimbursement of taxes qua BOP. There is one more reason to arrive at this conclusion. As per the claimant itself, vide letter dated 07.10.2016, the respondent had denied any liability of taxes on BOP. It, therefore, becomes unimaginable that after the denial on 07.10.2016, the respondent would have made payment on account of taxes on BOP on 31.10.2016.

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8.26 One more argument of the Ld. Counsel for the respondent needs to be addressed. It was argued that in case se payments towards taxes on BOP were made, there was no reason for the claimant to claim entire amount of Rs. 3,92,92,680 and even the claimant itself has not excluded/adjusted these payments. However, we find that after making the payment initially, the respondent adjusted this amount while reimbursing taxes against manufactured items. It is for this reason that the claimant has not given adjustment and has Bought to recover the entire amount.

8.27 Re: Limitation: Keeping in mind the aforesaid findings, we advert to the issue of limitation raised by the respondent. In the first instance, the entire argument of the respondent proceeds on the basis that no payments were made to reimburse Excise Duty and CST on BOP, which is not found to be correct. Payment on that account was made on 11.02.2015 at least.

8.28 The claimant has produced on record letter dated 06.10.2010 wherein it had requested the respondent to release the outstanding payments on account of taxes. A figure of Rs. 5,62,73,400 as BOP sales was not examined outstanding amount is mentioned therein. This includes BOP supplies as well which is clear from the details tabulated and filed along with the said letter. In reply, vide letter dated 07.10.2016, respondent stated that out of the aforesaid amount of Rs. 5.62 crore, a sum of Rs. 3.78 crore pertains to BOP

supplies and the contract does not provide for reimbursement of taxes and duties paid by the third party. According to the claimant, by this letter, for the first time, the respondent refused to pay/reimburse taxes and duties qua BOP and therefore, period of limitation of three years would start from this date. The Ld. Counsel for the claimant also argued that since respondent started making ad-hoc payments afterwards, the account between the parties assumed the character of a running account and therefore, limitation can be counted from the date when last payment was made and on this reckoning also, the claimant would be within limitation as the arbitration was invoked by notice dated 18.02.2019.

8.31 Having said so, we have to examine the issue of limitation keeping in view the facts which have been established on record. As noticed earlier, the main premise of respondent's case is that respondent never made any payment of taxes on BOP supplies. That argument has already been negated. While discussing this aspect, it is also noticed that reimbursement of taxes on account of BOP supplies was made on 04.03.2016 and 15.05.2015. It has also come on record that the claimant had been issuing Debit notes in respect of BOP even thereafter along with Debit Notes for taxes in respect of manufactured items. It is important to note that the respondent, thereafter, started making on account payments and did not make the payments specifically towards any Debit notes. In these circumstances, the claimant could presume that the respondent was acknowledging that, reimbursement of taxes and duties for BOP is also accepted by the respondent, more so when such liability was not disputed/refuted by the respondent. It is only vide letter dated 07.10.2016 that the respondent, denied this liability In the aforesaid factual situation, it can be stated that the cause of action accrued on 07.10.2016, when the respondent changed its stance by joining the issues, for the first time, with the contention that reimbursement of taxes on account of BOP supplies was not permissible in terms of the contract. The claims are raised within a period of three years therefrom and therefore, are not time barred.

8.32 Argument of the respondent that limitation should start after the expiry of 15 days from the date of invoices, in view of the above discussions, cannot be accepted. We thus hold that the entire claim made by the claimant is within the period of limitation.

8.33 Re: Judgment in DANS Energy Pvt Ltd: It is undisputed that the instant contract and the contract between the claimant and DANS have identical terms. The only difference was that in the present contract, there is absence of Schedule 7. However, we find that omission of Schedule 7 has not made any impact so far as the issue of payment/reimbursement of Excise Duty and CST on BOP is concerned. We have also returned the finding that the respondent had made reimbursement taxes on BOP supplies as well in the beginning. These were the only two reasons which were hammered by the respondent in distinguishing the instant case from the judgment in DANS. That apart, a reading of judgment of Ld. Single Judge as well as Division Bench, categorically makes out that Clause 14 of GCC in that contract was interpreted by observing that there was exclusion to the liability of the employer to reimburse the taxes paid by the contractor to such sub-contractor. It can be discerned from paras 8 and 9 of the judgment of the Ld Single Judge of the High Court. In para 8, clause 14 is reproduced, which is interpreted in para 9 in the following manner:

“9. A reading of the above clauses of the Agreement would show that the contract price mentioned in the contract was exclusive of the taxes and the same were to be borne by the petitioner. The contract itself, in Appendix 5, gives a list of approved sub-contractors from whom supply can be procured by the respondent. For such supplies that are procured by the respondent from the sub-contractors, there was no exclusion to the liability of the petitioner to reimburse the taxes so paid by the respondent to such sub-contractors. Even the petitioner interpreted the Agreement as such and reimbursed taxes to the respondent till 14.11.2016.

8.34 *The aforesaid para clearly demonstrates that the court had assigned specific meaning to Clause 14 viz., even in respect of BOP supplies, there was not exclusion to the liability of DANS to reimburse the taxes so paid by the claimant herein to such sub-contractors. Therefore, an independent observation is made that even DANS interpreted the agreement in the same manner. This interpretation is specifically approved by the Division Bench in paras 9 and 10. We find that this interpretation of Clause 14 is a stand-alone interpretation. Of course, it is supported with the reasoning that even DANS had interpreted the agreement in the same manner and had reimbursed the taxed on BOP initially and changed its stand later on. Even the discussion on conduct part is excluded, the interpretation given to Clause 14 will still remain the same. In any case, we have come to our conclusions on the interpretation of Clause 14 of GCC.*

8.35 *Likewise, the Court specifically dealt with the contention of DANS predicated in Section 6 of the CST Act (which was the same contention as raised before us by the respondent herein). Discussion in that behalf is contained in paras 15 and 10 of the Ld. Single Judge, which makes the following reading.*

“15. The learned counsel for the petitioner further relied upon Section 6(2) read with Section 9A of the Central Sales Tax Act 1956 to contend that only a registered dealer can collect tax in respect of sale of goods in the course of inter-State trade or commerce. Further relying upon the judgment of the Supreme Court in T. STanes & Co Ltd vs. State of T.N. (2006) 9 SCC 305, it is submitted that if there is a bar to collect tax, it cannot be recovered in form of purported recoupment or recovery.

16. Though, the legal principle contended by the learned counsel for the petitioner is not disputed, it would have no application to facts of the present case. The Arbitral Tribunal in paragraph 32, 40 and 21 of the Impugned Award has rejected the above argument on the ground that the same were raised without there

being any supporting pleading in that regard. It is not argued before me that the said finding of the Arbitral Tribunal is incorrect."

8.36 To sum up, we pass an Award in the sum of Rs. 3,89,62,930 along with interest @ 6% p.a. from 18.02.2019 when the arbitration was invoked, The claimant has filed the Bill of Cost showing the cost incurred towards arbitrators' fee, lawyers' fee and administrative and secretarial expenses. However, we are not awarding the entire cost and are of the opinion that the Claimant is entitled to Rs. 52,40,000, which we hereby award as cost."

45. The Relevant extract of the Statement of Defence filed by the petitioner is reproduced hereinbelow:

"...It is submitted that as per the Contract, the reimbursement of applicable taxes, duties and levies which was agreed between the Parties, was only applicable on the underlying transaction being the output leg of the business transaction of Claimant (i.e. sale of Products by the Claimant) and not on the input leg of the business transaction of Claimant (i.e. procurement of goods by the Claimant).

In this regard, the Respondent submits that on reading the above clauses, it is apparent and evident that the Respondent is in no way liable to pay taxes, i.e. Excise Duty and CST, on the goods procured by the Claimant from the approved Sub-Contractors for delivery to the Respondent, on account of the following reasons:

- i. 'Applicable taxes and duties' should be on the underlying transaction being the output leg of the transaction i.e., Products sold by the Claimant to the Respondent.*
- ii. 'Employer shall bear and promptly pay all Customs Duty on the Plant and Equipment' - As per the terms of the Contract, with respect to the input leg of the transaction (for the Claimant), the Respondent was only required to reimburse Customs Duty paid on the procurement of the Products by the Claimant, as the same was expressly and specifically agreed under the Contract (expressio unius est*

exclusio alterius). In other words, the Respondent submits that since the Excise Duty and CST paid by the Claimant to the Sub-Contractor was not expressly agreed to be reimbursed by the Respondent like import duty, the same cannot be recovered in any manner whatsoever from the Respondent.

An ambiguous interpretation cannot be assigned to the term 'applicable tax', which was relevant only with respect to the underlying transaction being the output leg of the supply of made by the Claimant.

iii. 'At Actuals' the taxes should have been actually paid by the Claimant to the exchequer. Since, in the input leg of the transaction (for the Claimant), the tax amount is collected by the Sub-Contractor (or the Claimant's supplier) and it is this Sub-Contractor, and not the Claimant, who deposits the tax with the exchequer, thus, the Respondent has no liability with regards to the payment of tax by the Sub-Contractor on supply made to the Claimant.

iv. Further, and most pertinently the Contract envisages that the Contract Price is based on the taxes and duties, which was or will be 'assessed on the Contractor.'

On a combined reading of the aforesaid Clauses pertaining to following three key aspects of the Contract viz.

- i. Parties to the Contract;
- ii. 'Contract Price' payable by the Employer to the Contractor; and
- iii. Taxes applicable 011 'Contract Price'.

It is apparent that the Contract envisaged the payment of 'applicable taxes' only with respect to the 'Contract Price' i.e. as applicable on the Contract Price payable by Employer to Contractor with respect to supply under the Contract.

(h) It is submitted that taxes borne by the Claimant became part of its cost. In that event, allowing the Claimant to again recover such taxes once again under the umbrella of tax clause would mean

double recovery of taxes paid. This is clearly a case of unjust enrichment, which is against the public policy and, therefore, should not be allowed.

With respect to the aforesaid, it would be relevant to mention herein that while the Claimant had charged an amount of Rs. 46,53,20,000/-, for the BOP items under the Contract (out of the total contract price of Rs. 97,52,50,853/-), the Claimant has (as per its own invoices) claimed to have paid an amount of Rs. 26,52,20,712/- to its vendors for the said BOP items. Therefore, the significant margin of the Claimant (being the difference between Rs. 46,53,20,000/- and Rs. 26,52,20,712/-) is wholly revealing of the fact - that the charges towards excise duty (being charged on the activity of manufacture) were already factored in the costs charged by the Claimant towards BOP items, as to be supplied under the Contract. Such being the case, it is wholly erroneous and misleading for the Claimant to claim such charges etc. on BOP items from the Respondent herein over and above the agreed Contract price.

In view of the aforementioned i.e. the charges towards excise duty (being charged on the activity of manufacture) were already factored in the costs charged by the Claimant towards BOP items - the averments of the Claimant that the benefit of duty draw back cannot be claimed by the Respondent without paying for the alleged claims, as raised in the present proceedings (being the third party taxes on BOP items) is wholly erroneous and misconceived.

(i) It is submitted that the Claimant has failed to appreciate that under a tax clause a vendor cannot be allowed to recover those taxes that are not applicable on the underlying transaction or the taxes that he was never liable to pay to the government. Allowing a person to recover something as 'tax', which is admittedly not leviable or applicable on such transaction or person under law, is clearly against the public policy.

Reference to Schedule 7 by Claimant erroneous and misconceived

(j) Reference by the Claimant to a 'Schedule 7' (more specifically in Para 28 of its Statement of Claim), to submit that the Respondent

Relevant Terms of Contract dated 21 May 2010 between the Claimant & the Respondent and the contract between the Claimant & Dans Energy Private Limited dated 07 August 2009

Clause of Contract	Shiga Energy Private Limited		Dans Energy Private Limited		Difference, if any
Article 2- Contract Price and Terms of Payment	2.1	Contract Price (Reference GCC Clause 11)-The Employer hereby agrees to pay to the Contractor the Contract Price in consideration of the performance by the Contractor of its obligations hereunder. The Contract Price shall be aggregate of:-	2.1	Contract Price (Reference GCC Clause 11) The Employer hereby agrees to pay to the Contractor the Contract Price in consideration of the performance by the Contractor of its obligations hereunder. The Contract Price shall be aggregate of:-	Identical
	I	Plant, Equipment and Mandatory spares supplied from outside India mainly from Europe, USA & Canada on CIF basis:- CIF (Indian Port of entry) price	I	Plant, Equipment and Mandatory spares supplied from outside India mainly from Europe, USA & Canada on CIF basis:- CIF (Indian Port of entry) price	
	II	Plant, Equipment and Mandatory spares supplied from India (Employer's	II	Plant, Equipment and Mandatory spares supplied from India (Employer's	
		975,250,853 (INR Nine Hundred Seventy five Million Two		976,453,898 (INR Ninety Seven crores Sixty Four Lakhs Fifty	

	Country) on Ex-works basis:-	Hundred Fifty Thousand Eight Hundred Fifty Three Only)	Country) on Ex-works basis:-	Three Thousand Eight Hundred and Ninety Eight Only)	
	Total	975,250,853 (INR Nine Hundred Seventy Five Million Two Hundred Fifty Thousand Eight Hundred Fifty Three Only)		AND 2,443,167 (Euro Two Million Four Hundred Forty Three Thousand one Hundred and Sixty Seven only)	
	as per the Price Schedule annexed as Appendix 10 and/or such other sums as may be determined in accordance with the terms and conditions of the Contract. The above price are excluding all applicable taxes and duties and levies. All taxes & duties and levies as applicable at the time of dispatch are to be paid / reimbursed by Employer to the Contractor at actuals, as per the		Total	2,443,167 (Euro Two Million Four Hundred Forty Three Thousand one Hundred and Sixty Seven only) plus 97,64,53,898 (INR Ninety Seven crores Sixty Four	

	Contract (refer indicative taxes and duties as Appendix 10, Schedule 7, Estimated Taxes & Duties)		Lakhs Fifty Three Thousand Eight Hundred and Ninety Eight Only)	
		as per the Price Schedule annexed as Appendix 10 and/or such other sums as may be determined in accordance with the terms and conditions of the Contract. The above price are excluding all applicable taxes and duties and levies. All taxes & duties and levies as applicable at the time of dispatch are to be paid / reimbursed by Employer to the Contractor at actuals, as per the Contract (refer indicative taxes and duties as Appendix 10, Schedule 7, Estimated Taxes & Duties)		
Appendix 1: Schedule No. 2. Plant and Equipment Supplied from within the	In respect of plant and equipment supplied from within the Employer's country, the following payments shall be made: • Ten percent (10%) of the total EXW amount as an interest free advance payment against receipt of invoice and an irrevocable Advance Payment Security for the amount as	In respect of plant and equipment supplied from within the Employer's country, the following payments shall be made: • Ten percent (10%) of the total EXW amount as an interest free advance payment against receipt of invoice and an irrevocable Advance Payment Security for the amount as	Identical (except the underlined clause number referred to in the clause)	

Employer's Country	specified in Cl. 10 Notification of Award made out in favour of the Employer. The Advance Payment Security may be reduced in proportion to the value of the plant and equipment delivered to the site, as evidenced by the delivery documents. • Five percent (5%) of total EXW amount after submission of Turbine Model Test Report and on expiry of 6 months reckoned from the date of release of initial advance, within Fifteen (15) days after receipt of invoice. • Fifteen percent (15%) of total EXW amount after submission of following: - Complete Draft Tube Data for Civil Design Works at Customer's end - Unpriced Purchase Order copies for major raw material for manufacturing of Turbine and Generator	specified in <u>Cl. 5.0</u> Notification of Award made out in favour of the Employer. The Advance Payment Security may be reduced in proportion to the value of the plant and equipment delivered to the site, as evidenced by the delivery documents. • Five percent (5%) of total EXW amount after submission of Turbine Model Test Report and on expiry of 6 months reckoned from the date of release of initial advance, within Fifteen (15) days after receipt of invoice. • Fifteen percent (15%) of total EXW amount after submission of following: - Complete Draft Tube Data for Civil Design Works at Customer's end - Unpriced Purchase Order copies for major raw material for manufacturing of Turbine and Generator	
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	- Balance data for Civil Design at Customer's end for Turbine and Generator. and on expiry of 12 months reckoned from the date of release of initial advance, within Fifteen (15) days after the receipt of invoice. • 60% of the total or pro rate EXW amount alongwith price variations, if any, within Fifteen (15) days after receipt of Invoice alongwith dispatch documents. All admissible taxes and duties shall be paid as per actuals at this stage. • Five percent (5%) of the total or pro rata (machine wise) EXW amount upon issue of the Completion Certificate, within Fifteen (15) days after receipt of Invoice. • Five percent (5%) of the total or pro rata EXW amount upon issue of the Operational Acceptance Certificate, within Fifteen (15) days after receipt of Invoice.	- Balance data for Civil Design at Customer's end for Turbine and Generator. and on expiry of 12 months reckoned from the date of release of initial advance, within Fifteen (15) days after the receipt of invoice. • 60% of the total or pro rate EXW amount alongwith price variations, if any, within Fifteen (15) days after receipt of Invoice alongwith dispatch documents. All admissible taxes and duties shall be paid as per actuals at this stage. • Five percent (5%) of the total or pro rata (machine wise) EXW amount upon issue of the Completion Certificate, within Fifteen (15) days after receipt of Invoice. • Five percent (5%) of the total or pro rata EXW amount upon issue of the Operational Acceptance Certificate, within Fifteen (15) days after receipt of Invoice.	
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Appendix 5	List of Subcontractors	List of Subcontractors	
Appendix 10	Schedule 7 missing	Schedule 7 present	Identical in respect of the footnotes, except Schedule 7 is missing in the contract with the Respondent.
Special Conditions of Contract (SCC) Clause 11- Deemed Export Benefit	11.1 This contract is for supply of Power Generation Equipment and placed against international Competitive Bidding procedure. In terms of Foreign Trade Policy, 2009-2014 of GOI the supply qualifies for "Deemed Export Benefits". The Employer / Project Authority shall be solely responsible for availing the Deemed Export benefits. 11.2 In terms of Foreign Trade Policy 2009-2014, Deemed Export Drawback is made available as one of the Deemed Export Benefit. Contractor (supplier) is therefore required to maintain all documents to enable the Employer to claim the excise/customs duty paid on inputs to the project from DGFT through drawback route and exemption of customs duty against Advance License.	The Contractor will submit the copies of Excise / Customs Duty paid documents to Employer required for getting the Deemed Export Benefits in terms of the Foreign Trade Policy of the Government of India. This contract is for supply of Power Generation Equipment and placed against International Competitive Bidding Procedure. In terms of Foreign Trade Policy, 2009-2014 of GOI the supply qualifies for "Deemed Export Benefits". It is resolved that both the parties will cooperate in furnishing the required documents to each other to enable claim all the benefits admissible without any delay. The list of documents would be advised progressively at the appropriate time. However, the Employer / Project Authority shall be solely responsible for availing the Deemed Export benefits. In terms of Foreign Trade Policy 2009-2014, Deemed Export Drawback is made available as one of the Deemed Export	Similar

11.3 Customs Duty on Import of Raw Materials	Benefit. Contractor (supplier) is therefore required to maintain all documents to enable the claim by Employer the excise/customs duty paid on inputs to the project from DGFT through drawback route and exemption of customs duty against Advance License. The following documents (and any additional documents if required) shall be supplied by the Contractor for the purpose of enabling the Employer to obtain Deemed Export benefit: a. For Imported Items a) Proforma Invoice of import well in time. b) Indigenous list of items with ITC (HS) nomenclature together with quantity and value so as to calculate the Value additions (if applicable) c) IEC, RCMC and pass word for applying on line to DGFT for Advance Authorisation.
i. Project authority Certificate / Essentially certificate shall be provided by the Employer and the contractor will have to import raw materials under duty free Advance License. Upon issuance of valid Project Authority Certificate (PAC) under the deemed export project status, to the contractor for import of raw materials, the Employer shall have no liability of customs duty under the Contract.	
ii. If the employer fails to provide the valid Project Authority Certificate, required by the Contractor for obtaining advance license under the project status of Deemed Export, then the custom duty shall be paid by the contractor on applicable merit rates and same shall be reimbursed by the employer within 15 days.	

	iii. The following documents shall be submitted by Contractor to Employer for imported Items i. Proforma Invoice of import well in time. ii. Indigenous list of items with ITC (HS) nomenclature with quantity and value so as to calculate the Value additions (if applicable) iii. At least 2 weeks of advance notice of shipping the goods. iv. Any other documents that may be required. All invoices shall mention that the supply is to the contractor A/C. Shiga Energy Pvt. Ltd. - Project Tashiding HEP 11.4 Excise Duty a. The Contractor will subject the copies of Excise paid documents to Employer required for getting the Deemed Export Benefits in terms of the Foreign Trade	d) At least 2 weeks of advance notice of shipping the goods. b. For Sale in Transit i. The sub-suppliers of the Contractor are to give the ER1, duly attested by Jurisdictional Central Excise Authorities or Rule 11 invoice as applicable. ii. Disclaimer Certificate by Contractor / Sub-Suppliers, wherein — ————— c. All invoices shall mention that the supply is to the contractor A/C. DAns Energy - project Jorethang. The Import content (if any) will have to be Imported against duty free license and the Project Authority will assist in obtaining the License. Project authority Certificate / Essentiality certificate shall be provided by the Employer.	
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	Policy of the Government of India. b. The Duty Drawback will be claimed by the Project Authority and suitable Disclaimer Certificate should be issued by the Contractor for enabling to claim the Duty Draw back in full including Disclaimer Certificate stating CENVAT credit facility / rebate has not been availed on such supplies. c. The following is the list of documents that are required as per currently relevant laws, rules and regulations, for enabling Employer to claim drawback of duties paid. The same shall be supplied by the Contractor for the purpose of enabling the employer to obtain Deemed Export Benefit: i. Copies of Supply Invoices ii. Copies of Sub-supplier invoices	The Duty Drawback will be claimed by the Project Authority and suitable Disclaimer Certificate should be issued by the Contractor for enabling to claim the Duty Draw back in full including Disclaimer Certificate stating CENVAT credit facility / rebate has not been availed on such supplies. However, the contractor shall pay the custom duty (if any) and employer shall reimburse the same at actuals along with the pro rata supply payment within seven days of invoicing by the contractor. If the employer fails to provide relevant documents, if any, the under the project status of Deemed Export then the custom duty shall be paid by the contractor on applicable merit rates and same shall be reimbursed by the employer within the specified time.	
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[Signature]

	11.5 It is resolved that both the parties will cooperate in furnishing the required documents to each other to enable claim all the benefits admissible without any delay. The list of documents would be advised progressively at the appropriate time. However, if the contractor fails to provide the documents required within reasonable time, pertaining to this Contract and Project, to enable the Employer to claim benefits under Deemed Export project status, then burden of additional expenses (excise duty element only) to the Employer on this account would be borne by the Contractor.		
General Conditions of Contract (GCC) Clause 14- Taxes and Duties	14.1 All Taxes and Duties (Excise Duty, Central Sales Tax, Customs Duty & Service Tax) applicable are indicated in Schedule 7 and will be paid / reimbursed by the Employer at actuals. All State & local (State Government, Municipal etc.) taxes, such as Entry Tax / Octroi / VAT / works Contract Tax / any other local taxes, duties, levies etc., which are not included in Schedule - 7, if	14.1 All Taxes and Duties (Excise Duty, Central Sales Tax, Customs Duty & Service Tax) applicable are indicated in Schedule 7 and will be paid / reimbursed by the Employer at actuals. All State & local (State Government, Municipal etc.) taxes, such as Entry Tax / Octroi / VAT / works Contract Tax / any other local taxes, duties, levies etc., which are not included in Schedule - 7, if levied	Identical

	be eligible for Deemed Export benefits. The Employer shall be solely responsible for obtaining such Deemed Export Benefits. For the Material / Items purchased outside the State of Sikkim Road Permit & Form "C" and other relevant statutory documents to avail the Concessional Rate of Central Sales Tax shall be issued by the Employer. The above payment / reimbursement of taxes, duties as defined in Schedule 7 i.e. Excise Duty, Customs, Duty, Central Sales Tax and Service tax shall be restricted to the extent of Grand Total amount mentioned in Schedule No. 7 subject to GCC Clause 14.4 & 36. If any material / item as per the nomenclature mentioned in Bill of Quantities and invoiced by the Contractor, are coming directly from the works of his duty approved Sub-contractor to the Employer's site in a state different from the state wherein Sub-contractor's work are located, the	be eligible for Deemed Export benefits. The Employer shall be solely responsible for obtaining such Deemed Export Benefits. For the Material / Items purchased outside the State of Sikkim, Road Permit & Form "C" and other relevant statutory documents to avail the Concessional Rate of Central Sales Tax shall be issued by the Employer. The above payment / reimbursement of taxes, duties as defined in Schedule 7 i.e. Excise Duty, Customs, Duty, Central Sales Tax and Service tax shall be restricted to the extent of Grand Total amount mentioned in Schedule No. 7 subject to GCC Clause 14.4 & 36. If any material / item as per the nomenclature mentioned in Bill of Quantities and invoiced by the Contractor, are coming directly from the works of his duty approved Sub-contractor to the Employer's site in a state different from the state wherein Sub-contractor's work are located, the contractor shall effect 'Sale in	
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	contractor shall effect 'Sale in Transit' for such transaction. For effecting 'Sale in Transit', the contractor shall ensure that his sub-contractor raises invoices in the Contractor's name and obtains GR/LR/RR in the name of Contractor and the Contractor further endorses the GR/LR/RR in the name of Employer during transit of the equipment before the delivery of equipment is taken over by the Employer. Such transaction shall also be treated as direct transaction between Employer and the Contractor.	Transit' for such transaction. For effecting 'Sale in Transit', the contractor shall ensure that his sub-contractor raises invoices in the Contractor's name and obtains GR/LR/RR in the name of Contractor and the Contractor further endorses the GR/LR/RR in the name of Employer during transit of the equipment before the delivery of equipment is taken over by the Employer. Such transaction shall also be treated as direct transaction between Employer and the Contractor.	
14.3	If any tax exemptions, reductions, allowances or privileges may be available to the Employer in the country where the Site is located, the Contractor shall extend all help to enable the Employer to benefit from any such tax savings to the maximum allowable extent.	14.3	If any tax exemptions, reductions, allowances or privileges may be available to the Employer in the country where the Site is located, the Contractor shall extend all help to enable the Employer to benefit from any such tax savings to the maximum allowable extent.
14.4	For the purpose of the Contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the Form of Contract Agreement is based on the taxes, duties, levies and charges	14.4	For the purpose of the Contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the Form of Contract Agreement is based on the taxes, duties, levies and charges prevailing on the date of signing of

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	prevailing on the date of signing of Contract (hereinafter called "Tax" in this GCC Sub-Clause 14.4). If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Contractor, in connection with performance of the Contract, an equitable adjustment of the Contract Price shall be made to fully take into account any such change by addition to the Contract Price or deduction therefrom, as the case may be, in accordance with GCC Clause 36 (Change in Laws and Regulations) hereof.	Contract (hereinafter called "Tax" in this GCC Sub-Clause 14.4). If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Contractor, in connection with performance of the Contract, an equitable adjustment of the Contract Price shall be made to fully take into account any such change by addition to the Contract Price or deduction therefrom, as the case may be, in accordance with GCC Clause 36 (Change in Laws and Regulations) hereof.	
General Conditions of Contract (GCC) Clause 19: Subtracting	19.1 Appendix 5 (List of Approved Sub-contractors) to the Contract Agreement specifies major items of supply or services and a list of approved Sub-contractors against each item, including vendors. Insofar as no Sub-contractors are listed against any such item, the Contractor shall prepare a list of Subcontractors for such item for	19.1 Appendix 5 (List of Approved Sub-contractors) to the Contract Agreement specifies major items of supply or services and a list of approved Subcontractors against each item, including vendors. Insofar as no Subcontractors are listed against any such item, the Contractor shall prepare a list of Subcontractors for such item for inclusion in such	Identical

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	inclusion in such list. The Contractor may from time to time propose any addition to or deletion from any such list. The Contractor shall submit any such list or any modification thereto to the Employer for its approval in sufficient time so as not to impede the progress of work on the Facilities. Such approval by the Employer for any of the Subcontractors shall not relieve the Contractor from any of its obligations, duties or responsibilities under the Contract.	list. The Contractor may from time to time propose any addition to or deletion from any such list. The Contractor shall submit any such list or any modification thereto to the Employer for its approval in sufficient time so as not to impede the progress of work on the Facilities. Such approval by the Employer for any of the Subcontractors shall not relieve the Contractor from any of its obligations, duties or responsibilities under the Contract.	
	19.2 The Contractor shall select and employ its Subcontractors for such major items for those listed in the lists referred to in GCC Sub-Clause 19.1.	19.2 The Contractor shall select and employ its Subcontractors for such major items for those listed in the lists referred to in GCC Sub-Clause 19.1.	
	19.3 For minor items or minor parts of the Facilities not specified in Appendix 5 (List of Approved Subcontractors) to the Contract Agreement, the Contractor may employ such Subcontractors as it may select, at its discretion.	19.3 For minor items or minor parts of the Facilities not specified in Appendix 5 (List of Approved Subcontractors) to the Contract Agreement, the Contractor may employ such Subcontractors as it may select, at its discretion.	

General Conditions of Contract (GCC)	36.1 If, after the date of signing the Contract, any law, regulation, ordinance, order or by-law having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the Contractor and/or the Time for Completion, the Contract Price shall be correspondingly increased or decreased, and/or the Time for Completion shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with the Appendix 2 to the Contract agreement.	36.1 If, after the date of signing the Contract, any law, regulation, ordinance, order or by-law having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the Contractor and/or the Time for Completion, the Contract Price shall be correspondingly increased or decreased, and/or the Time for Completion shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with the Appendix 2 to the Contract agreement.	Identical
Clause 36- Change in Laws and Regulation			

46. In the instant case, the dispute pertains to the taxes and levies in respect of BOP goods which were procured by the respondent from the approved sub-contractor as enunciated in the appendix to the contract. The other types of goods are manufactured goods which are directly manufactured by the respondent. The invoices in this aspect were raised as the consignee invoice to the respondent. The sub-contractor supplies the BOP along with invoice and after that the respondent sales in transit to the applicant takes places in accordance with Section 6(2) of the CST Act, 1956. The Excise Duty and CST were charged on such BOP goods supplied. The dispute between the parties arose, when the applicant did

not pay an amount of Rs. 3,89,92,930/- in respect of the taxes, levies and duties paid by the respondent. The genesis of the dispute is to determine whether the petitioner was contractually liable to pay aforesaid amount i.e. Rs. 3,89,92,930/- in respect of the taxes, levies and duties towards BOP to the respondent.

47. The learned Arbitral Tribunal, while interpreting the Clause 14 of the Contract, reached on the conclusion that the petitioner is obligated to pay the taxes and duties and there is no difference between the payment of taxes and duties in respect of manufactured goods and BOP. Taking view of the reason assigned in the interpretation as quoted in the foregoing paragraphs, I do not find any error or illegality in the said interpretation of the learned Arbitral Tribunal. The learned Arbitral Tribunal has also rejected the arguments of the applicant regarding the applicable taxes and duties and held that “the moment taxes and duties become applicable in respect of supplies to the respondent, they are reimbursable under Clause 14.1. That clause does not state that such taxes and duties were to be payable by the claimant directly to the Government. The expression “applicable” is to be understood in the context of manufacturing of goods and not with reference to the person. The sub-contractor while paying excise duty had passed on the burden to the claimant and the claimant therefore, became entitled to the payment or reimbursement thereof from the respondent.”

48. The learned Arbitral Tribunal rightly interpreted the term “at actuals” as “none of the contractual provisions qualify for the respondent’s obligation as confining to manufactured products only. On the contrary, the language is wide and all encompassing and includes

BOP as well. The expression “actual” in this context refers the taxes, duties and levies actually paid to the exchequer.” Therefore, as per the contract, there is no distinction between the respondent and the sub-contractor. The Schedule 7 does not in any way affect the tax liability of the petitioner towards the respondent. The Schedule 7 merely stated an estimate amount which may be paid to the petitioner and was not based on the actuals.

49. The learned Arbitral Tribunal has rightly rejected the argument of the applicant on the aspect that reimbursement of taxes on account of BOP supplies was not made by the petitioner on 4th March, 2015 and 15th May, 2015. The petitioner acknowledged reimbursement of taxes and duties for BOP and such liability was not disputed/refuted by the petitioner.

50. I am also in agreement with the learned Arbitral Tribunal’s finding that the Contract between the respondent and DANS have identical terms, the only distinction being omission of Schedule 7. However, the omission of Schedule 7 does not impact the petitioner’s liability to pay/reimburse the taxes, duties and levies on BOP. I have perused the entire documents on record and found that the applicant has never contended before the learned Tribunal that the respondent had not furnished the requisite documents for the reimbursement of taxes, duties and levies on BOP. The learned Arbitral Tribunal rightly reached on the conclusion and passed the impugned award, while considering the entire evidence on the record, the statement of claim, the statement of defence and written arguments filed and had given the detailed reasons. As it is a settled law while considering a challenge to an arbitral award where private parties are

involved, the Court need not examine the validity of the findings or the reasoning behind the findings given by an Arbitrator. The extent to which a Court may exercise supervisory power in this respect is limited to examining whether the award and the conclusion drawn therein is supported by findings and not whether the findings themselves are erroneous or sound. The Court shall not conduct a roving enquiry into the facts and evidence of the matter and neither shall the Court sit in appeal against the award of the Arbitrator.

51. In ***UHL Power Company Limited vs. State of Himachal Pradesh, 2022 4 SCC 116***, the Hon'ble Supreme Court reiterated the narrow scope under Section 34 of the Act and held as under:

“16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

“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 Ltd. v. Wednesbury Corpn., (1948) 1 KB 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.”

17. A similar view, as stated above, has been taken by this Court in *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.* [*K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*, (2020) 12 SCC 539], wherein it has been observed as follows: (SCC p. 540, para 2)

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.””

52. In *Delhi Airport Metro Express Private Limited vs. Delhi Metro Rail Corporation Limited*, 2022 1 SCC 131, the Hon'ble Supreme Court held as under:

“28. ...The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and therefore, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award.....”

53. Hence, the law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an arbitral award under Section 34 of the Act is fairly limited and narrow. The Court shall not sit in an appeal while adjudicating a challenge to an award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence and material before him.

54. In view of the foregoing discussions on facts and law, I don't find any reason to interfere in the impugned award as there is no perversity or illegality or error in the said award.

55. Accordingly, the instant petition, being devoid of any merit, is dismissed along with pending applications, if any.

56. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 8, 2023
gs/db

