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

Reserved on: 13th September, 2019
Pronounced on:7th January, 2020

\+ **O.M.P. (COMM) 158/2019**

G + H SCHALLSCHUTZ GMBH ..... Petitioner

Through: Mr. Abhimanyu Bhandari, Ms. Roohina Dua, Mr. Anirudh Bakhru and Mr. Cheitanya Madan, Advocates.

versus

M/S. BHARAT HEAVY ELECTRICALS LTD. ..... Respondent

Through: Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Saurav Agrawal, Ms. Akanksha Sisodia, Ms. Aakriti Dawar, Mr. Vibhu Anshuman, Mr. Anshuman Chowdhury Advocates.

JUDGMENT

SANJEEV NARULA, J

1. G + H Schallschutz GmbH, the Claimant in the arbitration proceedings, (hereinafter "Petitioner") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") for setting aside the Final Award dated 20th December 2018 (hereinafter "Impugned Award"), passed by the Arbitral Tribunal comprising of Mr. John Beechey, CBE (Presiding Officer), Dr. Werner Muller and Dr. Sudipto Sarkar, (hereinafter "AT") constituted under International Dispute Resolution Centre ('IDRC'), London. The challenge to the award is based *inter alia* on the ground that it is contrary to the public policy of Indian law, vitiated by patent illegality and it is contrary and incompatible with the prior Partial

Final Award dated 31st October 2017 (hereinafter " PFA"), passed by the AT.

Foreword

2. Before dealing with the rival contentions of the parties, a brief narrative of relevant facts is necessary to appreciate the perspective of the parties and the scope of challenge in the present petition.

3. Petitioner is a company incorporated under the laws of Germany and is engaged in the business of technical acoustics and industry. It primarily serves industrial and automotive sections, and power plant, gas & oil, and aviation industries. M/s Bharat Heavy Electricals Limited (Respondent in the Arbitration proceedings and hereinafter "BHEL" / "Respondent") is a power plant equipment manufacturer and is one of the largest manufacturing companies in India engaged in engineering, manufacturing, construction and commissioning of products for several industries, such as power, renewable energy, oil & gas, water and defense, amongst others.

4. Respondent was charged with the construction of the power plant in Marib, Yemen by the Public Electric Company of Yemen. For this purpose it issued a Tender enquiry to identify potential vendors. Pursuant thereto, on 3rd January 2014, Respondent issued a Purchase Order in favour of the Petitioner for manufacture, supply and supervision of erection and commissioning of four identical Exhaust Gas Systems ("EGS") for a Siemens Gas Turbine Model SGT5-2000E for the Marib Project.

5. In terms of the purchase order, EGS was to be supplied in two lots consisting of two systems each and delivered to Hodeidah seaport in Yemen. First lot was to be delivered on 3rd October 2014 and second on 3rd February 2015. The delivery date was revised to 11th January 2015 and 13th April 2015 respectively. On 16th December 2014, Petitioner shipped embedded parts of the components of Lot-II along with corresponding parts of Lot-I which were accepted by the Respondent and part payments were also made. There is no disagreement between the parties in relation to this portion of the supply. The dispute pertains to delivery of Indian Components of Unit 3 and 4 of Lot-II, which originated with the Respondent contending that Government of India had put a travel advisory asking Indians to leave Yemen and to avoid all travel to the said destination due to deterioration of political situation. As a consequence, on 20th February 2015, Respondent wrote to the Petitioner to put the purchase order on hold with immediate effect till further communication. Petitioner responded by informing Respondent that Unit-3 of Lot-II was completed and had been successfully inspected by the Inspecting Agency, Unit-4 was at the final stage of completion and it recommended that work should be completed and stored in accordance with Clause 25 of the purchase order, until further orders/notice from the Respondent. On 30th March 2015, Respondent formally declared *force majeure* conditions w.e.f. 27th March 2015 in terms of the contract between the parties. Subsequently, on 1st May 2015 the *force majeure* clause in the purchase order was invoked. Thereafter, correspondence followed between the parties, but without any resolution. Petitioner stored the completed supplies under storage and in accordance with revised delivery schedule the storage period expired on 13th October

2015, while Respondent claimed that *force majeure* condition subsisted. Petitioner vide letter dated 15th October 2015, relying upon Clause – 25 of the purchase order requested the Respondent to resolve the matter and accept the delivery of material of Lot-II. On the other hand, Respondent vide letter dated 20th October 2015, informed the Petitioner that it was optimistic that the situation will improve in Yemen and requested for "*further extension of currently available storage for materials till the end of March, 2016 without any financial implications*". Petitioner rejected Respondent's request and raised an invoice on the Respondent on 23rd November 2015.

6. In view of the foregoing, disputes and differences arose between the parties, bringing about invocation of the Arbitration Clause - 16 of the contract and leading to constitution of the AT. Petitioner filed its statement of claim and in response thereto, Respondent filed its statement of defence. On consideration of the submissions and material placed during the arbitration, AT passed the Partial Final Award ('PFA") dated 31st October 2017 deciding several contentious issues viz *the Purchase Order is subject to Indian law; the Purchase Order was frustrated with effect from 27 March 2015; the Claimant is entitled to rely upon, and Respondent is in breach of, the provisions of Clause 25 of the Purchase Order; The jurisdiction of the Tribunal to hear the Parties on damages arising from the said breach is expressly reserved, as is the Tribunal's jurisdiction as to costs.*

7. In a nutshell, the AT held that Petitioner is entitled to protection of Clause-25 and Respondent in breach thereof. However, on the aspect of damages, Tribunal felt that the matter is not ripe for determination and the

question of damages and quantum of damages should be subject to further submission which would necessarily include an examination of Claimant's claim for damages in respect of cost of storing the Indian components and cost for the inland transport to Mumbai/Haridwar. Similarly, it was observed that claim for interest would also require further consideration. In the above context AT reserved its jurisdiction to hear further submissions on the issues above-noted and proceeded further in the arbitration. In the meantime, Respondent's challenge to the PFA before this court, vide OMP (Comm) No. 151/2018, was unsuccessful, the award was upheld and the petition was dismissed vide judgment dated 9th July 2018.

8. In the ensuing arbitration proceedings, parties filed statements of witnesses along with exhibits and AT proceeded to pass the impugned Award. In the Final Award the AT held that Claimant's damages claim is denied; the Respondent shall pay the sum of EUR 18,685.39 in respect of Claimant's storage costs for the period 14 October 2015 to 8 April 2016 (25 weeks), together with interest thereon at the rate of 4% per annum from 9 April 2016 until the date of this Award; interest on any sums found due and owing shall be paid at the rate of 3% per annum from the date of this Final Award until the date of payment. Parties shall each bear 50% of the costs of the arbitration.

9. The Petitioner is aggrieved with the Final Award and has impugned the same under Section 34 of the Act.

Case of the Petitioner: In brief

10. Learned Counsel for the Petitioner, Mr. Abhimanyu Bhandari, commenced his attack to the impugned award by contending that the findings therein are contrary and conflicting with the opinion given by the AT in the previous PFA. He emphasized that in the PFA the AT, after deciding the scope of Clause 25 of the contract, has concluded that Respondent was in breach of its obligation under the aforesaid clause by reason of its failure to take the requisite steps, enabling the Petitioner to effect delivery of the goods to India. By virtue of this finding the AT upheld Petitioner's entitlement to compensation in lieu of the breach of contract, committed by the Respondent. Thereafter, in Final Award, the AT shockingly gave perverse reasoning declining to award damages thereby contradicting the PFA. The finding of the AT is irrational for the reason that despite taking note of the communications exchanged between the parties and observing that Petitioner was ready and willing to supply the goods throughout the term of the contract, and that the contract being frustrated owing to Respondent issuing *force majeure* notice, Petitioner's claim for damages has been turned down. AT's observation regarding failure of the Petitioner to mitigate losses is contrary to the expert opinion led by both the parties. The goods in dispute did not have any independent market without the auxiliary items attached therewith; hence no effective remedy was available to the Petitioner, other than requesting Respondent to accept delivery of the goods. The Final Award is contrary to substantial provisions of law as it imposes the responsibility for loss occasioned on the seller, contrary to the mandate of Section 44 of the Sale of Goods Act. The award is against the fundamental policy of Indian law and is liable to be set aside because the AT failed to evaluate and appreciate the evidence led by the

Petitioner to prove the loss and damages suffered by it, owing to Respondent's failure to accept delivery of the goods. Mr. Bhandari placed heavy reliance upon the judgment of the Supreme Court in ***NHAI v. Progressive MVR, (2018) 14 SCC 688 and Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. (2018) 3 SCC 133.***

Case of the Respondent: In brief

11. Learned senior counsel for the Respondent, Mr. Ciccu Mukhopadhaya, preludes his submissions by contending that post the 2015 amendment of the Arbitration and Conciliation Act, 1996, in terms of Clause 34(2A) of the Act and in view of the observations of the Apex Court in ***Ssangyong Engineering & Construction Co. Ltd. vs. NHAI, 2018 SCCOnLine Del 10184,*** in cases relating to international commercial arbitration seated in India, the scope of interference by Courts, is extremely narrow and "patent illegality" is no longer a valid ground for challenging the Arbitral Award. He urged that none of the grounds raised by Mr. Bhandari meet the test or the criteria for judicial interference as laid down in ***Ssangyong Engineering's case*** (*supra*). Petitioner's challenge is premised purely on factual aspects, which is not a ground available to assail the award under Section 34 of the Act and the petition merits dismissal.

12. Apart from the peripheral argument on jurisdiction, he also advanced submissions on the central issue viz. the alleged inconsistency between the two awards and submitted that the observation of the AT in the PFA, holding the Respondent responsible for breach of the contract in terms of

Clause 25, were in reference to the issue of, whether the contract was frustrated due to the war in Yemen and whether Clause 25 of the contract would survive despite *force majeure* condition. The observations of the AT in the PFA did not absolve the Petitioner of his burden to prove the losses or damages that it had allegedly suffered as a consequence of the breach of contract. He planked his contention on the ground that the matters relating to Petitioner's entitlement to damages had been categorically reserved by the AT in the Partial Final Award, and were to be decided in the Final Award. The finding in the two awards operates in different spheres.

13. To controvert the submissions on the applicability of Section 44 of the Sale of Goods Act, Mr. Mukhopadhaya placed reliance upon Section 31 of the Sale of Goods Act. He submitted that it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of contract. In the present case, since Petitioner did not undertake its obligation of supplying the goods, as a consequence, its claim for entitlement to price of goods/ damages has been rightly rejected by the AT. Reliance has also been placed on Section 36 of the Sale of Goods Act to contend that the issue of buyer's obligation to take possession of the goods or seller's responsibility to supply the goods is a question of fact which has to be decided, taking into account facts of each case and evidence led by the parties. Lastly, he argued that the selective reading and interpretation of the Partial and Final Awards, is not the proper approach. To get the complete picture, the awards have to be appreciated in the background of the submissions advanced by the parties and any reading out of context would be misinterpreted. He supported his submissions by relying upon the

decisions of the Supreme Court in ***Umabai v. Nilkanth Dhondiba Chavan, (2005) 6 SCC 243*** and ***Inderchand Jain v. Motilal (2009) 14 SCC 663.***

Analysis and Findings:

14. In light of the aforenoted submissions advanced by learned counsels for both the parties, I now proceed to evaluate the merits of their respective contentions.

I. Whether there is any conflict between the findings in the Partial Final Award and the Final Award.

15. Since the foremost and paramount ground of challenge centers around the conflict in the two awards, I propose to first deal with the same. Before adverting to the arguments advanced by the learned counsels on this issue, it would be apposite to note the findings given by the AT in the PFA and place the same alongside those rendered in the Final Award to make a comparison. Precursor to that should be to briefly note the context in which the findings came to be rendered. This can be best gauged by paying particular attention to the exact issue that has been decided and that can be easily ascertained from the portion of the PFA extracted hereunder:

> *"149. Claimant relied upon the decision in Ghose as authority for the proposition that a contract stands frustrated, if parties had not contemplated, and had not provided for, an alternative performance. It drew attention to para. 17 of the Judgment:*
>
> > *"it must be pointed out here that if the parties do contemplate the possibility of an intervening*

> *circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when the event happens. [Citing Lord Atkinson in Matthey v. Curling] This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Indian Contract Act cannot be accepted."*

150. In this case, Claimant argues that the Parties made specific provision for performance in an alternative fashion. Accordingly, the contract did not stand frustrated and performance can be demanded.

175. ***The question for the Tribunal is whether Clause 25 would allow the contract between Claimant and Respondent to stand in that, notwithstanding the general rule, the provisions of Clause 25 came within the exception identified in Ghose and in Tatem. That is to say that by the terms of Clause 25, it could be established that the Parties had provided for the survival of the contract in the event of a supervening circumstance, which had been foreseen.***

177. ***The question is whether, taking the contract as a whole, the provisions of Clause 25 bring the Purchase Order within the exception identified at paragraph 17 of Ghose (see paragraph 149 above).”***

(emphasis supplied)

16. The aforesaid issue was decided by the Tribunal, in the following words:

> *“186. In this* case, *the question* is *whether it is possible to regard the Purchase Order as containing two discrete items of*

supply (the components on the one hand and the supervision on the other) and, in those circumstances, whether the frustration of the underlying contract between PEC and Respondent would be an end to the Purchase Order as a whole or whether Clause 25 would operate to preserve the contract under the Ghose *exception to the extent of the supply of the components.*

187. On analysis of its terms, it seems to the Tribunal that the Purchase Order lends itself to such a construction. It cannot be disputed that the supply of the components constituted the overwhelming proportion of the supply.

188. In the opinion of the Tribunal, such a reading is sufficient to bring Clause 25 within the Ghose exception. It is effective to deal with the situation in which an event of hold or force majeure impacts upon the supply of the components, even though the Purchase Order otherwise would be a contract rendered practically impossible of performance.

189. The Tribunal has established on the facts that manufacture of the components was complete before notice of frustration of the PEC contract was given to PEC by Respondent and, in any event, well before any such notification of such frustration was provided by Respondent to Claimant. But for the events, which led to the frustration of the contract, there is no reason to suppose that Claimant would not have been in a position to meet the revised LOT 2 April 2015 delivery date. Claimant thereafter gave notice of its intention to effect delivery to India inconformity with Clause 25. In the opinion of the Tribunal:

(a) Claimant was entitled to apply the provisions of Clause 25 of the Purchase Order;

(b) Clause 25 provides an alternative mechanism for the delivery of the components in circumstances such as those which* arose *at Marib; and

(c) Respondent* is *in breach of* its *obligations by reason of* its *failure to take the* steps *required of it to enable Claimant to effect delivery to India in lieu of Hodaidah pursuant to the* terms *of Clause 25 of the Purchase Order.

190. The Tribunal must consider Claimant's entitlement to compensation in respect of the LOT 2 components by reference to principles of Indian law. Respondent insists that there is *no entitlement. It argued that the matter fell within Section 65 of the Indian Contract Act, which, in relevant part provides that:*

> *"When an agreement* is *discovered to be void, or when a contract* becomes *void, any person who has received any advantage under such agreement or contract* is *bound to restore it, or to make such compensation for it to the person from whom he received it.*"

191. In the event, however, the Tribunal has found that Claimant is *entitled to the protection of Clause 25 and that Respondent* is *in breach.*

193. This is not a matter, which is yet ripe for determination. ***The Parties are in agreement that the question of damages, and of any amount to be paid, should be the subject of further submissions. Those submissions will necessarily include an examination of Claimant's claims for damages in respect of the costs of storing the Indian Components and the costs for the inland transport to FCA Mumbai/ Haridwar of the Indian Components. Any claims for interest will likewise require further consideration. Accordingly, the Tribunal reserves its jurisdiction to hear further submissions on these matters - and on the question of costs****."*

(emphasis supplied)

17. Now, let's juxtapose the aforesaid findings with those appearing in the

Final Award as follows*:

> "81. ***But equally, in the context of Claimant's damages claim, it is necessary to ask whether Claimant itself did all it could to give effect to the terms of Clause 25 and thereby to protect its entitlement to payment.***
>
> *82. Claimant certainly complied with its obligation to keep the materials in its custody for six months without any storage charges to BHEL, but Clause 25 continues:*
>
> > *"[...] and if it is not possible to make shipment to Marib even after the 06 months of the scheduled delivery, then to ship/dispatch the material to Mumbai/Haridwar and claim the payment [...]"*
>
> *83. Those are steps, which it was within the power of Claimant to make; there is no requirement for a Lloyd's inspection report (although such a report in respect of the Components had already been issued on 27 February 2015), nor for an MDCC, nor a further LIC.* ***There was nothing to preclude Claimant from itself taking a decision to send the Components to Mumbai or Haridwar and having done so, it could claim payment.***
>
> *84.* ***On the plain language of Clause 25 of the Purchase Order, it would seem that this was an option open to Claimant once six months had elapsed after the scheduled delivery date of 13 April 2015 for the Components. Had it adopted such a course then, instead of entering into a further (inconclusive) round of correspondence in January-February 2016, or immediately or very soon after its letter of 22 February 2016 had fallen on stony ground, it would have been able to deliver the Components and claim payment.*** *Alternatively, by its letter of 22 December 2015 (or thereafter), it could have put Respondent on notice that it would treat Respondent's refusal to*

* The remaining portion from the relevant extract of the Final Award is reproduced at para 26 hereinbelow.

> *take delivery as repudiatory conduct by Respondent, which Claimant accepted and thereupon to sue for the price of the goods and the additional storage charges. Instead, matters were not pursued at a contractual level and this arbitration commenced in April 2016, while all the while, the Components lay gathering dust and storage costs mounted."*
>
> (emphasis supplied)

18. The contradiction that is sought to be highlighted is - in the PFA, the AT concluded that Respondent is in breach of its obligation under Clause 25 of the Purchase Order, and having categorically and unanimously decided this issue in favour of the Petitioner, in the Final Award, it could not have been held contrarily that Petitioner did not give effect to the terms of Clause 25 to prove its entitlement to cost of the component/damages. The contradictions and inconsistencies are further sought to be underscored by focusing attention of this Court to the chain of communications exchanged between the Claimant and the Respondent. It is argued that Claimant was always ready and willing to perform its obligations under the agreement and that the goods were ready to be supplied, however, it was the Respondent who failed to take steps for the delivery of the goods. Referring to para no. 189 of the PFA reproduced hereinabove, Mr. Bhandari, argued that the Tribunal took note of the fact that Respondent rather than making necessary provision to allow the claimant to deliver the goods, kept on delaying it, to extend the storage arrangements, which clearly indicated that it was not in a position to accept the delivery of the goods. Mr. Bhandari has also referred to a communication from the Claimant's Legal Department dated 22nd December, 2015, to which, he says there was no response or payment by the Respondent. The said communication *inter alia* reads as under:

"We refer to the above and would like to inform you that the subject matter has been passed on to us for further attention.

Mr. Schubert and Mr. Keuser have informed us of the meeting in Haridwar on 14-12-2015. Both were notified by B.H.E.L. that due to the instable situation in Marib, Yemen, force majeure is being upheld and the complete project is on hold. B.H.E.L. therefore declines to accept delivery of our exhaust gas systems, now stored at Raniped, Tamil Nadu, and will not pay our invoice no. 9069204 7 dated 24-11-2015.

However, according to clause no. 25 of the Purchase Order, B.H.E.L. is obliged to receive delivery of shipments, that cannot be made to Marib, in Mumbai or Haridwar if six months have passed since the scheduled delivery time, and to pay the agreed contract price.

Referring to our invoice no. 90692047 dated 24-11-2015 we therefore kindly ask you to pay the balance of EUR 3,160,513.84 to us by 8th January 2016 at the latest.

Please be advised, that we will instruct our lawyers to initiate arbitration proceedings as per clause 16 of the Purchase Order, if we do not receive payment by this date."

(emphasis supplied)

19. It was then argued that the Respondent did not indicate that it was ready to receive the delivery of the goods and also did not agree to pay the invoice of the Claimant. This reveals that Respondent was avoiding steps required to enable the Claimant to effect the delivery of the goods. In this scenario, the Petitioner could not be held to be at fault. The AT despite being aware of the aforesaid factual position has given inconsistent findings in the Final Award by denying the award of damages. Additionally, it has been argued that transportation of goods from the warehouse to Haridwar or Mumbai,

depending on the location, would have required 64 trucks and therefore, unless the Respondent indicated where it would take delivery, it was not possible for the Petitioner to load the goods and send them to BHEL. For this precise reason, after considering all the evidence on record, the AT had earlier concluded by way of unanimous PFA that the Respondent was in breach of its obligations to effect delivery, pursuant to Clause 25 of the Purchase Order. Mr. Bhandari has also referred to the pleadings of the Respondent to buttress his submissions. He submitted that in the pleadings, the Respondent has all throughout maintained that it was not under any obligation to accept the delivery due to frustration of the contract. The AT should not have given benefit to the Respondent of its own wrong doing, of refusing the accept delivery and the AT should have rather awarded damages resulting from the breach. He further submitted that the minority member of the AT has rightly reasoned in the impugned award that the Respondent should not be rewarded for disregarding its contractual obligation to accept the delivery of the goods and the Petitioner should not be deprived of its contractual rights. Respondent on the other hand, refuted Petitioner's entitlement to recover damages on the ground that in case of frustration, as held by AT in PFA, there can be no question of an award of damages in favour of any party. The conditions as set out in section 65 of the Contract Act, Section 56 of the Sale of Goods Act were not met and do not apply in case of frustration. Section 65 applied only for restoration of advantage. There was no legal relationship between the parties after frustration of the contract and even assuming there was any wrongful neglect or refusal to accept the components, the Petitioner cannot recover any damages as it failed to plead a case or adduce evidence of any damages

sustained by it. In any event, Claimant had failed to apply the terms of Clause 25 of the Purchase Order. All it had to do was to ship the components from Indira's facility to Haridwar to be in a position to claim payment. Not having taken any such steps, it is not entitled to the price of the goods.

20. I am not convinced with Mr. Bhandari's arguments. On a bare perusal of the PFA, it emerges that at the stage the AT was posed with the question as to whether the Purchase Order got frustrated because of the War in Yemen and whether Clause 15 of the PU-93 or Clause 25 of the Purchase Order would be invoked, despite *hold or frustration of the contract generally.* This issue came to be decided in favour of the Petitioner. Concurrently, AT called upon the parties to lead evidence and make submissions on the question of damages arising out of the breach of the Purchase Order. The PFA was assailed before this Court by the Respondent and the same resulted in a rejection. It is patently clear that the AT did not go into the question as to whether the Petitioner had complied with the conditions stipulated under Clause 25 of the Purchase Order, which would entitle it to the purchase price or damages in terms thereof. It is also clearly noticeable from the concluding portion of the PFA that the Tribunal at that stage reserved its opinion on the question of award of damages arising from the breach, as also its jurisdiction on the question of payment of costs. Petitioner has given undue and unnecessary weightage to the observations made in paragraph no. 189 (c) of the PFA (supra), in its endeavor to contend that there are inconsistencies in the award. It is well established in law that the judgment of a Court, and in this case the decision of the Tribunal has to be read in context of the

question that arose for consideration in the case in which the decision has been delivered. [See: ***JIK Industries Limited and Ors. vs. Amarlal V. Jumani and Ors., (2012) 3 SCC 255***]. The observations of the Tribunal in paragraph 189 (c) of the PFA can therefore, not be read in isolation, *de hors* the legal and the factual question that arose for its consideration. While deciding the question of frustration of contract, the findings of the Tribunal cannot be read to be conclusive on the question of claim for damages. Pertinently, even if Respondent is held to be guilty of breach, it does not necessarily mean that the Petitioner was ineluctably entitled to damages.

21. The dispositive paragraph i.e. 194 (c) of the PFA, distinctly specifies that the claimant can rely upon Clause 25 of the Purchase Order. The same reads as under:

> *"194. For the foregoing reasons, the Tribunal renders the following decisions:*
>
> *...*
> *(c) Claimant is entitled to rely upon, and Respondent is in breach of, the provisions of Clause 25 of the Purchase Order;"*

22. The unsuccessful challenge to the PFA brings finality only to one issue i.e. purchase order was frustrated, but Clause 25 thereof would operate to preserve the contract under the Ghose exception to the extent of the supply of the Components. Thus, Petitioner could certainly rely on the aforesaid clause, but it was still obligated to establish its claim for damages. Petitioner's position before the AT, subsequent to the passing of the PFA was in respect of entitlement to (i) price of the components by way of

damages (ii) storage cost (iii) interest and cost. It had to inevitably produce material and adduce evidence before the AT to establish its claim of price of components by way of damages. On these issues, AT did not find favour with the Petitioner for the detailed reasons analyzed above. This reasoning does not render the awards irreconcilable, and upholding the Final Award, would not create an anomalous situation, as sought to be canvassed by Mr. Bhandari. The two awards, arising out of the same cause of action, deal with different aspects altogether. The contractual provision of Clause 25, was a subject matter of PFA, however, Petitioner's claim for damages under the said clause was wholly a distinct question that was undoubtedly not decided in the PFA. I cannot comprehend any inconsistency in the two awards on the question of interpretation of the aforesaid Clause, as in the Final Award the interpretation of Clause 25 was not called in question.

23. Moreover, findings on damages are based purely on facts and the same ought not to be interfered with, by this Court while exercising jurisdiction under Section 34 of the Act. The Tribunal has determined Petitioner's claim of damages, holding that it has been unable to discharge the onus. Significantly, this aspect falls in the exclusive domain of the AT and denial of damages, is a factual determination that cannot be construed as a perverse finding so as to shock the conscience of the Court; I therefore, do not find any merit in the ground of challenge advanced by Mr. Bhandari in order to exercise jurisdiction under Section 34 of the Act and interfere with the FA. Mr. Bhandari has relied upon the decision of Supreme Court in ***National Highway Authority of India vs. Progressive-MVR (JV), (2018) 14 SCC 688***, to contend that, Courts can interfere with the findings of the AT, in case

of conflicting awards. In my view, the aforesaid judgment does not help the petitioner, as I am unable to see any conflict in the views expressed in PFA and in the Final Award.

II. Whether the Petitioner is entitled to damages

24. In order to determine this question, the AT had given opportunity to the parties to prove their case. Thereafter, on the basis of the material on record, including the testimony of the witnesses, the majority of the Tribunal concluded that the Petitioner did not take steps to firmly exercise its rights under Clause 25 of the Purchase Order.

25. Mr. Bhandari has argued that since in the PFA, the Tribunal had held the Respondent guilty of breach of the contract, it ought to have awarded damages. Additionally, he submitted that since the delivery of the components had not been approved or declined and had not been paid for, Petitioner would not have been in a position to dispose of the components, hence he is entitled to claim storage charges. In support of his submission, he relied upon the judgment of the Supreme Court in ***Maharashtra State Electricity Distribution Company Ltd. vs. Datar Switchgear Ltd. and Another, (2018) 3 SCC 133,*** the relevant portion whereof is extracted herein below:

> *"63. That apart, we also find that the Arbitral Tribunal, while awarding the damages, has relied upon the judgment of this Court in* ***Union of India v. Sugauli Sugar Works (P) Ltd., (1976) 3 SCC 32,*** *wherein a cardinal principle of damages had been laid down to the effect* ***that the injured party should be placed in as good a position as money could do as if the contract had been performed****. The following passage from*

the said judgment was kept in mind by the Arbitral Tribunal: (SCC p. 36, para 22)

> *"22.* ***The market rate is a presumptive test because it is the general intention of the law that, in giving damages, for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. The rule as to market price is intended to secure only an indemnity to the purchaser. The market value is taken because it is presumed to be the true value of the goods to the purchaser. One of the principles for award of damages is that as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally flows from the breach. Therefore, the principle is that as far as possible the injured party should be placed in as good a situation as if the contract had been performed. In other words, it is to provide compensation for pecuniary loss which naturally flows from the breach****. The High Court correctly applied these principles and adopted the contract price in the facts and circumstances of the case as the correct basis for compensation."*
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> (emphasis supplied)

26. The Tribunal while examining Clause 25 held that as a consequence of Petitioner's decision to maintain its "all or nothing" claim for the price of goods, it had given up its option of an alternative claim for recovery of the cost of manufacturing the components, stored at Indira. This factual finding

of the Tribunal is evident from the observations made in Paragraph 81, 83, 84, 92 and 94 of the Final Award, as reproduced hereinunder:

> *"81. But equally, in the context of Claimant's damages claim, it is necessary to ask whether Claimant itself did all it could to give effect to the terms of Clause 25 and thereby to protect its entitlement to payment.*
>
> *83. Those are steps, which it was within the power of Claimant to make**; there is no requirement for a Lloyd's inspection report** (although such a report in respect of the Components had already been issued on 27 February 2015), nor for an MDCC, nor a further LIC. **There was nothing to preclude Claimant from itself taking a decision to send the Components to Mumbai or Haridwar.** And having done so, it could claim payment.*
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> *84. On the plain language of Clause 25 of the Purchase Order, it would seem that this was an option open to Claimant once six months had elapsed after the scheduled delivery date of 13 April 2015 for the Components. Had it adopted such a course then, instead of entering into a further (inconclusive) round of correspondence in January-February 2016, or immediately or very soon after its letter of 22 February 2016 had fallen on stony ground, it would have been able to deliver the Components and claim payment. Alternatively, by its letter of 22 December 2015 (or thereafter), **it could have put Respondent on notice that it would treat Respondent's refusal to take delivery as repudiatory conduct by Respondent, which Claimant accepted and thereupon to sue for the price of the goods and the additional storage charges. Instead, matters were not pursued at a contractual level and this arbitration commenced in April 2016, while all the while, the Components lay gathering dust and storage costs mounted**.*
>
> *92. As the Tribunal understands it, the Components are still held by Claimant in store at Indira's premises. **At any time between***

the mid-December 2015 meetings until it commenced this arbitration in April 2016, Claimant could have insisted upon its right to effect delivery to Haridwar or Mumbai at its election pursuant to Clause 25 of the Purchase Order and to claim its price. Had it done so, and had Respondent actually refused delivery and/or payment *(as it had threatened to do),* ***thereby repudiating the contract, then Claimant's case in this arbitration would have been very different.*** *In stark terms,* ***Claimant has taken no steps to dispose of the Components or otherwise in any way to mitigate its asserted loss nor has it done anything to limit (or stop) the storage costs which continue to accrue; it has pressed ahead on the basis that it will make good its claim for the full price, subject, it now acknowledges, to a reduction for any scrap value in the Components.***

94. ***The majority of the Tribunal takes a different view. It is unable to condone the course of action actually adopted by Claimant. It is satisfied that Claimant could have taken steps formally to exercise its rights under Clause 25 of the Purchase Order, certainly by April 2016.*** *At that point,* ***had delivery of the Components been proffered and/or attempted and declined and/or had Claimant not been paid, it would have been in a position to dispose of the Components, to cease running up storage costs and to bring a claim in this arbitration for the price of the goods and for storage costs incurred. It is now far too late. In all the circumstances, the Tribunal concludes that Claimant's application for recovery of the contract price must fail; it is entitled to retain such residual value as it can realise from the Components, which remain in its possession. It is to be noted that, as a consequence of Claimant's decision to maintain its 'all or nothing' claim for the price of the goods, it precluded the option of an alternative claim for recovery of the costs of manufacture of the Components by Indira. In fact, at no point - either in its Statement of Claim or in the Submission of Damages of 31 March 2017*** *(or, for that matter, in the year that elapsed between the filing of Submission of Damages and the hearings in June 2018)* ***did Claimant seek to advance such an alternative claim. Had it done so, it would have been required***

to adduce evidence as to the actual cost of the manufacture of the Components and of the extent of Clai1nant's profit margin, but the Tribunal had no such material available to it*"*

27. The law with respect to claim of damages is no longer *res integra*. Ordinarily, the findings of breach of contract should be followed with the award for damages, in view of the principle that the Court ought to put the injured party in the same position as if the contract had been performed. However, in order to succeed, the Petitioner was required to strictly adhere to the terms of the contract for establishing its claim for damages. The award of damages has to be in terms of Section 73 and 74 of the Indian Contract Act, whereby the non-breaching party is bound to prove the loss suffered by it, in order to be entitled to claim damages from the party in breach. The measure of damages as a result of breach of contract requires the non-breaching party to produce evidence before the Court/Tribunal to ascertain the damages suffered by it so as to enable the AT to award the same. Once the breach is established, the next question that arises for consideration is the effect thereof. In order to ascertain the same, the reference to the terms of the contract becomes necessary. In present case, the relevant Clauses are 24 and 25, which read as under:

*"**CLAUSE 24:** Order cancellation clause:*

If BHEL will cancel the contract for the reason not attributable to the M/S G+H; BHEL will reimburse the explained and documented cost to M/S G+H as per mutual agreement. Amount of the cancellation cost will be limited to contract value.

***CLAUSE 25:** Storage Conditions in Case of Hold by BHEL:*

> *In the event of hold / force major condition M/S G+H will keep material in their custody for 6 month without any storage charges to BHEL and if it is not possible to make shipment to Marib even after 06 months of the scheduled delivery, then to ship / dispatch the material to Mumbai / Haridwar and claim the payment. The CFR value will remain unchanged in such eventuality."*

28. Petitioner argues that damages should have been awarded to put it in the position it would have been, had the Respondent not committed the breach of contract. Petitioner has painstakingly argued that AT has gone completely wrong in its approach while deciding the claim of damages and the favorable outcome of PFA gets completely eroded and thus the findings are irreconcilable and incompatible. There is inherent misconception in the argument of the Petitioner. After the passing of PFA, the next logical follow-up question was whether to award damages to the Petitioner or not. To perceive the PFA as an all-encompassing award is not the right outlook. After succeeding in the PFA, Petitioner got the platform to proceed to prove the damage claim. The next step was to establish this claim with optimal evidence and proof. This is where Petitioner faltered. It pinned its claim only on the basis that the findings in the PFA were all pervading, not realizing that damage claims entails proving loss and for enforcing Clause 25 the preceding compliance on part of the Petitioner was sine qua non. Ignoring this fundamental requirement is a glaring flaw in Petitioner's case. After the PFA, no doubt the scope of proceedings had been shrunk, but since Petitioner failed to adduce evidence, AT was confronted with no choice, but to deny relief, except to the extent it was sustainable. From the reading of the clauses of the Purchase Order reproduced hereinabove, and in light of

the observations of the AT, it emanates that parties had stipulated and envisioned the eventualities of cancellation of the order as well as provided for the claim of payment of damages. As per Clause 25 in the event of *force majeure* condition, if the Petitioner were to keep material in the custody for more than six months of the scheduled delivery, it could then make a claim for the payment of goods after shipping/dispatching the same to Mumbai/Haridwar. In order to press Clause 25 and claim damages, the pre-requisite was shipment/dispatch of the material to Mumbai/Haridwar. If the price was not paid on the delivery of the goods or the goods were rejected or returned, the Petitioner would have been entitled to the price of the goods and also claim damages on account of any extra expenditure incurred in the return of shipment for such other claims. Considerably, the Petitioner did not exercise this option and thus in my considered opinion, the claim for price of components by way of damages was not maintainable. Nonetheless, Petitioner could have alternatively claimed damages on the basis of the refusal to receive goods, as repudiation of the contract, which is stipulated for in terms of Clause 24. Although Clause 24 does not specifically find mention in the Final Award, yet it is evident that the AT examined and interpreted all the relevant terms. The AT analyzed Clause 25 of the Purchase Order and held that in order to claim payment of the goods, it was essential for the Petitioner to have dispatched shipment of goods. The Petitioner could have also triggered clause 24 and claimed reimbursement of the explained and documented cost, which would be limited to the contract value. In order to succeed for reimbursement under Clause 24, it should have produced necessary evidence of the documented cost incurred in the manufacturing of the goods. Additionally, Petitioner would have been in a

position to claim damages for the price of the goods and storage costs incurred. However, since the Petitioner did not adduce any such evidence, the Tribunal concluded that Claimant's obligation for recovery of contract price and its claim for storage cost must fail *inter alia* on the ground that there is no evidence before the AT, that the Petitioner had actually paid any of the asserted storage charges. The Tribunal also noted inconsistencies in the storage costs claim, but nevertheless awarded a sum of EUR 18,685.39 in respect of the Petitioner's storage costs for the period 14th October, 2015 to 8th April, 2016 together with interest thereon @ 4% per annum from 9th April, 2016 until the date of the award along with the residual value that it can realize for the special components. In my opinion the observations of the AT are factual and rational and they do not call for any interference.

29. It would be also profitable to refer to the settled position of law in relation to interpretation of contract, as laid down in several decisions of the Supreme Court, that when a binding contract stipulates a particular thing to be done in a particular manner, it should be done in that manner alone or not at all. ***[See: Bishambhar Nath Agarwal vs. Kishan Chand and Others 1989 SCC OnLine All 426, and Raman & Raman Automobiles Ltd. vs. Mahendra & Mahendra Ltd. 2015 SCC OnLine Mad 10186].***

30. Pertinently, that the award of damages and storage costs is premised on findings of fact. These findings cannot be examined under Section 34 of the Act, more so, since the Tribunal has interpreted Clause 25 of the Purchase Order in consonance with the understanding between the parties which is discernible by referring to other pre-conditions of the Purchase Order. The

aforesaid interpretation of the terms of the Purchase Order in my opinion, does not call for any interference. Indisputably, the aforesaid interpretation cannot under any circumstances be held to be perverse or unreasonable that no reasonable person could have reached that interpretation. The interpretation of the contract based on factual aspects relating to the compliance of Clause 25 of the purchase order on the part of the Petitioner cannot be interpreted under Section 34 of the Act. Petitioner's failure to deliver the goods before claiming the price and its further failure to bring on record any evidence in support of the documented cost of manufacture, for which it could have made a claim in alternative, are also factual findings. There are several judgments of the Supreme Court and of this Court holding that the interpretation of contract is purely the dominion of the Arbitrator and the Court would not interfere with the same, only because different interpretations are possible. I need not elaborate on this well settled proposition of law and reference to the observations made by the Supreme Court in ***State of U.P. vs. Allied Constructions, (2003) 7 SCC 396,*** extracted below would suffice:

> **"4.** Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the

> arbitrator to determine (see *Sudarsan Trading Co.* v. *Govt. of Kerala* [(1989) 2 SCC 38 : AIR 1989 SC 890]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *U.P. SEB* v. *Searsole Chemicals Ltd.* [(2001) 3 SCC 397] and *Ispat Engg. & Foundry Works* v. *Steel Authority of India Ltd.* [(2001) 6 SCC 347])."

Also see: ***Mcdermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181*** and ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306.***

31. Since we are dealing with the judicial precedents relating to interference of the Court with arbitral awards, it would be apropos to deal with the objection raised by Mr. Mukhopadhyay relating to the narrow/limited scope of interference of this Court in relation to International Commercial Arbitration in India, noted in the earlier part of the judgment. The Court finds merit in the submissions of the learned senior counsel in light of the views expressed by the Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. vs. NHAI, 2019 SCC OnLine SC 677,*** wherein it has

been laid down that the scope of interference for International Commercial Arbitration, in India, subsequent to the amendment of Section 34 of the Act, has been narrowed down and even patent illegality is no longer a ground available to challenge International Commercial Award passed in India, the relevant portion of the said judgment are extracted below:

> ***"43. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Section 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."***

32. Having regard of the aforesaid decision of the Supreme Court and in light of the facts discussed above, I undeniably do not find any scope of interference in the present petition.

III. <u>Applicability of Sale of Goods Act</u>

33. Finally, I proceed to deal with the submissions relating to the Sales of Goods Act. The Petitioner has primarily relied upon certain communications exchanged between the parties and the observations made in the PFA, which according to it, suggest that Respondent has declined to accept the delivery of the goods. Mr. Bhandari argued that the Final Award is in teeth of provisions of Section 44 of the Sale of Goods Act. He contended that the buyer is liable to seller for any loss accruing by his conduct or refusal to take delivery, once it is proved that the seller was ready and willing to deliver the goods at request of the buyer. The Tribunal has observed that the seller had completed the manufacture of the goods and the Respondent had failed to

take steps to enable the Petitioner to affect delivery and therefore the reasoning for refusal to consider the claim of damages is perverse.

34. Mr. Mukhopadhaya has strongly refuted the aforenoted contentions. He has argued that the Petitioner was required to deliver the goods and the letters offering delivery do not meet the requisite conditions under the contract. He argued that in all such letters, the Petitioner sought to vary the contract as it wanted payment or letter of credit before making the delivery and the Respondent was not bound to accept such variations. He urged that in the initial letters dated 7th September, 2015, 24th September, 2015 and 23rd October, 2015, referred to in paragraphs No. 80, 81, 85 of the PFA, the Petitioner as a condition of delivery under Clause 25 had sought for letter of credit to be issued/ established in its favour for the full contract value. In this background, the letter dated 22nd December, 2015 was issued by the Petitioner recording that BHEL had declined to accept delivery and it will not make the payment of invoice, that had already been issued on 23rd November, 2015. He further submitted that there is no evidence that prior to the meeting of the 14th -15th December, 2015 the Petitioner had stopped insisting on this pre-condition of letter of credit or payment of invoice, which it had issued on 23rd November, 2015. He submits that the subsequent letter dated 22nd February, 2016 Petitioner sought 50% advance payment for further storage, only for an amicable settlement.

35. From the extracts of the award, noted in the preceding paragraphs, one can perceive that the AT has laid considerable stress on the fact that in view of Respondent's refusal and unwillingness to accept the goods, Petitioner

could have dispatched the goods and sent them to Respondent's office, without first insisting on a formal expression of readiness to accept the goods and indication of the address where the goods were to be sent. The reasoning is borne out of the facts and contrasting stand of parties, noted above. In my opinion the observations of the Tribunal on these aspects are factual in nature and this Court while exercising jurisdiction under Section 34 of the Act, cannot revaluate such findings. The fundamental fact remains that Petitioner did not deliver or ship/dispatch the goods before making a claim under Clause 25 of the Purchase Order and this has disentitled them to claim the benefit of the said clause. Notwithstanding, it could still recover damages for the loss sustained by it. Unfortunately, as observed by the AT, the Petitioner failed to prove the same. This conclusion is based on facts and does not call for any interference by this Court. As regards Petitioner's contention that it would have required 64 trucks to load the goods and dispatch the same to BHEL office, making it next to impossible for the Petitioner to comply with the condition, I am unable to find any factual foundation made out, noticed either in the PFA or the impugned Final Award. I have also not observed recording of any argument raised by the Petitioner before the AT regarding the impossibility of performance. The Petitioner has all throughout contended that the Respondent has breached the contract by not accepting the delivery of the goods. In absence of any pleadings or submissions advanced on the aspect of impossibility, this Court cannot under Section 34 of the Act examine these contentions being raised for the first time.

36. Before parting, I may note that the Respondent in his note of

submissions urged that the Tribunal wrongly entertained the plea for damages without amendment of the statement of claim. It has been further urged that the Petitioner had not even made a claim for damages in its statement of claim, but had rather sought specific performance relying on German Law. Once the Tribunal held that the Indian Laws govern the contract, it did not seek to amend the statement of claim to seek damages, in lieu of specific performance and in absence of pleadings, the Tribunal could not have even awarded damages. It has been also urged that the Tribunal has wrongly allowed the Petitioner to make its claim for damages on the basis of supplemental submissions. In my considered view, the Court need not go into these questions as the same deal with matters of procedure before the AT. Therefore, I do not consider it necessary to go into this aspect while exercising jurisdiction under Section 34 of the Act.

37. In view of the foregoing reasons, I find no merit in the petition and the same is dismissed, with no order as to costs.

SANJEEV NARULA, J.

JANUARY 7, 2020
nk/v/Pallavi