IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.12.2021

\+ **O.M.P. (COMM) 537/2020**

SMS WATER GRACE BMW PVT. LTD. ..... Petitioner

versus

GOVT. OF NCT OF DELHI DIRECTORATE OF HEALTH SERVICES ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Darpan Wadhwa, Senior Advocate with
: Mr Sandeep Das, Mr Sitesh Mukherjee an
: Ms Aarushi Mishra, Advocates

For the Respondent : Mr Anuj Aggarwal, ASC, GNCTD with
: Ms Ayushi Bansal, Ms Aishwarya Sharma
: and Mr Sanyam Suri, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the '**A&C Act**') impugning an arbitral award dated 18.03.2020 (hereafter the

'**impugned award**') rendered by the Arbitral Tribunal constituted of a Sole Arbitrator (hereafter the '**Arbitral Tribunal**').

2. The controversy between the parties, essentially, relates to the obligations of the petitioner to collect and treat bio-medical waste from Healthcare establishments identified by the Government of NCT of Delhi (the respondent), free of any charge, in terms of Clause 10 of an agreement dated 21.07.2006 (hereafter the '**Agreement**').

3. The petitioner contends that in terms of the said clause, its liability to collect, transport and treat bio-medical waste from the Healthcare establishments was limited to approximately 1000 kgs. per day. The respondent disputes the same. According to the respondent, the petitioner was obliged to collect, transport, treat and dispose of all the bio-medical waste from all Healthcare establishments identified by it, free of charge, during the term of the Agreement.

4. The Arbitral Tribunal accepted the respondent's contention and rejected the claims made by the petitioner. It also rejected the counter-claims raised by the respondent.

Factual background

5. The petitioner is engaged, *inter alia*, in the business of treating waste material.

6. The Directorate of Health Services, Government of NCT of Delhi (the respondent) had acquired land measuring 1000 sq. meters at Ghazipur, Delhi, for establishment of the Centralised Treatment Facility (hereafter '**CTF**') for treatment of bio-medical waste. It invited tenders

for establishing a CTF for bio-medical waste generated from private hospitals/public nursing homes, diagnostic centers, laboratories/blood banks, medical/ISM colleges, as a joint venture, on BOT (Build Operate Transfer) basis for a period of ten years.

7. The joint venture was premised on the respondent providing the site and infrastructural support to the selected party/agency for establishing the CTF, in terms of transferring the site on such terms and conditions as may be approved by the Delhi Development Authority/Municipal Corporation of Delhi. The selected tenderer was obliged to incur all capital expenditure for establishing the CTF as well as for operation and maintenance.

8. The tender documents also expressly provided that the selected tenderer would transport and treat bio-medical waste generated in hospitals and dispensaries under the Government of NCT of Delhi (where treatment facilities were not available on site) free of cost.

9. The petitioner tendered for the project and was successful. The respondent issued a Letter of Intent dated 23.04.2006 (hereafter '**LoI**') and called upon the petitioner to furnish a Performance Bank Guarantee. The petitioner submitted the Performance Bank Guarantee on 21.07.2006 and thereafter, the parties entered into the Agreement dated 21.07.2006.

10. In terms of the Agreement, the respondent agreed to provide the land at Ghazipur for setting up the CTF. And, in terms of Clause 12 of the Agreement, the petitioner agreed to pay a sum of ₹4,32,000/- to the

respondent as monthly charges till the date of handing over of the site back to the respondent.

11. In compliance with its obligations, the respondent delivered possession of the land at Ghazipur to the petitioner on 07.08.2006. The petitioner applied to the Delhi Pollution Control Committee (hereafter '**DPCC**') for Consent to Establish the proposed Centralized Bio-Waste Treatment Facility [under the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974] at the site. However, the DPCC declined to grant the Consent to Establish as sought, by its letter dated 25.06.2007. The petitioner states that it immediately handed over the possession of the site at Gazipur to the respondent.

12. Thereafter, on 04.11.2009, the respondent allotted a new site (land measuring approximately 2000 sq. meters at Nilothi) to the petitioner in lieu of the site at Gazipur and the parties entered into an Addendum Agreement dated 04.11.2009. The petitioner claims that it commenced paying monthly charges of ₹4,32,000/- to the respondent with effect from June, 2010 after it had established the CTF. Although, the land at Gazipur was found to be unsuitable by the DPCC and possession of the same was returned to the respondent, the respondent raised a demand of ₹1,71,03,600/- on account of unpaid monthly charges for the period from 07.08.2006 to 04.11.2009 and also levied penalty. The petitioner disputed the said demand and the said disputes were referred to arbitration.

13. A former District and Sessions Judge of Delhi was appointed as the Sole Arbitrator (hereafter '**the First Arbitral Tribunal**') to adjudicate the said disputes. The respondent filed a claim before the First Arbitral Tribunal. The petitioner also filed its counter-claims claiming certain amounts towards expenses incurred in respect of the Gazipur site and the alleged losses suffered by it. In addition, the petitioner also raised a dispute regarding computation of the period of the contract and claimed that the period of ten years was required to be computed from the date of receipt of Consent to Establish from DPCC. According to the petitioner, the said permission was obtained on 21.04.2010 and the period of ten years was required to be reckoned from that date.

14. The First Arbitral Tribunal rendered an arbitral award dated 11.09.2015 rejecting all claims and counter claims made by the parties. However, the First Arbitral Tribunal accepted the petitioner's contention that the contract period of ten years would commence with effect from 21.04.2010, being the date when the DPCC granted the Consent to Establish the CTF. The First Arbitral Tribunal also made certain observations to the effect that the increase in the term of the contract, as a result of the same being computed from 21.04.2010, would also benefit the respondent as the respondent's share of treatment of waste would also increase on account of increase in the generation of waste by the Government hospitals.

15. The aforesaid arbitral award dated 11.09.2015 was not challenged by either of the parties.

16. The petitioner claims that in terms of Clause 10 of the Agreement, it was obliged to transport and treat bio-medical waste from all Healthcare establishments identified by the respondent to the extent of 1000 kgs. per day without any charges; however, it was not obliged to treat bio-medical waste in excess of that quantity.

17. The petitioner further claimed that during the term of the Agreement, certain *Mohalla Clinics*, which were not in existence at the material time, were established at local level and the petitioner was also required to collect, transport and treat bio-medical waste from these *Mohalla Clinics*. It claimed that the aggregate quantity of bio-medical waste collected daily from various Healthcare establishments including *Mohalla Clinics* was more than three times the quantity of 1000 kgs. as envisaged earlier and thus, it was entitled to be paid for the same.

18. In view of the above, the petitioner raised a demand of ₹4,30,83,116/- for the period 01.06.2015 to 31.03.2018. It also raised a claim of ₹11,39,994/- for bio-medical waste from *Mohalla Clinics* as according to the petitioner, it was not obliged to collect, transport and treat waste from these clinics, free of cost.

19. On 13.06.2018, the petitioner issued a notice demanding ₹4,42,23,110/- along with interest at the rate of 18% per annum. It further called upon the respondent to refer the disputes to arbitration in the event it was not agreeable to pay the demanded amount.

20. Thereafter, by a communication dated 08.08.2018, the respondent informed the petitioner that in terms of the Office

Memorandum dated 15.05.2015 issued by the DPCC, the petitioner was required to 'collect, transport, treat and dispose of entire bio-medical waste (BMW) free of cost of Delhi Government Health Care Establishments', from the specified area and denied its liability to pay any charges for collection and treatment of bio-medical waste from the Healthcare establishments including the *Aam Aadmi Mohalla Clinics*. The respondent further stated that since the claim was untenable, there was no requirement to refer the disputes to arbitration.

21. In view of the disputes between the parties, the petitioner filed a petition under Section 11 of the A&C Act before this Court for the appointment of an arbitrator. And by an order dated 14.03.2019, this Court constituted the Arbitral Tribunal to adjudicate the disputes between the parties.

22. The petitioner filed the Statement of Claims before the Arbitral Tribunal. The claims made by the petitioner are summarised as under:

Claim no 1	₹6,40,92,630/- on account of charges for collection, transport, treatment and disposal of Bio-Medical Waste of Government Health Care Establishments, in excess of 1000 kg. Per day
Claim no 2	₹22,43,160 /- on account of charges for Mohalla Clinics
Claim no 3	Interest at the rate of 18°/o per annum from the date of respective bills till the date of full payment)
Claim no 4	₹20,00,000/- on account of costs of Arbitration

23. The respondent had also preferred counter claims. It claimed additional compensation for use of the extra land provided to the petitioner. The respondent claimed that in terms of the Agreement, it had agreed to provide land measuring 1000 sq. metres. However, on 04.11.2009, the respondent had handed over a land admeasuring over half an acre [2000 sq. metres] at Nilothi. Thus, the respondent reasoned that the petitioner would be liable to pay for the additional land at the same rate as agreed under the Agreement – an additional amount of ₹4,32,000/- per month. The respondent claimed an amount of ₹9,33,33,600/- on account of additional monthly charges for the period 04.11.2009 till 03.07.2019 along with interest at the rate of 18% per annum (Counter-Claim no. 1) on the aforesaid basis. The respondent further claimed costs quantified at ₹20,00,000/-.

24. The respondent also claimed compensation from the petitioner for collecting waste beyond 1000 kgs per day, however, that claim was not pressed before the Arbitral Tribunal. It was, accordingly, not considered.

The Impugned Award

25. The Arbitral Tribunal examined the language of Clause 10 in the context of the Agreement and the Tender Documents. The Arbitral Tribunal also considered the evidence led by the parties. It concluded that there was no maximum limit fixed for collection and treatment of the bio-medical waste from the Healthcare establishments as identified by the respondent. The Arbitral Tribunal reasoned that no such limit

was mentioned in the Tender Documents and the contract between the parties was premised on the respondent providing the land for setting up the CTF. In consideration, the petitioner had agreed to pay an amount of ₹4,32,000/- and further, to collect and treat bio-medical waste from Government identified Healthcare establishments, free of any charges.

26. The Arbitral Tribunal also noted that the petitioner had not raised any claim at the material time and the same indicated that it was understood that the petitioner was not entitled to any additional payments for collecting, transporting and treating bio-medical waste from various establishments under the respondent. In addition, the Arbitral Tribunal also noted that the petitioner had made a grievance regarding permission granted to another agency to carry on similar work on the ground that the same had curtailed the quantity of waste available to it. More importantly, the Arbitral Tribunal found that the First Arbitral Tribunal had accepted the petitioner's contention regarding calculating the term of the Contract from the date of grant of Consent to Establish by the DPCC. It had reasoned that the respondent would also benefit as the waste generated by hospitals and Healthcare establishments under it, would also increase.

27. The Arbitral Tribunal did not find any merit in the counter-claims as well. There was no agreement which obliged the petitioner to pay enhanced charges on account of the increase in the area of land provided to it. The Arbitral Tribunal rejected the claims and counter-claims filed by the parties.

Submissions

28. Mr Wadhwa, learned senior counsel appearing for the petitioner submitted that the impugned order is patently erroneous as the findings of the Arbitral Tribunal to the effect that the petitioner had not raised its claims at the material time, is *ex-facie* erroneous. He submitted that there was no dispute that the petitioner had raised bills for collecting bio-medical waste in excess of 1000 kgs. However, the said invoices remain unpaid. Thus, the reasoning of the Arbitral Tribunal would be contrary to the admitted documents and material on record.

29. Second, he submitted that the impugned award is contrary to the express terms of the Agreement. He submitted that Clause 10 of the Agreement clearly mentioned the quantity '*about 1000 kg/day*' and therefore, the Agreement had expressly provided the quantum of bio-medical waste that would be collected and treated free of charge. According to him, the said expression did not leave any room for doubt and therefore, the decision of the Arbitral Tribunal is perverse and contrary to the terms of the Agreement.

30. He referred to the decision in ***Ramana Dayaram Shetty v. International Airport Authority of India & Ors : (1979) 3 SCC 489*** and submitted that a commercial contract is required to be interpreted strictly and an interpretation that renders any term of the contract redundant should be avoided. He also referred to the decision of this Court in ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd and Anr. : (2021) 2 ARBLR 326*** and, on the strength of the said decision submitted that words appearing in parenthesis must be read as an explanation. He also referred to the decision of the Supreme Court

in ***M.R. Goda Rao Sahib v. State of Madras : AIR 1966 SC 653*** and contended that the word 'about' literally means 'almost or approximately' and in the context of Clause 10 of the Agreement would suggest the approximate quantity to be collected and treated free of cost. He submitted that the use of the word 'about' could not be stretched to mean unlimited quantity. Therefore, variation to some extent may be included, however, that could not mean that the petitioner was obliged to collect and treat more than three times the stated quantity.

31. Next, he contended that the Arbitral Tribunal had relied on an Office Memorandum dated 15.05.2015 to hold that the same had altered Clause 10 of the Agreement. The said decision is perverse as the Agreement could not be unilaterally amended by the respondent by issuing an Office Memorandum.

32. Lastly, he contended that since there was no dispute that the petitioner had collected and treated bio-medical waste in excess of the quantities as provided under the Agreement, it was entitled to be compensated for the extra work done.

33. Mr Anuj Aggarwal, learned counsel appearing for the respondent countered the aforesaid submissions. He submitted that it was apparent from the nature of the contract between the parties that it was not possible to fix any quantity of bio-medical waste to be collected and treated from Healthcare establishments. He stated that the petitioner was fully aware that the quantities would continue to increase and it had raised no objections in this regard at the material time. He submitted that the parties had referred their differences and disputes to arbitration

in the year 2014-15. However, even at that stage, the petitioner had not raised any issue regarding a cap on the quantity to be collected and treated free of charge. He stated that the Agreement expired on 20.04.2020 and the petitioner has sought renewal of the contract without any caveat as to the quantity of the bio-medical waste that it would treat. Thus, it is clear that the parties have always understood that the petitioner was obliged to lift bio-medical waste from the Government Healthcare establishments without any limit on the quantities. He submitted that therefore, neither the Agreement nor the Addendum entered into on 04.11.2009 includes any clause for payment of any extra remuneration or charges for bio-medical waste exceeding 1000 kgs per day. He submitted that the petitioner had commenced raising invoices in the year 2017 for the period 01.06.2015 onwards and the same indicates that it was an afterthought.

34. Next, he submitted that the petitioner's contention that he was entitled to extra charges for collecting bio-medical waste from *Mohalla Clinics* is also unsustainable and, the petitioner was obliged to collect and treat bio-medical waste from all Healthcare establishments identified by the respondent, free of cost. Further, the material on record indicates that bio-medical waste collected from *Aam Admi Mohalla Clinics* constituted a negligible fraction of the total waste collected by the petitioner.

35. Insofar as the interpretation of Clause 10 of the Agreement is concerned, he submitted that the words 'about 1000 kgs/day' in the parenthesis were merely indicative of the quantities at the material time.

Reasons and Conclusion

36. The principal question to be addressed is whether the impugned award is contrary to the terms of the Agreement between the parties and therefore, vitiated by patent illegality.

37. Before proceeding further it would be relevant to note that the petitioner had submitted its tender on the basis of the terms and conditions as set out in the Tender Documents. Concededly, the Tender Documents did not limit the quantity that was required to be collected and treated by the selected bidder. The relevant extract from the Notice Inviting Tender dated 07.11.2005 is set out below:-

> "The Government of National Capital Territory of Delhi has planned to utilize the above site for establishing CTF for BMW as a joint venture with the Private Sector/NGO etc. on BOT basis to be identified and selected through a transparent process. For this venture, Government of National Capital Territory of Delhi shall only provide infrastructural support to the selected Party/Agency in terms of transfer of the above site on such terms and conditions as shall be approved by the Delhi Development Authority/Municipal Corporation of Delhi. Neither any additional capital expenditure for the establishment of the facility nor any recurring revenue expenditure for operation and maintenance of the facility will be forthcoming from the Government of National Capital Territory of Delhi in this regard. Given the above conditions, the Party for the joint venture shall be selected who is able to offer the services to the Hospitals/Nursing Homes/Clinics etc. at the

> most reasonable rates conforming to all the required statutory conditions. As land will be provided by the Government of National Capital Territory of Delhi, therefore Biomedical Waste generated in Hospitals and Dispensaries under Government of National Capital Territory of Delhi (where onsite treatment facilities are not available) will be transported and treated free of cost by the entrepreneur."
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> [Underlined for Emphasis]

38. It is apparent from the above that the respondent had invited bids on the premise that it would provide land for setting up the CTF for bio-medical waste in a joint venture with the selected bidder. The selected bidder would establish, operate and maintain, the facility at its cost and would also transport and treat bio-medical waste generated by hospitals and dispensaries under the respondent, where onsite treatment facilities are not available, free of cost.

39. Mr Wadhwa contends that the intention of the parties is to be discerned from the plain language of the Agreement. However, the attendant circumstances and the contemporaneous documents are not irrelevant. It is well settled that the surrounding circumstances, correspondence exchanged between the parties as well as the object of the contract are relevant for determining the intention of the parties while interpreting a Contract.

40. In ***Transmission Corpn. of Andhra Pradesh Ltd. v. GMR Vemagiri Power Generation Ltd.:*** **(2018) 3 SCC 716** the Supreme Court had observed that "*in the event of any ambiguity arising, the terms*

of the contract will have to be interpreted by taking into consideration all surrounding facts and circumstances, including correspondence exchanged, to arrive at the real intendment of the parties." Thus, the approach of the Arbitral Tribunal to take note of the Tender Documents while interpreting the clauses of the Agreement cannot be faulted.

41. Clause 10 of the Agreement, which is at the centre of the disputes between the parties, reads as under:-

> "The contractor shall collect, transport, treat and dispose of all Biomedical waste (about 1000 kg/day) from all health care establishments (all hospitals, dispensaries, Medical colleges) identified by the government of National Capital Territory of Delhi, free of charge during the contract period. "

42. It is clear from the plain language of the aforesaid clause that the petitioner had agreed to collect, transport, treat and dispose of '***all*** Biomedical waste' from '***all*** health care establishments' identified by the Government of NCT of Delhi, free of charge during the contract period. According to the petitioner, the words 'about 1000 kg/ day' qualifies the expression '***all*** Biomedical waste'. It is at once clear that there is a conflict between the words in the parenthesis 'about 1000 kg/day' and the expression 'all Biomedical waste'.

43. According to the respondent, the words 'about 1000 kg/day' merely indicates the quantity that was being generated at the material time and did not in any manner curtail the obligations of the petitioner

to collect, transport, treat and dispose of all bio-medical waste from Healthcare establishments identified by the respondents.

44. As stated above, it is clear that Clause 10 of the Agreement is not free from any ambiguity. The words 'about 1000 kg/day' conflicts with the remaining clause, which contemplates that the Contractor [the petitioner] "*shall collect, transport and treat and dispose of all Biomedical waste…*". In the circumstances, the approach of the Arbitral Tribunal to look at the surrounding circumstances and to determine the intention of the parties, cannot be faulted.

45. In ***Bank of India v. K. Mohandas : (2009) 5 SCC 313***, the Supreme Court had observed as under "*the intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties*".

46. In the present case, the Tender Documents clearly set out the intention of the respondent in inviting bids for setting up a CTF as a joint venture and to provide land for setting up the facility. The Tender Documents made it explicitly clear that the respondent would provide the land, *inter alia*, in consideration for collection and treatment of the bio-medical waste generated from its establishments, free of cost. It is not the petitioner's case that it had submitted its bid with any reservation; on the contrary, it is asserted that it had submitted its bid pursuant to the tender floated by the respondent and its bid was accepted.

47. The Arbitral Tribunal also examined the Agreement bearing in mind that it was a commercial contract. The Arbitral Tribunal reasoned that the petitioner was an experienced entrepreneur and would be aware that the generation of bio-medical waste would not be static and yet, it had offered and agreed to collect and treat all bio-medical waste from identified establishments free of charge. Thus, the Arbitral Tribunal rejected the contention that its obligations were limited to collecting and treating only 1000 kgs per day.

48. In addition, the Arbitral Tribunal also evaluated the evidence led by the parties. The petitioner's witness (CW-1) had deposed that (a) the petitioner had been lifting bio-medical waste in excess of 1000 kgs./day since 2015; (b) petitioner had not raised any invoice till 14.09.2017; and (c) there was no written agreement whereby the respondent had agreed to pay the charges as demanded for bio-medical waste in excess of 1000 kgs. per day. According to CW-I, there was only an oral discussion.

49. On appreciation and evaluation of evidence, the Arbitral Tribunal concluded that the petitioner's demand for additional charges was an afterthought.

50. The Arbitral Tribunal also noted the Office Memorandum dated 15.05.2015 issued by the DPCC. The same indicated that a meeting of the Advisory Committee for bio-medical waste was held on 11.05.2015 under the Chairmanship of the Special Secretary (Health and Family Welfare), Government of NCT of Delhi regarding re-distribution of areas among two common Bio-Medical Treatment Facilities in Delhi.

Clause (c) of the said Office Memorandum is relevant and reads as under:

> "*As per their agreements with the Directorate of Health Services, Govt of NCT of Delhi, Mis SMS Water Grace Pvt. Ltd & Mis Biotic Waste Solution Pvt Ltd. shall continue to collect, transport, treat and disposed of the entire BioMedical Waste (BMW) free of cost of Delhi Government Health Care Establishments in their respective districts;*"

51. The respondent stated that the petitioner's representative was present at the meeting, pursuant to which the Office Memorandum dated 15.05.2015 was issued. And, the petitioner had not expressed any reservations regarding the aforesaid Office Memorandum at the material time.

52. It is well settled that an Agreement is to be read as a whole. There was no provision in the Agreement that could be read to support the petitioner's interpretation of Clause 10 of the Agreement. The plain language of Clause 10 of the Agreement does not indicate that the only way to interpret it is that '1000 kg/ day' was the maximum limit of waste to be collected and treated by the petitioner. There are no words in Clause 10 of the Agreement that would support the interpretation that 1000 kgs per day was the upper most cap. If the petitioner's contention that the words in the parenthesis 'about 1000 kg/day' are to be read as an explanation of the expression '<u>*all*</u> Bio-medical waste' then it may also follow that the petitioner had agreed to collect and treat about 1000 kgs. per day for the entire term of the contract. Thus, the aggregate

quantity of bio-medical waste to be transported during the term of the contract would be 36,52,000 kgs [1000 kgs multiplied by 3652 days (365 x 10 + 2 days for leap years)]. However, the petitioner did not provide any calculation to establish the bio-medical waste collected during the entire term of the contract. According to the petitioner, the quantity of bio-medical waste generated per day had exceeded 1000 kgs in the year 2015; but there was no material to indicate the quantity of bio-medical waste collected and treated by the petitioner prior to June, 2015. Thus, Mr Wadhwa's contention that Clause 10 of the Agreement should be interpreted literally may not support the claim as made.

53. The decision in ***Ramana Dayaram Shetty v. International Airport Authority of India & Ors.*** (*supra*) is not strictly applicable. The words 'about 1000 kg/day' are not read as being meaningless; they do mention the approximate quantity of bio-medical waste. However, they do not circumscribe the petitioner's obligation. The decision in ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd and Anr.*** (*supra*) is not of much assistance to the petitioner. The words in parenthesis in that case were interpreted in view of the surrounding circumstances and bearing in mind the contract between the parties and, not as determinative of any repugnancy between the expressions used. It is also relevant to note that the said decision was rendered in the context of a petition under Section 11 of the A&C Act and, the examination under that section is confined to the existence of an arbitration agreement. A view that an arbitration agreement exists, is merely a *prima facie* view and this Court had clarified the same.

54. This Court is unable to accept the contention that Clause 10 of the Agreement must be read as to limit the petitioner's obligation to collect and treat bio-medical waste from the Healthcare establishments identified by the respondent, to a maximum of 1000 kgs per day.

55. Having stated the above, it is also necessary to mention that the view of this Court with regard to the petitioner's case is not relevant as the scope of examination in these proceedings is limited to ascertaining whether the impugned award is vitiated by patent illegality or that the impugned award is in conflict with the public policy of India. Clearly, none of the two grounds are met. It is well settled that an Arbitral Tribunal is also the final authority for interpreting the contract and the impugned award cannot be interfered with merely because a different interpretation is possible.

56. In ***Mc Dermott International Inc. v. Burn Standard Co. Ltd. & Ors. : (2006) 11 SCC 181***, the Supreme held as under:

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a

contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd.* v. *ONGC* [(2003) 8 SCC 593] and *D.D. Sharma* v. *Union of India* [(2004) 5 SCC 325] .)

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

[Underlined for Emphasis]

57. In ***Associate Builders v. Delhi Development Authority : (2015) 3 SCC 49***, the Supreme Court had further explained as under:

"42.3. (*c*) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"**28.*Rules applicable to substance of dispute***.— (1)-(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way

> that it could be said to be something that no fair-minded or reasonable person could do."
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> [Underlined for Emphasis]

58. It is also relevant to refer to the decision of the Supreme Court in ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. : (2010) 11 SCC 296***, wherein the Supreme Court had observed as under:

> *"43*. … The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn.* v. *Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

59. In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran : (2012) 5 SCC 306***, the Supreme Court referred to its earlier decision in

Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (*supra*) and expressed a similar view. The relevant extract of the said decision is set out below:

> 43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.
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> 44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL* v. *Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.
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> 45. This para 43 reads as follows: (*Sumitomo case* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)"

60. In ***MSK Projects (I) (JV) Ltd. v. State of Rajasthan : (2011) 10 SCC 573***, the Supreme Court explained that even an error in regard to construction of a contract is an error within his jurisdiction and would not warrant any interference in proceedings under Section 34 of the A&C Act. The Arbitral Tribunal would commit a jurisdictional error

only if it deals with matters outside the contract and those not allotted to it. The relevant observations of the Supreme Court are as under:

> "17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das* v. *Lachhmi Ram* [AIR 1954 SC 689] , *Thawardas Pherumal* v. *Union of India* [AIR 1955 SC 468] , *Union of India* v. *Kishorilal Gupta & Bros.* [AIR 1959 SC 1362] , *Alopi Parshad & Sons Ltd.* v. *Union of India* [AIR 1960 SC 588] , *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji* [AIR 1965 SC 214] and *Renusagar Power Co. Ltd.* v. *General Electric Co.* [(1984) 4 SCC 679 : AIR 1985 SC 1156])"

61. In view of the above, this Court does not find that the Arbitral Tribunal has committed any jurisdictional error or its interpretation of Clause 10 of the Agreement is perverse and warrants any interference in these proceedings.

62. The petition is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

December 13, 2021
pkv/rk/v