IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	22.12.2023
Pronounced On	29.04.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.305 of 2021

M/s.VGP Marine Kingdom Private Limited,
VGP Square, 86, Dharmaraja Koil Street,
Saidapet, Chennai - 600 015,
Rep. by its Director, VGP Ravidas ... Petitioner

vs.

1.Ian Mellsop
7-97, Shangri La,
Jervois Road,
Herneb Bay,
New Zealand - 1001.

2.Marinescape PM Limited,
Level 1, 60/64
Upper Queen Street, Eden Terrace,
Auckland,
New Zealand - 1010,
Rep. by its Director Ian Mellsop

3.M/s.Aqees Limited
Level 1, 60/64
Upper Queen Street, Eden Terrace,
Auckland,
New Zealand - 1010,

Rep. by its Director Ian Mellsop ... Respondents

Prayer: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, praying to set aside the impugned award dated 09.01.2020 and allow the claim of the petitioner as prayed for in the claim petition and award the cost.

For Petitioner	:	Mr.V.Selvaraj for Mr.D.Jayasingh
For R2 and R3	:	Mr.S.K.Srinivasan

ORDER

The claimant before the Arbitral Tribunal is aggrieved by the impugned award dated 19.01.2020, passed by the Arbitral Tribunal and is thus before this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

2. By the impugned award, the Arbitral Tribunal has rejected the claim filed by the petitioner before the Arbitral Tribunal. The Arbitral Tribunal has also partly rejected the counter-claim of the respondent.

3. The respondent has not challenged the award of the Arbitral Tribunal insofar as it rejects the counter-claim of the respondent.

4. Operative portion of the impugned award passed by the Arbitral Tribunal insofar as rejection of the claim of the petitioner reads as under:-

> ''*101. For all the reasons, conclusions, findings arrived at supra, we pass the following final Award under S.31 of the Arbitration and Conciliation Act, 1996 as amended by Act 3 of 2016.*
>
> Issue No.1 :
>
> *The nature of the project contemplated is one of 'Turnkey' Contract mechanism.*
>
> **Issue Nos. 2 & 3**:
>
> *The respondents have not committed any breach as such and the delay in the execution of project in time as agreed by 30.04.2018, is at any rate not attributable to the respondents.*
>
> ***Issue Nos. 4 & 5:***
>
> *The exclusion of the respondent from the execution of the project works and termination of the agreements with the respondents by the claimant is unwarranted, unjustified and not in accordance with law and the same cannot be sustained.*
>
> ***Issue No. 6:***
>
> *6.1: Claimant is not entitled to the amount claimed as claim No.1, and the same is rejected and dismissed.*

6.2: The claim for refund of 2,95,000 USD cannot be sustained or allowed and the claim is dismissed.

6.3: Claim does not merit countenance and shall stand dismissed.

6.4: The claimant alone was at fault in disabling the respondents from completing the project without also performing their obligations to facilitate such completion by the respondents, this claim has to fail and is dismissed.

6.5: The claimant will be entitled to only such liberties granted and are available under Clause 9.3 of Design Agreement (Ex.C4) and the claim as projected for handing over the Designs, Drawings and Warranties or in the alternative refund of 18,40,000 USD said to have been paid fails and is dismissed.

6.6: The respondents have not committed any breach as such and the delay in the execution of project in time as agreed by 30.04.2018, is at any rate not attributable to the respondents.

Issue No.7 & 8:

The claimant had not produced any legally acceptable evidence of material to substantiate that the said third party u/s Polin Aquarium, Turky did executed any works or paid and that the project was completed only through them.

Issue No.9:

It has to be taken that in September 2017 itself 75% of the project must have been completed. As on 15.9.2018, the Respondent had completed the work and it may be up to 95% of the work agreed to be done.

Issue No.10:

10.1 : The counter claim for payment of USD 4,05,000 due under Addendum Agreement dt. 28.5.2018 (Ex.C11) together with interest is rejected.''

5. The Arbitral Tribunal has issued few directions to the petitioner herein in Para 10.2 of the impugned award. Relevant portion of the impugned award passed by the Arbitral Tribunal is reproduced below:-

''10.2: The claimant is liable and legally bound to ensure the return of the articles listed below or in the alternative if they fail to do so, shall pay the value of the other articles:-

i) Acrylic installation equipment including jacking trolley: US 5,000;

ii) Theming Workshop and fit out: USD 75,000;

iii) 40 Feet Container on VGP premises: USD 3,500;

iv) Miscellaneous plant and equipment: USD 50,000

v) Refrigerator - USD 750;

vi) Office furniture, Glass fronted side beach, 2 glass side tables, couch, 10 chairs, filing cabinet, extendable 3m long glass directors table, 4 easy chairs: USD 20,000;

vii) Television: USD 1,000;

viii) Office files and original contracts and banking records,

ix) Miscellaneous personal effects: USD 2,000

10.3: The claim is not maintainable and rejected.

10.4: In the absence of any positive/constructive proof of the said person's arrival at the project site or attending to any of the works pertaining to the project in question, and proof of the actual incurring of such expenditure, this claim cannot be sustained and the Counter Claim stands dismissed.

10.5: A sum of USD 52,500 is awarded in favour of the Respondents, which the Claimant shall *pay with interest at 9% p.a. from the date of filing of the counter claim (16.03.2019), till date of realization.*

10.6: The counter claim is not maintainable and also in the absence of any evidence produced regarding the sufferance or damages, no relief is granted to the respondents and hence the counter claim is rejected.

***Issue No.11**: Except for award of interest in respect of counter claim no.5 wherein interest at the rate of percent (9%) per annum from the date of filing of the Counter Claim (16.03.2019) till the date of realization, no other interest is ordered in respect of any other claim. The issue is answered accordingly.*

***Issue No.12**: No cost is ordered and both parties are allowed to bear their own costs of these arbitration proceedings.''*

6. Brief facts of the case is that the petitioner herein had engaged the services of the third respondent **M/s.Aqess Limited** [formerly **Marinescape Construction Chennai Ltd.]** vide Exhibit C.1 Construction Agreement dated 27.07.2012 for Design and Supply of General Construction and Specialised Services and Equipment Commissioning and Management Services on a turnkey basis for construction of an aquarium.

7. Exhibit C.2 Share Subscription and Shareholders Agreement dated 27.07.2012 was also signed between **Marinescape Properties India Ltd.**, a Company organised under the laws in New Zealand, **VGP Housing Private Limited**, a Company incorporated in India with the petitioner **VGP Marine Kingdom Private Limited**. Exhibit C.2 Share Subscription Agreement and Share Holders Agreement dated 27.07.2012 was amended by Exhibit C.10 dated 06.12.2017 signed between petitioner **[V.G.P. Marine Kingdom Private Limited]**, **Mr.Kay Ellen Arnold** and **VGP Housing Pvt. Ltd**.

8. Exhibit C.2 Share Subscription Agreement and Share Holders Agreement dated 27.07.2012 as amended by Exhibit C.10 **Amendment to the Share Subscription and Share Holders Agreement** stood terminated at the behest of the petitioner by Exhibit C.31 letter dated 04.01.2019. By the said letter, the petitioner also nominated Hon'ble Mr.Justice P.Jyothimani, a former Judge of this Court, its Arbitrator.

9. As far as Exhibit C.1 Construction Agreement dated 27.07.2012 signed between the petitioner and the third respondent **M/s.Aqees Limited** [formerly **Marinescape Construction Chennai Ltd.**] is concerned, it was subsequently, split into Exhibits C.3 and C.4 as detailed below:-

Sl. No.	Exhibit No.	Date	Description of documents
1	C3	27.04.2016	Agreement between the Claimant and the 1st respondent - **Ian Mellsop**
2	C4	27.04.2016	Agreement between the Claimant and **Aqees Limited** (3rd respondent) herein for Design Services and supply of equipment

10. As per Exhibit C.3, Agreement dated 27.04.2016, there were obligations caused on the petitioner and obligations caused on the second respondent. Clauses 2 and 3.4 of Exhibit C.3, dated 27.04.2016, read as under:-

''***2. OBLIGATIONS OF THE OWNER***

2.1 Right of Access to the Site

2.1.1. The Owner shall, promptly after the Agreement Date, give the PMC right of access to and possession of, *the Site for managing the Project and carrying out the works until Completion. Contractor acknowledges and agrees that such right and possession may not be exclusive to Contractor and will be subject to the terms of any relevant Approvals. In such case, the Contractor shall be entitled, from time to time in the course of the Project, to require and obtain exclusive possession of any part of the Site (as opposed to the whole), which special operational requirements make necessary.*

2.1.2. The Owner shall be responsible only for obtaining the necessary building plan approval from Chennai Metropolitan Development Authority (CMDA) relating to the Project.

2.1.3. PMC shall be responsible for identification of the appropriate persons and entities as Project Personnel and for the direction, management and supervision of the Project Personnel (as further detailed in Appendix 1). All Project Personnel shall be appointed/contracted by the PMC, provided however that in the event of any payments paid by the Owner directly to such Project Personnel (at the request of PMC), the PMC shall be responsible for verification of such invoices raised by third party Project Personnel as well as the work-time sheets in case of Project Personnel. The Owner's liability for payment of such invoices shall arise upon the completion of the PMC's verification of such invoices and confirmation thereof to the Owner. The Owner shall not, without prior consultation with PMC, directly instruct any member of the Project Personnel, except in emergency or other special circumstances.

3.4. RESPONSIBILITIES AND OBLIGATIONS OF PMC

PMC's General Obligations

3.4.1. PMC shall exercise all the skill, care and diligence required for the Works, and as to be expected of an aquarium developer holding himself out as having the competence, experience and resources necessary for the proper performance of such Works.

3.4.2. The PMC further warrants that:

(a) the design and the specified Works Material shall be suitable for their intended purpose and shall meet the requirements of the Project in all respects;

(b) the execution and implementation of the Works shall be in conformance with the Design;

(c) the Works Equipment shall comply with Owner specifications;

(d) the execution and completion of the Works shall be in compliance with Approvals and Applicable Laws;

(e) all Works Material and Works Equipment shall be new and unused, and when completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Agreement or, where no such purpose is defined, fit for its ordinary purpose;

(f) the Works when completed shall be stable and fit for the purposes of the Project, and shall be undertaken in accordance with Best Industry Practice as being necessary for stability or for the completion, or safe and proper operation, of the Works;

(g) it shall identify and contract duly skilled personnel with the requisite experience for undertaking the Works;

(h) it shall comply with, and ensure the compliance by sub-contractors, of all Applicable Laws, including laws relating to the working conditions, site conditions, labour welfare, wages, etc., in force for the benefit of its personnel;

(i) it shall ensure that all the requisite equipment and documents specified in the Agreement, goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for the execution and completion of the Works and remedying of defects are provided.

3.4.3. The Works shall include any work which is specified or necessary to complete the Project.

3.4.4. PMC shall be responsible for ensuring the adequacy, stability and safety of all Site operations, of all methods of construction and of all the Works.

> *3.4.5. PMC shall, whenever required by the Owner, submit details of the arrangements and methods which PMC proposes to adopt for the execution of the Works. No significant alteration to these arrangements and methods shall be made without this having previously been approved by the Owner.''*

11. A reading of the above clause indicates that the agreement was drafted ambiguously as it is not clear as to who is the Contractor contemplated in clause 2.1.1.

12. Exhibit C.3 Agreement, dated 27.04.2016 was further amended by first amendment in Exhibit C.6, dated 06.12.2017, which has been referred hereinafter.

13. As per Exhibit C.3 Agreement dated 27.04.2016, the first respondent Mr.Ian Mellsop was appointed as a Project Management Consultant. As per clause 1.3, the scope of work read as under:-

> ''***1.3.SCOPE OF WORK***
>
> *The Owner hereby appoints the PMC as the project management consultant for (a) procurement of the Design (Appendix IV) and Works Equipment; (b)*

> *supervision of the Works in accordance with the terms of this Agreement; and (c) such as specialised services as set out in Appendix I in terms of the schedule for Completion of the Works set forth in Appendix II respectively.*

The Work was to be completed by 30th April, 2018.

14. Exhibits C.3 and C.4 both dated 27.04.2016 were amended by Exhibit C.6 **First Amendment to Agreement for Specialist Service** dated 06.12.2017 between the petitioner and the first respondent and Exhibit C.8 dated 06.12.2017 **First Amendment for Design Services and Supply of Equipment** between the petitioner and the second respondent, respectively.

15. In Exhibit C.6 First Amendment to Agreement for Specialist Service dated 06.12.2017 between the petitioner and the first respondent, it was stated that the provision of Exhibit C.3 Agreement dated 27.04.2016 shall, save as amended by clause 5 of the above said agreement dated 06.12.2017 in Exhibit C.6 First Amendment to Agreement for Specialist Service and subject to terms contained therein,

will continue in full force and effect.

16. Clause 5 of Exhibit C.6, dated 06.12.2017, reads as under:-

‘’***5. AMENDMENT TO THE PMC AGREEMENT***

5.1. New Clause 7.1.9 shall be introduced to the PMC Agreement follows:

"Notwithstanding anything contrary to anything contained in this Agreement, PMC agrees and acknowledges that to the extent any invoices raised by any third party under the Agreement (including but not limited to any suppliers, sub-contractors etc.) are assigned by the PMC to the Owner, such invoices shall be directly payable by the Owner to such third parties and the process set forth in sub- clauses 7.1.1 to 7.1.8 shall not be applicable. Further, the aggregate amount paid by the Owner pursuant to this Clause 7.1.9 shall be reduced from the total Fees payable to the PMC. It is further clarified that such invoices will have to be prior approved in writing by the PMC and the payment for such invoices shall be in accordance with the timelines specified therein or in the relevant purchase order. The Parties hereby agree to reconcile payment of such invoices to third parties on a periodical basis as may be mutually agreed between the Parties from time to time."

5.2. Clause 28 of the PMC Agreement shall stand amended in its entirety as follows:

> *"This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Each Party hereto will receive by delivery or facsimile transmission or e-mail transmission a duplicate original of the Agreement executed by each Party and each Party agrees that the delivery of the Agreement by facsimile transmission or e-mail transmission will be deemed an original of the Agreement so transmitted. The delivery of signed counterparts by facsimile transmission or electronic mail in 'portable document format' ('.pdf') shall be as effective as signing and delivering the counterpart in person."*

17. Similarly, Exhibit C.4 that was signed between the petitioner and the second respondent for Design Services and Supply of Equipment was amended by Exhibit C.8, First Amendment for Design Services and Supply of Equipment dated 06.12.2017 between the petitioner and the second respondent. Thus, Exhibit C.1 stood bifurcated into Exhibits C.3 and C.4, both dated 27.04.2016 which were amended by Exhibits C.6 and C.8, both dated 06.12.2017.

18. Exhibit C.7 dated 27.04.2016 was signed between the petitioner and the second respondent at the fag end of the period stipulated in Exhibit C.3, dated 27.04.2016.

19. The time for completion of work under Exhibit C.3 Agreement, dated 27.04.2016, signed between the petitioner and the first respondent as Project Management Consultant was to expire on 30.04.2018. Under Exhibit C.7, dated 27.04.2016, it was agreed that the payment of amount of US$ 2,500,000 as per clause 6.6 of Exhibit C.4, dated 27.04.2016, will be deferred for five years and payment will commence on final supply of equipment for the value of **US$ 2,500,000** by the second respondent to the petitioner.

20. Relevant clauses reads as under:-

Clause 1	Clause 2
Subject to Applicable Laws, the parties agree and acknowledge that the payment of the Deferred Fee Amount shall be subject to a 5 (Five) year delayed payment. The payment of the Deferred Fee Amount will commence on the final supplies of Equipment of the value of US$ 2,500,000 by AQESS to the Owner.	Subject to Applicable Laws, the Owner will pay the Deferred Fee Amount not later than 8 (eight) years from the Commissioning of the Project. The Owner will not be liable to pay interest on the Deferred Fee Amount for the first four years from the Commissioning of the Project, and will be liable to pay interest at the rate of 5% p.a. on

	the amounts outstanding on the Deferred Fee Amount from the fifth year until repayment of the amount outstanding from the Deferred Fee Amount.

21. It appears that the petitioner had nominated it's Director Mr.V.G.P.Ravidas under Exhibit C.3, dated 27.04.2016. There were fiction at site on account of the decisions taken by the petitioner's Director Mr.V.G.P.Ravidas. A criminal complaint thus came to be lodged by the first respondent Mr.Ian Mellsop against Mr.V.G.P.Ravidas, which was registered in Crime No.1428 of 2018, by the Neelankarai Police Station [Exhibit C.14, dated 17.09.2018].

22. This has led to a counter complaint by the petitioner against the first respondent namely, Mr.Ian Mellsop in Crime No.1435 of 2018 [Exhibit C.16, dated 18.09.2018]. These have also led to proceedings before this Court in Exhibits C.17 to C.20, as detailed below:-

Sl.No.	Exhibit No.	Date	Description
1	C17	20.09.2018	Intervener Petition filed by the 1st respondent in Crl.O.P.No.22551 of 2018, High Court, Madras.

2	C18	10.10.2018	Crl.O.P.No.26120 of 2018 filed by the 1st respondent, High Court, Madras.
3	C19	21.11.2018	Counter affidavit filed on behalf of the petitioner
4	C20	28.11.2018	Order passed by the Madras High Court in Crl.O.P.No.26120 of 2018.

23. In this background, the petitioner terminated the arrangement in Exhibit C.3 Agreement, dated 27.04.2016 by Exhibit C.27, dated 23.11.2018 and by Exhibit C.31 dated 04.01.2019, whereby the petitioner nominated Hon'ble Mr.Justice P.Jyothimani, a former Judge of this Court, its Arbitrator.

24. The respondent, in turn, nominated Hon'ble Mr.Justice K.Chandru, a former Judge of this Court, vide Exhibit C.29, Reply dated 27.11.2018. By the above said Reply, the first respondent as the Managing Director of the second respondent Company denied the allegations contained in Exhibit C.27, dated 23.11.2018.

25. By Exhibit C.30 Notice, the second respondent represented by

the first respondent specifically terminated the obligations under the following documents:-

Sl.No.	Exhibit	Date	Description
1	C3	27.04.2016	Agreement between the petitioner and the 1st respondent
2	C6	06.12.2017	First amendment to the agreement for Specialist Service between the petitioner and the 1st respondent
3	C4	27.04.2016	Agreement between the petitioner and Aqees Limited [2nd respondent herein] for design services and supply of equipment
4	C8	06.12.2017	First amendment to the agreement for design services and supply of equipment between the petitioner and the 2nd respondent
5	C7	27.04.2016	Binding MoU between the petitioner and the 2nd respondent
6	C9	06.12.2017	Amended Binding MoU between the petitioner and the 2nd respondent
7	C11	28.05.2018	Addendum Agreement between the petitioner, V.G.P. Housing Pvt. Ltd. Ian Mellsop, Mainescape PM Ltd. and Aqees Ltd.

26. It is in this background, the Arbitral Tribunal has proceeded to pass the impugned award.

27. The petitioner claimed the following reliefs before the Arbitral Tribunal against the respondents:-

‘’ *(i) To pay a sum of Rs.2.28 million USD with interest at 18% per annum representing the sum said to have been paid by the claimant for import of equipments;*

(ii) To pay 2,95,000 USD said to have been paid to the Respondents, pursuant to the Addendum Agreement;

(iii) To pay damages at the rate of 4 crores per month commencing from 01.09.2018, till date of commissioning of the project;

(iv) To handover all the Designs, Drawings and Warranties or in the alternative refund 1,840,000 USD said to have been paid by the Claimant for Designs, Drawings and Warranties;

(v) To pay the additional cost to be incurred, to complete the project;

(vi) Award the costs and pass such further or other orders, as may be required."

28. A counter-claim was made by the respondents as against the petitioner before the Arbitral Tribunal. Details of the counter-claim are as under:-

“*(i) A sum of 405,000 USD, said to be due to Respondents by way of balance payable under the*

Addendum Agreement dated 28.05.2018, by the Claimant with interest at 18% per annum from 15.09.2018 till date of payment;

(ii) A sum of (Total to be calculated) in respect of items (a) to (j) as enumerated in paragraph 93 (as counter claim no:2) and for return of articles said to have been illegally retained by the Claimant or their value;

(iii) A sum of 1,250,000 USD, which was said to have been given erroneously as concession, said to have been got by the Claimant under misrepresentation of facts;

(iv) A sum of 92060 USD, said to be the amount incurred by the Respondent to pay one Gergard Beukes engaged by the Respondent in respect of the project, with interest at 18% per annum from 15.09.2018, till date of repayment said to have been constituted;

(v) A sum of 1,612,312 USD towards damages by way of compensation for loss of profit at 10% of the contract value for the breach said to have been committed by the claimant of the contract, entered into between parties, relying upon the decision of the Supreme Court reported in AIR 1984 SC 1703; A.T. Brij Paul Singh and others Vs. State of Gujarat.

(vi) A sum of 10,000,000 USD towards breach of agreement and damages for loss of the reputation of the Respondent, for maligning and defaming the respondents."

29. The Arbitral Tribunal had framed the following issues:-

"(1) What are the essential terms, conditions and mutual duties and obligations of the parties on either side under the various agreements Ex.C1 to C11, executed constituting and governing the contract for construction, supervision, maintenance and operation of the "Under water Aquarium" entered into between the claimant on the one side and the Respondent(s) on the other side?

(2) What are the causes, reasons, factors and events which contributed to the delay, deficiencies and defaults in the execution and completion, of the project in question as envisaged under the contract comprised in the various agreements entered into between the parties?

(3) Which are of the parties who contributed for the delay deficiencies, defaults and breaches and extent and proportion which they contributed to the failure in the successful completion & implementation of the project undertaken in this case?

(4) Whether the termination of the contract by the claimant is justified or warranted and factually or legally sustainable; if not what consequences follows and to what extent the claimant is answerable for the same?

(5) Whether the Respondent is justified in suspending the execution of works and is justified or warranted and factually or legally justified in terminating the contract and abandoning the execution of the project?

(6) Whether the claimant is entitled to all or any of the claims-1 to 6 or to any one or the other of the reliefs as prayed for in para-43 of Statement of Claim, filed in this proceeding and if so to what extent thereof?

(7) Whether the engagement of Polin Aquariums by the Claimant amounts to violation of the intellectual property rights of the Respondents?

(8) Whether the respondents are liable to pay the additional cost incurred by the claimant by engaging M/s Polin Aquarium, Turkey to complete the project?

(9) Whether, as per the report of the Claimant's appointed expert viz., Aquatherm Engineering Consultants Pvt. Ltd., the project was completed up to 75% in September 2017 itself? Whether and to what extent the project was completed by the Respondents up to 15.09.2018?

(10) Whether the Respondent is entitled to all or any of the Counter Claims-1 to 6 and any one or other of the reliefs claimed in para-94 of the Common Counter Statement & Counter Claims and if so to what extent thereof?

(11) Whether the parties on either side are entitled to interest on the amounts claimed or that may be awarded and if so at what rate and for what period?

(12) To what any other reliefs, if any, the parties on either side are entitled to, including the relief as to costs

of these Arbitration proceedings?"

30. **The submissions of the petitioner**:-

(i) The petitioner is a Company incorporated in India under the Companies Act. Respondents 2 and 3 are the Companies incorporated in New Zealand. The Agreement between the petitioner and respondents relate to construction of an underwater Aquarium in East Coast Road, Chennai.

(ii) The award under challenge is an award under "international commercial arbitration" within the meaning of Section 2(f) of the Arbitration and Conciliation Act, 1996. Exhibit C.1 dated 27.07.2012 is an agreement for **Agreement for the Design and Supply of General Construction and Specialist Equipment, Commissioning and Ongoing Management Services** on Turnkey basis for the Aquarium in Chennai, India.

(iii) Under the said Agreement, the design, supply of equipment, construction, import of machineries etc. was the responsibility of the third respondent herein formerly, Marinescape Construction Chennai Limited [presently, Aqess Limited]. Advance amount was to be paid in US$ either under the heading Design Service or Import of Equipments.

(iv) Exhibit C.1 dated 27.07.2012 was replaced by two agreements:-

(a) Exhibit C.3 – Agreement dated 27.04.2016 between the petitioner and the 2nd respondent for supervision, co-ordination, management, construction and commissioning of the project namely Underwater Aquarium.

(b) Exhibit C.4 – Agreement dated 27.04.2016 between the petitioner and the 3rd respondent Aqees Limited [formerly, Marinescape Construction Chennai Limited] for Design Services and Supply of Equipment.

(v) The project is a Turnkey Project. The petitioner was responsible only for obtaining the necessary building plan approval from Chennai Metropolitan Development Authority relating to the Project. Clause 6.2 of Exhibit C.3 dated 27.04.2016 specifically states that the PMC acknowledges that the completion of the Agreement and the commission of the Project on or prior to the completion date was of the essence of the contract.

(vi) The completion date was 30.04.2018. Under Clause 1.3 of Exhibit C.3, dated 27.04.2016 the scope of the work is detailed. The 2nd respondent should (a) procure the design (Appendix IV) and works equipment and (b) Supervision of the work in accordance with the Agreement and (c) such as specialized services as set out in Appendix -I in terms of the schedule for the completion of the work set forth in Appendix - II.

(vii) The responsibilities and obligations of the 2nd respondent are detailed in Clause 3.4. Clause 3.4 (i) provides that PMC, 2nd respondent shall ensure that all the requisite equipment and documents specified in the agreement are provided. Thus, respondents 2 and 3 are interconnected. The 1st respondent has been managing and controlling of respondents 2 and 3.

(viii) On account of breach of the terms of contract by the respondents Exhibit C.3 was amended by Exhibit C.6 dated 06.12.2017 and Exhibit C.4 was amended by Exhibit C.8 dated 06.12.2017 a dispute arose. Under Clause 5 of Exhibit C.8, the parties expressly agreed that the fee payable by the Owner to the 3rd respondent Aqess Limited for (1) provision of Design Services shall be US$ 6,140,000 (United States Dollars Six Million One Hundred and Forty Thousand only) and (ii) supply of equipment as listed in Appendix I and the fish listed in Appendix V shall be US$ 2,300,000 (United States Dollars Two Million and Three Hundred Thousand only).

(ix) The total amount paid for import of design is USD 18,40,000. Thus, no amount is due from the petitioner to the 3rd respondent in respect of import of design service.

(x) The total amount paid as advance for import of specialized equipment was USD 2.28 Million as per Exhibit C.23 Series.

(xi) The Addendum Agreement namely, Exhibit C.11 dated 28.05.2018 was entered into extending the period for commissioning of the Project up to 30.08.2018, the revised commissioning date. Paragraph 5 of Exhibit C.11 contained responsibilities of the petitioner and the respondents. The payment mechanism is stipulated under Clause 5(c). The petitioner should pay USD 700,000 to the respondents under the PMC

Agreement in the manner set out thereunder. Clause 5 (e) of the Agreement provides for corporate guarantee for USD 700,000. Marinescape failed to complete the Project in terms of Clause 5(d).

(xii) A reading of Clauses 6 and 7 of the Addendum Agreement would show that the Agreement is subject to compliance with the requirements of applicable laws and the parties agree to structure the understanding in the Addendum Agreement in accordance with the applicable law requirements.

(xiii) The respondents however failed to complete the project in terms of the revised date of commissioning of the Project namely, **30.08.2018**. It is submitted that there was no agreement for extending the time for completion of the Project beyond 30.08.2018.

(xiv) The respondents deliberately violated Clause 5(d) (i) to (iv) of Exhibit C.11. The respondents did not submit the Bill of Quantities as per Annexure to the said agreement.

(xv) The petitioner hoping that the respondents would complete the Project allowed them to execute the work beyond 30.08.2018. However, in and by Exhibit C.12 dated 13.09.2018, the respondents suspended the work. Consequently, vide Exhibit C.13 dated 14.09.2018, the petitioner required the respondents to vacate the premises.

(xvi) It is not in dispute that there was no further agreement extending the work beyond 30.08.2018. Question of suspension of work will arise only if the contract subsists. Assuming that the contract subsists, variations, delays and suspension of work was governed by Clause 6 of Exhibit C.3 PMC Agreement dated 27.04.2016. Clause 6 of PMC Agreement dated 27.04.2016 provides for liquidated damages for delay in completion of the work by PMC. Clause 6.3 of the PMC Agreement dated 27.04.2016 deals with delays by the petitioner. Clause 7.4 of Exhibit C.3 PMC Agreement dated 27.04.2016 deals with suspension of work. Clause 16.8 of Exhibit C.3 deals with termination by owner. Clause 17 of PMC Agreement dated 27.04.2016 deals with termination by the 2nd respondent.

(xvii) If there is prolonged suspension, the Agreement stands terminated and neither party shall be liable to the other party for any loss or claim except for payments due under Appendix III of Exhibit C.3 PMC Agreement dated 27.04.2016. Under Exhibit C.27 dated 23.11.2018, the petitioner terminated the contract. Under Exhibit C.30, the respondent terminated the Agreement. The consequences of termination and rights and liabilities are stipulated in Clause 16.2 and Clause 17 of the said Agreement. Respondents have no right to remain in the site and create any problem.

(xviii) The 2nd respondent is governed by Clause 16.2.3 of Exhibit C.3 PMC Agreement dated 27.04.2016. The 2nd respondent should deliver all documents and other documents relating to the Project made by or for the PMC to the Owner. After termination, the petitioner as Owner was entitled to complete the work. In the case of termination by the 2nd respondent, the obligation of the 2nd respondent is detailed in Clause 17.2.1. All the project documents, materials and other work for which PMC has received payment should be handed over to the petitioner.

(xix) Similarly, under Exhibit C.4 Agreement dated 27.04.2016 in the event of termination of the agreement or revocation of license by 3rd respondent Clause 9.3.9 will apply. Under Clause 9.3.9(b) of Agreement dated 27.04.2016, it is stated that in the event that the Agreement is terminated but the project has been substantially completed, the owner is entitled to a license/assignment of rights as referred to in Clauses 9.3.1 and 9.3.2 in respect of any document for which the owner has already fully paid the third respondent Aqess Limited. No payment is due towards import of design service to the third respondent Aqees Limited.

(xx) Counter Claim No.2 for return of the articles left by the respondents is untenable. The respondents have no right to remain in the premises and cause mischief. In the rejoinder to the claim, the petitioner has clearly stated in Paragraph 19 that the first respondent - Ian Mellsop was free to remove all his belongings which were in the leased premises. There is no justification for passing an award against the petitioner in respect of Counter Claim No.2. It is for the respondent to remove his belongings. The first respondent has not removed the articles till date.

31. On behalf of the petitioner, Mr.V.G.P.Ravidas was examined before the Arbitral Tribunal as C.W.1 through whom Exhibits C.1 to C.36 were marked. On behalf of the respondents, first respondent was examined as R.W.1 through whom Exhibits R.1 to R.45 were marked.

32. **Legal submissions of the petitioner:-**

(i) Only Court competent to entertain the petition under Section 34 of the Arbitration and Conciliation Act is the High Court in view of Section 2(1)(e)(ii) of the said Act.

(ii) Clause 14 of the Agreement refers to Disputes and Arbitration. Clause 9.3.8 states that notwithstanding Clause 14, but subject to Clause 14.2 and 14.3, Courts in New Zealand shall have exclusive jurisdiction with respect of ownership of design documents. Clauses 14.1 to 14.4.5 make it clear that dispute concerning Clause 9.3.9(b) is to be adjudicated only by Arbitration at Chennai and not otherwise.

(iii) Claim No.1 is for return of the money paid under Exhibit C.23 series for import of specialized equipments. The invoices were raised by respondents for Design Service and for Import of Specialized Equipments as provided for in the Agreements. Advance remittance was made for Import of Design Service and Import of Specialized Equipments based upon Invoices raised by respondents 2 and 3. Import of Specialized Equipment is governed by Section 2(e) (I) of the Foreign Trade

Development and Regulation Act, 1992. Import of Design Service is governed by Section 2 (e) (II). Contravention of the provisions of the Foreign Trade Development and Regulation Act is dealt with in Section 11. No import or export shall be made except in accordance with Section 11(1). Section 11(2) deals with penalty for contravention of the Act.

(iv) Foreign Exchange transactions are governed by Foreign Exchange Management Act, 1999. Under Section 2 (p) of the Foreign Exchange Management Act, import is defined as bringing into India any goods or services. Regulation and Management of Foreign Exchange is governed by Chapter II Realization and Repatriation of Foreign Exchange is dealt with under Section 8 of the Act. Contravention and Penalty is dealt with in Chapter IV of the Act.

(v) Claim No.1 for repayment of USD 2.8 Million is rejected on the ground that the payment is for Design Service and not for Import of Machinery. This is contrary to Exhibits C.3, C.4, C.6 and C.8. The amounts payable for Project Management, Import of Machinery and Import of Design Service are separately dealt with. The first amendment to the Design Agreement namely, Exhibit C.8 specifically quantifies the amount for Design Service and Supply of Equipment. Clauses 6 and 7 of the Addendum Agreement specifically stipulate that the Addendum Agreement is subject to the applicable laws (Applicable Laws are specifically mentioned as Indian Laws vide, Clause 20.1 of Exhibit C.3). The applicable law for Project Management Agreement and Import of Design and Import of Specialized Equipment is the Indian Law and the place of Arbitration is Chennai, India. The Award is contrary to the Foreign Trade Development and Regulation Act and the Foreign Exchange Management Act insofar as it relates to Claim No.1. Further, the Arbitrators cannot ignore the order passed by this Court in Crl.O.P.No.26120 of 2018 dated 10.10.2018 Exhibit C.18.

(vi) Claim No.5 is based upon payment of entire sum payable under the Import of Design Service and the liability of the respondents to handover all the documents for which payments have been already made as per Clause 6.3.1 (d), Clause 7.6.1, Clause 16.2.3 and 17.2.1. Clause 14 of Exhibit C.4 deals with disputes and arbitration. Clause 9.3.8 states that notwithstanding Clause 14 but subject to Clause 14.2 and 14.3 Courts at New Zealand shall have jurisdiction with respect to claims arising under

Clause 9.3. The petitioner is not claiming ownership of documents. The petitioner is claiming rights under Clause 9.3.9 (b) which is arbitrable under Clause 14.1 to 14.4.5. Therefore, rejection of the claim is contrary to the terms of the agreement between the claimant and respondents 2 and 3.

(vii) Counter Claim No.5 for damages for breach of contract. Suspension or the agreement, termination of agreement are specifically dealt with under the agreement and the respondents are not entitled for any damages other than monies due under the respective clauses. Therefore, award of USD 52,500 in favour of the respondents is contrary to the terms of the agreement. The award is thus contrary to the provisions of the Indian Contract Act.

(viii) In Re Section 34 of the Arbitration and Conciliation Act, it is submitted as follows:

> (a) The judgment of the Hon'ble Supreme Court in **Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.,** 2003 (5) SCC 705, was prior to the amendment of Section 34 and Section 48 of the

Arbitration and Conciliation Act, 1996. In Paragraph 4 of the judgment, Section 34 as it stood prior to the amendment of Section 34 by Arbitration and Conciliation (Amendment) Act, 2015 has been extracted. Relying upon the various provisions of the Act the Hon'ble Supreme Court construed the meaning of the phrase "Public Policy of India". The Hon'ble Supreme Court held that an award could be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal.

(b) The judgment rendered by the Hon'ble Supreme Court in **Associate Builders vs. Delhi Development Authority**, 2015 (3) SCC 49, is a case arising before the amendment of Section 34. The Hon'ble Supreme Court referred to the judgment in **Oil and Natural Gas Corporation Ltd. case** [cited supra] and held that the award could be set aside if the award is contrary to public policy, fundamental policy of

Indian Law or interest of India or justice or morality etc. Further, the Hon'ble Supreme Court held that an award could be set aside if it is in contravention of the provisions of Foreign Exchange Regulations Act.

(c) The judgment rendered by the Hon'ble Supreme Court in **Ssangyong Engineering and Construction Company Ltd., vs. National Highways Authority of India (NHAI)**, 2019 (15) SCC 131, deals with Section 34 and Section 48 after the Arbitration and Conciliation Amendment Act, 2015. Paragraph 26 of the said judgment refers to the Law Commission Report for setting aside domestic awards and recognition or enforcement of foreign awards. Paragraph 27 deals with the amendment of Section 28, Paragraph 28 deals with amendment of Section 34 and Paragraph 29 deals with amendment of Section 48. Paragraph 30 of the judgment deals with 246th Report of the Law Commission and refers to introduction of 34 (2-A). In Paragraph 34 of the judgment the Hon'ble Supreme

Court has held that the expression "public policy of India" whether contained in Section 34 or in Section 48, would now mean the fundamental policy of Indian Law as explained in paragraphs 18 and 27 of the judgment in **Renusagar Power Co. Ltd. vs. General Electric Co.,** 1994 Supp (I) SCC 644.

(d) **Renusagar Power Co. Ltd. case** [cited supra] relied upon by the Hon'ble Supreme Court for interpreting Section 34 deals with the issue of Public Policy under the Foreign Awards Recognition and Enforcement Act, 1961. The Hon'ble Supreme Court has held that a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of India Law or (ii) the interest of India or (iii) justice or morality. The Hon'ble Supreme Court further held that an award would be contrary to public policy if it involves contravention of provisions of FERA.

(e) In **Dyna Technologies Private Limited vs.**

Crompton Greaves Limited, 2019 (20) SCC 1, the Hon'ble Supreme Court modified the award on the finding that the award was contrary to the terms of the contract.

(f) In **State of Haryana vs. Shiv Shankar Construction Company and another,** 2022 (3) SCC 109, the Hon'ble Supreme Court has held that an award cannot be contrary to the contract and the Tribunal has no power to pass any order contrary to the contract. It is wholly impermissible and construed to be perverse.

(ix) The learned Arbitrators cannot pass an award in contravention of fundamental policy of Indian Law. No award can be passed contrary to Foreign Trade Development and Regulation Act, 1992, the Foreign Exchange Management Act, 1999 and the Indian Contract Act, 1923. The award is in contravention of the fundamental policy of Indian Law and is in conflict with the basic notions of justice. Therefore, the award may be set aside.

33. **The submissions of the respondents**:-

(i) The first respondent is not a party to the arbitration proceedings at all and has been wrongly shown as a respondent in the Arbitral Proceeding and the petitioner is wrongfully taking advantage of the same by pointing out this fact. The entire pleadings and the proceedings would show that the first respondent is not a party in the arbitral proceedings in his individual capacity and the arbitration was conducted only against the respondents 2 and 3 herein. Therefore, the award purportedly passed against the first respondent must be set aside *in limine*.

(ii) The respondents 2 and 3 further submitted that two agreements namely, the PMC Agreement and the Design Services and Supply of Specialist Equipment Agreement together with the Binding MoU were entered into by the petitioner with the respondents 2 and 3 for construction of Aquarium at ECR, Chennai, in November, 2016 vide Exhibits C.3 and C.4 dated 27.04.2016 but the Agreements were pre-dated to the month of April, 2016. The respondents 2 and 3 submitted that the discussions on these Agreements and terms thereof went on till

November, 2016.

(iii) The Design Services Agreement (hereinafter referred to as the "Aqess Agreement") was first signed in the first week of November, 2016, since the first respondent had to leave for New Zealand immediately after signing the Agreement. The petitioner did not fill in the date of this Agreement and informed that a suitable date will be written after discussing with the consultants. Thereafter, the second Agreement with petitioner (hereinafter referred to as the "PMC Agreement") was signed. It was only then that the respondents 2 and 3 came to know that both the Agreements have been pre-dated to 27.04.2016. In fact, it will be clear from a reading of the Agreement and correspondence that both these Agreements could not have been signed on the dates mentioned therein.

(iv) The respondents 2 and 3 submitted that before proceeding further, it is important to place the importance of the Aquarium design work. If the concept, design and supervision of the construction are not carried out correctly, then the Project will almost certainly fail.

(v) The respondents 2 and 3 state that the petitioner not only kept changing the design but also the terms of payment and made the respondents 2 and 3 to alter the invoices raised for the design payments into invoices for equipment supply and later, distorted the whole story to allege that the respondents 2 and 3 had cheated and failed to supply the equipment.

(vi) The respondents 2 and 3 submitted that after getting the sanction of the funding from the Syndicate Bank in 2016, the petitioner suddenly and arbitrarily wanted to reduce the scope of the contract by reducing the size of the Project. The revised cost of the Project worked out to about USD 13 Million as against the original cost of USD 15 Million. Considering all the above facts stated in the previous paragraphs regarding the design work, the sudden change in scope and size caused great disruption and enormous extra effort, time and costs to the respondents 1 and 2. This was not a simple matter and meant a complete redesign and delay in placing orders for all essential long lead items. The reduction in size exercise took an additional three months. But, it didn’t end there, as the petitioner Mr.Ravidas and his son Premdas continued to change the design on a weekly basis, on their whims and fancies, all of which are highlighted infra. The respondents 2 and 3 had committed themselves to the Project from 2011 onwards and there was no turning back for them. Therefore, they had no other option but to comply with the demands of the petitioner.

(vii) The respondents 2 and 3 submitted that in April-May, 2016, the petitioner's financial consultant, *viz*. Trans Corporate Advisory represented by Mr.S.Neelakantan and M.Jagadeesh advised the petitioner to split the Turnkey Contract into two components *viz*. for onshore services as a Project Management Consultancy Agreement and for off-shore services as a Design Services and Supply of Equipment Agreement. The said consultants advised MSCCL to form two separate Companies for the two Agreements and according to their advice, the second respondent Company was formed and the name of MSCCL was changed to Aqess Ltd with effect from May, 2016 after the exit of Kay Arnold from the Company. The ostensible reason for this splitting was for the petitioner's tax planning and compliance with local laws but on hindsight, the respondents 2 and 3 realise that it was for (a) taking away complete financial control from the respondents 2 and 3; (b) to divert the surplus money from the Bank loan to the petitioner's other group Companies; and (c) to circumvent service tax obligations.

(viii) The respondents 2 and 3 further submitted that commencing from 2012 onwards, since the petitioner had started working on the design of the Aquarium incurring huge expenditure, it was agreed under the 2012 Agreement that an advance of 20% of the project cost would be paid to the respondents 2 and 3 to cover the expenditure as well as payment of fees towards the design work. Accordingly, MSCCL presented their first Invoice No. MSCC_01 on 06.04.2016 (Exhibit R.6) so that they could have enough working capital to kick start the Project. It is submitted that at that point of time, the Petitioner had agreed that 20% Advance payment [originally 20% of USD15 m = 3,000,000] would be fixed at USD 2,515,000 after taking into account some ad-hoc small design payments made over the period 2012 to 2016 and also a deduction to adjust for the design fee that the petitioner had already paid to the VDM Group of Australia with whom they had an earlier agreement. Though such payments made to the Australian Company were not binding on MSSCL, as it was a *de novo* design prepared by MSCCL, it was agreed to accommodate the client's request in good faith. The respondents 2 and 3 submitted Invoice No.MSCC_001 dated 06.04.2016, for a total sum of USD 2,515,000.00.

(ix) It is submitted that in respect of the above Invoice dated

06.04.2016, Mr.VGP Ravidas, representing the petitioner, wrote an e-mail dated 23.05.2016, stating that the Invoice has to be submitted to the Bank as "Advance for Specialist Equipment" and the TDS (Tax deducted as Source) need not be applied for this Invoice and submit the same preferably before 27th May, 2016.

(x) It is submitted that believing the petitioner's representation that it was a requirement made by the Bank, the respondents 2 and 3 sent a revised invoice for USD 1,250,000.00 as requested by the petitioner.

(xi) It is submitted that the revised invoice was also not accepted by the petitioner who specifically wanted the amount to be mentioned as "Advance for Specialist Equipment" and wanted 3 different invoices to be raised under the same head splitting up the advance payable under the original invoice. It was in this manner that the three invoices enclosed by the petitioner came to be raised. The amounts paid under the 3 invoices were paid in the following manner, as evident from the aforesaid documents filed by the petitioner:-

(a) Amount due under Invoice No.MSCC_01 dated 23.05.2016 – USD 1,250,000.00, paid as follows:-

(i) USD 500,000.00 paid on 25.05.2016;

(ii) USD 500,000.00 paid on 01.06.2016; and

(iii) USD 250,000.00 paid on 07.06.2016;

(b) Amount due under Invoice No.MSCC_02, dated 11.06.2016. USD 1,000,000.00:-

(i) USD 500,000.00 paid on 29.06.2016; and

(ii) USD 500,000.00 paid on 15.07.2016;

(c) Amount due under Invoice No.MSCC_03, dated 29.09.2016 namely, USD 30,000.00 was paid on 30.01.2017.

(xii) It may thus be seen that the advances payable for the design services were asked to be stated as "advance for specialist equipment" by the petitioner under the pretext of meeting the requirement of the Bank and the petitioner is now distorting this to allege that the respondents 2 and 3 received money for the supply of the specialist equipment and failed to supply the same thereby cheating the petitioner. It is submitted further that the Advance Payment was a consolidated payment set up for the Project and such payment was distributed as appropriate to kick-start the works and not for any supply of equipment as alleged. The petitioner has now distorted the whole thing by taking advantage of his own wrong and is now alleging that the monies under the above invoices were paid as advance for supply of specialist equipment which was not supplied and thereby, the respondents 2 and 3 have cheated the petitioner.

(xiii) In the above context, it is submitted further that by falsely making a spurious claim that equipments have not been supplied under the impugned invoices, the petitioner has in effect appallingly and outrageously suppressed the following facts borne out clearly by records:

(a) that the payment envisaged under the impugned invoices were raised pursuant to the understanding arrived between the parties under the earlier agreement dated 27.07.2012;

(b) that the payment envisaged under the impugned invoices was raised for services pertaining to design work and not for any equipment supply in terms of the earlier agreement, though the invoices ostensibly refer to equipment supply at the behest of the petitioner;

(c) that it was the petitioner who requested the invoices to be raised for supply of equipments and therefore, the 2nd respondent was compelled to cancel the earlier invoice and raise the impugned invoices;

(d) that the petitioner has advised the 2nd respondent to change the invoice surreptitiously only to avoid service tax about which, the 2nd respondent was not informed and was in fact misguided by the advisers appointed by the petitioner (copies of the correspondence exchanged in this regard with the advisers was enclosed as Exhibit R.9 before the Arbitral Tribunal);

(e) that the parties never had any contract for supply of any equipment as specified under the impugned invoices at the point of time when the impugned invoices were raised;

(f) that in fact the Aqess Agreement, executed in the year 2016, itself recognises the payment of USD 2.5 million payable under the 2012 Agreement;

(g) that the petitioner has never ever sent any communication whatsoever requesting the 2nd respondent to supply the equipment as envisaged under the impugned invoices, which clearly substantiates the fact that the parties never intended supply of equipment under the impugned invoices;

(h) that in fact, the responsibility for purchase of the equipment was subsequently taken over by the petitioner; and

(i) that the petitioner has in fact told the 2nd respondent to "reconcile" the payments made under the impugned invoices towards design services as evidenced in the Minutes of the Meeting dated 14.07.2017 sent by Premdas under cover of his email dated 18.07.2017, in which the date of the attached minutes is incorrectly mentioned as 12.07.2017.

(xiv) The petitioner has suppressed the fact that the 2nd respondent had already placed commercial orders for the acrylic and paid some advance for the same. However, the procurement of acrylic was taken over by the petitioner as evidenced by the documents enclosed herewith as Exhibit R.11 before the Arbitral Tribunal.

(xv) The petitioner has deliberately and wilfully suppressed the entire line of correspondence exchanged in this regard. The respondents 2 and 3 state that all these facts, which are in support of the petitioner, are clearly substantiated through several communications and through the conduct of the petitioner and these acts of the petitioner are spread over a period of time across several months. On the contrary, by maliciously relying upon a single piece of evidence, *viz.* the impugned invoices, and distorting the same by suppressing facts and also by filing a criminal case, the respondent is abusing the process of law. In other words, the petitioner has committed wrongful act by seeking cancellation of original invoice and requesting the respondent to raise the impugned invoices and has thus become the very author of the impugned invoices. Now, by relying upon his own malicious act, the petitioner's representative Mr.Ravidas, is attempting to harass the respondents 2 and 3 herein.

(xvi) The respondents submit that petitioner had made similar and various false allegations against the respondent and wrongfully terminated contracts and wilfully interfered with the execution of the project which caused the delay in project commissioning. The details of which are found in the pleadings filed before the Arbitrator and the respondents do not want to repeat the same herein and craves the leave of this Tribunal to refer to and rely upon the same wherever necessary. This resulted in enormous loss for the respondents and eventually the parties agreed for arbitration as per the appointment procedure envisaged under the contract and the Arbitral Tribunal comprising three Arbitrators was appointed and the matter heard in detail after full trial.

(xvii) The petitioner's conduct is important and it clearly establishes the fact that the petitioner is deliberately lying and has no case on merits whatsoever. The petitioner is guilty of the following and had craved the leave of the Arbitral Tribunal to take into account while passing the award:-

> (a) The petitioner has suppressed the fact that the contract was signed only in November, 2016 and was ante-dated. The petitioner has suppressed the

same not only in the claim petition, but also in their reply. Further, C.W.1 also continued to not only suppress the above fact but also deliberately lied in testimony.

(b) Thus, by suppressing the above fact, the petitioner has deliberately misled the Tribunal that the payment of USD 2.28 Million was raised under 2016 Contract. Thus, by suppression they have altered and misrepresented contract mobilisation advance as equipment invoice.

(c) The petitioner has suppressed the fact that it was they who advised the respondents 2 and 3 to change the contents of the invoice and that the original invoice raised included fee for overall design as well as advance towards design fee for equipment supply.

(d) The petitioner has deliberately suppressed to explain the details of design fee payable at USD

6,140,000 design fee fixed under Exhibit C.8 agreed to be paid them under the contracts.

(e) The petitioner has also suppressed the fact that they took over the equipment supply portion of the contract directly from the respondents 2 and 3.

(f) By suppressing the above facts, the petitioner has falsely made up a case whereby they are actually reclaiming the design fee made to the petitioner in the garb of making a claim for equipment supply.

(g) By making such a false claim, the petitioner not only attempts to deprive the respondents 2 and 3 of the design fee already paid, they also attempt to make up a false case for defeating and scuttling the lawful liability towards Kay Ellen Arnold, who has invested her valuable hard earned money at the request of the respondents 2 and 3. Thus, by suppressing the truth the petitioner is trying to hit a double whammy.

(h) The petitioner has clearly suppressed that 23% of the acrylic was in fact supplied by the respondents 2 and 3. In fact, they have not only suppressed in the pleadings, but petitioner witness C.W.1 denied this fact, controverting admitted documents. C.W.1 has given evasive reply in cross examination while answering Question Nos.43 and 44 which relate to equipment supply. Further, C.W.1 has given a factually incorrect reply in answer to Question No.81 with regard to 23% acrylic supply.

(i) The petitioner has suppressed deliberately to inform the damage caused by the fire in the Aquarium and the extent of damage suffered. This is the material fact in order determine any claim.

(j) The petitioner has suppressed that the design drawings has been forwarded to them at every stage of the contract.

(k) The petitioner has further suppressed the fact that, at no point of time, the petitioner has ever demanded the supply of the equipment and it is clearly an afterthought to counter-blast the complaint filed by Ian Mellsop and to put up a concocted claim before the Tribunal.

(l) The petitioner has further failed to address any of the issues raised by the respondents 2 and 3 in their various letters, emails and meetings and acted in a most arbitrary and high-handed manner in throwing out the respondents 2 and 3 from the project site and then alleging that the respondents 2 and 3 have abandoned the project, which shows the *mala fide* manner in which the petitioner has dealt with the whole contract and the manifest intention of the petitioner to cheat and defraud the respondents 2 and 3.

(xviii) It is further submitted that evidence was let in by both parties and witnesses were cross examined. Thereafter, the matter was heard in detail and the Arbitral Tribunal dismissed the entire claim put forth by the petitioner and partially allowed the counter claim made by the respondents 2 and 3. The respondents 2 and 3 are aggrieved insofar it relates to the dismissal of the counter-claim and have filed a separate petition, which is yet to be numbered.

(xix) The Arbitral Tribunal had categorically dismissed the entire claim made by the petitioner in toto. Thus, the Arbitral Tribunal came to the right conclusion and dismissed the claims made by the petitioner under Issue Nos.1 to 7 and the petitioner has not made any ground under Section 34 of the Arbitration and Conciliation Act, warranting interference of this Court.

(xx) It is further submitted that the Arbitral Tribunal after detailed analysis and discussion has decreed that the claim made by the petitioner in respect of Issue No.9 is liable to be dismissed. It is submitted that Section 34 of the Arbitration and Conciliation Act provides the provisions of certain specific grounds on the basis of which an arbitral award rendered in India can be set aside. They are-

(a) Incapacity of a party while making an application to enter the agreement.

(b) Arbitration agreement not being valid under the law.

(c) Parties were not given proper notice of the appointed Arbitrators or the Arbitral Tribunal.

(d) Nature of dispute not capable of settlement by arbitration.

(e) Composition of the arbitral award was not in accordance with the agreement of parties.

(f) The Arbitral award is in the violation of the public policy of a State.

(g) The Arbitral award deals with a dispute not falling within the terms of submissions to an arbitration.

(xxi) It is submitted that the petitioner has not made out any of the above grounds. It is submitted that the observation and findings arrived by the Arbitral Tribunal would show that the Arbitral Tribunal has applied its mind in most judicious manner. The Tribunal has given succinct reasons and has implemented the terms of the contract in letter and spirit.

(xxii) The respondents further submitted that the first claim for a sum of USD 2.28 Million made by the petitioner relating to alleged supply of equipment is untenable in the light of the facts that have emerged during trial which have been taken into consideration by the Arbitral Tribunal in rejecting the claim made by the petitioner.

(xxiii) It is further submitted that the petitioner has not submitted any fact to rebut to the finding given by the Arbitral Tribunal that the payment of USD.2.28 was not raised for supply of equipments and that the same is an account payment which is not liable to be repaid.

(xxiv) It is also submitted that Section 34 of the Arbitration and Conciliation Act, 1996 has a narrow scope *i.e.,* the grounds on which the award can be set aside is limited. It is submitted that the spirit of arbitration, *i.e.,* minimum interference of the Courts are manifested under Section 34 of the Act. The petitioner has not made out any grounds for intervention of this Court and therefore, the learned counsel prayed for dismissal of the Petition.

34. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondents. I have gone through the impugned award dated 19.01.2020, passed by the Arbitral Tribunal. I have also perused the Exhibits that were marked before the Arbitral Tribunal and the claim of the petitioner and counter-claim of the respondents.

35. As mentioned above, the Tribunal has framed 12 issues in respect of six claims of the petitioner and six counter-claims of the respondents.

36. The scope of enquiry under Section 34 of the Arbitration and Conciliation Act, 1996 are limited. This Court can neither sit as a court of appeal or re-appreciate the evidence placed before the Arbitral Tribunal or substitute the finding of the Arbitral Tribunal with its own conclusion on facts or evidence.

37. In this connection, the attention to the decision of the Hon'ble Supreme Court in **The Project Director, NHAI vs. M. Hakim,** (2021) 9

SCC 1, is invited, wherein it was held that the power to set aside an Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996 does not include the authority to modify the award. It further held that an award can be 'set aside' only on limited grounds as specified in Section 34 of the Act and it is not an appellate provision. It further held that an application under Section 34 for setting aside an award does not entail any challenge on merits to an award.

38. The Hon'ble Supreme Court in **Ssangyong Engineering and Construction Co Ltd vs. National Highway Authority of India,** (2019) 15 SCC 131, has held that an award can be set aside on the ground of patent illegality under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996 only where the illegality in the award goes to the root of the matter. It further held that **erroneous application of law by an Arbitral Tribunal** or the re-appreciation of evidence by the Court under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996 is not available.

39. The Hon'ble Supreme Court held that the above ground is

available only where the view taken by the Arbitral Tribunal is an impossible view while construing the contract between the parties or where the award of the Tribunal lacks any reasons. The Hon'ble Supreme Court further held that an award can be set aside only if an Arbitrator/Arbitral Tribunal decide(s) the question beyond the contract or beyond the terms of reference or if the finding arrived by the Arbitral Tribunal is based on no evidence or ignoring vital evidence or is based on documents taken as evidence without notice to the parties.

40. The Hon'ble Supreme Court in **Patel Engineering Ltd vs**. **NEEPCO**, (2020) 7 SCC 167, held that patent illegality as a ground for setting aside an award is available only if the decision of the Arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same or the construction of the contract is such that no fair or reasonable person would take or that the view of the Arbitrator is not even a possible view.

41. The Hon'ble Supreme Court in **McDermott International Inc. vs. Burn Standard Co. Ltd,** (2006) 11 SCC 181, held that while interpreting the terms of a contract, the conduct of parties and

correspondences exchanged would also be relevant factors and it is well within the arbitrator's jurisdiction to consider the same.

42. The Hon'ble Supreme Court in **Sutlej Construction Ltd. vs. UT of Chandigarh** (2018) 1 SCC 718, held that when the award is a reasoned one and the view taken is plausible, re-appreciation of evidence is not allowed while dealing with the challenge to an award under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an award.

43. The Hon'ble Supreme Court in **Sheladia Associates Inc. vs. TN Road Sector Project II, Represented by its Project Director,** 2019 SCC OnLine Mad 17883, reminded itself of the Hodgkinson Principle which has been explained by the Hon'ble Supreme Court in the oft-quoted and celebrated Associate Builders Case being **Associate Builders vs. Delhi Development Authority**, (2015) 3 SCC 49. It held that Hodgkinson Principle in simple terms means that the Arbitral Tribunal is the best Judge with regard to quality and quantity of evidence before it. It further held that if there is no infraction of Section 28(3) of the Arbitration and Conciliation Act, 1996 the question of challenge on the

grounds of public policy does not arise.

44. In the facts of the case, what is evident is that the relationship between the petitioner and the respondents started in the year 2012 with the execution of **Exhibit C.1** Construction Agreement **dated 27.07.2012** between the petitioner and the third respondent [formerly Marinescape Construction Chennai Ltd.]. The agreement has been titled ''Agreement for the Design and Supply of General Construction and Specialist Services and Equipment Commissioning and Ongoing Management Services on a Turnkey basis for an Aquarium in Chennai''. The said Agreement was complimented with **Exhibit C.2**, Share Subscription Agreement and Share Holders Agreement, **dated 27.07.2012**, signed between the petitioner and VGP Housing Private Limited and Marinescape Properties India Limited. As mentioned elsewhere, this Agreement was modified by **Exhibit C.10**, dated **06.12.2017**.

45. **Exhibit C.1** Construction Agreement dated **27.07.2012** was replaced by Exhibits C.3 and C.4 Agreements dated 27.04.2016. Content of which has been explained in the beginning of this order. Thus, there

was substitution of the Agreement between the parties. **Exhibit C.1** dated **27.07.2012** with Exhibits C.3 and C.4 both dated 27.04.2016. The arrangement in **Exhibits C.3 and C.4** both dated 27.04.2016 further stood modified by **Exhibits C.6, C.7, C.8** and **C.9** Agreement and Memorandum of Understanding. Exhibit C.2 stood modified by Exhibit C.10. However, the fact remains that several factors contributed to the delay. The parties arrived at a final agreement in **Exhibit C.11**, dated **28.05.2018**. This agreement was signed between the petitioner, V.G.P. Housing Private Ltd. on the one side and the respondents on the other side. Thus, Exhibit C.11 resulted in a new agreement substituting the old agreement.

46. All the liabilities under the old Agreement stood extinguished and revived only in terms of **Exhibit C.11**, dated **28.05.2018**. The claim of the petitioner for a sum of **USD 2,280,000** pertains to amounts paid against the following invoices in **Exhibit C.23** series:-

Exhibit C.23 Invoice series			Payment		
Date	Amount	Page No.	Date	Amount	Page No.
23.05.2016	1,250,000	679	25.05.2016	5,00,000	680
11.06.2016	1,000,000	683	01.06.2016	5,00,000	681

29.08.2016	30,000	686	07.06.2016	2,50,000	682
Total	2,280,000		Total	1,250,000	
			29.06.2016	5,00,000	684
			15.07.2016	5,00,000	685
			Grand Total	2,250,000	

47. According to the petitioner, the petitioner has paid the amounts without actual supply of the equipments by the respondents and therefore, the payments that have been made by the petitioner for USD 2,250,000 on the following dates is to be paid back, as there was no supply. It is the case of the petitioner that in the absence of import of the equipments on the strength of invoices in Exhibit C.23 series ought to have been ordered to be paid back and since, the Arbitral Tribunal has rejected Claim No.1 for USD 2,280,000. The Award is liable to be set aside on the ground of it being a violation of Section 34(2)(b)(ii) Explanation - 1 (2) of the Arbitration and Conciliation Act, 1996.

48. On the other hand, it was the case of the respondent that the amount that was paid by the respondent on various dates starting from 25.05.2016 and ending with 15.07.2016 for a total a sum of USD

2,250,000 and was against the mobilization amount under **Exhibit R.6** dated **06.04.2016**, for a sum of **USD 2,515,000**. The Arbitral Tribunal has accepted the contention of the respondents and rejected the claim of the petitioner for USD 2,280,000 also said to have been paid by the petitioner to the respondents against **Exhibit C.23 invoice series**. This is a finding of fact which cannot be altered under Section 34 of the Arbitration and Conciliation Act, 1996.

49. The defence of the respondent was that Exhibit R.6, invoice dated 06.04.2016 was a pure advance for contract mobilization under Clause 1.1.25 of Exhibit C.1 Construction Agreement, dated 27.07.2012. The Arbitral Tribunal has ultimately concluded as follows:-

> ''*58. We have carefully considered the submissions of the Learned counsel on either side and-it appears that both in the Statement of claim, rejoinder, the proof affidavit of CWI as well as the written submissions, the claimant has chosen to conspicuously avoid to either referred to or deal with the entire gamut of relevant and vital facts, the various stages of different agreements, the events which transpired in their inter-se relationship of parties, the minutes of meeting held between them to clear hiccups now and then, culminating in Ex C11 dated 28.05.2018, which almost settled all the differences among the parties, besides clearly specifying the works*

to be completed and the time limit within which it has to be completed and the payment mechanism, which in our view also settled finally, once and for all, the payments which alone need be paid by each of them to the other as well as the timing of such payments.

59. The contents of the above referred to documents disclose that the sum referred to in claim no.1 is not for supply of any equipments or materials. The claimant therefore cannot make any claim for any other payments from the Respondents, other than those that are specified in the Addendum Agreement Ex.C11. The contents of Ex.C11 also disclose that, it did not leave any past differences, disparities and disputes and monetary claims among them unsettled. Consequently, any grievances or disputes between the parties could be only those which could arise or arose post execution of Ex C11, and in respect of those provided for therein and not in respect of the previous lapses, default or claims and disputes. Consequently, in our considered opinion the claimant is not entitled to the amount claimed as claim No.1, and the same is rejected and dismissed.''

50. In other words, the Arbitral Tribunal has found that there was no dispute between the petitioner and the respondents regarding the payments made prior to execution of **Exhibit C.11** Addendum Agreement, dated **28.05.2018**. The conclusions arrived at by the Arbitral Tribunal insofar as Claim No.1 is concerned, is based on the facts that were available before it.

51. The Arbitral Tribunal is the ultimate fact finding authority. Unless the Award suffers from patent illegality or is against the public policy or contrary to the terms of the contract or reference, the Award cannot be set aside. In my view, the Award does not suffer from any of the grounds specified in Section 34 of the Arbitration and Conciliation Act, 1996, insofar as rejection of Claim No.1 is concerned.

52. Insofar as Claim No.2 for USD 295,000 under Exhibit C.11 Addendum Agreement dated 28.05.2018 is concerned, the same traces the History of Agreement between the parties. Under the Agreement, the petitioner and the V.G.P. Housing Private Limited [referred to as ''the VGP Group''] agreed to pay the respondents a consolidated sum of USD 700,000 in instalments. Out of USD 700,000, the petitioner has paid a sum of USD 2,95,000, which was sought to be recovered in the arbitral proceedings from the respondents. The amount was to be paid in the following instalments.

Sl.No.	Date	Amount
1.	03.04.2018	1,00,000

2.	28.05.2018	50,000
3.	15.06.2018	50,000
4.	30.06.2018	50,000
5.	30.07.2018	75,000
6.	31.08.2018	75,000
7.	Upon expiry of defects liability period	3,00,000
	Total	7,00,000

53. The Arbitral Tribunal has concluded as follows:-

''*60. Claim No.2 in the Statement of Claim is in respect of the refund of USD 295,000 with interest at 18% P.A, said to have been the total sum paid under the Addendum Agreement. According to the Claimant, as per the Addendum Agreement the claimant was to pay a total of USD 700,000 to the Respondents for finishing the remaining work, that as per Annexure-A of Ex.C.11 bill of quantity as per Annexure A of Ex C11 has to be submitted by Marine Scape before 06.06.2018 detailing the pending works to be executed and that despite the multiple reminders by the claimant the respondents did not complete the work as promised under Ex C11 and therefore the Respondents are bound to refund the amount, as claimed. In para 26 of the Statement of Claim.*

61. Though the claimant would contend that the said sum was paid as envisaged in Ex C.11, despite the respondents not fulfilling their obligations by adhering to Ex.C11, according to the Respondents since the condition at the site were extremely unsatisfactory and not conducive to continue the works, until situation is *mended and rectified, the respondents issued notice dated 14.09.2018 (E-mail-Ex.C12) to the respondent (CW1) informed that the works will be suspended as of 4 P.M. on 14.09.2018, until the conditions referred to therein are met and once it set right, the remaining works can be completed within 4 weeks. It also informed that the respondents can remobilize within 24 hours after the conditions are met and it will also help the respondents to defray their ongoing delay charges. On receipt of the same, on the same day the claimant seems to have issued an e-mail communication, calling upon RW1 to vacate the premises and hand over the company's property and "whenever you are called for resuming the work will deal with your accommodation and logistics.*

62. The respondents also deny the allegation that, as envisaged in Ex.C11, the respondent has not provided the BOQ despite reminders and in spite of such defaults the said amount has been paid to the respondents. In Ex C9 and C30, RW1 claims vide, pages 428, 436, 437, and 438 (CV) that the respondent carried out and executed works upto 13.09.2018 (month wrongly stated) and that more than 95% of works had been completed and what remained was only a fraction of the overall work. It is also urged therein that fee was due and payable for works carried out under the Addendum Agreement and that the respondents deny any liability to repay. We have carefully considered the submissions of the learned counsel on either side. The Claimant whose burden it is has not substantiated the claim before this Arbitral Tribunal by any concrete material or any legally acceptable evidence that no works whatsoever has been executed subsequent to 28.05.2018, and till 13.09.2018, as claimed by the respondents. In the absence of any material to prove/substantiate by the claimant to the contrary despites such assertions of the respondents in

> *C29 and C30, the claim for refund of 2,95,000 USD cannot be sustained or allowed by this Arbitral Tribunal. Consequently, the claim is dismissed.''*

54. It is clear that by Exhibit C.13 E-mail dated 14.09.2018, the petitioner has called upon the first respondent to vacate the premises. Thus, the Tribunal has concluded that the petitioner was not entitled to claim for a sum of **USD 2,95,000**.

55. Thus, the reasoning of the Arbitral Tribunal cannot be subjected to challenge on the ground of perversity or suffers from patent illegality insofar as it rejects Claim No.2.

56. As far as Claim No.3 for damages of Rs.4 Crores per month starting from 01.09.2018 till the date of commissioning of the Project is concerned, the Arbitral Tribunal has come to a conclusion that the termination of the contract by the petitioner was illegal and that before handing over the work to M/s.Polin Aquariums, Turkey, they should have got the work executed by the respondent up to 14.09.2018. Paragraphs 65

to 67 of the Award has come to a reasonable conclusion on the facts, which are reproduced below:-

> ''*65. We have carefully considered the submissions made by the learned counsel appearing on either side and in our view the claimant who not only failed to discharge its obligations by clearing the impediments to enable the respondents to complete the work but also failed to supply in time the materials undertaken to be produced and defaulted in making the payments in time for third party vendors has chosen to eject the respondent from the project site and terminated the agreements with the respondents. We have held already that the termination of the contract is illegal and unwarranted and consequently the claimant will not be entitled to this claim for the recovery of the amount said to have been paid to M/s. Polin Aquarium, Turkey. The claimant ought to have before deploying any other contractor into the works of the project, to complete the remaining works ought to have got the works executed by the respondent upto 14.09.2018, when they were ejected properly identified assessed and determined in the presence of RWI or his representative to fix any liability of this nature for a particular or specified amount of money, all the more so when the stand of the respondents is that they have completed almost 95% of the work. In our view even a cursory look at Ex.C32, would patently disclose the serious infirmities which undermine the credit worthiness of the said document and that it could be the basis of a claim of the nature in question of reimbursement.*
>
> *66. Ex C32 apart from being found to have been*

made on an ordinary paper unlike the agreements executed by the parties in this case on stamp paper and does not have the date/month on the top of the document, which is left blank. The address of that company is not furnished and it does not disclosed the name of the person representing the company and his position as well as whether he was authorised to enter in to such an agreement binding M/s. Polin Aquariums Limited, foreign company. Even in the concluding part of the agreement dates are put in ink below the signatures and the witnesses portion of the document is left blank. Consequently, it is all the more necessary for the claimant to produce official receipts from the other company to evidence either payment or receipt of the amounts claimed, the nature of the works executed by them and the value of the works so executed mentioned in the receipts. In the absence of such concrete material and any legally acceptable evidence to substantiate the claim the same does not merit acceptance in our hands. Consequently, this claim also fails and is dismissed.

67. In the absence of any such concrete materials to substantiate the same this claim also has to fail for absence of legal proof as to be quantum claim. Even that apart, the claimant could not claim from the respondents the entirety of the costs alleged to have been incurred for the so-called completion of the work. In Law, if at all what could reasonably and legitimately claimed is only the difference representing the increased cost on account of the claimant having allegedly got the works done through M/s.Polin Aquarium Limited. In view of this conclusion of ours also the claim does not merit countenance and shall stand dismissed.''

57. In view of the above, it cannot be said that the impugned award suffers from any vice, which would attract sting under Section 34 of the Arbitration and Conciliation Act, 1996.

58. In my view, the rejection of Claim Nos.4 and 5 by the Arbitral Tribunal also does not call for interference, as all the information was available with the petitioner. The findings of the Arbitral Tribunal with regard to Claim Nos.4 and 5, read as follows:-

> ''*68. Claim No.4 is for the recovery of a sum of Rs.4 crores per month from 01.09.2018, till the date of commissioning of the project (which is on 21.04.2019). According to the claimant as per the Addendum Agreement (Ex.C11) the project was to be commissioned on or before 30.08.2018, and on account of delay caused by the respondent and abandonment of the project, the claimant had incurred heavy loss and it is on that account this claim has been made. Per contra, the respondents contend that what has been done by the communication dated 14.09.2018 is only intimation of the temporary suspension, on account of the impediments enumerated in the letter and in several such communications pointing out such impediments and requesting the claimant to rectify the same to facilitate execution of work expeditiously and that once such rectification is made the respondents can regroup*

within 24 hours notice and complete the works in 4 weeks.

69. Instead of considering these reasonable requests and either replying to the same properly or rectifying matters, the respondents would urge that the claimant has mischievously proceeded to take it as abandonment and instantly ejected RW1 from the project site and followed it in due course by termination of the agreements and therefore the claimant alone was at fault and cannot take advantage of its own default and claim damages of the nature in question. During cross examination, when a specific question has been put to the CW1 as to whether the Claimant has informed the Respondent, that the 9 specific issues raised in their letter Ex C12 are not valid the witness conveniently even at that stage to give a proper answer, specifically dealing with or disputing them.

70. We have carefully considered the submissions of the learned Counsel on either side. Anyone claiming damages on the ground of breach of the contractual obligations against the other party to the contract must on the basis of concrete material and legally acceptable evidence proved that the other party did really commit the breach, that only on account of the said breach the claimant concerned has suffered damages. That apart the claimant in such a case must also substantiate the quantum claim by setting out and proving the basis and the principles or formula on the basis on which such a claim is made for a particular quantum to justify the quantum claim. In the absence of any such concrete material, which is conspicuously absent in this case the claimant cannot succeed in getting an award in its favour for the amount claimed.

71. It is by now well settled that the sine qua non for claiming damages is the proof of the above ingredients noticed above and in the absence of the same no such claim can be countenanced by this Arbitral Tribunal. On the facts of this case except a summary and blunt assertion of this claim and that too of an astronomical figure no material whatsoever worth credence of acceptance, has been either pleaded in the pleadings or produced during the course of trial and letting in oral and documentary evidence. For all the reasons stated above, this claim also fails and shall stand dismissed. That apart, since we have already held that the claimant alone was at fault in disabling the respondents from completing the project without also performing their obligations to facilitate such completion by the respondents, this claim has to fail and is dismissed.

72. Claim No.5 is for the refund of a sum of USD 18,40,000/- or handover all the drawings, designs and warranties. The case of the claimant is that it has paid USD 18,40,000/- for the drawings detailed in Appendix IX IV of the agreement for Design Services (Ex.C4). The stand taken for the respondents in this regard is that as per Cl 9.3 of the Design Agreement (Ex.C4) the property and copyright in all drawings, specifications and other documents prepared or provided by AQESS in connection with the project including but not limited to design document (Project Documents) is vested in AQESS and shall remain vested in AQESS in perpetuity after the expiry or termination of the agreement and that the claimant shall be allowed only upon payment of ail instalments of the fee to use project documents.

73. Only for this specific purpose of the project and the subsequent maintenance, repairs, renovation, upgradation or expansion of the aquarium and associated speciality and not for design, construction or installation of any other project are set up any aquarium business without the express permission or consent of AQESS. It is also urged for the respondents that the claimant is not entitled to claim for handing over of the drawings, especially when the claimant had committed breach of the contract and also has chosen to terminate the contract.

74. It is also urged that during the course of work under the contract, which spread over two years, drawings have been sent to the claimant by the respondents as evidenced by Ex.R19 at pages 743 to 789. Finally, it is asserted that claim for handing over of documents can be tried only by the Courts in New Zealand and not before this Arbitral Tribunal. The respondents also contend that the claimant is obligated under clause 9.3.9 of Ex.C11 to make payment instalment, but has failed to do so and committed breach and that the respondents have invoked Clause 9.3.9 and sent a notice dated 01.02.2019 revoking the licence to use the same and calling upon the claimant to return all the documents as per Clause 9.3.9(a) and (b) and that if the claimant allows any other persons or entity, not approved in writing by the respondents to carry out the works in account with the documents of the respondents it will constitute further violation of the agreement (vide counter statement of respondents in para 91).

75. The rejoinder filed by the claimant does not *traverse or dispute the same. All these would show that the claimant also had and was in possession of some of the documents. As could be seen from Ex.R19 series, which is full of allegations against each other as to the removal of the drawings, etc., and at page 789 of RV, there is a statement in which it is stated that drawing files were shared with Studio Skai, who was said to have been appointed by VGP and worked directly for VGP co-ordinating all drawings, the items so shared with the respective dates thereof is found furnished. Neither the claimant whose duty is to substantiate the claims projected has taken pains to take on the respondent's evidence (RWI) to bring out the truth by at least confronting them with such aspects nor the respondent has taken steps to prove its claim on factual assertions, firmly. Cl.9.3.1 lays down that subsequent to clause 9.3.2. the property and copyright in all drawings, specifications and other drawings prepared and provided by AQESS in connection with the project shall remain vested with AQESS in perpetuity after the expiry of certain obligations of the said agreement (Ex.C4). Clause 9.3.9 stipulates that in the event that the agreement is terminated but project has been substantially completed the claimant shall be entitled to a licence/assignment of the rights as referred to in Clause 9.3.1 and 9.3.2. In respect of any documents for which the claimant has already paid to AQESS, according to the respondent, in any event the claimant has a right to use the drawing and not make any claim for handing over. Consequently, we hold that the claimant will be entitled to only such liberties granted and are available under Cl.9.3 and the claim as projected for handing over the Designs, Drawings and Warranties or in the alternative refund of 18,40,000 USD said to have been paid fails and is dismissed.''*

59. Since the respondent has not challenged the impugned award insofar as it rejects the counter-claim of the respondent, I do not wish to delve into the same. In my view, the Award does not call for any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

60. In the result, this Original Petition is dismissed, leaving the parties to bear their own costs.

29.04.2024

Index : Yes/No
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C.SARAVANAN, J.

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