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

Date of decision: 14th OCTOBER, 2025

IN THE MATTER OF:

\+ **O.M.P. (COMM) 210/2018**

GYPSUM STRUCTURAL INDIA PVT. LTD. .....Petitioner

Through: Dr. Anurag Kr. Agarwal, Mr. Prateek Agarwal, Mrs. Surabhi Mittal, Advocates

versus

COASTAL MARINE CONSTRUCTION & ENGINEERING LTD .....Respondent

Through: Mr. Bimal Rajasekhar, Mr Aditya Verma, Mr. K Rigved Prasad, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court under Section 34 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], challenging the Award dated 30.01.2018 passed by the learned Sole Arbitrator ["**Impugned Award**"].

2. By way of the Impugned Award, the learned Sole Arbitrator has partly allowed the claims filed by the Respondent, who was the Claimant before the arbitral tribunal as well as some counter-claims filed by the Petitioner, who was the Respondent/Counter-Claimant before the arbitral tribunal.

3. To the extent necessary and relevant, the facts leading to the filing of the present Petition are as follows:

i. The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 having its office at 185-A, Pocket B, Mayur Vihar, Phase 2, Delhi – 110091 and is the owner of a micro-tunnelling spread equipment ["MT Spread"], consisting the principal equipment and its accessories.

ii. The Respondent is also a company incorporated under the Companies Act, 1956 having its office at C-Cube Mira Bhayander Road, Mira Road East, Thane – 401107, India and engaged in the business of providing services to oil and gas and marine infrastructure industry, including but not limited to hydrography, oceanography, engineering surveys, geotechnical investigation, laying of seawater intake and outfall pipelines, as well as operation and maintenance of Special Purpose Machines.

iii. The parties entered into a contract/agreement dated 10.11.2011 for lease of MT Spread equipment, consisting the principal equipment and its accessories, excluding Subsea Recovery Module ["SRM"], for the project of GSPC Pipavav Power Company Limited, Kovaya, Gujarat ["GPPC"].

iv. As per the terms of the Agreement, the Petitioner was bound to provide the Respondent with a 'Herrenknecht' ["HK"] make AVN 1200 MT Spread with all necessary accessories excluding SRM in working condition, to the Respondent, who was desirous of leasing the MT Spread.

v. Clause 3 of the Agreement prescribed the hire charges payable by the Respondent to the Petitioner for the MT Spread.

vi. Clause 5 contained the Respondent's scope of work which inter alia included the arrangement of all consumables requisite for the operation of MT Spread at the Respondent's own cost. These consumables would include fuel, batteries, oil and lubricants, bentonite, polymers, sweet water, shaft seals and all other such items as may be required for the smooth operation of the MT Spread. Operation and management of the MT Spread along with the consumables, was under the scope of work of the Respondent.

vii. In addition, the Respondent, under Clause 5 of the Agreement, was also obligated to provide, at its own cost, all logistics and manpower for the operation and management of the MT Spread, other than those included in the Petitioner's scope under Clause 1B of the Agreement.

viii. Clause 5 further provided for the assessment of the working condition of the MT Spread by HK's Engineer during the last drive and at the time of recovery. Deficiency, if any, was to be made good by the Respondent in the Petitioner's stockyard

ix. The Petitioner, on the other hand, was obligated [insert clause] to provide one set of all wear items, including rock cutter head tools (cutter discs, scraper knives, etc.), slurry pumps, shakers, screws, etc. at the start of the rental. Post-completion of the Project, the conditions of these parts was also to be reassessed by HK's Engineer, and any part with significant damage, rendering it unusable for future work was to be replaced by the Respondent at its own cost.

x. Clause 8 of the Agreement provided for the payment terms, inter alia providing that there shall be an 'on-hire survey' by HK, to certify that the MT Spread is in order before delivery at Siliguri with detailed list

and inventory. Post-completion of the Project, there was to be a similar survey referred to by the parties as the 'off-hire survey' to ascertain and confirm the condition of the machine at the time of its return. Cost of these surveys was to be shared between the parties equally. HK's Engineer's record of inspection at the time of delivery was the agreed condition for all future references by and between the parties.

xi. Further, in Clause of 10 of the Agreement, it was provided that the Petitioner will not be liable for any consequential or other loss of any kind suffered by the Respondent due to any breakdown of the equipment.

xii. The aforesaid on-hire survey was to be done at Siliguri, at the Petitioner's warehouse, however, the same was conducted from 07.11.2011 to 10.12.2011 at the Respondent's site, after the MT Spread were received and unloaded at the Respondent's site on 06.11.2021. The Respondent's case was that the machine was set up between 11.12.2011 to 15.12.2011, after the on-hire survey and thereafter, the trial run was done on 19.12.2011. However, according to the Respondent, the machine lacked certain essential parts, which rendered it unsuitable and unequipped to work at its site.

xiii. To ensure workability, certain machine parts were ordered by the parties and such parts were received at the site in the beginning of February 2012. From 07.02.2012 to 21.02.2012, HK's Technicians were at the site to install/repair the damaged parts and refurbished machines.

xiv. The machine started operation on 21/22.02.2012, which stood completed on 23.06.2012. The off-hire survey was completed at the Claimant's site on 03.07.2012 and the machine returned to the Respondent's warehouse on 06.08.2012, after its repair and refurbishing.

xv. As per the Respondent, the Petitioner acted in breach of the Agreement, which was refuted by the Petitioner. In order to adjudicate upon their *inter se* claims, the parties mutually appointed the learned Sole Arbitrator in accordance with Clause 15(x) of the Agreement.

xvi. *Vide* its Statement of Claims, the Respondent claimed a total sum of Rs. 2,86,03,386/- along with interest @21% per annum w.e.f. 03.06.2012, across 28 heads, which are as follows:

Sr. No.	***Particulars***	***Amount in INR***
1.	*Purchases from Herrenknecht, Germany based on Gypsum's Order (Email dated 09.04.2012) € 5,539.23*	*5,20,904.00*
2.	*Purchase from Herrenknecht, Germany, based on COMACOE'S order, €6474.71*	*7,14,418.00*
3.	*Cost of Cutting Tools for cutting head procured for Petitioner's Machine, €6494.71*	*18,13,778/-*
4.	*Material arranged for 600 KVA DG repair – Dev Earthmoving Spares with Freight*	*23,940.00*
5.	*Cost of DG Repair – Service Engineer, Invoice dt. 14.03.2012*	*7,721.00*

6.	*Compressor fitting – Yogi Electronics*	*4500.00*
7.	*Purchase and fitting of machine cooling system – Nobel Sales Corporation*	*29,290.00*
8.	*Slurry Hoses / pipes / clamps – [Invoice No. 2149 dt. 27.01.2012 by M/s € (India) Hose System]*	*3,30,750.00*
9.	*Other miscellaneous Item purchase – [M/s Butt Bhavan, HILTI, etc.]*	*25,665.00*
10.	*Repairing, servicing, fitting of parts, assembly, commissioning, of machine and fabrication fitting and alignment of pumps etc.*	*12,64,475.00*
11.	*Hiring of DG 600 KVA due to Petitioner's defective DG Set*	*8,79,185.00*
12.	*Hiring of 320 KVA DG for trial run of machine due to Petitioner's defective DG set – (M/s Bhagwati Electricals)*	*1,65,450.00*
13.	*Cost of alternate cable, 185 sq. mm for machine trial, due to defective DG set (Respondent's email dated 24.05.2012)*	*5,000.00*
14.	*Cost of service engineer visit to repair VFD (P-drive)*	*1,880.00*
15.	*Repair of P-Drive – (M/s Integrated Control Solutions)*	*46,525.00*
16.	*AC drive hire charges due to defective P-Drive of Petitioner's machine for the period of 21.02.2012 to 08.06.2012*	*2,72,500.00*

	(Respondent's email dated 13.04.2012)	
17.	*Non-provision of operator 33 days including 20 days of bring the machine in working condition and 13 operation days*	*19,68,120.00*
18.	*Breakdown of P-Drive in first 2.5 meter full rental deduction, Clause 3.3 of Agreement*	*5,83,333.00*
19.	*Delay in execution due to deliberate wrong selection of cutting head or fake head. Despite providing _the soil strata well in advance and also providing inspection of site to confirm ·the soil strata existing at site - (Email dated06.03.2012 from M/s Patrizia of M/s Palmeri Rock Tools)*	*35,00,000.00*
20.	*Machinery and manpower remained idle for 2 months due to non-working of Petitioner's Machine*	*22,22,400.00*
21.	*50% cost of on-hire survey – Petitioner's share*	*56,256.00*
22.	*100% cost trial run of machine from 11.12.2011 to 20.12.2011*	*2,63,892.00*
23.	*Deduction of 3 days rental of machine due to Petitioner's instructions for not starting machine works.*	*3,50,000.00*
24.	*Machinery and manpower idle for 3 days*	*5,30,400.00*

25.	*15% LD imposed by the client due to delay, hence, deduction of 15% of total invoice value of Petitioner*	*24,63,005.00*
26.	*Excess rent paid after the agreed contractual period of 45 days (105- 45 = 60 days) (35 lacs x 2 months)*	*70,00,000/-*
27.	*Refundable Security Deposit*	*35,00,000.00*
28.	*Cost incurred by Respondent for (JOS) Survey at Siliguri*	*35,000.00*

xvii. On the other hand, the Petitioner claimed a sum of Rs. 1,20,32,547/- along with interest @18% per annum w.e.f. 04.04.2013 as well as Rs. 5,00,000/- as cost of proceedings.

xviii. On the basis of the evidence led by the respective parties as well as the arguments advanced, the learned Sole Arbitrator by way of the Impugned Award dated 30.01.2018, awarded the following claims in favor of the Respondent/Claimant herein:

Sr. No.	***Claim***	***Claim Amount (in INR)***	***Allowed/ Rejected***
1.	*Purchases from Herrenknecht, Germany based on Gypsum's Order (Email dated 09.04.2012) € 5,539.23*	*5,20,904.00*	*Allowed*
2.	*Purchase from Herrenknecht, Germany, based on COMACOE'S order,*	*7,14,418.00*	*Allowed*

	€6474.71		
3.	*Cost of Cutting Tools for cutting head procured for Petitioner's Machine, €6494.71*	*18,13,778/-*	*Allowed*
4.	*Material arranged for 600 KVA DG repair – Dev Earthmoving Spares with Freight*	*23,940.00*	*Allowed*
5.	*Cost of DG Repair – Service Engineer, Invoice dt. 14.03.2012*	*7,721.00*	*Dropped by the Respondent*
6.	*Compressor fitting – Yogi Electronics*	*4500.00*	*Rejected*
7.	*Purchase and fitting of machine cooling system – Nobel Sales Corporation*	*29,290.00*	*Allowed*
8.	*Slurry Hoses / pipes / clamps – [Invoice No. 2149 dt. 27.01.2012 by M/s € (India) Hose System]*	*3,30,750.00*	*Rejected*
9.	*Other miscellaneous Item purchase – [M/s Butt Bhavan, HILTI, etc.]*	*25,665.00*	*Partly allowed for INR 6,370/-*
10.	*Repairing, servicing, fitting of parts, assembly, commissioning, of*	*12,64,475.00*	*Partly allowed for INR 11,08,275*

	machine and fabrication fitting and alignment of pumps etc.		*/-*
11.	*Hiring of DG 600 KVA due to Petitioner's defective DG Set*	*8,79,185.00*	*Allowed*
12.	*Hiring of 320 KVA DG for trial run of machine due to Petitioner's defective DG set – (M/s Bhagwati Electricals)*	*1,65,450.00*	*Allowed*
13.	*Cost of alternate cable, 185 sq. mm for machine trial, due to defective DG set (Respondent's email dated 24.05.2012)*	*5,000.00*	*Allowed*
14.	*Cost of service engineer visit to repair VFD (P-drive)*	*1,880.00*	*Allowed*
15.	*Repair of P-Drive – (M/s Integrated Control Solutions)*	*46,525.00*	*Allowed*
16.	*AC drive hire charges due to defective P-Drive of Petitioner's machine for the period of 21.02.2012 to 08.06.2012 (Respondent's email dated 13.04.2012)*	*2,72,500.00*	*Partly allowed for Rs. 2,72,500/-*
17.	*Non-provision of operator 33 days including 20 days of*	*19,68,120.00*	*Partly allowed for Rs.*

	bring the machine in working condition and 13 operation days		*2,16,000/-*
18.	*Breakdown of P-Drive in first 2.5 meter full rental deduction, Clause 3.3 of Agreement*	*5,83,333.00*	*Partly allowed for Rs. 5,83,000/-*
19.	*Delay in execution due to deliberate wrong selection of cutting head or fake head. Despite providing _the soil strata well in advance and also providing inspection of site to confirm ·the soil strata existing at site - (Email dated06.03.2012 from M/s Patrizia of M/s Palmeri Rock Tools)*	*35,00,000.00*	*Dropped by the Respondent*
20.	*Machinery and manpower remained idle for 2 months due to non-working of Petitioner's Machine*	*22,22,400.00*	*Allowed*
21.	*50% cost of on-hire survey – Petitioner's share*	*56,256.00*	*Allowed*
22.	*100% cost trial run of machine from 11.12.2011 to 20.12.2011*	*2,63,892.00*	*Partly allowed for Rs. 1,31,523/-*
23.	*Deduction of 3 days*	*3,50,000.00*	*Rejected*

	rental of machine due to Petitioner's instructions for not starting machine works.		
24.	*Machinery and manpower idle for 3 days*	*5,30,400.00*	*Rejected*
25.	*15% LD imposed by the client due to delay, hence, deduction of 15% of total invoice value of Petitioner*	*24,63,005.00*	*Rejected*
26.	*Excess rent paid after the agreed contractual period of 45 days (105-45 = 60 days) (35 lacs x 2 months)*	*70,00,000/-*	*Partly allowed for Rs. 52,50,000 /-*
27.	*Refundable Security Deposit*	*35,00,000.00*	*Rejected*
28.	*Cost incurred by Respondent for (JOS) Survey at Siliguri*	*35,000.00*	*Dropped by the Respondent*
TOTAL		***1,33,18,976/- along with interest @9% from 06.08.2012***	

xix. As regards the counterclaim of the Petitioner/Counterclaimant, the learned Sole Arbitrator partly allowed the same for Rs. 7,53,166/- along with interest @ 9% from 06.08.2012.

4. Against the grant of claims to the Respondent, the present Petition under Section 34 of the Arbitration Act has been filed.

5. Learned Counsel for the Petitioner, while praying for the setting aside of the Impugned Award passed by the learned Sole Arbitrator, has submitted as under:

i) The learned Sole Arbitrator has travelled beyond the terms of the Agreement and read into it those conditions which were non-existent, inasmuch as the Petitioner was only required to provide the MT Spread in a 'working' condition and not 'customized' according to site conditions of the Respondent and that, any customization was required to be done by the Respondent itself.

ii) The MT Spread was provided on hire and its operation and control was squarely within the scope of the Respondent.

iii) As the Petitioner was neither aware of the geological strata nor the exact length of work to be done, time duration within which it was to be performed, there was no minimum guarantee of MT Spread for any given period. The MT Spread was let out for 45 days, subject to further extension in multiples of 7 days.

iv) The Impugned Award is patently illegal, as it allows a claim of Rs. 1,33,18,976 + Rs. 65,02,807/- in favor of the Respondent in a contract of hire, where the Respondent had paid a total hire charge of Rs. 1,26,58,475/-.

v) The learned Sole Arbitrator wrongly held that the ML Spread was returned to the warehouse of the Petitioner after repayment and refurbishing, despite the record of the 'off-hire survey' depicting that the requisite parts for refurbishing were not supplied.

vi) The learned Sole Arbitrator wrongly assumed that wear items were to be provided after understanding the Respondent's site

conditions, as there was no such clause in the Agreement, nor was there any such requirement.

vii) The provision of non-charging of rentals in case of a breakdown during the first 2.5 m operation of the MT Spread, was on account of the requirement of the Petitioner giving the MT Spread in a working condition, and the same had nothing to do with efficiency or customization of the MT Spread according to the Respondent's site conditions.

viii) The fact that the Petitioner voluntarily participated in the procurement of parts by the Respondent does not denote that the Petitioner was under an obligation to do so. The Respondent procured Cutter Head Tools according to its site conditions, on the specific understanding that they will be removed from the site after the operation.

6. *Per contra,* the learned Counsel for the Respondent has submitted as under:

i) Not only was the Petitioner under the obligation to provide the MT Spread which was capable of micro-tunnelling at the Respondent's site, but by virtue of Clause 13.1 of the Agreement, the Respondent was barred from making any modifications to the MT Spread to suit its project requirements.

ii) The principles of Section 16(1) of the Sales of Goods Act, 1930, as the Respondent had apprised the Petitioner of the purpose for which the MT Spread was required and as such, the Respondent was relying on the Petitioner's skill and judgment, insofar as the capability of the MT Spread to carry out micro-tunnelling at the

site is concerned. Therefore, the Petitioner was obligated to provide the MT Spread which was fit for such purpose.

iii) The Petitioner itself admitted that its obligations did not end merely on the leasing out of the MT Spread, which is evident from its replies to the various communications sent by the Respondent regarding deficiencies, missing parts, refurbishing, etc. Therefore, the conduct of the Petitioner made it clear that it considered itself contractually bound to provide an MT Spread complete for micro-tunneling operation at the Respondent's site.

iv) The Petitioner itself understood that its obligation was to provide an MT Spread capable of micro-tunneling operations, as it only started charging monthly rental once the required parts were procured by the Petitioner, or by the Respondent on behalf of the Petitioner.

v) Survey undertaken by HK's Engineer/Technician shows that the MT Spread provided by the Petitioner was not complete for micro-tunneling operation at the site or even for general micro-tunneling operations. Findings of this survey bound both the parties, as the same was carried out jointly.

7. Before embarking on the analysis on merits of the present Petition, this Court deems it fit to recall the scope of interference permitted to a court exercising its power under Section 34 of the Arbitration Act. The most recent pronouncement Apex Court explaining the scope for judicial interference in arbitral awards in Section 34 of the A&C Act was rendered in OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd., **(2025) 2 SCC 417**["**OPG v. Enexio**"] has held as under:

"69. *Perversity as a ground for setting aside an arbitral award was recognised in Western Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] . Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.*

70. *In Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:*

(i) a finding is based on no evidence; or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

71. *In Ssangyong [SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was*

observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse [See SsangyongEngg. case, (2019) 15 SCC 131, para 41 : (2020) 2 SCC (Civ) 213] .

72. *The tests laid down in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] to determine perversity were followed in Ssangyong [SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] and later approved by a three-Judge Bench of this Court in Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd. [Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149]*

73. *In a recent three-Judge Bench decision of this Court in DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd. [DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd., (2024) 6 SCC 357 : (2024) 3 SCC (Civ) 112 : 2024 INSC 292] , the ground of patent illegality/perversity was delineated in the following terms : (SCC p. 376, para 39)*

"39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have

arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

75. In Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 27-43] , a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section

> ***34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.***
>
> [Emphasis Supplied]

8. Further, in the case of Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. &Ors.,**(2018) 3 SCC 133**, the Apex Court has held that Arbitral Tribunal is the master of evidence and a finding of fact arrived at by an arbitrator is on an appreciation of the evidence on record, and is not to be scrutinized as if the Court was sitting in appeal. At paragraph 51 of the judgment, it is observed and held as under:

> "*51. Categorical findings are arrived at by the Arbitral Tribunal to the effect that insofar as Respondent 2 is concerned, it was always ready and willing to perform its contractual obligations, but was prevented by the appellant from such performance. Another specific finding which is returned by the Arbitral Tribunal is that the appellant had not given the list of locations and, therefore, its submissions that Respondent2 had adequate lists of locations. In fact, on this count, the Arbitral Tribunal has commented upon the working of the appellant itself and expressed its dismay about lack of control by the Head Office of the appellant over the field offices which led to the failure of the contract.* ***These findings of facts which are arrived at by the Arbitral Tribunal after appreciating the evidence and documents on record. From these findings it stands established that there is a fundamental breach on the part of the appellant in carrying out its obligations, with no fault of Respondent which had invested whopping amount of Rs 163 crores in the project****. A perusal of the award reveals that the Tribunal investigated the conduct of the entire*

> *transaction between the parties pertaining to the work order, including withholding of DTC locations, allegations and counter-allegations by the parties concerning installed objects. The arbitrators did not focus on a particular breach qua particular number of objects/class of objects. Respondent 2 is right in its submission that the fundamental breach, by its very nature, pervades the entire contract and once committed, the contract as a whole stands abrogated. It is on the aforesaid basis that the Arbitral Tribunal has come to the conclusion that the termination of contract by Respondent was in order and valid.* ***The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are notto be scrutinized as if the Court was sitting in appeal now stands settled by a catena of judgments pronounced by this Court without any exception thereto.***"
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> [Emphasis Added]

9. The aforesaid position has also been discussed by the Apex Court in the case of State of Jharkhand &Ors. v. HSS Integrated Sdn. &Anr.,**(2019) 9 SCC 798.**

10. In SsangyongEngg. & Construction Co. Ltd. v. NHAI, **(2019) 15 SCC 131**, the Apex Court has spelt out the contours of the limited scope of judicial interference in reviewing the arbitral awards under the 1996 Act and observed thus:

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

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

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

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate

Builders[Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Buildersv. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.

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

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

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself,

is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

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

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

evidence led by the parties, and therefore, would also have to be characterised as perverse."

11. Keeping in mind the aforesaid four corners of intervention permitted to courts under Section 34 of the Arbitration, this Court shall now deal with the respective contentions raised by the parties in the present Petition.

12. To begin with, it is noted that majority of the pleadings and arguments advanced by the Petitioner call upon this Court to conduct an in-depth analysis into the correctness of the findings of the learned Sole Arbitrator which, needless to state, is impermissible. Be that as it may, this Court shall analyse the claim-wise findings contained in the Impugned Award, to the extent permitted.

13. It is apposite, at the outset, to note that the nature of submissions advanced by the Petitioner sufficiently depict that it is nowhere denying that the MT Spread leased out by it to the Respondent had certain shortcomings which brought about difficulties/delays in execution of the micro-tunneling operations at the Respondent's site. The Petitioner's grievance is only that it was not obligated to provide the MT Spread with all those specifications that the Respondent's project and site would requisite. Perusal of the Impugned Award indicates that the learned Sole Arbitrator has duly dealt with this grievance of the Petitioner, and answered the same against the Petitioner.

14. Perusal of the Impugned Award shows that the learned Sole Arbitrator has adjudicated upon three primary issues that arose out of the contentions of the parties. The first of the three primary issues was as to whether the MT Spread to be delivered by the Petitioner, equipped to work at the Respondent's site or, was the Petitioner's obligation to simply provide the MT Spread, leaving the customization to the Respondent?

15. On the above formulated issue, the learned Sole Arbitrator held that the Respondent taking the MT Spread on lease from the Petitioner was for a specific purpose, and this was within the knowledge of the Petitioner. Reference here has been made to Clause 3 of the Agreement, which provides as follows:

> *"3. Hire Charges:*
>
> *i) The monthly hire charges for the above spread will be Rs 35,00,000/- (Rupees Thirty-five Lakhs only).*
>
> *ii) This full rental will start when machine will start drilling/cross launch seal for the first drive. Once started, rental to stop only when the equipment leaves site.*
>
> *iii) For any equipment breakdown duration during first 2.5m drilling (only for the first drive), no rental will be payable, reason being the Lessor is required to provide the equipment is working condition. Although if work stoppages during first 2.5m grilling are due to deficiency in lessee's scope of supply, full rental will be payable. During further equipment breakdown durations, reduced rental will be payable @ Rs 40,000 / day. For all other work stoppages with reasons not attributable to MT equipment breakdown Itself, full rental will be payable.*
>
> *iv) During initial setup of equipment, reduced rental will be payable @ Rs 40,000 / day starting immediately after unloading Starts at Lessee's Gujarat site and ending when full rental will start as explained in Point ii) above.*

v) Reduced rental during initial setup and no rental during equipment breakdowns for first 2.5m drilling applicable only for first drive. For next drives, full rental to be payable at all times other than periods of reduced rental during MT equipment breakdown.

vi) Rs.7,50,000 (Rupees Seven Lakhs and fifty thousand only) lump sum amount will be payable towards mob-demob rental charges during transit from Siliguri to Gujarat site and from Gujarat site to Delhi or any other place with equivalent distance to Delhi.
vii) Service tax will be extra as applicable from time to time."

16. Summary of Clause 3 of the Agreement shows that the Petitioner was to provide was an MT Spread in a working condition, along with one set of wear items and an operator. Starting of rental was tied to start of drilling / cross launch seal for the first drive. No rental was payable for any equipment breakdown during first 2.5m drilling. Considering this provision, the learned Sole Arbitrator is correct in holding that the Petitioner could not have provided such items *in vacuo*, meaning that these items could only be provided after an understanding of the Respondent's site conditions and its requirements.

17. In fact, the emails exchanged between the parties prior to entering into the Agreement are also indicative of the fact that the Petitioner was fully aware of the sand stone strata and other site conditions, on which the provision of the MT Spread and other items was dependent.

18. Another crucial aspect contained within Issue (i) formulated above which was adjudicated upon by the learned Sole Arbitrator, is the fact that

the Petitioner decided to forego rental for the MT Spread, which could only have been done in the conditions laid down in Clause 3 of the Agreement extracted above.

19. What was further evidence of the Petitioner knowing that its obligations were more than just a robotic leasing out of a machine, was the absence of any averment by the Petitioner thereto, when numerous emails were sent by the Respondent stating that the MT Spread was not operation. In fact, the Petitioner continued to participate in the procurement of parts, especially when it referred the Respondent to its Italian supplier. In addition, the Petitioner itself wrote to the Italian supplier *vide* an email dt. 24.11.2011, seeking their assistance in customising the cutter head. The said email is reproduced below:

> *"From: Sunir Garg [mailto:sunir@gypsum.in]*
> *Sent: Thursday, November 24, 2011 12:33 PM*
> *To: 'Rajan Sood'; 'Gypsum'*
> *Cc: sanjeev@comacoe.com; 'KS Ravi'; 'Vikas Yadav'*
> *Subject: RE: Cuttingwheel*
>
> *Dear Mr Rajan Sood*
>
> *I believe sir was talking about just purchasing the cutter discs, bucket lips, tools, fasteners, etc (consumable parts of cutter head) in your name. But in your mail, you have mentioned you want to purchase the whole cutting wheel (which will be lot more expensive). Please confirm what direction you want to take - just the consumables or the whole cutting wheel? Accordingly, I will start correspondence with our Italian supplier.*
>
> *Thanks*

Sunir Garg

+91 98186 42705

and

From: Rajan Sood [mailto:sood@comacoe.com]
Sent: Thursday, November 24, 2011 12:21 PM
To: 'Gypsum'; 'Sunir Garg'
Cc: sanjeev@comacoe.com; 'KS Ravi'; 'Vikas Yadav'
Subject: Cuttingwheel
Importance: High

Dear Mr Niranjan Garg/Mr Sunir Garg

Please refer to our telecom a short while ago and we accept your suggestion to remove the existing defective cutting wheel and replace it with our new cutting wheel. We request you to obtain quote from your regular supplier keeping us in copy of the correspondence so that the same can be imported directly in our name. This is based on the mutual understanding that the cutting wheel being purchased by us will removed after completion of our work and we will install or hand over your cutting wheel to you as may be required or suggested by you.

Regards

Rajan Sood"

20. Finally, as far as Issue (i) formulated above is concerned, the learned Sole Arbitrator has very rightly observed that in the backdrop of two parties being businessmen, the contention of the Petitioner that it was solely responsible for a mechanical leasing out of a machine without understanding the need and requirement of the Respondent, is wholly untenable. Reference

hereto has again been made to the emails dt. 10.09.2011, 14.09.2011 and 25.10.2011, that is, correspondences prior to entering into the Agreement, wherein the site requirements were duly notified by the Respondent to the Petitioner. The conduct of the Petitioner in having gained such knowledge and subsequently entering into the Agreement, is indicative enough that the Petitioner was aware of the obligation of providing equipment on the basis of requirements of the Respondent's site.

> *"**Email dated 10.09.2011***
>
> *Gypsum <info@gypsum.in> Sat, Sep 10, 2011 at 11:08 AM*
> *To: Sunir Garg <sunir@gypsum.in>*
> *From: Ravi [mailto:ravi@comacoe.com]*
> *Sent: 09 September 2011 21:45*
> *To: info@gypsum.in*
> *Cc: 'Vivek Bansal'; 'Manoj Sharma'; 'Rajan Sood'; 'Sanjeev Rai'*
>
> *Subject: Microtunnel Machine for rent .*
>
> *Dear Mr. Niranjan Garg,*
>
> *It was nice to get introduced to you over phone and am really excited to know about the availability of a microtunnelling machine in your company. As discussed with you, we are in urgent need of a Herrenkenecht microtunnelling machine capable of drilling the tunnels of 1200mm dia from landward side to seaward side wherein the driving head will be recovered from sea at the end of tunnel. In this context we invite your reasonal price for renting your MT machine with crew and with the following requisites.*

1. Duration - 1 month, extendable by 1-1.5 month (ask for for discounted rates for the addl period as an incentive for us to use their machine)

2. Confirmation of age of machine

3. Confirmation of the following components/systems in the package:

1. Microtunnell machine with suitable cutter heads for sand stone strata
2. Slurry and separation pump/system
3. Bentonite mixing plant
4. Inter Jacking Station (IJS)
5. Laser Unit
6. Gensel 600 KVA
7. All tools and tackles required for continuous operation
*8. Operator and engineer for 24*7 hours operation*
9. Transport to site +board/lodge

4. Comacoe Scope

1. Fuel
2. Compressor
3. Oil & Consumables
4. Crane
5. Jacking Pipe
6. Bulkhead
7. Seafall arrangement
8. Rock cutters/cutter discs?
9. Bentonite
10. Rigger

*What is the progress per day on basis of 24*7 operations.*

RCC jacking pipes are of HDPE lined 1200mm ID and 1470mm OD. If required by you we can send the drawing of RCC jack pipe for reference.

Please send us your price at the earliest for us to have technocommercial discussions in person.

Regards,

Ravishankar K S

General Manager
Coastal Marine Construction & Engineering Ltd

***Email dated* 14.09.2011**

Rajan Sood <sood@comacoe.com> Wed, Sep 14, 2011 at 4:17 PM
To: Sunir Garg <sunir@gypsum.in>, Ravi <ravi@comacoe.com>
Cc: Mr Vivek Bansal <vivek.bansal@comacoe.com>, "Sanjeev Sir(comacoe ID)" <sanjeev@comacoe.com>, "Mr. Manoj Sharma" <manoj@comacoe,com>, Gypsum India <info@gypsum.in>

Dear Mr Garg

We are in receipt of your offer for hiring of Microtunneling Spread vide your offer dated 12th September, 2011. We are evaluating your proposal to see how it fits into our budget as against alternatives. As you may be aware we also own a similar machine and are considering hiring only if it provides an economical solution with time efficiency to our project. Your offer sent was way out of our budget in terms of price, time and terms & conditions. We therefore

request you to submit revised offer considering the following points:

1. Substantial review and ·downward revision of cost of rental per month

2. The machine would be required to work for 24x7 with 26 days working which would be inclusive of maintenance period/breakdown. No Separate break down/maintenance period can be considered.

3. The rental from Depot to Depot cannot be considered. We can consider transport cost plus fix reasonable lump sum during transit and set up of as machine is not in use in this period of transit and set up. There should be sufficient incentive to your team to get the machine delivered and started as soon as possible.

4. Documentation needs to be expeditiously organized by both the parties as may be required to transport the machine and to reduce the transit time.

5. Rental to commence after installation of machine at site and would stop once dismantling after completion of the tunnel or as advised by our project manager.

6. Insurance of the machine shall be to your account.

7. We agree to provide lodging and boarding to your staff. However medical and insurance of your personnel shall be your liability.

8. We would be providing the consumables as per our email dated 09.11.2011.

9. Wear and tear of equipment due to use cannot be attributable to our account.

10. P&M at site will be provided by us based on requirement.

Please revert so that individual items of your offer can be discussed.

Regards

Rajan Sood
Coastal Marine Construction & Engineering Ltd

Email dated 25.10.2011

Sunir Garg <sunir@gypsum.in> Tue, Oct 25, 2011 at 1:12 PM
To: Rajan Sood <sood@comacoe.com>
Cc: info@gypsum.in

Dear Mr Sood

Please find attached our draft agreement. Before finalization of agreement, we can send it to the legal team to standardize the format.

Thanks

Sunir"

21. Notably, even in the cross examination of the Petitioner's witness, he has categorically stated that the MT Spread as delivered was not ready for drilling and that it had to be customized for operations as per the Respondent's site conditions.

22. As such, the learned Sole Arbitrator's conclusion that the Petitioner was obligated to provide the MT Spread in a working condition suitable and

customized to the Respondent's work at its site, and the Petitioner was not contracted to only provide a machine suitable for general micro-tunnelling operations, cannot be found fault with.

23. The second primary issue adjudicated upon by the learned Sole Arbitrator, after observing that the Petitioner was in fact contracted to provide the MT Spread as per the site requirements of the Respondent, is whether it did eventually provide such a machine or not.

24. In order to analyse the aforesaid issue, the learned Sole Arbitrator referred to cross examination of the Petitioner's witness, who has admitted to the fact that the MT Spread delivered to the Respondent's site was not complete for micro-tunnelling and had to be customized as per site conditions. The Petitioner's witness, upon being put to the questions, has also deposed by stating that arranging of parts requisite to make the machine drilling at the site was within the scope of the Petitioner itself.

> *"Q26. Could you say that the machine was "complete" for micro tunnelling operation, when it was delivered to the Claimant?*
>
> *Ans. The "on hire" report mentions that the machine was in a working condition except for a few spare parts. Some of the spare parts identified in the report were not to be used for operationalizing the machine, but as spares alone.*
>
> *Q27. Is it correct that the spare parts, which were not simply spares, were to be used for operationalizing the machine?*
>
> *Ans. No. The machine was operational without any parts needed at the time of trial run. However, for its efficient operation in the course of the project, those*

parts were needed.

Q28. Therefore, according to you the machine was ready for drilling when delivered?

Ans. No. It had to be customized as per the site conditions.

Q29. Would it be correct to say that the machine was not complete for micro tunnelling operations at the Claimant's site at the time of delivery?

Ans. No. It had to be customized for the operations on the Claimant's site along with procurement of consumables. (Vol.) However, the machine was complete for general micro tunnelling operations.

Q30. When did the spare parts referred by you in answer to Q26 arrive at site?

Ans. I am not aware of the exact date, because their delivery was handled by the Claimant.

Q31. Did you arrange the parts (not consumables) required to make the machine ready for drilling at site?

Ans. Yes. Some of the parts were pur6hased by us in our own name and some were purchased in the name of the Claimant, as we did not have VAT registration in Gujarat..

Q32. Therefore, would it be correct to say that according to you, you arranged the parts required to make the machine drilling at the site even though the same was not within your scope?

Ans. As I have already answered, some spare parts

were in Respondent's scope.

Q52. Please see your answer to Q22. Reading this with your answer to Q51, would it be correct to say that no attempt was made to procure any spare parts to refurbish the machine after the Oil India project until the machine was again required for the next project.

Ans. The machine was not refurbished. As I have already answered, the machine was in a working condition except for a few spare parts for which we had already sent an enquiry. The refurbishment is done at the time of the next project keeping in view the customisation required for that project.

Q. 54 Is it correct that according to you these parts were not essential for the working of the machine?

Ans. Yes, it is correct. (Vol.) But they were required for efficient working of the machine.

Q.55 Do you mean to say that you provided an inefficient machine to the claimant?

Ans. I disagree. I had already mentioned to the claimant in our exchanges that we shall procure those spare parts and as I said yesterday, some of those parts were procured by us in our own name and some others in the name of the claimant.

Q.56 Were these exchanges you referred to, prior to the contract?
Ans. No. As I have stated, procurement of these parts was to be done along with the customisation of the machine and procurement of the parts required for its customisation. For this, we relied upon the "on hire" survey conducted by HK engineer. Thereafter, the required parts were procured."

25. Deposition of the Petitioner's witness coupled with the fact that the Petitioner started charging the monthly rental of the MT Spread only after all the parts had been procured by the parties and the MT Spread was capable of drilling at the Project's site, are factors that have led the learned Sole Arbitrator to conclude that the Petitioner understood that it was required to provide the MT Spread that was capable of performing at the Respondent's site. This Court does not see any infirmity in this conclusion of the learned Sole Arbitrator, being a plausible one arrived at after due appreciation of evidence and in the backdrop of the clauses of the Agreement between the parties.

26. The third primary issue dealt with by the learned Sole Arbitrator was as to whether or not the Petitioner was obligated to provide suitable Cutter Head with Tools or merely the Cutter Head and not the Tools, and this question, if answered in the affirmative, were the Cutter Head Tools supposed to be the kind suitable to the Respondent's work?

27. To adjudicate upon the above issue, the learned Sole Arbitrator referred to Clause 5(ii) of the Agreement, which provides as follows:

> *"5(ii) The Lessor shall provide at no extra cost to the Lessee as part of the equipment - One set of all wear items including rock cutter head tools (cutter discs, scraper knives, etc.), slurry pumps, shakers, screens, etc. at the start of rental. Post project, condition of these parts will be reassessed by Herrenknecht engineer/technician and any part with significant damage rendering it unusable for, future work will have to be replaced by the Lessee at their cost. Parts without damage need not be replaced."*

28. Even a bare perusal of the above extracted clause is makes it *prima facie* evident that the Petitioner was obligated to provide Cutter Head Tools in terms of the Agreement. The fact that the Respondent went ahead and procured the Cutter Head Tools in its own name and at its own cost does not lead to a conclusion that the Petitioner was not obligated to provide them at all. Rather, the above clause, read in conjunction with the fact that the Respondent was constrained to itself make a purchase of a crucial component for its project, goes on to show that there was non-performance on part of the Petitioner itself.

29. The above conclusions arrived at by the learned Sole Arbitrator on the three primary issues have formed the basis for the award of claims and counter-claims in the Impugned Award, and this Court has already opined that there exists no infirmity in the same. With this background, this Court shall delve into the claim/counter-claim-wise adjudication carried out by the learned Sole Arbitrator.

30. Claim No. 1 of the Respondent herein was for an amount of Rs. 5,20,904/-, relating to purchases from HK, which have been stated to be in the Petitioner's scope, but of which the costs have been borne by the Respondent. On this claim, the learned Sole Arbitrator has referred to the Statement of Defence filed by the Petitioner, as well as deposition of Respondent's witness (i.e., CW-1 before the learned Sole Arbitrator). The parts in questions are wear items, mentioned at Serial Nos. 1 to 16 of Exhibit C-2. Reference has been made to Paragraph No. 27 of the Petitioner's Statement of Defence wherein the following has been pleaded:

> *"27. That the claim at Sr. No 1 is wrong and denied. Although the respondent agreed for the amount of Euro*

5539.23 is payable as the said parts were bought by the claimant on behalf of the respondent only as spares/additional parts and they were not part and parcel of machine supplied, the accompanying calculations and remarks are wrong and denied. In their account statement (ANNEXURE - R - 16) dated 24th June, 2013, already enclosed, claimant has tried to claim these parts were supplied by them in order to avoid the refurbishment cost to them. Thus, if the claimant had provided these parts to the respondent as replacement, then they are estopped from claiming any amount in respect thereof from the respondent. Further the remark by the claimant in Exhibit 1 that this shipment was booked with their sub-sea recovery shipment is false as can be seen with their accompanying invoice and custom clearance documents that this shipment was booked with the claimant's consumables order from the same supplier. The freight invoice, CHA, DO and AAI invoice and local transportation invoice from claimant does not mention it is for this particular shipment. Full custom duty clearance documents are not filed by the claimant in the present proceedings. The Euro rate of Rs.71.65/- applied for conversion to INR by the claimant is arbitrary. Even the custom clearance documents show the exchange rate of Rs.66/- instead of Rs.71.65/- claimed by the claimant, showing the mala fide nature of the claimant. That the cost of said parts comes to only Rs.3,65,589.18. That so far as freight, customs duty and CHA charges are concerned, the respondent is willing to adjust the amount in respect thereof subject to production of relevant documents in relation to import of the said parts. Needless to mention the documents filed by the claimant do not reflect that they are in relation to import of aforesaid parts."

31. The conclusion arrived at by the learned Sole Arbitrator, is that looking at the nature of pleadings, deposition of witness and documents on

record, there is no dispute from the Petitioner's end as to its liability with regard to the parts purchased by the Respondent from HK, insofar as the wear items mentioned at Serial Nos. 1 to 16 of Exhibit C-2 are concerned.

32. Against this finding, the learned Counsel for the Petitioner has stated that the Petitioner was under an obligation to provide one set of wear items as per the Agreement, however, there was no provision for selection of such wear items according to the site conditions of the Respondent. In the opinion of this Court, this contention of the Petitioner is in contradiction with the above-extracted Paragraph No. 27 of the Petitioner's Statement of Defence, reason being that once the Petitioner had agreed to adjust the amount spent by the Respondent in purchase of such items, it cannot be permitted to now contend that it had no liability whatsoever against such payment on the ground that it never had the liability to deliver such items.

33. Insofar as the overarching contention of the Petitioner, being that such wear items were not to be provided as the Respondent's site conditions, the same has already been discussed in the foregoing paragraphs, wherein this Court is in agreement with the finding of the learned Sole Arbitrator that the Petitioner was aware of the site conditions and could not have provided the MT Spread and the other components contained in the Agreement *in vacuo*.

34. Resultantly, this Court does not see any scope of interference in the findings of the learned Sole Arbitrator on Claim 1 raised by the Respondent and awarded in its favor.

35. Moving further, Claim No. 2 of the Respondent was for an amount of Rs. 7,14,418/-, with respect to items at Serial Nos. 17 to 20 of Exhibit C-2. This claim is again for wear items, which the Petitioner had objected to at Paragraph No. 28 of its Statement of Defence, by contending that these

items were 'consumables' and not wear items and resultantly, within the scope of Respondent and not the Petitioner.

36. Reference by the learned Sole Arbitrator for adjudication of this claim was made to an email dated 12.01.2012 sent by HK to the Petitioner, contents of which are being reproduced hereunder:

> *"Dear Mr Garg I Anand,*
>
> *Please find attached QT11-0479-- spare parts supposed to be purchased by Gypsum.*
>
> *QT12-00 - - - .the spare parts supposed to be purchased by COMACOE. Please provide us one PO from Gypsum and another from COMACOE."*

37. It appears that HK had referred to two distinct Purchase Orders ["**POs**"] for purchase of spare parts – one by the Petitioner herein and one by the Respondent. However, material on record before the learned Sole Arbitrator indicated only one such PO, being Exhibit C-2. In this scenario, the learned Sole Arbitrator's decision to award Claim No. 2 in favor of the Respondent cannot be said to be erroneous, as it was already determined that purchase of wear items at Serial Nos. 1-16 of Exhibit C-2 was within the scope of the Petitioner and by that reasoning, and as such, parts at Serial No. 17-22 also would be within the Petitioner's scope.

38. This Court has also perused the PO in question, which contains 30 items, which are being stated hereunder:

> *"1. BALL VALVE*
> *2. PRESSURE TRANSDUCER MEMBRANE*
> *3. SCREW COUPLING SOCKET*
> *4. SCREW COUPLING PLUG*
> *5. GREASE PUMP*

6. SAFETY VALVE
7. PROXIMITY SWITCH/ PLUG 3 PIN
8. TUNNEL LIGHT LARGE
9. PRESSURE GAUGE TYPE 213.53
10. OIL LEVEL INDICATION
11. FLANGE COUPLING
12. PROTECTING CAP
13. PRESSURE GAUGE
14. PRESSURE GAUGE
15. PHASE SEQUENCE RELAY 160-690VA
16. BALL VALVE 1/4"
17. DISTRIBUTOR
18. ROTARY SHAFT LIP TYPE SEAL
19. ROTARY SHAFT LIP TYPE SEAL
20. ROUND CORD
21. ROUND CORD 21, L=4520
22. FILTER INSERT
23. SEALING SET
24. SEALING SET
25. SEALING SET
26. SEALING SET
27. SEALING SET
28. GASKET
29. UNDERFLOW BOOT
30. CLAMP T-BOLT"

39. Items at Serial No. 1 to 16 contain items like safety valves, flange coupling, etc., while those at Serial No. 17 to 22 contain items like filter insert, gasket, etc. This Court, in line with the reasoning given by the learned Sole Arbitrator, is able to conclude that all the items contained in the PO involve similar usage and no bifurcation can be made out between them. Findings on technicalities which may lead to an alternate conclusion, are not within the powers of this Court exercising its power under Section 34 of the Arbitration Act.

40. Resultantly, this Court does not see any scope of interference in the findings of the learned Sole Arbitrator on Claim No. 2 raised by the Respondent and awarded in its favour.

41. Claim No. 3 was raised by the Respondent for an amount of Rs. 18,13,778/-, contending that though the cutting tools for the cutter head procured by the Respondent for the MT Spread were returned to the Petitioner, they were supposed to be retained by the Respondent.

42. The learned Sole Arbitrator has analysed the deposition of CW-1, which is being reproduced below:

> *"**46. Claim No.3:** The Claim No.3 is with respect to Rs.18, 13, 778/-.This claim is made on the premise that the cutting tools for the cutter head procured by the Claimant for the MT Spread were returned with the machine to the Respondent. It is claimed that these parts were actually to be retained by the Claimant but were eventually returned along with the machine. On this aspect, CW-1 states as follows:*
>
> > *"8.5 I state that, apart from the parts above dealt with, the Respondent was also supposed to provide a set of appropriate cutter head tools. I stated that on the Respondent's recommendation, the Claimant ordered a set of the cutter head tools as was advised to it as being suitable for the job from Palmieri SpA. I hereby tender in evidence the true copy of the invoice dated 10th January, 2012 from Palmieri SpA for EUR 20,403.08 (equivalent to INR 14,16,536) as received by the Claimant, annexed hereto as Exhibit C-6. I hereby tender in evidence the original invoices dated 30th January, 2012 from Falcom Cargo Services (I) Pvt. ltd. for INR 12,539 and INR 4,964, annexed hereto as Exhibit C-7. I hereby tender in evidence the original invoice dated 9th February,*

2012 from Mehta Transport for INR 18,000 annexed hereto as Exhibit C-8. I hereby tender in evidence the originals of the Bills of Entry dated 18th January, 2012 which relate to the said parts and the original of the challan for payment of INR 3,86,739, annexed hereto as Exhibit C-9. The total amount paid by the Claimant on this count was INR 18,38,778/-. I stated that the initial understanding was that the cutter head tools ordered by the Claimant would be retained by the Claimant (as evidence by the Claimant's email of 24th November, 2011 at page 87 of the SoD). However, the same as eventually returned along with the Machine to the Respondent, and accepted by the Respondent as well. I stated that the Claimant did not intend to deliver anything non-gratuitously to the Respondent and should be reimbursed for the same."

43. The learned Sole Arbitrator has also referred to an email dated 24.11.2011 sent by the Respondent to the Petitioner relating to the removal of the existing defective cutting wheel and replacing the same with a new cutting wheel which would be purchased by the Respondent itself.

44. The extract of CW-1 above, read in conjunction with the email dated 24.11.2011, indicates that certain cutter head tools were being purchased by the Respondent, in order to replace the existing defective cutting wheel, which was provided by the Petitioner. What is also evident from the email dated 24.11.2011 there was a mutual understanding between the parties that the cutting wheel will be purchased by the Respondent, removed after completion of work and replaced with the Petitioner's cutting wheel. However, it so transpired that the MT Spread was returned to the Petitioner

along with the cutting wheel purchased by the Respondent, which the Petitioner ended up retaining.

45. The Petitioner has now contended that since it never consented or agreed to the Respondent returning the purchased cutting wheel along with the MT Spread, it is not liable to make any payment whatsoever for the same.

46. This Court does not find merit in the Petitioner's contention, s the Petitioner did not dispute the factum of retaining an equipment which was purchased by the Respondent. Moreover, this purchase had to be made by the Respondent solely because the Petitioner had delivered a defective cutting wheel. In this circumstance, fastening of liability on the Petitioner by the learned Sole Arbitrator to now repay the Respondent for retaining the newly purchased cutting wheel *albeit* after a 30% depreciation is, in the opinion of this Court, reasonable.

47. Resultantly, this Court does not see any scope of interference in the findings of the learned Sole Arbitrator on Claim No. 3 raised by the Respondent and partly awarded in its favour.

48. Claim No. 4 was raised by the Respondent for an amount of Rs. 23,940/- incurred by it on account of repair of Respondent's 600 KVA DG set. This claim was awarded by the learned Sole Arbitrator in the Respondent's favour, as there was no challenge by the Petitioner that the DG set was not in a working condition and as per Clause 1A of the Agreement, the Petitioner was obligated to provide the same in a working condition.

49. As such, this Court does not see any scope of interference in the findings of the learned Sole Arbitrator on Claim No. 4 raised by the Respondent and awarded in its favour.

50. Claim Nos. 11 and 12, also related to the generator set, were raised by the Respondent for the amounts of Rs. 8,79,185/- and Rs. 1,65,450, respectively.

51. The learned Sole Arbitrator has adjudicated the above claims no. 11 and 12, at the outset, on the basis of his observations on Claim No. 4, wherein it was already held observed that the Petitioner did not supply the DG set to the Respondent in a working condition.

52. In addition, the learned Sole Arbitrator has also referred to Paragraph No. 25 of the affidavit in evidence of RW-1, led on behalf of the Petitioner itself. The same is being reproduced below for reference:

> *"25. I submit that the agreement between the claimant and the respondent was only with regard to leasing out of machine and nothing more. That so far as liquidated damages claimed by the claimant is concerned, the same are not admissible and are denied. A reference in this regard may be made to clause no 10. (v) and 11. (iii) of the agreement which are to the following effect:-*
>
> > *10. v. The Lessor will not be liable for any consequential or other loss of any kind whatsoever arising to lease due to any breakdown of the equipment. And therefore deduction in respect of such losses is not allowable from lessor's bills for hire charges.*
> >
> > *11 (iii) As the equipment will be working directly under lessee's supervision, lessor will not assume any sort of liability, civil or criminal, directly or indirectly attributable to the working or otherwise of the equipment in respect of lessee's material, personnel or other loss of any kind whatsoever."*

Moreover, the claimant was never kept in dark about the status of the machine at any stage as has already been explained herein above. The claimant is making wrong claim that machine was mobilized without material components when it has already been mentioned in On Hire Survey Report (OHS) that material components were all there and only a list of spares and consumables had to be procured to start the project. Further, the respondent could have never represented any fact about claimant's other machine in Qatar when the respondent never even saw that machine nor was aware of its make, model or specifications. The claimant had made bald allegations in this regard. The respondent never requested claimant to order the cutter head and cutters on their behalf. The parts which were in the scope of the respondent were clearly identified even before placement of such orders, in order to avoid any kind of ambiguity in future. The allegations of the claimant that the respondent retained the parts is misleading. The machine was sent to respondent's yard before complete overhaul by the claimant and moreover the cutter head consumable tools as purchased by claimant were specific to their project site according to its geo-technical conditions and were of no use to the respondent. Furthermore, no packing list was ever given by the claimant for the returned items to respondent's store to even collaborate which items were returned, as the respondent was still waiting for complete overhaul of machine by claimant before taking measure of what was returned back. Further, claimant's mail dt. 3rd July, 2012, clearly states that they will handover parts from HK once received, which was never done. This was further collaborated by claimant's mail dt. 20th July, 2012, stating parts of very low significance, as per their own non-expert opinion, are only left to be delivered. The said chain of

> *emails is Ex.RW-1/21. I submit that the entire machine is set up by connecting its innumerable parts and no such part is of 'low significance' in as much as the machine could not be put on even in absence of a single part. Claimant's repeated stating of DG repair is needless when all DG repair expenses were already paid for directly by respondent to DG's OEM and the said DG was provided soon after repair and it was mutually agreed to debit one month's DG rental on the respondent as per prevailing market rate for the period during which the DG set of the respondent was not available at site."*

53. The above extracted paragraph indicates that there was a mutual agreement to deduct one month's DG rental from the amount payable by the Respondent, being the period during which the Petitioner's DG Set was not available at the Respondent's site. However, the learned Sole Arbitrator has also noted the failure on part of the Petitioner to lead any evidence to depict as to exactly when the repaired DG Set was made available to the Respondent.

54. The learned Sole Arbitrator has also referred to Exhibit C-11 filed by the Respondent along with its Statement of Claims, which depicts the costs incurred by the Respondent for hiring the 600 KVA DG Set from a third party. Again, owing to the chain of facts being that the Petitioner's DG Set as supplied suffered a breakdown and went for repairing for an extended period of time during which the Respondent had to procure the DG Set from a third party, invoices whereof have been duly produced by the Respondent, the learned Sole Arbitrator cannot be said to have committed any error in awarding both these claims in favour of the Respondent.

55. Resultantly, this Court does not see any scope of interference in the findings of the learned Sole Arbitrator on Claim Nos. 11 and 12 raised by the Respondent and awarded in its favour.

56. Claim Nos. 6, 7 and 8 have been adjudicated conjunctively by the learned Sole Arbitrator, having arisen on account of certain expenditure incurred by the Respondent after the MT Spread had started working on site. Claim No. 6 was for an amount of Rs. 4,500/- being the cost incurred towards pressure switches, which as per the Respondent, had to be arranged as the ones provided by the Petitioner with the MT Spread had stopped working. Claim No. 7 was for an amount of Rs. 29,250/- towards the purchase and fitting of machine cooling system, while Claim No. 8 was for an amount of Rs. 3,30,750/- towards slurry hoses/pipes/clamps. Out of these, since the learned Sole Arbitrator has disallowed the Claim Nos. 6 and 8 and no challenge has been preferred to the same by either parties, this Court will not delve into the findings on these claims.

57. As far as Claim No. 7towards the purchase and fitting of machine cooling system is concerned, the learned Sole Arbitrator has referred an email dated 24.06.2013 sent by the Respondent to the Petitioner, as well as the SOD of the Petitioner. Perusal of the same indicates that the Petitioner had agreed to an amount of Rs. 21,967.50, basis that out of 4 fittings, only 1 was damaged at the Respondent's site. Notably, therefore, the Petitioner had agreed to bear the liability of the purchase made by the Petitioner, albeit to the extent of Rs. 21,967.50. Yet, since it remained undisputed that the supply of a workable machine cooling system was a responsibility of the Petitioner, the learned Sole Arbitrator awarded Claim No. 7 entirely in favour of the Respondent.

58. The only challenge by the Petitioner to the award of claim no. 7 is at Paragraph No. 3.33 of the Petition, wherein it is stated that the Respondent did not provide a "clear" in support of its claim and the invoice did not pertain to the fittings of cooling system. However, the Petitioner has stated that it had agreed to bear the cost of fittings of the cooling system incurred by the Respondent. As such, since the dispute was only one of cost, the learned Sole Arbitrator, being the master of evidence, has held that there is enough evidence to award the claim in favour of the Respondent.

59. Therefore, this Court does not see any scope ofinterference in the findings of the learned Sole Arbitrator on Claim No. 7 raised by the Respondent and awarded in its favour.

60. Claim No. 9 was raised by the Respondent for an amount of Rs. 25,675/-, based on two invoices, one dated 02.04.2012 and another dated 25.01.2012. However, the learned Sole Arbitrator has noted that in his evidence, CW-1 has claimed that out of Rs. 15,200/- in the invoice dated 02.04.2012, an amount of Rs. 12,000/- was on account of the Respondent. On the other hand, CW-1 has also stated that the entire amount of Rs. 6,370/- in the invoice dated 25.01.2012, for a rotor assembly, was on account of the Petitioner.

61. At the outset, the learned Sole Arbitrator disallowed part of the claim based on invoice dated 02.04.2012, as the same was after the commissioning of MT Spread, as also because the CW-1 himself claimed that the same was the Respondent's own liability. As this part of the claim has already been rejected by the learned Sole Arbitrator, this Court does not see any requirement to delve into the findings.

62. The purchase on 25.01.2012 reflected in the invoice of the even date, was prior to commissioning of the MT Spread. There being no viable challenge to this part of the claim, the learned Sole Arbitrator partly awarded Claim No. 9 in favour of the Respondent for an amount of Rs. 6,370/- only.

63. Before this Court also, the Petitioner has not raised any appropriate ground against the finding on Claim No. 9.

64. Therefore, this Court does not see any scope of interference in the findings of the learned Sole Arbitrator on Claim No. 9 raised by the Respondent and partly-awarded in its favour.

65. Claim No. 10 was raised by the Respondent for an amount of Rs. 12,64,475/- being the costs incurred towards repairing, servicing, fitting of parts, assembly, commissioning of machine, fabrication fittings, alignment of pumps, etc.

66. The learned Sole Arbitrator split Claim No. 10 into two parts, one relating to costs of HK Technician from 07.02.2012 to 25.02.2012, including the travelling and lodging costs, and the other relating to costs of machinery and personnel incurred by the Respondent to repair the MT Spread and install the parts required to get the MT Spread in a working condition.

67. As far as Part One as bifurcated above is concerned, the learned Sole Arbitrator first recalled the fact that the Petitioner did not deliver the MT Spread in a working condition. The learned Sole Arbitrator then referred to CW-1's cross examination, relevant parts whereof are being reproduced below:

> ***Q149.*** *Have you informed in writing to the respondent that the respondent would be required to pay charges for HK technician and his travel and lodging cost*

before his hiring for setting up the MT machine?

Ans.*I can check and revert. However, the technician was not hired for setting up of the machine, but for repairing, maintenance, refurbishment and for completing all short falls mentioned by TPI in its report. The respondent was obliged to provide the machine in good and ready working condition. However, the respondent failed to do so, and therefore, the claimant incurred these costs to make the machine functional for the project.*

Q150*. Have you informed in writing to the respondent that the respondent would be liable to pay for various machinery and personnel employed by the claimant to repair and install parts in the MT machine as mentioned by you in para 8.11 of your affidavit?*

Ans.I can check and revert. However, the machinery and personnel were hired for. repairing,· maintenance, refurbishment and for completing all short falls mentioned by TPI in its report. The respondent was obliged to provide the machine in good and ready working condition. However, the respondent failed to do so, and therefore, the claimant incurred these costs to make the machine functional for the project.

68. The above statements, read in conjunction with the observation and undisputed position that the Petitioner had not delivered an MT Spread to the Respondent in a working condition, has rightly led the learned Sole Arbitrator award an amount of Rs. 4,48,875/- incurred by the Respondent towards costs of HK Technician.

69. Insofar as Part Two of Claim No. 10 is concerned, the same contains 3 items of expenses, first being 'equipment' for Rs. 3,90,000/-, second being 'manpower' for Rs. 7,18,275/- and the third being 'consumables' for Rs. 1,56,200/-.

70. As it was already observed that the liability for 'consumables' cannot be fastened on the Petitioner, the learned Sole Arbitrator rightly disallowed the Respondent's claim of Rs. 1,56,200/-.

71. As far as costs of manpower amounting Rs. 7,18,275/- is concerned, the learned Sole Arbitrator reduced the already award amount of Rs. 4,48,875/- towards costs of HK Technician, leaving only Rs. 2,69,400/-.

72. Seeing as the only challenge against award of Claim No. 10 by the Petitioner was that the setting up of MT Spread was within the Respondent's scope, on which the learned Sole Arbitrator awarded the amounts of Rs. 2,69,400/- towards 'manpower' and Rs. 3,90,000/- towards 'equipment' to then Respondent. There can be no error in this finding, as it is premised on the fact that setting up of the MT Spread was within the Petitioner's scope and the Petitioner did not deliver the MT Spread in a working condition to the Respondent's site.

73. Resultantly, a total of Rs. 11,08,275/- was awarded to the Respondent under Claim No. 10, and this Court is in agreement with this conclusion of the learned Sole Arbitrator.

74. Claim Nos. 13, 14, 15 and 16 have been dealt with in conjunction by the learned Sole Arbitrator, as all of them were related to P-Drive of the MT Spread, which according to the Respondent, was defective and broke down. The Respondent was also unsuccessful in repair the defective P-Drive.

75. Resultantly, Claim No. 16 was raised for an amount of Rs. 2,72,500/- incurred by the Respondent for hiring an AC-Drive between the period of 21.02.2012 to 08.06.2012. Two emails dated 13.04.2012 and 31.07.2012 have been referred to by the learned Sole Arbitrator.

> *"From: chandrashekhar < chandrashekhar@comacoe.com >*
> *Sent: 13 April 2012 14:11*
> *To: 'Sunir Garg; Arun Singh*
> *Cc: dharmesh@comacoe.com; anil.khatri@comacoe.com; 'sanjeev; info@gypsum.in; sood@comacoe.com; vikas.yadav@comacoe.com*
>
> *Subject: RE: Pending Bills/Accounts*
> *Attachments: Debit Details 12 04 12 Rev.xlsx*
>
> *Dear Mr. Sunir,*
>
> *Enclosed above statement of expenses incurred for your MTM Machine by us.*
>
> *Please review and revert, difference if any can be discussed in person.*
>
> *Also note that Mr. Sood was to come to Delhi, but due to another urgency he has gone to Chennai.*
>
> *Regard,*
>
> *Chandrashekhar*

DEBIT DETAILS FOR GYPSUM

S. No.	*Details of Activities*	*Debit Amount (Rs.)*	*Remarks*
xxx	*xxx*	*xxx*	*xxx*

7.	*Hiring of equipments to start the machine*		
	xxx		
	Supply of AC derive for tunnel pump dues to non availability of derive from gypsum		*Details to be collect from site*
xxx	*xxx*	*xxx*	*xxx*
xxx	*xxx*	*xxx*	*xxx*

xxx

SUMMARY OF DEBIT DETAILS, Annexure - 2				
S. No.	*Description of Heads*	*Amount, Rs.*	*Comment*	*Remarks*
xxx	*xxx*	*xxx*	*xxx*	*xxx*
17.	*Ac drive hire charges, due to defective P-derive of Gypsum [period from 21st Feb to 8th June]*	*27,000*	*As per meeting*	*Item agreed*
xxx	*xxx*	*xxx*	*xxx*	*xxx*

76. The learned Sole Arbitrator, at the outset, noted from the email dated 31.07.2012 that the Petitioner did not dispute the fact that the P-Drive was defective. He has also, while rightly referring to Serial No. 17 of the table contained in the email dated 31.07.2012, concluded that since the amount agreed between the parties for hiring an AC-Drive was Rs. 2,70,000/-, and the difference claim of Rs. 2,500/- remained unsubstantiated, the Petitioner was liable to pay the amount of Rs. 2,70,000/- to the Respondent.

77. Seeing that the above conclusion was based on *ad idem* position between the parties regarding the defects in the P-Drive, as also the agreed

amount contained in the email dated 31.07.2012, this Court does not see any infirmity in the part-award of Claim No. 16 to the Respondent by the learned Sole Arbitrator.

78. Similarly, Claim No. 13 for an amount of Rs. 5,000/-incurred on account of arrangement of cable, was also awarded to the Respondent by the learned Sole Arbitrator, basis on the said amount being agreed to in the email dated 31.07.2012. As such, this Court does not see any scope of interference in this awarded claim as well.

79. Claim Nos. 14 and 15 relate to the expenses incurred by the Respondent towards the repair of the defective P-Drive. The Respondent based the claim on a debit note dated 14.03.2012 and an invoice dated 24.03.2012. The learned Sole Arbitrator, seeing that no specific challenge was made by the Petitioner against these claims, nor were the debit note or invoice disproved, awarded a sum of Rs. 3,23,405/- to the Respondent.

80. As such, this Court does not see any scope of interference in the award of Claim Nos. 14 and 15 in favour of the Respondent.

81. Claim No. 18, also related to the P-Drive, was raised by the Respondent for an amount of Rs. 5,83,333/- being the costs towards refund of the rental paid by the Respondent to the Petitioner.

82. Reference by the learned Sole Arbitrator was made to Clause 3(iii) of the Agreement, according to which no rental was payable for any breakdown during the first 2.5m drilling. Seeing that there no serious challenge against this claim, coupled with the admitted position that the Petitioner had indeed supplied a defective P-Drive to the Respondent, the learned Sole Arbitrator awarded the amount of Rs. 5,83,000/- to the Respondent.

83. Since the award of Claim No. 18 is premised on the preceding findings of supply of a defective P-Drive, as also Clause 3(iii) of the Agreement leading to a plausible conclusion, this Court does not see any scope for interference in the finding of the learned Sole Arbitrator.

84. Claim No. 17 was raised by the Respondent for an amount of Rs. 19,68,120/- towards non-provision of an operator for a total of 33 days by the Petitioner.

85. As per Clause 1B of the Agreement, the Petitioner was obligated to provide one operator assisted by a supervisor, on a six-working-day per week basis. According to the Respondent, the operator provided by the Petitioner was absent for a total of 33 days, that is, 13 days of machine operation and 20 days of machine readiness and setup. For the same, the Respondent quantified the claim on the basis of HK Operator's rate of 70 Euros per hour. Due to this, the Respondent claims that it had to hire an operator from HK for which it incurred a cost of Rs. 19,68,120/-. This detail was sent to the Petitioner on 31.07.2012, however, there was no consensus between the parties regarding the same. *Per contra*, the Petitioner claimed before the learned Sole Arbitrator that the operator was not available only from 22.02.2012 to 26.02.2012, and the date of requirement of the operator kept changing because of late arrival of consumables.

86. The respondent also raised an issue regarding the qualification of the operator, however, the learned Sole Arbitrator noted that this issue was never raised by the Respondent before the Petitioner. Moreover, the learned Sole Arbitrator was of the opinion that if in fact the operator was not qualified, his presence for whatever period on the site would be

inconsequential. As such, the question of qualification of the operator was rendered as inconclusive by the learned Sole Arbitrator.

87. As regards his absence, the learned Sole Arbitrator examined that before 21.02.2012, which is the date on which the MT Spread became ready for operations, the Respondent itself did not feel the need for the HK Operator. However, for the period thereafter, the learned Sole Arbitrator concluded that on the basis of paragraph 12 of CW-1's affidavit, the absence of operator for 4 days has been proven. Paragraph No. 12 of CW-1's affidavit is being reproduced below for reference:

> *"12. I state that the Respondent was obliged to provide an operator for the Machine and supervisors from the date of arrival of the Machine at site, i.e. 6 December 2016. I state that the operator, Mr. Chendhil Kumar did not come till 26 February 2012. This is also evidenced by the Respondent's email dated 24 February 2012 at page 35 of the SoC. I further state that the operator provided by the Respondent was not qualified. I state that the operator, once arrived again was absent for a total of about 13 days in between. The Respondent's operator was, therefore, not present for about 33 days when he should have been there. The Claimant is entitled to deduct an amount equivalent to an operator's cost for 33 days from the rental paid by it. The Claimant considers an operator's rate to be EUR 70 per hour. This is as per the rate charged by HK for its operator- which operator the Claimant was constrained to call for once it quickly became evident that the operator provided by the Respondent was not properly qualified. I hereby tender in evidence the original of the invoice dated 31 May 2012 raised by HK upon the Claimant for its operator, Mr. Roman Stocker, annexed hereto as Exhibit C-25. I state that the Claimant is entitled to a refund of an amount of INR 19,68,120. I, hereby tender in evidence the*

original debit note dated, 28 May 2016 for INR 19,68,120/-. The flight expenses are to be shared equally."

88. Accordingly, Claim No. 7 was partly awarded for Rs. 2,16,000/- (that is, at the rate of Rs. 3000/- per hour x 12 hour shift x 6 days).

89. Before this Court, the Petitioner has reagitated pleadings similar to those in its Statement of Defence, as against Claim No. 17. However, since the learned Sole Arbitrator has arrived at a conclusion on the basis of evidence before it, this Court does not see any scope of interference in the part-award of the same to the Respondent.

90. Claim No. 20 was raised by the Respondent for an amount of Rs. 22,22,400/- as costs incurred towards idling of Respondent's machinery and manpower due to the non-working of the MT Spread.

91. For adjudication of the above claim, the learned Sole Arbitrator has looked into Paragraph No. 11 of CW-1's affidavit and a debit note dated 28.05.2016 relied upon by the Respondent. Paragraph No. 11 CW-1's affidavit is being extracted below for reference:

"11. I state that the Claimant had arranged for all its manpower and machinery so as to start the work on/ about 20 December 2011, i.e. when the Machine arrived at site and the joint on-hire survey and machine set up work and trial run was to have completed. However, the actual work could eventually only start on 21 February 2012 on account of the missing/ damaged parts. I state that the table at page 153 of the SoC reflects the idle status of the Claimant's various machinery/ personnel. I state that they were put to work as and when the parts arrived they could work with - this is reflected in the said table. I confirm that the rates given in the said table are the rates

which the Claimant has fixed for its manpower/ machinery. I state that the Claimant is entitled to INR 22,22,400 on this count. I hereby tender in evidence the original debit note dated 28 May 2016 for INR 22,22,400 raised by the Claimant, annexed hereto as Exhibit C- 24."

92. The learned Sole Arbitrator has awarded the entire claim to the Respondent on the basis of its earlier findings of the Petitioner not having provided a fully functional MT Spread to the Respondent and this factum being one that even the Petitioner had admitted to, though, it had constantly denied its liability against the same.

93. Before this Court, the Petitioner has contended that this claim was being raised by the Respondent for the first time only before the learned Sole Arbitrator. However, this Court, upon the perusal of the above extract from CW-1's affidavit as well as the debit note dated 28.05.2016 which is annexed at Annexure A-44 to the present Petition, is in agreement with the view taken by the learned Sole Arbitrator since the Agreement was a time-fixed one and both the parties understood the importance of a time-bound performance by the MT Spread, the supply of an unequipped machine which was unsuitable for a viable operation, could in no way have meant the fulfilment of obligations by the Petitioner.

94. Resultantly, since the findings of the learned Sole Arbitrator on Claim No. 20 are based squarely on the evidence produced by the Respondent as well as the factual circumstances surrounding the delivery of a non-functional MT Spread, this Court does not see any scope for interference in the same.

95. Under Claim No. 21, the Respondent has claimed 50% costs for the on-hire survey, for an amount of Rs. 56,256/-, which in terms of Clause 8(vi) of the Agreement, was to be shared equally by the parties. Further, under Claim No. 22, the Respondent has claimed an amount of Rs. 2,63,892/- for the 100% trail run of the MT Spread during the period from 11.12.2011 to 20.12.2011.

96. The learned Sole Arbitrator has looked into Paragraph No. 13 of CW-1's affidavit, invoice dated 09.01.2012, the hotel bills and travel invoices, which were relied upon by the Respondent, and fully awarded Claim No. 21, while partly allowing Claim No. 22 for an amount of Rs. 1,31,523/- to the Respondent.

97. Clause 8(vi) of the Agreement is being reproduced hereunder for ready reference:

> *"8(vi) There shall be on hire survey at the time of handing over of the machine by engineer from Herrenknecht to ascertain the condition of machine being delivered with detailed list and inventory and a similar off hire survey will be carried out at the time of returning the machine with detailed list and inventory to ascertain and confirm the same condition which was at the time of original delivery. The cost of survey fees, if any, to be shared equally. The Herrenknecht engineer's record of inspection at time of delivery shall form the baseline condition for all future reference."*

98. Paragraph No. 13 of CW-1's affidavit is being extracted below:

> *"13. I state that the Claimant is entitled to 50% of the cost of the on hire suryey and 100% of the cost of the trial run of the. Machine. The trial run was done as per the Respondent's requirements. I hereby tender in evidence the original of the invoice dated 9 January*

2012 for EUR 5,412.97 raised by HK upon the Claimant for its engineer, Mr. Jarayuth Kaewkongjan, annexed hereto as Exhibit C-26. The cost for 6 December to 10 December 2011, i.e. for the survey was EUR 1540, half of which is EUR 770 (equivaient to INR 51,921) and which is to be borne by the Respondent. The hotel bill for the period 6 December to 10 December 2011 was INR 8,671 - half of which. i.e. INR 4,335.50 is to be borne by the Respondent. The hotel bill for the balance period till 20 December 2011, i.e. INR 19,150 is to be borne completely by the Respondent. I hereby tender in evidence the original hotel bills for INR 12,274 + INR 15,547 from Hotel Lord's Inn, annexed hereto as Exhibit C-27. The flight expenses till Bombay and visa expenses are already part of the invoice raised by HK and are to be split halfway, i.e. the Claimant is entitled to INR 18,605 + INR 7,829 + INR 1,481 on that account. The flight expenses from Bombay to the local airport is also to be split half-way- the Claimant is entitled to INR 2,452 + INR 3,869. I hereby tender in evidence the printout of the invoices for the same, annexed hereto as Exhibit C-28. I state that payment of these expenses is already reflected in the Claimant's bank statement- which is already annexed hereto. I state that the Claimant is, on this count, entitled to INR 3,14,9676-."

99. This Court has also perused the Bill No. 4039 of the Hotel Lords Inn, Amreli for the stay of one Kaewong Jan Jarayuth from 07.12.2011 to 20.12.2011, along with relevant travel invoices, annexed at Annexure A-84 to the present Petition.

100. This Court has also perused the email dated 24.06.2013, on the basis of which the learned Sole Arbitrator has only partly allowed Claim No. 22 for an amount of Rs. 1,31,523/-, being the amount agreed upon between the

parties with respect to the trial run. Thus, *prima facie*, there appears to be no error in the conclusion arrived at by the learned Sole Arbitrator, as Clause 8(vi) of the Agreement provided for the equal sharing of costs between the parties for the on-hire survey and as far as the trial run is concerned, the same was discussed between the parties in the joint Minutes of Meetings.

101. As such, this Court sees no scope of interference in the findings of the learned Sole Arbitrator on Claim Nos. 21 and 22.

102. Claim No. 23 was claimed by the Respondent for an amount of Rs. 3,50,000/- towards the refund of rental of MT Spread paid for the period from 07.05.2012 to 09.05.2012, on the basis of its contention that the Petitioner, without any justification, stopped the MT Spread from working in these three days. Accordingly, a separate Claim No. 24 for an amount of Rs. 5,30,400/- was also claimed by the Respondent towards idling of Respondent's machinery and manpower in these three days.

103. The relevant provision for this claim is Clause 8(iv) of the Agreement, which is being extracted below:

> *"8(iv) In case there is a delay in making the stipulated payments, lessor reserves the right to stop the working of the MT spread until such payment is made. The hire charges however shall be payable in full even during such period. Lessor may also withdraw the spread after awaiting the payment for a reasonable period of time."*

104. The learned Sole Arbitrator has also looked into Paragraph No. 14 of CW-1's affidavit, which was relied upon by the Respondent, and is being reproduced hereunder:

> *"14. I state that the Respondent, without any justification, stopped the Machine from working from 7 May 2012 to 9 May 2012. The Claimant is entitled to a refund of the amounts paid for these 3 days, i.e. INR 3,50,000/-. The Claimant contemporaneously recorded its protest, as is evident from the invoice dated 5 May 2011 at page 172 of the SoC. The Claimant is further entitled to the cost to it of its manpower/ machinery being idle for 3 days, i.e. to INR 5,30,400. I confirm that the rates thereof are as given in the table at page 178 of the SoC. I hereby tender in evidence the original debit notes dated 28 May 2016 for INR 3,50,000 and INR 5,30,400, annexed hereto as Exhibit C-29 and Exhibit C-30."*

105. Reading of the above extract from CW-1's affidavit indicates that the basis of Respondent's were two handwritten remarks on an invoice dated 21.05.2012, one reading '*stopped by M/s Gypsum*' and the other reading *'3 days break down*'. The Repondent's claim is also supported by a debit note dated 28.05.2016.

106. The learned Sole Arbitrator, after an analysis of the above documents has opined that since the debit not was raised nearly four years after the alleged stopping of the MT Spread by the Petitioner and the communications between the parties do not reveal any discussion on the said issue, the Respondent's claims no. 23 and 24 were unsubstantiated. Since the rejection of these claims have not been challenged, this Court is not delving into the correctness or otherwise thereof.

107. Claim No. 25 has been raised for an amount of Rs. 24,63,005/- towards Liquidated Damages imposed by the Respondent's client, M/s GPPCL on the Respondent on account of delay in completion of work. The

learned Sole Arbitrator has disallowed this claim, on the basis of already award charges towards the non-working period of the MT Spread, as also the bar under the Agreement on the recovery of damages from the Petitioner. Since no challenge has been preferred against the rejection of this claim, this Court is not delving into the correctness or otherwise thereof.

108. Claim No. 26 has been claimed by the Respondent for an amount of Rs. 70,00,000/- towards the excess rent paid by it beyond the 45-days period. According to the Respondent, the micro-tunnelling operation ran into 105 days of work, which was beyond the 45 days' period contemplated under the Agreement.

109. At the outset, the learned Sole Arbitrator has deemed the above stated 45 days period to be only an estimation of the Respondent, as the Petitioner had not given any warranty of completion of work in the said duration. Thus, the learned Sole Arbitrator opined that in order to prove its claim, the Respondent had to establish that the MT Spread was not working at the desired pace, which would depict a breach of Agreement on part of the Petitioner.

110. Reliance of the Respondent has been placed on Paragraph No. 9.2 of CW-1's affidavit, which is being extracted below:

> *"9.2. I state that the Claimant had expected that the progress would be at such a rate as would enable it to finish the microtunneling operation in 45 days. This is why the period was fixed at 45 days. I state that, with a Machine functioning at full capacity, the work would have been done in 45 days. However, on account of the slow progress attributable to tools ordered as per the Respondent's recommendation, the work took 105 days to complete. The Respondent agreed with the Claimant that the progress was slow, as is evident from its*

communications. The Claimant made a payment of INR 1,26,00,000 to the Claimant where it ought to have made only INR 56,00,000 (i.e. 45 days' rent). The Claimant is entitled to a refund of the excess rental paid to the Respondent, i.e. INR 70,00,000. I hereby tender in evidence, the original debit note dated 28 May 2016 for INR 70,00,000 raised by the Claimant, annexed hereto as Exhibit C-22."

111. The learned Sole Arbitrator has also looked into the email exchanges wherein the Respondent has complained about the delay in work to the Petitioner. In particular, an email dated 29.02.2012 has been referred to, wherein the Petitioner has written to its Italian supplied that the progress was slow and sought technical advice, to which a reply was received on 06.03.2012.

"From: Sunir Garg [mailto:sunir@gypsum.in]
Sent: Wednesday, February 29, 2012 6:08PM
To: p.patrizia@palmierirocktools.com; 'Rajan Sood'
Cc: 'Vikas Yadav'; 'Jarayuth Kaewkongjan'
Subject: RE: Status of Parts

Hi Patrizia

Our drilling is going on but at a comparatively slow rate. This may be because of presence of harder rocks than expected.

Can you please ask your design team to make a drawing of how the rippers and other tools you supplied to us are positioned on the rock cutting wheel we got from you couple of years back? This will help us in determining the overcut and also what should be ordered for the next drives.

Regards

Sunir"

112. Thus, the learned Sole Arbitrator has rightly concluded that there was no dispute that the pace of progress was slow due to the cutter head selection. This conclusion has been supported by Clauses 3, 5(i) and 5(ii) of the Agreement, under which the rental for the MT Spread was to start when the machine starts drilling or on cross-launch seal for the first drive, which was subject to provision of wear items and the same was to be assessed by HK after the project completion. Any damage rendering the parts unusable was a liability on the Respondent itself.

113. As was previously established, the Petitioner was obligated to provide the MT Spread in a functional condition as per the site conditions of the Respondent, as well as the wear items. The learned Sole Arbitrator also observed that the Respondent, who was not a novice, also possessed functional knowledge of the equipment and as such, no evidence was placed on record to show that the Respondent had contributed to any delays.

114. However, since the evidence on record only suggested that there was a delay of 45 days only beyond the maximum of 60 days, as there was a mutual extension of 14 days, the learned Sole Arbitrator partly awarded the claim no. 26 for an amount of Rs. 52,50,000/-.

115. Since the learned Sole Arbitrator has rendered an observation after an extensive analysis into the relevant provisions of the Agreement, the pleadings of the parties and the evidences on record, this Court does not find any error in the same, as the conclusion is a plausible one.

116. The Petitioner herein has also raised a counterclaim of Rs. 1,20,32,547/- along with interest at 18%, based on 3 sets of documents,

being quotations from HK, invoices from HK and invoices raised by the Petitioner towards rental. The Petitioner has also claimed costs of Rs. 5,00,000/-.

117. The learned Sole Arbitrator has observed that the quotations received from HK did not depict that they were either for repair/refurbishing of the MT Spread, in line with the off-hire survey and even if it was, mere receiving of quotations cannot lead to a legal claim for the Petitioner. Moreover, even the RW-1's deposition indicated that this quotation was not an invoice.

118. Even otherwise, the learned Sole Arbitrator observed from the material on record that the Petitioner did not even order the parts/items as mentioned in the quotation. Thus, as to the first part of the Petitioner's counterclaim, the learned Sole Arbitrator concluded that the same was unsubstantiated.

119. As to the second part based on an invoice dated 27.01.2013 raised by HK for an amount of 2,372.80 Euros towards travel of HK's Engineer. Since the parties under Clause 8(vi) of the Agreement had agreed to equally share the survey fees of HK's Engineer, the learned Sole Arbitrator partly awarded an amount of Rs. 80,000/- (that is, for 1,186 Euros).

120. This Court has gone through the findings and does not find any infirmity in the award of counterclaims to the Petitioner.

121. It is trite law that the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, and the findings based on appreciation of such evidence, are not to be scrutinized as if the court exercising its jurisdiction under Section 34 of the Arbitration Act is sitting in

appeal. This has recently been observed by the Apex Court in OPG Power Generation (P) Ltd. (Supra).

122. Seeing the nature of contentions of the Petitioner, being primarily that the learned Sole Arbitrator has travelled beyond the scope of the Agreement, this Court deems it fit to refer to Section 28 of the Arbitration Act, which is being reproduced hereunder:

> *"**28. Rules applicable to substance of dispute.***
>
> *(1) Where the place of arbitration is situate in India,—*
>
> *(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;*
>
> *(b) in international commercial arbitration,—*
>
> *(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;*
>
> *(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;*
>
> *(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.*
>
> *(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have*

expressly authorised it to do so.

> ***(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contractand trade usages applicable to the transaction.****"*
>
> [Emphasis Supplied]

123. Specific emphasis is laid on sub-section (3) of Section 28, as amended pursuant to the recommendations of the 246th Law Commission Report, *inter alia* further narrowing the grounds of challenge to arbitral awards available under Arbitration Act. The provision, as it stands now, allows for an arbitrator to take a practical and commercial approach to the competing claims, instead of giving a overly restrictive meaning to the terms of the contract, which may lead to an absurd conclusion.

124. In the present case, the learned Sole Arbitrator, while primarily laying down the foundation of the Impugned Award, by holding that it is impossible to conclude that the Petitioner was solely responsible for leasing out a machine *in vacuo*, has indeed taken a practical and commercial approach, after considering the terms of the Agreement, the respective pleadings, evidences, as well as oral submissions.

125. By observing that the parties, being businessmen entering to a commercial contract, could never have agreed to entering into a contract with gaining no knowledge as to what type of machine is being leased out or where the same would be used. In doing so, the learned Sole Arbitrator has given a correct construction to sub-Section (3) of Section 28 of the Arbitration Act as he took into account the terms of the Agreement, trade

usages as well as the commercial practices. Yet, the primary observations have not swayed the learned Sole Arbitrator completely so as to blindly award all the claims raised by the Respondent or counterclaims raised by the Petitioner. Where a clear contradiction of statements, lack of evidence, etc., was observed, the learned Sole Arbitrator has taken the same into account and rejected such unfounded claims/counterclaims as well.

126. In this Court's view, the extent of expenditure incurred under different heads and the quantum awarded under each head of claim by the learned arbitrator is a question of fact arrived at after proper evaluation of materials and a re-assessment of those facts can only be done if the assessment is found to be misdirected or perverse. The Impugned Award is in consonance with efficacious business practices applicable to commercial transactions where a contractor can apply for liquidated damages for the loss and damage suffered by it on account of premature termination of the contract.

127. This Court is of the opinion that the present case is not one where the learned Sole Arbitrator has wandered outside the provisions of the Agreement, but one where he has applied business common sense to interpret the terms of the Agreement.

128. As a result, this Court finds no reason whatsoever to interfere with the findings of the learned Sole Arbitrator in the Impugned Award.

129. The present Petition is, accordingly, dismissed.

130. Pending application(s), if any, are also disposed of.

SUBRAMONIUM PRASAD, J

OCTOBER 14, 2025
AP