IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
COMMERCIAL DIVISION
APPELLATE SIDE

Present:

The Hon'ble Justice Arijit Banerjee

AND

The Hon'ble Justice Rai Chattopadhyay

FMAT (ARBAWARD) No. 7 of 2024
With
FMAT (ARBAWARD) No. 8 of 2024

Steel Authority of India Limited
Vs.
M/s SMS India Private Limited

For the Appellant	: Mr. Sarathi Dasgupta
	: Mr. Arijit Basu
For the Respondent	: Mr. A. Tripathi, ld. Sr. Adv.
	: Ms. Sneha Nath
	: Ms. Suprava Jana
	: Mr. Ayanava Acharya
Heard on	: **03.09.2025**
Judgment on	: **24.09.2025**

<u>Rai Chattopadhyay, J.</u> :-

1. Two identical judgments and orders of the Commercial Court at Asansol dated December 21, 2023 in proceedings under section 34 of the Arbitration and Conciliation Act 1996 being Misc Arbitration Case No. 10 of 2022 and Misc Arbitration Case No. 11 of 2022, are assailed in the instant appeals, which are filed by the award debtor/Steel Authority of India Limited [in short 'SAIL'] under section 37 of the said Act of 1996. The appeals have been heard together and are being disposed of by dint of the following common judgment.

2. The issue involved and required to be decided here is with regard to construction of terms of a contract, entered into between the parties on May 23, 2008. This Court may not enter into the enormous details of the background facts. Suffice to state for the time being that, being aggrieved with the deductions made by the appellant in disbursement of bills, the respondent sought to bring the dispute before the arbitral tribunal. The tribunal decided the act of the appellant as above to be improper and illegal and directed for refund of the deducted sum of money to the respondent, in its award dated June 28, 2022 [in Arbitration Case No. 25594/HTG]. The present appellant being aggrieved with the said award of the tribunal, dated June 28, 2022, filed its cases under section 34 of the Arbitration and Conciliation Act 1996, before the Commercial Court at Asansol [being Misc Arbitration Cases No. 10 & 11 of 2022], which have ultimately culminated into the judgments dated December 21, 2023. Those judgments are identical in nature and have been assailed in the instant appeals, filed by the appellant /SAIL, under section 37 of the Arbitration and Conciliation Act 1996.

3. Details of the two contract agreements are as follows:

(a) Contract Agreement for Basic Oxygen Furnace ("Contract 1"), dated 19 March 2008 signed by the Parties, SMS Demag AG and Bridge and Roof (I) Ltd. This Contract is the subject matter of Arbitration Case No. 25594/HTG.

(b) Contract Agreement for Secondary Refining Unit ("Contract 2"), dated 23 May 2008, signed by the Parties, SMS Mevak UK Ltd., and Shriram

EPC Ltd. This Contract is the subject matter of Arbitration Case No. 25595/HTG arises out of this Contract.

It may be mentioned at the outset that the provisions of the two Contracts are similar. In fact, those provisions which are relevant for determining the controversy/disputes that have arisen in these proceedings are identical. It is also pointed out at this stage itself that all the concerned clauses of the Special Conditions of the Contract (SCC) and General Conditions of the Contract (GCC) in both the Contract 1 and Contract 2 are also identical.

4. The respondent/claimant's case in a nutshell is as follows:

Pursuant to the award of work and in terms of the agreement entered between the parties, the contractor's obligation covered design & engineering; supply of technological steel structures; manufacture (including associated purchases and/or sub-contracting) & supply of plant & equipment and commissioning spares; customs & port clearances (excluding all taxes, duties, levies, cess, etc. as may be applicable in India other than withholding tax on design & engineering, supervision and training services as may be applicable in India for which prices are quoted in Foreign currency); inland transportation; marine and inland transit insurance, erection, testing, pre-commissioning, start-up & commissioning and demonstration & establishment of performance guarantees of the Facilities, in accordance with the plans, specifications, drawings, codes and any other documents as specified in the Contract Technical Specifications. For providing these services a lump sum price was fixed. However, in the Price Schedule appended with the contract, this amount was further categorized into following elements: (a) Basic price, (b) Excise Duty (ED), (c) Central Sales Tax (CST), (d) Value Added Tax (VAT) and (e) Service Tax (ST) etc.

5. Upon completion of works on 19 May 2019, the appellant issued a Performance Guarantee Certificate dated 06.07.2019 to all the consortium members including the respondent/claimant certifying that the works had been successfully completed. Accordingly, in terms of the contract, the claimant on 29 July 2019 submitted invoices towards 5% payments upon issuance of Performance Guarantee Certificate. Out of the said invoices, the appellant withheld an amount of INR 23,98,07,285. On 24 December 2019 the appellant informed that the said payment had been kept on hold on account of shortfall in the amount of guaranteed CENVAT Credit, which had not been passed on to the appellant by the respondent/claimant. The claimant protested against the said withholding through letters dated 2 January 2020 and 24 January 2020 wherein it was explained that such withholding was not in terms of the contract. However, the appellant, vide its letter dated 4 March 2020, reiterated its stand and justified the withholding of the amount.

6. In terms of Article 10 of the Contract read with Clause 6 of the GCC, the respondent issued a notice of Conciliation to resolve the disputes vide letters dated 19 March 2020 (in respect to 25594/HTG) and 19 March 2020 (in respect to 25595/HTG). In the said letter, the respondent stated: "Failure on your part to release the payment within 15 days shall be deemed to have exhausted all attempts towards amicable settlement of the dispute and we shall be constrained to take appropriate actions as may be advised and permissible under our contract and law to enforce our rights". The appellant did not respond to the above letters and hence, the respondent invoked the arbitration clause and filed its Request for Arbitration (RFA) before the ICC on 24 August 2020.

7. The contra-case of the appellant is also stated below:

The appellant say that arbitration invoked by the respondent is time barred, non-maintainable and de-hors the contractual agreements and law. Contracts were awarded by the appellant to a Consortium of three members entities of which the respondent is one of the members. The Arbitration Agreement contained in the contracts provide for arbitration only between the consortium (collectively composed of three parties) and the appellant. In the RFA, the appropriate law governing this arbitration proceeding has been agreed to be held under the aegis of the Indian Laws and the settled Indian Law prohibits arbitration proceeding being filed by individual member of consortium. Accordingly, where the parties to an arbitration agreement in their wisdom have agreed to enter into the agreement only as a consortium, clearly the obligation to arbitrate is between the consortium as a whole with the appellant on the other side. The respondent's attempt to individually invoke the arbitration proceedings is, thus, highly flawed and is in contravention to the terms and conditions of the Contract.

8. The respondent was awarded the contract by the appellant after evaluating all Bids received (including that of the respondent) net of taxes as all the Bidders including the respondent had, while quoting price under their respective Bids, specified "minimum guaranteed CENVAT Credit". The Bidders were to indicate Minimum Guaranteed CENVAT Credit that can be availed by the appellant against materials supplies for subject work and, in case of any shortfall in CENVAT Credit from that guaranteed by the Bidder, the said shortfall shall be deducted by the appellant from the contract. In this case, the respondent failed to discharge its obligation to pass on the specified amount of CENVAT Credit to the appellant. Not only has the respondent failed to perform its contractual obligation, but also it has unilaterally amended the contract Price by nullifying the guaranteed tax credit which has resulted into loss to the appellant and Public Exchequer. Further, in terms of the minimum guaranteed assurance given by respondent under the contract, to provide a specific value of tax credits, which is unconditional, the shortfall from such assured sum is recoverable by appellant from the respondent as per contract. Therefore, the appellant acting within the four corners of the terms and conditions of the awarded contract, has made payments to the respondents against the invoices received and has recovered the shortfall that it has incurred from the assured sum of guaranteed credit. Since the shortfall in the tax credits have not been disputed by the respondent, the appellant is entitled to deduct the same from payments due to the respondent. The respondent is interested in denying the right of the appellant to recover the said guaranteed sum under the contractual agreement.

9. The appellant seeks the relief by stating that the respondent does not have any cause of action against the appellant, nor does the alleged claim of the respondent disclose any cause of action. It is submitted that no ground has been made justifying any of the claims and the reliefs sought by the respondent. Accordingly, the same should be dismissed. The appellant, therefore, seeks relief in the form of declaration that it is entitled to withhold such payments from the monies due to the respondent under the terms of the contract. Consequently, the appellant is also entitled to an award of the guaranteed sum less adjustments already made thereunder.

10. Before the arbitration tribunal, the respondent/claimant has sought for the following relief:

CASE NO. 25594/HTG (Contract 1)

Sl No.	**Particulars**	**Amount in INR**
A.	Outstanding payment due towards Invoice No. Prof/18-19/48 dated 29.07.2019 of supply issued against	23,98,07,285

	Performance Guarantee certificate.	
B.	Interest @18% on the aforementioned claim from the date the same became due till the date of realization of the payment.	To be Quantified
C.	Costs on actual	To be determined
	Total Outstanding Amount	**23,98,07,285**

CASE NO. c-25595/HTG (Contract 2)

Sl No.	**Particulars**	**Amount in INR**
A.	Outstanding payment due towards Invoices dated 23.07.2018 issued against Commissioning certificate.	4,19,63,769
B.	Interest @18% on the aforementioned claim from the date the same became due till the date of realization of the payment.	To be Quantified
C.	Costs on actual	To be determined
	Total Outstanding Amount	**4,19,63,769**

11. Summary of the tribunal's award is as follows:

"M1 BOF Contract (Case No. 25594/HTG)

Claim No.	**Particulars**	**Tribunal's Decision**
A.	Outstanding payment of INR 23,98,07,285 due towards Invoice	Awarded INR 23,98,07,285 in

	No. Prof/18-19/48 dated 29.07.2019 of supply issued against Performance Guarantee certificate.	favour of the Claimant
B.	Interest @18% on the aforementioned claim from the date the same became due till the date of realization of the payment.	Awarded simple interest @ 7% per annum (refer paragraph L6.3 above)

M2 BOF Contract (Case No. c-25595/HTG)

Claim No.	**Particulars**	**Tribunal's Decision**
A.	Outstanding payment of INR 4,19,63,769 due towards Invoices dated 23.07.2018 issued against Commissioning certificate.	Awarded INR 4,19,63,769 in favour of the Claimant
B.	Interest @18% on the aforementioned claim from the date the same became due till the date of realization of the payment.	Awarded simple interest @ 7% per annum (refer paragraph L6.3 above)

181. In addition, the tribunal awards combined cost of US$ 285,000 plus INR 2,100,000 in Case No. 25594/HTG and Case No. c-25595/HTG in favour of the Claimant."

12. The operative part of the tribunal's award is quoted bellow:

"OPERATIVE PART

In summation, various findings of the Tribunal on different issues and claims are recapitulated below:

(a) The Additional Parties are not necessary for adjudication of disputes raised in the present proceedings.

(b) The arbitration initiated by the Claimant is not premature.

(c) The Tribunal has the jurisdiction over the Respondent pursuant to the Arbitration Agreement to adjudicate upon the disputes.

For all the reasons set out above, the Tribunal has concluded and declares that SMS INDIA PVT. LTD. is held entitled to the following reliefs:

(a) STEEL AUTHORITY OF INDIA LIMITED shall pay SMS INDIA PVT. LTD. the outstanding payment of INR 23,98,07,285 due towards Invoice no. Prof/18-19/48 dated 29.07.2019 of supply issued against Performance Guarantee certificate and outstanding payment of INR 4,19,63,769 due towards Invoices dated 23.07.2018 issued against the commissioning certificate from Respondent;

(b) STEEL AUTHORITY OF INDIA LIMITED shall pay SMS INDIA PVT. LTD. simple interest @ 7% per annum on the aforesaid amount of INR 23,98,07,285 and INR 4,19,63,769 from the date of invocation of the arbitration, i.e., from 24 August 2020 until full payment by Respondent;

(c) STEEL AUTHORITY OF INDIA LIMITED shall pay SMS INDIA PVT. LTD. costs of INR 2,10,000 being the legal costs incurred by Claimant, and US$ 285,000 being the costs of the arbitration; and

(d) All other requests and claims are rejected.

Wherever necessary, relevant portions of the Contract Agreement, judgments, laws, etc. are reproduced in the Award. Despite all care having been taken, it may be possible that some typographical and/or clerical errors in the quoted portions may have crept in. It is observed that such errors would be treated as corrected and substituted by the original text of the concerned documents and/or evidence."

13. The Commercial Court, Asansol in its judgments dated December 21, 2023, has held inter-alia that, the arbitral award does not suffer from any perversity and that the interpretation of the contract made therein is reasonable; that individual facts of the case have been duly considered with reference to the relevant clauses of the contract, and the award cannot be said to be based on any conjecture or surmises. Hence, it has declined to interfere with the arbitral award and the proceedings initiated before it by the present appellant/SAIL, under section 34 of the Arbitration and Conciliation Act 1996 were dismissed.

14. Mr. Dasgupta, learned counsel, has represented the appellant/SAIL. He has submitted that the parties are bound by the terms of the concluded contract entered into by and between them. He says that the contract dated May 23, 2008 is such a concluded and binding contract between the parties. That the terms thereof cannot be varied while performing the same and if so, can only be done pursuant to a specific stipulation to that effect, made in the contract itself. Otherwise, that will attract the consequential penal or compensatory provisions as enumerated in the contract itself. He submits that according to the terms of the said contract entered into between the parties, the contractor/claimant/present respondent would be obliged to fulfil requirement of raising demand for tax reimbursement to the tune of optimum ceiling limit as prescribed in the said contract. This condition of contract being prescribed in the contract itself, has been well known to the respective parties from the day of entering into such contract. He elaborates further that reimbursement of tax to the optimum ceiling limit as prescribed under the contract, by the appellant/SAIL, would fetch the appellant credits, with regard to its own contractual outflow and the taxes payable by it. He elaborates further that the instant provision in the contract is the safeguard so that the appellant/SAIL is not twice vexed with the liability to pay the tax. He says that according to the terms of the contract, any lesser credit obtained by the appellant/SAIL and attributable to the claimant/contractor/respondent, would be recoverable by the SAIL, as per the contractual terms. He submits that the contractor would be obliged to arrange his affairs in such a manner, that a minimum guaranteed credit be available to the SAIL. He has ventilated the grievance of the appellant that in the instant cases, the respondent/contractor has not fulfilled its obligations under the contract to secure the minimum guaranteed credit for the appellant/SAIL, resulting in non-receipt of or receipt of lesser amount of credit by the SAIL against its own contractual outflow. According to the appellant, this amounts to deviation in performance of contract by the respondent/contractor, in terms thereof, rendering it to be liable for the process of recovery of the deficit credit amount, than the optimum ceiling limit thereof. Hence, according to the appellant, withholding of the shortfall from the milestone payments to be made to the respondent /claimant is maintainable as per the terms of the contract. Hence that there would not be any infirmity or illegality as alleged and held, as regards deductions made by the appellant/SAIL, from the milestone payments to be disbursed to the respondent/claimant. It is the contention of the appellant/SAIL that in such view of the matter, both the decisions of the arbitral tribunal as well as the Commercial Court at Asansol are erroneous and unreasonable. The judgments of the Commercial court at Asansol, challenged in the instant proceeding under section 37 of Arbitration and Conciliation Act 1996 are thus liable to be set aside.

15. Per contra, Mr. A. Tripathi, learned Senior counsel appearing for the respondent/claimant/contractor, has vehemently objected to the contentions and prayer made by the appellant in the instant appeals. He has vehemently objected to the contention of the appellant/SAIL that the amount of CENVAT credit in favour of the appellant would only be static and guaranteed amount, in terms of the contract entered into between the parties. He has argued that the credit allowable to the appellant is dependent on and subject to the amount of tax reimbursed by the appellant towards the respondent/contractor, while disbursing its bills. The tax reimbursement sought for by the respondent/contractor has diminished over time, from the date of entering into the contract, pursuant to reduction in the rate of taxes over the period of time. Mr. Tripathi has stated that the Excise Duty payable by the contractor which was 12 percent and odd at the time of entering into the contract, subsequently reduced to 10 per cent and thereafter to 8 percent. Hence, the contractor, having remitted tax at a reduced rate, would not ever raise a bill for reimbursement thereof, at a rate or for an amount greater than what the contractor has actually remitted. More so, when his demand should be supported by appropriate and relevant documents. That, with reduction of rate of tax, the contractor had to pay less on account of tax and therefore sought for reimbursement at a rate and for an amount which was actually paid by the same as tax. Mr. Tripathi submits that the contractor would not have any control over the change in the rate of taxes over the period of time. He says that in accordance with the contractual terms, cent percent tax liability of the contractor is reimbursable by the SAIL, that in turn fetches it the adequate credit. It is submitted that there cannot be any minimum unchangeable guaranteed amount for which the contractor would be liable to raise bill, irrespective of whatever actual amount of tax paid by the contractor, as the rate of tax is always subject to change in pursuance of the policies of the government in this regard.

16. Mr. A. Tripathi, learned Senior Counsel has submitted further that in absence of any patent error, illegality or perversity being traced in the impugned judgments of the Ld. Commercial Court or in the award of the arbitral tribunal, this Court while deciding the appellant's case under section 37 of the Arbitration and Conciliation Act 1996, may not venture to re appreciate the evidence, as it is the dictum of the law as settled on date. He has stated that after due consideration of the materials on record and the evidence, a proper and reasoned decision has been arrived at by the arbitral tribunal, which has not been unsettled or varied or interfered into by the Ld. Commercial Court, Asansol, in any manner whatsoever. That, the Appeal Court exercises only limited supervisory role as to any patent illegality or perversity of the said decision. He says that this principle applies both in cases of

Court exercising power under section 34 of the said Act and this Court which exercises power under section 37 thereof. Rather it is more narrow in case of this Court, he says. The appellate power of section 37 of the Act is said to be limited within the domain of section 34 of the Act; that it is exercisable only to find out if the Court exercising power under section 34 of the Act, has acted within its limits as prescribed under the law or has exceeded or failed to exercise the power so conferred. With reference to one judgment of the Supreme Court in ***Punjab State Civil Supplies Corporation Limited vs Salman Rice Mills***, reported at ***2024 SCC Online SC 2632***, Mr. Tripathi has stated that the Appellate Court shall have no authority of law to consider the matter in dispute before the arbitral tribunal on merits, so as to find out as to whether the decision of the arbitral tribunal is right or wrong, upon reappraisal of evidence, as if it is sitting in an ordinary Court of Appeal. To buttress his argument and on the proposition of law as mentioned above, he has relied on some other judgments also, as stated below:

(I) ***AC Chokshi Share Broker Private Limited Vs. Jatin Pratap Desai And Another*** reported at ***(2025) 5 SCC 321***

(II) ***UHL Power Company Limited Vs. State of Himachal Pradesh*** reported at ***(2022) 4 SCC 116***

(III) ***MMTC Limited Vs. Vedanta Limited*** reported at ***(2019) 4 SCC 163***

(IV) ***Associate Builders Vs. Delhi Development Authority*** reported at ***(2015) 3 SCC 49***

(V) ***Executive Engineer Vs. S. Bose*** reported at ***2025 SCC OnLine Cal 567***

(VI) ***National Highways Authority of India Vs. Manta Kumar Saha and Others*** reported at ***2024 SCC OnLine Cal 7587***

(VII) ***South City Projects (Kolkata) Limited and Another Vs. Kolkata Metropolitan Development Authority*** reported at ***2023 SCC Online Cal 2050***

17. Mr. A. Tripathi, learned Senior counsel has further submitted that in these appeals, the appellant makes endeavour to prompt the Court to appreciate materials and evidence one again, which is however, not permissible under the law. He submits that the award of the arbitral tribunal would not be proper to be interfered with, since the same has not been challenged on the ground of any illegality or perversity. He submits further that in this case the Court exercising power under section 34 of the said Act has neither acted beyond its power as prescribed nor has exceeded or failed to exercise the power conferred by law, on the same. Therefore, he submits further, that this Court while exercising power conferred under section 37 of the said Act is not authorised to see if the decision of the arbitral tribunal or the Commercial Court was right or not, upon re-appraisal of the evidence and the case on merits. The respondent has stated that within the narrow scope and purview of section 37 of the Arbitration and Conciliation Act 1996, and while exercising the power of superintendence as vested in it by law, this Court may not enter into the questions of the impugned orders or the arbitral award being right or wrong, as sought for by the appellant. Instead the said impugned orders being not patently erroneous, illegal or perverse, may not be interfered into by this Court. Mr. Tripathi, learned Senior Counsel for the respondent seeks that the appeals as above may be dismissed.

18. Before proceeding further with the discussions, relevant terms of the contract may be extracted as herein below, for benefit of the discussion:

"The Summary Price Schedule reads as follows:

S.N	Description	Total Price at base date **In INR (INR Million) at base date for SMS (I) Pvt. Ltd.**
A	B	
14.	Total Contract Price	**1857.643**
15.	CENVAT Credit	**125.643**
16.	VAT Credit (Input Tax Credit)	
17.	VAT on Works Contract Credit	
18.	Total Package Price-net of CENVAT, VAT & Vat On Works Contract	**1732.00**

2.1 <u>Contract Price</u> (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 the aggregate of : GBP 4000,000/- (GBP four million only), and Indian Rupees 1944913000/- (Rupees one billion nine hundred forty four million nine hundred thirteen thousand only) or such other sums as may be determined in accordance with the terms and conditions of the Contract. The guaranteed amount of CENVAT and VAT Credit to be passed on to the Employer in Indian Rupees 134,913,000 Million (Rupees One Hundred Thirty Four Million Nine Hundred Thirteen Thousand Only).

<u>**"GCC Clause 11.2, Price Basis**</u>

11.2.1 The Contract Price indicated in Indian Rupees shall comprise Basic price, Excise Duty, Central Sales Tax/VAT (including sales tax/VAT/Works Contract Tax for the erection portion of the contract only) Octroi, Service Tax, Education Cess and any other duties, taxes and levies, as may be applicable and prevailing on base date of the Contract. **While the basic price will constitute the consideration under the Contract**, <u>the payment of duties, taxes, levies, etc., will be reimbursed (on actual)/ paid against documentary evidence to be produced by the Contractor, subject to a ceiling indicated in Price Schedule given in</u> <u>**Appendix 1**</u>. In no case the reimbursement towards duties and taxes, etc., shall exceed the amount indicated in **Appendix 1** towards duties, taxes, levies, etc., except as indicated in Sub-clause 14.06.1, hereof.

Service Tax and Excise Duty shall mean to cover applicable Education Cess, Secondary and Higher Education Cess or any other surcharge thereon as applicable.

"GCC Clause 14. Taxes and Duties

14.1 Except as otherwise specifically provided in the Contract, the Contractor shall bear and pay all taxes, duties, levies and charges assessed on the Contractor, its Sub-Contractors or their employees by Municipal, State or Central Government Authorities.

However, subject to stipulations of the Contract, the payment of duties, taxes, levies, cess etc., will be reimbursed / paid (on actual) against documentary evidence to be produced by the Contractor, subject to a ceiling indicated in price schedule (s) of the Contract. In no case the reimbursement / payment towards duties, taxes, levies, cess etc., shall exceed the amount indicated in price schedule(s) of the Contract towards duties, taxes, levies, cess etc., except on account of statutory variation in Taxes & Duties and / or imposition of new taxes and duties. All taxes and duties payable outside India in respect of performance of the Contract, shall be borne & paid by the Contractor.

"GCC Clause 14.5 CENVAT, VAT, VAT ON WCT

14.5.1 Contractor shall furnish the Employer along with the billing schedule the list of goods for which CENVAT Credit can be availed indicating the Tariff headings to enable the Employer to declare the same to Appropriate Authority.

14.5.3 Excise Invoices for all indigenous plant, equipment and materials shall be made consigned to "Steel Authority of India Limited-IISCO Steel Plant" for availing CENVAT Credit under relevant Rules and shall be furnished by the Contractor to the Employer for availing CENVAT Credit.

14.5.5 The Contractor shall also submit any other Document required by the Employer to avail the CENVAT Credit. In case, the Contractor fails to submit the required document for availing the CENVAT credit by the Employer in respect of supplies, the amount of Excise Duty on such indigenous plant & equipment and countervailing duty on imported plant & equipment for which the prices are in Indian Rupees shall not be paid by the Employer to the Contractor.

14.5.6 Contractors has indicated Minimum Guaranteed CENVAT Credit that can be availed by the Employer against material supplies for subject work for which price quoted is in Indian Rupees. In case of any shortfall

<u>in CENVAT credit from the value guaranteed by the Contractor, the shortfall shall not be reimbursed to the Contractor.</u>

In case, Employer is not able to avail CENVAT credit for reasons, attributable to the Contractor and the ED amount for such cenvat credit has already been paid to the contractor as per the approved billing schedule, the same shall be recovered by the Employer from the Contractor. CENVAT credit in excess of the guaranteed amount will be shared in proportion of 50: 50 between the Employer and the contractor. Sharing of CENVAT Credit as detailed above shall not include in CENVAT credit amount on account of statutory variation.

14.5.8 For direct supply of the indigenous brought-out plant & equipment by the Sub-contractor to the Employer, the contractors will draw their invoices as per relevant trade notice to enable the Employer to avail the CENVAT Credit.

<u>**"GCC Clause 14.6 Variations in Taxes & Duties"**</u>

14.6.1 For the purposes of the Contract, it is agreed that the <u>**'Contract Price'**</u> specified in Article 2 ("Contract" & "Terms of Payment") of the Contract Agreement <u>**is based on the taxes, duties, levies etc., and charges prevailing on Base Rate**</u> (hereinafter called "Tax" in this Sub-Clause 14.6 hereof). <u>**If any rate of tax is increased or decreased**</u>, 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, Sub-Contractors or their employees in connection with performance of the Contract, <u>**an adjustment of the Contract Price or indigenous portion for which prices are indicated in Indian Rupees shall be made**</u> as per Sub-Clause 14.6.2 & 14.6.3 hereof, by addition to the Contract Price or deduction therefrom, as the case may be.

14.6.2 The adjustment in the Contract Price towards variation in the taxes shall be made by the Employer on production of the documentary evidence by the Contractor."

19. On a careful reading of the provisions under sections 34 and 37 of the Arbitration and Conciliation Act 1996 and the verdicts of the Court in interpretation thereof, the law as it stands on the date emerges to be that the Court in exercise of power under the said provisions of statute shall only have a limited supervisory power, as enshrined in the said provisions of law. The Court cannot intervene beyond the specific grounds, enumerated in the statute and cannot correct errors in the arbitral award. The Court cannot undertake an independent assessment of the merits of the award by appreciating evidence or interfering with a reasonable interpretation of contractual terms by the arbitral tribunal. The law has been narrated by the Supreme Court that a Court under section 37 must only determine whether the section 34 Court has exercised its jurisdiction properly and rightly, without exceeding its scope as enumerated in the statute itself. Otherwise, the Court's verdict would be marred with erroneous exercise of jurisdiction as per law. In the case of ***Jatin Pratap Desai (supra)***, the Supreme Court has dwelled on these principles.

20. The law is now settled that the scope of intervention of the Court in arbitral matters is virtually prohibited. The interference if any, is confined only to the extent envisaged under the said statutory provisions, including that the appellate power of section 37 of the Act is limited within the domain of section 34 of the Act. That it is excisable only to find out if the Court exercising power under section 34 of the Act, has acted within its limits as prescribed under the law or has exceeded or failed to exercise the power so conferred. That the Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong, upon appraisal of evidence. As it has been held by the Supreme Court in the case of ***Sanman Rice Mills (supra)***, that it is only where the Court exercising power under section 34 has failed to exercise its jurisdiction vested in it under section 34 or has travelled beyond its jurisdiction, the Appellate Court can step in and set aside the order passed under section 34 of the Act. The Supreme Court says that the power of the Appellate Court is more akin to that of superintendence, as is vested in civil Courts while exercising revisionary power.

21. Pertinent is to note what the Supreme Court has laid down while discussing the scope and extent of 2015 amendments to section 34 of the Arbitration and Conciliation Act 1996, in the case of ***Vedanta Limited (supra)***, which is in the following words:

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

22. The scope of the provision under section 37 has been discussed therein in the following manner:

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

23. Similarly, in the other judgments of the Supreme Court and this Court, as relied on by the respondent in this appeal, the law as mentioned, have been elaborately discussed. Findings of this Court in ***South City Projects (supra)***, may also be apt and beneficial to be mentioned in this regard, which is as follows:

> ***"41. From the above decisions the following principles may be culled out. An award may be interfered with only if:—***
>
> ***a) It is perverse i.e. the conclusions are not based on the evidence on record and/or based on extraneous considerations and/or material.***
>
> ***b) No reasonable man can arrive at the conclusion arrived at by the Arbitral Tribunal.***
>
> ***c) The findings of the Tribunal are such that would shock the conscience of a reasonable person.***
>
> ***d) The award is patently illegal or irrational.***
>
> ***e) The award is against the basic and/or fundamental and/or public policy of India or Indian Law.***
>
> ***f) Any of the parties have been denied a reasonable opportunity to put forth their case or an equal opportunity is not given to the parties and there is denial of the principles of natural justice and the procedure followed is dehors a judicial approach.***
>
> ***g) If the award is against the specific term of the contract and against the substantive law if India."***

24. Within the limited power vested under the law this Court would only be justified to assess whether the Commercial Court at Asansol, while exercising its power under section 34 of the Arbitration and Conciliation Act 1996, has travelled beyond scope of that vested in it by the law or has committed any patent illegality or been patently irrational or that if it has failed to consider whether the arbitral award was against the terms of contract or any substantive law or public policy of the of the country.

25. Going back to the case as made out by the appellant in this Court, we find that the appellant's case is basically with regard to the alleged invalidity of the arbitral award due to the reason of it not being in terms of the contractual terms. The terms of contract as relied on by the appellant are elaborately referred to above. It is the case of the appellant herein that they were entitled to deduct the shortfall in CENVAT credit from the bills of the respondent and that arbitral tribunal misinterpreted Clause 14.5.6 of the GCC and erroneously came to the conclusion that the appellant has no power or right to deduct or withhold the amount of shortfall in the CENVAT credit. According to the respondent, the contract does not permit withholding/deducting amount of shortfall in the CENVAT credit from bills of the respondent.

26. It would be pertinent to mention the finding of the tribunal, as follows:

> ***"128. To sum up, the "guaranteed amount of CENVAT Credit" records minimum assured amount of CENVAT Credit in the Contract on the basis of quotations given by the Contractor in the bid. The Employer keeps in mind that it will be able to avail the stated figure of CENVAT Credit. However, even when the Contractor fulfils its assurance and enables the Employer to avail the figure of minimum CENVAT Credit mentioned in the Contract, the Employer does not gain anything therefrom. On the one hand, the Employer avails the CENVAT Credit and on the other hand, it pays this very amount to the Contractor in the form of "reimbursement" of the taxes paid by the Contractor. The position remains the same even when the CENVAT Credit availed of by the Employer is lesser than the minimum guaranteed amount thereof as mentioned in the Contract....."***
>
> ***"136. Clause 14.5.6 of GCC in no uncertain terms states that "in case of any shortfall in CENVAT Credit from the value guaranteed by the contractor, the shortfall shall not be reimbursed to the contractor". As noted above, this shortfall can be for the reason that proper and valid documents are not given by the Claimant to the Respondent to enable the Respondent to avail full credit. It may also be for the reason that excise duty paid was lesser than which was guaranteed. This clause takes care of both the situations resulting in shortfall of CENVAT Credit. The stipulation that "the shortfall shall not be reimbursed to the contractor" applies to both the eventualities. Apart from this, there is no provision in the Contract which entitles the Employer/Respondent to "withhold" or "deduct" the said shortfall from the amounts that are payable to the Contractor/Claimant under the Contract. In the absence of such a provision in Clause 14.5.6 of GCC or anywhere in the Contract,***

> ***it can safely be inferred that the Respondent has no right to deduct or withhold the amount of shortfall in the CENVAT Credit. Clause 14.5.6 of GCC, thus, provides the complete answer."***
>
> ***"141 To sum up, the Contract provides for Contract Price (Article 2.1 of the Contract) and also gives the basis of this price (Clause 11.2.1 of GCC) by bifurcating it into the basic price (which is the consideration for the performance and its obligation under the Contract by the Contractor) and the duties, taxes, etc. No doubt, the Contract also mentions the minimum guaranteed CENVAT Credit that is assured by the Contractor to the Employer. However, in case of shortfall, the consequence thereof is also provided in the Contract itself (Clause 14.5.6 of the GCC). To repeat, the only consequence is that the Contractor shall not be reimbursed for the amount of taxes, etc. which it has not paid. This clause nowhere provides for "deduction" or "withholding" of such a shortfall from the basic price which is the consideration payable by the Respondent to the Claimant under the Contract."***

27. The reasoning given by the tribunal was further endorsed by the Commercial Court at Asansol with the following words:

> ***"23. Having examined the various contentions of the Learned Advocate for the petitioner on the touchstone of the parameter of interference as laid down by the Hon'ble Apex Court in several judgments referred to above I am of the view that the impugned award does not suffer from any infirmity. The Learned Arbitral Tribunal has deliberated on all issues under reference and has duly explained the reasons for arriving at its decision. There is nothing to indicate that the award is in conflict with the basic notion of justice and fair play and fundamental of policy of Indian Law or is in contravention of the terms of the contract or lacks reasoning. The impugned award therefore does not call for any interference.***
>
> ***Hence,***
> ***It is, ORDERED***
> ***That Misc. Arbitration case being Misc. Arbitration Case No.10 of 2022 is rejected on contest.***
> ***The impugned award is upheld."***

28. The basic contract price (Net Package Price) as specified in the contract is a lump-sum price, which the appellant agreed to pay to the respondent. Thus, the lump sum price payable to the respondent was Rs. 1732 million (Item 18). If, as per the Summary Price Schedule, the respondent had submitted CENVAT documents of Rs. 125.643 Million (Item 15), they would have been paid Rs. 1857.643 Million (Item 14) by the appellant (Rs. 1732 Million + Rs. 125.643 Million = Rs. 1857.643 Million). In the present case, the respondent submitted documents (on which appellant received CENVAT credit) of Rs. 58.323 Million. Thus, as per contract, the respondent is entitled to Rs. 1790.323 Million (Rs. 1732 Million + Rs. 58.323 Million). If somehow no tax had been paid (assuming indirect taxation was abolished), the respondent would have been entitled only to the sum of Rs. 1732 Million. From the above, it is evident that the amounts mentioned in the contract can change on the basis of a host of factors, including market dynamics, change in rates of taxes etc. The shortfall in the documentation pertaining to ED, ST, Education cess etc. is due to a number of factors, including (a) change in rates of taxation (b) change in rates of items (c) changes in quantity of materials to be supplied. The respondent could not have paid more taxes than demanded by the Government. Moreover, there was no reason for the respondent to hide the taxes paid since they were, in any case, to be reimbursed by the appellant for the taxes paid by them. Merely because the words "guaranteed" and "minimum" have been used in the contract does not make the said figure a constant figure. A conjoint reading of Article 2.1 of the agreement and GCC Clause 14.5.6 would make the intention of the terms "Minimum" and "Guaranteed" clear and unequivocal. Thus, the averment of the appellant that the contract price as set out in the contract is not changeable, is unacceptable. The Gross Contract Price depends upon a number of variables, including changes in rates of taxes, price variation etc. and hence, it cannot ever be stated that the Contract Price is a fixed amount. Accordingly, Article 2.1 of the agreement read with clause 14.5.6 and 14.6 envisages that the Contract

Price as well as CENVAT amount is subject to changes (upwards or downwards). They cannot remain constant as stated by the appellant.

29. A perusal of the paragraphs of the award quoted above would show that the appellant has no power under the contract to make any deduction and that the amount of minimum guaranteed CENVAT credit is not a sum due to the appellant but depends upon factors, which are changeable in nature. Hence, the insistence of the appellant on the amount of shortfall is beyond the provisions of the contract and was correctly held as such by the learned arbitral tribunal. The contention of the appellant that the shortfall in the CENVAT amount had any impact on their financial planning has also been dealt with in the Award and endorsed in the judgment of the Commercial Court at Asansol.

30. This court finds the tribunal's award to be based on a careful examination of the contract, contemporaneous records, evidence of parties, and consistent application of law. Under Section 34 of the Act, such findings are not liable to be interfered with, even if an alternative view is possible. The Hon'ble Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI*** reported at ***(2019) 15 SCC 131*** has held that unless the award is perverse or patently illegal, no interference is permissible. None of the conclusions in the present award satisfy that threshold.

31. The challenge that the tribunal exceeded its mandate under Section 34(2)(a)(iv) is wholly unfounded. The tribunal adjudicated the dispute framed in the Terms of Reference, namely, whether the appellant was contractually entitled to withhold ₹23.98 crores under Clause 14.5.6. The award does not travel beyond this issue. No extraneous relief was granted. The findings remain strictly confined to the scope of submission. In fact, the tribunal repeatedly emphasized its interpretive limits and derived all conclusions from specific clauses, notably Clause 14.5.6 and Article 13.

32. The appellant alleges patent illegality, but this challenge is an impermissible attempt to reargue the merits. As per ***Ssangyong Engineering (supra)*** to show a patent illegality, challenge must be held as to a contravention of law on the face of the award. Here, the tribunal's analysis of Clause 14.5.6 is cogent, reasoned, and entirely consistent with commercial logic. The award was never improbable but only a plausible outcome, considering that the deduction was made unilaterally against a certified invoice. No error of law or fact is manifest on the face of the record. The appellant did not demonstrate any claim under Clause 14.5.6. Moreover, no contemporaneous amendment under Article 13 existed permitting any such deduction. The tribunal therefore rightly held that the deduction was baseless.

33. The Commercial Court, in its judgment dated 21st December 2023, while rejecting the Section 34 petition, has categorically upheld the arbitral award as being reasoned, legally sound, and consistent with both the contractual terms and settled legal principles. The judgment reinforces several key conclusions of the arbitral tribunal and highlights the absence of any grounds for interference under Section 34 of the Arbitration and Conciliation Act, 1996. The Court reaffirmed that the arbitral tribunal had interpreted clause 14.5.6 of the General Conditions of Contract (GCC) correctly by holding that the said clause does not authorize unilateral deductions from certified invoices. Instead, the only consequence contemplated by the clause is the non-reimbursement of excess duty amounts in the event of a shortfall of CENVAT credit. At Paragraphs 135–141 of the judgment, the Commercial Court observed that "there is no provision in the Contract which entitles the Employer to 'withhold' or 'deduct' the said shortfall from the amounts that are payable," thereby endorsing the tribunal's core finding.

34. The Court has further held that the invocation of arbitration by the respondent was entirely valid and permissible. Interpreting clause 1 of the GCC and the structure of the consortium, the Court found that each member, including the respondent herein, was independently treated as a "Contractor" under the terms of the agreement. The Court also recorded that the other consortium members neither raised claims nor objected to exclusion from arbitration, and thus their non-participation did not vitiate the proceedings. The Court specifically cited the tribunal's holistic interpretation of Articles 1.3, 10.1, 12.1.1, and the Terms of Payment, concluding that the contract was divisible and permitted independent invocation of arbitration by any consortium member. The Court has also emphasized the well-established limitations on judicial review of arbitral awards. It relied on precedents including ***Associate Builders (supra,) Ssangyong Engineering (supra)*** to reiterate that re-appreciation of evidence or alternate interpretations of contractual clauses are impermissible unless the award suffers from patent illegality or is contrary to the fundamental policy of Indian law. The Court observed that the arbitral award was well-reasoned, based on documentary evidence, and not rendered in violation of any procedural mandate, thereby precluding any interference. Lastly, the Court upheld the tribunal's award of interest and costs under Sections 31(7) and 31A of the Act. It noted that the simple interest at 7% per annum was neither excessive nor arbitrary, and the costs awarded reflected the prevailing norms and the conduct of the parties.

35. These judicial observations lend further credence to the Award and demonstrate that the tribunal's reasoning has passed judicial scrutiny on all relevant parameters, jurisdiction, contractual interpretation, procedural confirmation, significantly diminishing any scope for further challenge.

36. The present appeal essentially seeks reappraisal of facts and interpretation of contractual clauses,, impermissible under settled arbitration law. The tribunal's award as well as the order by the Commercial Court at Asansol in regard to the application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 is well-reasoned and contractually consistent, withstands all grounds of challenge presented by the appellant.

37. Hence, on the basis of the entire discussion as above, this Court finds no merits in the instant appeals.

38. The appeals being FMAT (ARBAWARD) No. 7 of 2024 and FMAT (ARBAWARD) No. 8 of 2024 are dismissed. There will be no order as to costs.

39. Urgent certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

Arijit Banerjee, J. **Rai Chattopadhyay, J.**