Court of Sri M. C. Jha A.J.C.III Ranchi

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District-Ranchi.

IN THE COURT OF ADDITIONAL JUDICIAL COMMISSIONER-III-CUM- PRESIDING OFFICER, COMMERCIAL COURT, RANCHI.

Present;- **Manoj Chandra Jha,** ✓
A.J.-C-III-cum-Presiding Officer,
Commercial Court, Ranchi

Dated, Ranchi the 16th Day of March, 2024.

Commercial Arbitration Case No- 04/2022 ✓

CNR:JHRN01-002473-2022

The State Highways Authority of Jharkhand through its Member Technical, State Highways Authority of Jharkhand (SHAJ) , resident of Deendayal Nagar, Booty Road (Near offie of Executive Engineer, N.H. Ranchi Division), Ranchi - 834008 Jharkhand) through its **Authorized Officer.**

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Applicant .

Versus

Intercontinental Consultants & Technocrats Pvt. Ltd., A-8, Green Park, New Delhi - 110016, India in association with M/S Espana Consultns Pvt. Ltd., Delhi, Shop No. 17 WZ - 23, Jwalaheri, Paschim Vihar, Delhi - 110063, India.

Respondent .

Counsel for the Applicant : - **Sri Sharad Kaushal,**
Sri Ashutosh Anand,
Sri Shyam Narsaria,
Miss Bharati Kumari
Advocates.

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Counsel for the Opposite Party :- **Sri Praveen Moudgil, and others**

Advocates.

JUDGMENT

1. For convenience, the parties shall be referred to as they appeared before the Arbitral Tribunal (hereinafter **AT**). The present case has been filed on behalf of the Petitioner **The State Highways Authority of Jharkhand (Respondent therein at AT)** against the respondent **Intercontinental Consultants & Technocrats Private Limited (claimant therein at AT)** against the Respondent/ Opposite Party for setting aside the Arbitral Award passed dated 14.12.2021 against the Applicant/petitioner by the learned Arbitral Tribunal comprising sole arbitrator in an arbitration relating to the dispute arising out between the parties with respect to contract.

Case of the petitioner/applicant

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2. The State Highways Authority of Jharkhand, established under the State Highways Authority of Jharkhand Act 2007, is a body corporate under the Government of Jharkhand, specifically the Department of Road Construction. Its primary mandate is to oversee the development, maintenance, and management of State Highways and related infrastructure. The authority is represented by authorized officials, with its principal office located at Deen Dayal Nagar, Booty Road, Ranchi, Jharkhand.

3. The State Highways Authority of Jharkhand (SHAJ) entered into an agreement with Intercontinental & Technocrats Pvt. Ltd., located in New Delhi, in collaboration with M/s Espana Consul-

tants Pvt. Ltd., also in Delhi, for consulting services related to the Second Jharkhand State Road Project (ADB Funded). This agreement, referred to as the "Time-Based Contract Agreement," was initiated on November 2, 2016. The contract stipulated a revised price of US $29,58,300.00 plus INR 30,60,60,750.00 for the execution, completion of works, and rectification of defects, inclusive of provisional sum and contingencies but exclusive of local indirect taxes.

4. Following the issuance of a Notice to Proceed on 16.11.2016, work officially commenced on 01.12.2016. The duration of the contract was set at 50 months, including a two-month pre-construction period and a subsequent 12-month Defects and Liability period, starting from the effective date of the contract.

5. The State Highways Authority of Jharkhand (SHAJ) terminated the contract on 05.06.2018, due to breach of contract by the respondent. The termination was communicated through Letter No. ADB/Vividh/73-2017-111.

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6. The State Highways Authority of Jharkhand (SHAJ), currently functioning as an executing agency of the Government of Jharkhand, is undergoing a transformation to become a fully autonomous body. This transition aims to enhance road development, planning, and maintenance capabilities, enabling SHAJ to independently undertake construction works and participate in global-level procurement processes. To achieve this goal, the selection process led to the engagement of Intercontinental Consultants & Technocrats Pvt. Ltd. in association with Espana Consultants Pvt. Ltd. Their services were procured through Contract No. SHAJ/SHSRP/PMC-15 of 2016-17.

7. A contract was executed between the Claimant and SHAJ on 02.11.2016. As per the terms of reference (TOR) outlined in paragraph 4, the Claimant was tasked with evolving SHAJ into a modern and progressive client role. Their responsibilities included advising and guiding SHAJ to adopt best practices in road asset management, user-friendly road safety measures, climate resilience features, social and environmental safeguards, and gender mainstreaming. However, the Claimant failed to fulfill these obligations, resulting in the termination of the contract in accordance with its terms.

8. It is stated that the performance of the Claimant (respondent herein) did not align with the requirements outlined in the communications, terms of reference (TOR), and contract. Several instances highlight this discrepancy:

i. The Claimant failed to submit the inception report within the stipulated timeframe, delaying it by four months from the commencement of the contract, violating the clauses and TOR.

ii. The submitted inception report did not meet the TOR requirements despite subsequent communication highlighting deficiencies. The Consultant's management acknowledged the lack of understanding of the assignment's objectives by the deployed Team Leader.

iii. The Consultant's experts lacked the necessary professional skills for the assigned tasks, necessitating their replacement with skilled specialists.

iv. Despite continuous urging for effective mobilization of the PMC team, significant delays persisted, with only a portion of the required staff and experts mobilized.

v. The Claimant failed to appoint all necessary personnel and experts, hindering efficient project progress as per the contractual agreement

and TOR.

vi. Only a fraction of the intermittent staff was mobilized, and several experts were yet to be mobilized, resulting in non-performance until termination.

vii. Despite being provided with necessary data and access to project records, the Claimant failed to justify its presence and work efficiently, further exacerbating delays and inefficiencies.

viii. The Claimant's PMC Team Leader failed to comprehend their importance and role in the project, leading to disappointment for **SHAJ and undermining the intended project outcomes.**

ix. Effective mobilization of the Claimant's PMC was never achieved, negatively impacting project outcomes.

x. Despite SHAJ raising concerns and providing opportunities for remedial action, the Claimant's responses and actions were unsatisfactory, indicating a lack of commitment towards fulfilling contractual obligations.

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xi. The Claimant's alleged work duration significantly exceeded the actual progress achieved, as evidenced by the completion of less than 1% of the contract work within the stated period.

xii. Despite the engagement, there has been no discernible enhancement in the portfolio of SHAJ.

xiii. Consequently, the termination of the contract was executed in accordance with Clause 19.1.1, which permits the Client to terminate the Contract upon the occurrence of events specified in paragraphs (a) through (f) of said clause.

It is submitted that these instances collectively illustrate the failure of the Claimant to meet contractual obligations and deliver satisfactory performance, resulting in the termination of the contract.

9. It is submitted that the Respondent (applicant herein) has adhered to the procedure outlined in the contract to activate the termination clause, providing the Consultant with the requisite notice period as specified in the agreement. Consequently, the termination of the contract is entirely legal and valid in accordance with the terms of the agreement.

10. The Claimant, dissatisfied with the termination of the contract, proceeded to invoke the arbitration clause unlawfully. Consequently, an Arbitral Tribunal was constituted, with Mr. Dinkar Sharma appointed as the Sole Arbitrator.

11. During the arbitration proceedings, it was agreed to follow the UNCITRAL Model Rules alongside the Arbitration and Conciliation Act 1996. The claimant submitted a Statement of Claim, to which the respondent raised objections. One objection was that the claimant had not provided all required documents. The tribunal directed the claimant to submit the necessary documents. However, the claimant later submitted an Amendment Statement of Claim, which was objected to and subsequently withdrawn, with only limited pages related to the contract being accepted. The respondent then submitted a Statement of Defence and Counter Claim. The claimant submitted a Rejoinder to the Statement of Defence, including additional documents that had been previously withdrawn upon objection. The respondent objected to these new documents, but the tribunal proceeded with the hearing without resolving the objection or allowing the respondent to contest the documents. The arbitration was proceeded and did not adhere to principles of natural justice, with no opportunity for the respondent to present evidence. Additionally, no documents were formally admitted as exhibits, and despite objec-

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tions, the tribunal passed the final Award on 14.12.2021.

12. The learned Arbitral Tribunal in view of the ten claims passed the award as under-

Claim No	Contractor's Claim Amount		Respondent's Assessement & Counter Claim	Tribunal Assessment		
	INR	USD			INR	USD
SOC 1	--	--	Claim Rejected	Claimant's Claim is upheld	--	--
SOC 2	6,44,67,031	4,66,205	Claim Rejected		6,44,67,031	4,66,205
SOC 3	2,26,49,000		Claim Rejected		2,26,49,000	
SOC 4	6,27,41,094	6,39,208	Claim Rejected		6,27,41,094	6,39,208
SOC 5		68,00,000	Claim Rejected	Rejected	--	--
SOC 6	1,03,42,664	82,156	Claim Rejected		1,01,35,810	80,500
SOC 7	27,79,516	9,11,386	Claim Rejected		40,68,680	--
SOC 8	65,22,000				65,22,000	
Sub Total	16,95,01,305	88,98,955			17,05,83,615	11,85,913
SOC 9	12% interest on the above sum	12% interest on the above sum 13		Interest for INR=10 % compounded and for USD=8 % compounded per year	2,42,04,177	1,68,269
Counter Claim of the Respondent				Disallowed		
Total					19,47,87,92	13,54,182

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13. Being aggrieved and dissatisfied with the conduct of the learned Arbitral Tribunal, including the Award dated 14.12.2021, the award has been assailed on different grounds.

It is argued that the power exercised by the Arbitral Tribunal is excessive and extends beyond the terms of reference. The Arbitral Tribunal committed illegality by proceeding with the Arbitral proceedings and passing the Award in violation of the principles of natural justice.

It is argued that the impugned Award violates public policy in India, contravenes the UNCITRAL Model Rules, infringes upon the Arbitration and Conciliation Act, breaches principles of natural justice, violates fundamental policies of Indian law, and conflicts with basic notions of morality or justice. The Arbitral Tribunal has proceeded in haste in deciding the dispute. The learned Arbitral Tribunal has not abided by the principles of natural justice. It is contended that the impugned Award is perverse and legally untenable, failing to align with both legal principles and the factual context of the case. The Arbitral Tribunal erred by granting a claim that amounts to 50% of the contract value despite incomplete work and non-compliance with the terms of the contract. It is argued that the Arbitral Tribunal neglected to consider that the claim is invalidated due to the non-inclusion of necessary parties, indicating a procedural error in the arbitration process.

The Arbitral Tribunal is criticized for accepting documents filed by the Claimant in Rejoinder without giving the Applicant/SHAJ an opportunity to respond, suggesting a violation of procedural fairness. It is argued that the Arbitral Tribunal erred by not considering evidence in the matter, implying a failure to adequately assess the facts presented.

The Arbitral Tribunal has erred in payment proceeding in

haste in passing the impugned Award, while indicating a lack of thorough consideration. The Arbitral Tribunal is faulted for considering documents that were not proven in accordance with the law, despite being denied, suggesting a disregard for evidentiary standards. It is argued that the Tribunal erred by not recognizing that the Claimant fabricated various documents, which should have led to the rejection of the claim application. It is contended that the Tribunal erred by disregarding the Applicant/SHAJ's defense, written arguments, and detailed submissions, occasioned in the matter which aptly established that the claimant has only misled the Learned Tribunal.

It is argued that the Tribunal erred in awarding the entire amount to the Claimant without considering that a portion of it was supposed to be paid to a third party as per the agreement, who was not included as a party to the proceedings.

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The Tribunal erred by acknowledging documents that were previously withdrawn after objections were raised by the Applicant, suggesting inconsistency in its handling of evidence. It is claimed that the Tribunal failed to consider discrepancies, significant disparities, and self-contradictory elements within the documents and pleadings, indicating a lack of thoroughness in its assessment.

It is submitted that the Tribunal erred in for only considering the Claimant's version and neglecting to recognize evident falsities within it when deciding on the claims, suggesting a bias or oversight in the evaluation process.

These points (points O to R of para 66 of Application) collectively indicate concerns regarding the Tribunal's adherence to procedural requirements, consistency in evidence handling, thoroughness in analysis, and impartiality in decision-making.

It is contended that the Learned Tribunal has erred in al-

lowing Claim nos . 1 , 2 , 3 , 4 , 6 , 7 , 8 , 9 in an illegal, arbitrary manner.

It is argued that the Arbitral Tribunal summarily rejected the counterclaim without considering that the Claimant did not raise any objections to the counterclaim in writing, suggesting a lack of procedural fairness. The impugned Award is alleged to be illegal, arbitrary and discriminatory, violating Articles 14 and 16 of the Constitution of India, implying that it fails to uphold principles of equality and non-discrimination. The Tribunal is criticized for not acknowledging that the denial of the opportunity to cross-examine the Claimant's witness is illegal and contrary to law, indicating a violation of procedural rights.

These points (points T to V of para 66 of Application) highlight concerns regarding procedural fairness, adherence to constitutional principles and the Tribunal's treatment of evidentiary and cross-examination procedures.

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It is argued that the Arbitral Tribunal failed to recognize the negligence and breach of contract on the part of the Claimant. Consequently, it is contended that Claim No. 1 should not be considered admissible due to these shortcomings, suggesting that the Claimant's actions render the claim invalid. It is further asserted that the Arbitral Tribunal neglected to acknowledge that the termination was legal and in accordance with the contract terms. As a result, it is argued that Claim No. 1 should not be deemed admissible, implying that the termination of the contract itself negates the basis for the claim.

It is contended that the Arbitral Tribunal made an error by stating that the invoices were not denied, whereas in reality, they were disputed and denied. Therefore, it is argued that Claim No. 2

should not be considered admissible due to this factual inaccuracy. It is asserted that the Arbitral Tribunal failed to take into account that the invoices were not raised in accordance with the contract terms. The invoices themselves do not meet the contractual requirements, and accordingly Claim No. 2 was wrongly allowed in favour of the claimant. The Arbitral Tribunal erred in not considering that none of the invoices were admissible or payable. This indicates that the invoices lacked legitimacy or validity, rendering Claim No. 2 inadmissible. These points collectively raise concerns about the validity, accuracy, and compliance of the invoices with the contractual terms, which resulted in the admissibility of Claim No. 2. The Arbitral Tribunal has not considered that no invoice was admissible nor payable.

The learned counsel for the applicant contends that the Arbitral Tribunal overlooked the fact that no additional work was performed by the claimant and accordingly Claim No. 3 is not admissible since there was no basis for it. It is asserted that the Arbitral Tribunal made an error by failing to distinguish between *additional* and *extra work*. The argument highlights that in *additional work*, only the quantity changes, whereas in *extra work*, the nature of the work changes. Hence, it is argued that it suggests a lack of clarity or precision in the Tribunal's understanding of the types of work involved. It is contended that the Arbitral Tribunal neglected to acknowledge that there was no change in the quantity of work in the proceedings. By not considering this aspect, it is argued that the Tribunal overlooked a crucial factor that would have impacted the validity of Claim No. 3. It is argued that the Tribunal failed to properly assess the nature of the work performed and differentiate between different types of work, which affected the admissibility of Claim No. 3 resulting in favour of the claimant.

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The learned Arbitral Tribunal made an error by allowing 25%

towards loss of profit on the entire work, which is deemed illegal and unjustifiable as it could lead to double gain. Hence, it is contended that Claim No. 4 is inadmissible. The Arbitral Tribunal failed to consider that the claimant did not complete the work and was responsible for the termination. Consequently, it's argued that no loss of profit should be awarded to the claimant.

The Arbitral Tribunal made an error in allowing interest on Claims, rendering Claim No. 6 and 7 inadmissible. The Arbitral Tribunal erred by permitting interest at a rate of 6% per annum, which is deemed excessive and untenable considering the significant decline in bank interest rates.

The Arbitral Tribunal erred in allowing Claim No. 8, which pertains to arbitration costs, as the Claimant was at fault. The Arbitral Tribunal erred in allowing Claim No. 8 for administrative expenses, as the Applicant objected to the levy of Rs. 10,00,000 towards Administrative Assistant Costs. Moreover, neither under UNCITRAL nor the Arbitration and Conciliation Act, 1996, is such payment mandated. Additionally, no details of the administrative expenses were provided, and since all proceedings were conducted virtually through Free ZOOM meetings, no payment should be required. The Arbitral Tribunal erred in allowing Claim No. 8 for advocate fees, as no law mandates reimbursement of such substantial expenses towards advocate fees by the Arbitral Tribunal, especially considering that the choice of advocate was made by the claimant.

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It is argued that the Arbitral Tribunal erred in awarding interest at a rate of 10% per annum on INR and 8% per annum on USD on a monthly compounded basis beyond 15.08.2020. This is argued to be illegal and contrary to the law. Additionally, the interest rates are deemed excessive and exorbitant, especially considering the significant decline in interest rates. Furthermore, the monthly com-

pounding is regarded as excessive and not justifiable.

It is submitted that the Arbitral Tribunal summarily rejected the counterclaim without adequately considering the fact that the claimant did not object to the counterclaim, and without providing any findings on the counterclaim itself.

It is argued that the entire proceeding, including the impugned Award, is illegal, arbitrary, and discriminatory and thus violating Articles 14 and 16 of the Constitution of India. The Arbitral Tribunal conducted the proceedings and passed the impugned Award unlawfully, constituting an act of illegality. The Arbitral Tribunal erred in failing to recognize that the applicant qualifies as 'State' within the meaning of Article 12 of the Constitution of India, implying that any ordered payment would be from the public exchequer, thereby affecting the public at large. It is submitted that the Arbitral Tribunal erred in not adhering to the purpose of allowing counterclaims, which is to prevent multiple proceedings and conflicting findings, in accordance with the amended objectives. It is contended that the conduct and hastiness displayed by the Arbitral Tribunal suggest potential misconduct on their part.

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Hence, the argument that the order of the learned Arbitral Tribunal be set aside.

It may be pointed out that the the learned counsel for the applicant/petitioner has argued in detail on each of the claim which will dealt in later part of the judgment(while giving findings of the court).

Case of the Claimant Intercontinental Consultants & Technocrats Pvt. Ltd.(respondent herein)

14. The learned counsel for the respondent argued that the

Arbitral Award should be upheld as all parties' contentions were duly considered by the Sole Arbitrator, resulting in a well-reasoned Award. The respondent contends that the applicant has raised frivolous issues in their Section 34 application, which are legally untenable.

The learned counsel for the respondent submits that the Award rendered by the Learned Sole Arbitrator does not merit intervention since it was passed after thorough consideration of both parties' pleadings, submissions, and documents. The Award is in accordance with established legal principles and does not violate any provisions of the UNCITRAL Rules of Arbitration or The Arbitration & Conciliation Act, 1996. There is no apparent illegality or perversity in the Arbitral Award, and it cannot be set aside merely due to an erroneous application of law and re-appreciation of evidence is not permissible.

It is contended that the Learned Sole Arbitrator adhered to a judicial approach while ensuring compliance with the principles of natural justice. The respondent/claimant cites various judgments by the Hon'ble Supreme Court, including Associate Builders Vs. Delhi Development Authority [(2015) 3 SCC 49], Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd. decided on 22 September 2014, Ssangyoung Engineering & Construction Co. Ltd. Vs. National Highways Authority of India [(2019) 15 SCC 131], and Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited [2022(1) SCC 131], to support its arguments. Additionally, reliance is placed on a judgment by the Hon'ble Delhi High Court in Union of India Vs. Arctic India. In view of the aforementioned cases, the respondent/claimant contends that the Arbitral Award cannot be set aside by this Court.

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The respondent has given its parawise reply. It has been contended that the Learned Sole Arbitrator has passed a well-rea-

soned award that should be upheld by this Court.

The learned counsel for the respondent submitted that the respondent/claimant fulfilled its obligations as per the contract and even provided additional services beyond the scope of the contract. However, the applicant failed to compensate the respondent/claimant for these services. The Learned Sole Arbitrator appropriately dismissed all frivolous contentions raised by the applicant regarding the work performed by the respondent/claimant.

It is disputed and denied by the respondent that the termination of the contract was legal and valid. Similarly, it is refuted that orders were not passed on the objections raised by the Applicant/SHAJ, or that the arbitral proceedings were conducted hastily and without adherence to the principles of natural justice.

The respondent contends that the termination of the contract by the Applicant/SHAJ was illegal.

Furthermore, it is asserted that the frivolous objections raised by the Applicant/SHAJ during the arbitration proceedings were duly responded to by the respondent/claimant and addressed by the Learned Sole Arbitrator in accordance with the UNCITRAL Rules, 2013, and the Arbitration and Conciliation Act, 1996. Regarding objections raised regarding missing documents (CVs) during the arbitration proceedings, it is argued that these objections were raised to delay the proceedings, as the documents in question were part of the Contract Agreement and were possessed by both parties.

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The learned counsel for the respondent submitted that the arbitration proceedings were conducted with equal opportunities provided to both parties and were not decided hastily or without adherence to principles of natural justice. Evidence was filed as directed by the Learned Sole Arbitrator, and objections raised by the Appli-

cant/SHAJ were addressed accordingly.

It is emphasized that the claimant has adequately demonstrated, how the frivolous objections raised by the Applicant/SHAJ were addressed by the Learned Sole Arbitrator.

It is argued, on behalf of respondent, that the applicant raised frivolous objections regarding incomplete documents before the Learned Sole Arbitrator solely to delay the proceedings and gain additional time to file its Statement of Defense. The respondent further asserts that its Rejoinder to the Statement of Defense was filed in compliance with the minutes of the meeting passed by the Learned Sole Arbitrator on 23.06.2021.

Additionally, it is submitted that the applicant's attempt to cast doubt on the presentations made by the respondent/claimant is impermissible in law. Such objections, raised for the first time in the present application, are deemed frivolous and vexatious and are not tenable under Section 34 of the Arbitration and Conciliation Act. The respondent contends that the presentations were made before officials of the applicant/SHAJ, RCD, and ADB on multiple occasions, and the applicant never raised such objections in its Statement of Defense.

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Moreover, the respondent argues that there is no legal bar preventing the reuse of earlier materials on the same subject for presentation to another court. The frivolous objections raised by the applicant/SHAJ during the arbitral proceedings were duly responded to by the respondent/claimant and addressed by the Learned Sole Arbitrator in accordance with the UNCITRAL Rules, 2013, and the Arbitration and Conciliation Act, 1996.

The learned counsel for the respondent reiterated that the respondent/claimant fulfilled its obligations as per the contract and

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even provided additional services beyond the scope of the contract. However, the applicant failed to compensate the respondent/claimant for these services. Furthermore, it is maintained that the termination of the contract by the applicant was illegal.

It is asserted that the claimant adhered to the contract by submitting invoices to the Applicant/SHAJ, which were genuine and the objections raised by the Applicant/SHAJ were baseless.

15. It is contended that the grounds presented by the Applicant lacks merit. It is submitted that the Arbitral award was made in accordance with the UNCITRAL Rules and the Arbitration and Conciliation Act, 1996, is legally sound and should be upheld by the Court. It emphasizes that both parties were given equal opportunities to present their cases during the arbitration proceedings, adhering to the principles of natural justice. Furthermore, it denies any irregularity or hastiness in the arbitration process, asserting that the learned Arbitrator appropriately considered the pleadings of both parties before allowing the Claimant's claim.

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It is contended that the legal arguments put forth by the Applicant are not valid.

It is submitted that the arguments presented by the Applicant lack validity. It is asserted that the Claimant submitted authentic documents before the Learned Sole Arbitrator, who thoroughly considered all pleadings, including detailed arguments, before passing the Award in favor of the Claimant. It is contended that the grounds as raised by the applicant is not tenable in law.

It is submitted that grounds as raised by the Applicant/ SHAJ are misconceived. It is also submitted by the Claimant/Respondent that the Applicant should not be given any further chances

with respect to submission of any further grounds at the time of hearing of the present application as it will delay and derail the adjudication of the Section 34 Application. It is submitted that the Arbitral Award has been correctly passed and is liable to be upheld by this Court.

Hence, the argument to dismiss the Application/Petition under Section 34 as filed by the SHAJ/Applicant.

FINDINGS OF THE COURT

The learned counsel for the petitioner/applicant has emphasised the fact that the award passed by the learned Arbitral Tribunal is against the Public Policy of India, shocking to the conscience and its grounds are covered U/s- 34 of the Arbitration and Conciliation Act, 1996. As against this, the learned counsel for the respondent has challenged each and every grounds.

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I. On behalf of the respondent, it was contended that scope of Section - 34 of the Arbitration and Conciliation Act 1996 is restricted to the grounds specified therein and is not to be treated like a regular appeal. In this context, the learned counsel for the respondent referred the cases of *Associate Builders Vs. Delhi Development Authority* [(2015) 3 SCC 49], *Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.* decided on 22 September 2014, *Ssangyoung Engineering & Construction Co. Ltd. Vs. National Highways Authority of India* [(2019) 15 SCC 131], *Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited* [2022(1) SCC 131], to support its arguments. Additionally, reliance is placed on a judgment by the Hon'ble Delhi High Court in Union of India Vs. Arctic India., wherein the learned counsel referred in detail the Hon'ble Supreme

Court's findings as to what are the grounds which can be considered for setting aside an award U/s- 34 of the Arbitration and Conciliation Act.

II. The learned counsel for the respondent also referred the cases of-

1. Associate Builders Versus Delhi Development Authority (2015) 3 SCC 49.

2. Swan Gold Mining Ltd. Versus Hindustan Copper Ltd.[(2015) 5 SCC 739]

3. Ssangyong Engineering and Construction Co. Ltd. vs. NHAI (2019) 15 SCC 131,

4. Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Limited. (2022) 1 SCC 131,

5.Union of India versus Arctic India [2010 SCC Online Del 2518 decided on 29.07.2018

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The learned counsel for the applicant (SHAJ) referred as many as 4 cases. They are in respect of the grounds taken in its application. They are as under:

1. Rajasthan State Mines & Minerals Ltd. v . Eastern Engg . Enterprises, [(1999) 9 SCC 283]

2. DDA v . R.S. Sharma and Co., [(2008) 13 SCC 80]

3. ONGC Ltd. v . Western Geco International Ltd., [(2014) 9 SCC 263]

4. Associate Builders v . DDA , [(2015) 3 SCC 49]

Needless to say that both sides have relied on these citations referring as per their convenience. It will not be out of place to mention that all these citations defines the contours, limitation of

hearing under section 34 of the Arbitration and Conciliation Act. Both sides have admitted that this is not an appeal and the evidence cannot be re-appreciated as in appeal.

III. After having heard both sides, following propositions has been laid by the Hon'ble Apex Court through various judgments, and this has not been disputed by the learned counsels for either side. These are as under-

a. *Scope of Section 34 is very clear and the ambit of challenging the award is very narrow and no party should be permitted to consider the same as an opportunity to re-argue or re-agitate the same submissions. (* held in ***M.P. Power Generation Co. Ltd. Vrs. Ansaldo Energia SPA and Anr., (2018) 16 SCC 661]***

b. *A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence (*held in ***M.P. Power Generation Co. Ltd. Vrs. Ansaldo Energia SPA and Anr., (2018) 16 SCC 661,)***

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c. *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality' (*held in ***Associated Builders vrs. DDA, (2015) 3 SCC 49)***

d. *No re-appreciation of evidence is permitted to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award.* [held in ***(DAMEPL v DMRC, (2022) 1 SCC 131 ; Sangyong Engineering and Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131).***

e. *Contractual interpretation is the sole prerogative of the Arbitrator/Arbitral Tribunal.* (held in ***McDermott International Inc. V. Burn Standard Co. Ltd., (2006) 11 SCC 419).***

f. *Determination of damages need not necessarily be done or be possible while grant of nominal / general damages. Guesstimates (honest guesswork) are permitted for award of damages.* (held in ***Gemini Bay Transcription Pvt. Ltd. Vrs. Integrated Sales Service Ltd. and Ors. [MANU/SC/0517/2021],***

g. *No subsequent development can be taken into account while considering an application under Section 34* (held in ***Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Limited. (2022) 1 SCC 131,)***

It was argued, on behalf of respondent, that when the instant petition is tested on the above settled propositions of law it will fall short of passing the threshold of this Hon'ble Court to interfere in this matter. Accordingly, the petition of the applicant deserves to be dismissed.

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The learned counsel for the applicant has argued that the its case is covered by the aforementioned judgments calling for interference.

IV. There is no dispute regarding the scope of Section 34 of the Arbitration and Conciliation Act. Admittedly, there is limited grounds specified in Section 34 of the Arbitration and Conciliation Act for setting aside of an award. Section 34 of the act clearly stipulates that an arbitral Award can be set aside on the following grounds only and no other grounds. It says-

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(2 An arbitral award may be set aside by the Court only if—

"(a) the party making the application establishes on the basis of the record of arbitral tribunal that —

(i)a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

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(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation. — For the avoidance of any doubt, it is clarified that an award is in conflict with the Public Policy of India, only if, -

(I) The making of award was induced or affected by fraud or cor-

ruption or was in violation of section 75 or section 81; or

(ii) It is in contravention with fundamental policy of Indian law; or

(iii) It is in conflict with the most basic notions of morality or justice.

[Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]------"

V. Many of the grounds mentioned in the section, has been advanced including the argument that it is against the public policy of India with its explanation. The public policy of India covers a wide connotation. Other grounds raised by the applicant/SHAJ relates to re-appreciation of evidence.

Thus, the only point for the determination in the case/ application is whether the Award delivered is against the public policy of India with its explanation or it is hit by the grounds mentioned therein under section 34 of the Arbitration and Conciliation Act,1996.

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The tabular form of the award given earlier clearly shows that most of the claims of claimant (respondent herein) were admitted. It will be better to see the claims one by one and its finding by the learned Arbitral Tribunal and whether they are covered by the grounds mentioned in section 34 of the Arbitration and Conciliation Act.

VI. CLAIM No. 1

Claim no. 1 relates to for setting aside the illegal Termination of Contract by the Respondent (applicant herein) vide letter dated 05.06.2018 by the Arbitral Tribunal. It is contended that the Arbitral Tribunal without application of mind has ignored points raised

by the SHAJ and in mechanical manner has set aside the termination order in complete violation of Principles of Natural Justice. It is submitted that the termination was legal and valid. They claim that the performance of the Claimant was not in line with SHAJ's requirements. The Claimant/PMC allegedly failed to adhere to the terms of reference (TOR) and did not fulfill contractual obligations. Further contended that the inception report submitted by the Claimant/PMC did not meet the TOR requirements and was delayed. The experts provided by the Claimant were unskilled, and replacements were needed. Despite six months passing, the Claimant/PMC team had not been effectively mobilized. The Claimant acknowledged the lack of required professional skills among their experts. Further submitted that inadequate staff mobilization resulted in non-performance until termination. The Claimant's team leader failed to understand their role in the project. It is further argued that the Claimant's work progress was significantly below expectations. It is emphasized that the termination was legal under Clause 19.1.1 of the contract. It is further contended that Respondent's Letter No. 156 dated 24.07.2017, attracts Clause No. 18 of the contract.

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It is argued that on 08.08.2017 by letter no. 165, the Claimant was communicated about non- recognition of any of its services till date as well as non requirement of claimant's services further which very well invoked provision of Clause 19.1 . (a) , (e) , (f). It is claimed that SHAJ have followed termination procedures outlined in the contract and provided sufficient notice. SHAJ contends that the Claimant's claims are maintainable under UNCITRAL Rules 2013 and Arbitration and Conciliation Act 1996, while also arguing against issues of nonjoinder and mis-joinder of parties.

As against this, the learned counsel for the Respondent/Claimant argued before the Learned Sole Arbitrator that

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the Applicant effectively accepted the delay in submitting the Inception Report. They submitted the Inception Report on 17.04.2017, providing reasons for the delay. However, the Applicant, after a three-month delay, sent comments on the Draft Inception Report on 24.07.2017 without mentioning any objection to the delay. The Respondent/Claimant, in their reply dated 31.07.2017, pointed out the Applicant's delay in providing comments. Subsequently, after the Applicant terminated the contract on 05.06.2018, they raised the issue of delayed submission of the inception report for the first time on 05.07.2018. The Respondent/Claimant argues that this objection is baseless since the Applicant had previously waived its right to object to the delayed submission through its conduct. Therefore, the Respondent/Claimant contends that the Applicant is estopped from raising this objection, having accepted the delayed submission of the Draft Inception report and waived its right to object when comments were initially submitted.

The Respondent/Claimant also presented evidence demonstrating their work through weekly progress reports, quarterly progress reports, and various presentations. Quarterly reports were submitted for the periods of January-March 2017, April-June 2017, and July-September 2017. However, the Respondent/Claimant was not given the opportunity to submit the annual progress report as the Applicant terminated the contract prematurely, before the project's completion. Additionally, many deliverable were supposed to be provided to the Applicant within 12 or 24 months, but the contract was unlawfully terminated by the Applicant in their letter dated 08.08.2017 just 8 months after the commencement of services.

In addition, the Respondent/Claimant, through a letter dated 07.12.2017, responded to the Applicant's letter dated 08.08.2017, providing updates on all the work completed and

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achievements made up to that point. These updates highlighted significant progress made by the Respondent/Claimant. Furthermore, the Respondent/Claimant included a table showing the work executed by them in their Post-Hearing Notes, further substantiating their efforts and progress on the assignments.

It is argued that the Applicant, from the outset, created an environment that was not conducive for the Respondent/Claimant to carry out their work smoothly. This included unjust, irrational, and whimsical demands by the Applicant. Such demands even led to the replacement of the Team Leader of the Respondent/Claimant. According to Clause 13 of the General Conditions of Contract (GCC), the CVs of key experts were submitted and approved before the contract commencement. While all experts except the Team Leader continued throughout the contract period, the Applicant/SHAJ approved the initial list of experts.

Regarding the mobilization of experts, it is argued on behalf of the respondent/claimant, all six positions for long-term experts on the PMC team had been filled. Out of the 18 positions for intermittent staff, only 8 had been mobilized because the remaining 10 positions were not immediately necessary. These positions would have been mobilized as and when required based on the project's demands.

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I find that the Leaned Sole Arbitrator correctly noted that the Claimant had fulfilled the deliverables on the work front. Additionally, it was observed that in consultancy contracts, not all personnel need to be deployed at the initial stage, and they are mobilized as necessary according to the work requirements. The Learned Sole Arbitrator further noted that intermittent staff are deployed at appropriate intervals and that their deployment was approved by the Respondent. Regarding the allegation of delay in submitting the draft in-

ception report, the Learned Sole Arbitrator observed that submission of the inception report does not appear to be mandatory according to the Applicant's letter dated 24.07.2017. Furthermore, it was noted that the Applicant did not raise any objection at the time of its delivery.

The learned Arbitral Tribunal has held that on 05th June 2018 by letter No. - ADB / Vividh / 73 / 2017 -111 , the Respondent terminated the PMC Contract between SHAJ and the Consultant under Sub clause 19.1.1 (a) stating that the performance of PMC had not been in consonance with the need and requirement of TOR / Agreement. The learned AT further stated that the Claimant submits that the Respondent has exercised such power without complying with the requirement of Contract. In doing so , Clause 18 of the GCC has been ignored according to which the Claimant should have provided a 30 days prior notice and as such should have provided an opportunity to the claimant to remedy such failure from the date of receipt of the notice of suspension. The AT noted that the Respondent defends the Claimant's argument on 05/07/2018 by letter No.- ADB / Vividh / 73 / 2017-132 stating that its letter No.- ADB / Vividh / 73 / 2017-156 dated 24.07.2017 attracts provisions of Clause No. 18. Further, by his letter of 08/08/2017, the Respondent claims that non - recognition of any of the services till date as well as non- requirement of Claimants services invokes the provisions of Clause 19.1.1 (a) , (e) , (f) . *The learned AT has noted that the Respondent's explanation on termination regarding use of Clause 19.1.1 . (a) , (e) and (f) came only after the Claimant contested the action taken by the Respondent on 05th June 2018 by letter No. - ADB / Vividh / 73 / 2017 -111 wherein the Respondent terminated the Contract under Clause 19.1.1 (a) only .*

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I find that the termination of contract could have

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been under clause 19 of the GCC. Clause 18 and 19 are as under-

18. Suspension

18.1 . The Client may, by written notice of suspension to the Consultant , suspend all payments to the Consultant hereunder if the Consultant fails to perform any of its obligations under this Contract , including the carrying out of the Services , provided that such notice of suspension (i) shall specify the nature of the failure , and (ii) shall request the Consultant to remedy such failure within a period not exceeding thirty (30) calendar days after receipt by the Consultant of such notice of suspension .

19. Termination

19. 1 This Contract may be terminaled by either Party as per provisions set up below :

a . By the Client

19.1.1 The Client may terminate this Contract in case of the occurrence of any of the events specified in paragraphs (a) through (f) of this Clause . In such an occurrence the Client shall give at least thirty (30) calendar days ' written notice of termination to the Consultant in case of the events referred to in (a) through (d) ; at least sixty (60) calendar days ' written notice in case of the event referred to in (e) ; and at least five (5) calendar days ' written notice in case of the event referred to in (f) :

(a) If the Consultant fails to remedy a failure in the performance of its obligations hereunder , as specified in a notice of suspension pursuant to Clause GCC 18 ;

(b) If the Consultant becomes (or , if the Consultant consists of more than one entity , if any of its members becomes) insolvent or bankrupt or enter into any agreements with their creditors for relief

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of debt or take advantage of any law for the benefit of debtors or go into liquidation or receivership whether compulsory or voluntary ,

(c) If the Consultant fails to comply with any final decision reached as a result of arbitration proceedings pursuant to Clause GCC 49.1 ;

(d) If , as the result of Force Majeure , the Consultant is unable to perform a material portion of the Services for a period of not less than sixty (60) calendar days ;

(e) If the Client , in its sole discretion and for any reason whatsoever , decides to terminate this Contract ;

(f) If the Consultant fails to confirm availability of Key Experts as required in Clause GCC 13 .

19.1.2 Furthermore , if the Client determines that the Consultant has engaged in corrupt , fraudulent , collusive , coercive for obstructive] practices , in competing for or in executing the Contract , then the Client may , after giving fourteen (14) calendar days written notice to the Consultant , terminate the Consultant's employment under the Contract .

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The learned Arbitral Tribuanl held that it is crucial to note that the crux of Claim No. 1 does not revolve around the submission of the inception report, the progress made by the Claimant before termination, the effectiveness of personnel mobilization, or whether the Claimant's performance aligned with the TOR requirements. Rather, the central issue to be determined is whether the termination process adhered to the contractual agreement. The Claimant contends that the Respondent terminated the contract without following proper procedures, making the termination wrongful, illegal, and arbitrary. Furthermore, the Claimant asserts that they continued to provide services up until and beyond the point of termination, empha-

sizing the impropriety of the termination despite their ongoing commitment to fulfilling their obligations under the contract.

The learned AT further held that the Respondent terminated the Contract on 05/06/2018 through letter No. ADB/Vividh/73/2017-111, citing Subclause 19.1.1 (a) and referencing notice provided to the Claimant via letter No. ADB/Vividh/73/2017-165 dated 08.08.2017.

Sub-clause 19.1.1 of the Contract permits termination by the Client in the event of occurrences specified in paragraphs (a) through (f). The clause specifies notice periods: at least thirty (30) calendar days for events (a) through (d), at least sixty (60) calendar days for event (e), and at least five (5) calendar days for event (f). Notably, the initial termination letter issued on 05/06/2018 referenced Subclause 19.1.1 (a). However, in a subsequent letter dated 05/07/2018, referenced as ADB/Vividh/73/2017-132, the Respondent clarified that letter No. ADB/Vividh/73/2017-156 dated 24.07.2017 invoked provisions of Clause No. 18, which in turn applied to Subclause 19.1.1 (a), (e), and (f).

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The Tribunal determined that the letter dated 24.07.2017 does not invoke or attract the provisions of Clause No. 18, which pertains to Suspension. Clause 18 allows the Client to suspend payments to the Consultant if the Consultant fails to fulfill its obligations, provided certain conditions are met. However, the Tribunal found that the letter neither specified any failure on the Consultant's part nor requested remediation within a specified period. Rather, it was a comment by the Respondent on the Draft Inception Report, requesting its submission within a week in accordance with the agreement.

Since the letter did not meet the requirements of Clause 18, it cannot be considered a formal suspension notice. Furthermore, even if it were to be construed as such, the Respondent's delayed ter-

mination of the Contract on 05/06/2018 raises questions about why they waited almost a year to exercise their authority.

It's worth noting that during this period, the Consultant continued to perform various tasks such as presentations, training, and submission of weekly/quarterly reports.

The Tribunal emphasized that in order to invoke Termination under Sub-clause 19.1.1 (a), a written notice of termination providing a thirty (30) calendar day period should have been issued. Prior to issuing such notice, the Respondent should have complied with Clause 18 - Suspension, which requires providing the Claimant a period not exceeding thirty (30) calendar days after receiving a Suspension Notice to remedy any failure to fulfill its contractual obligations.

The issuance of a suspension notice in accordance with GCC Clause 18, along with the opportunity to remedy any contractual obligations, is mandatory under the Contract before activating Termination under Sub-clause 19.1.1 (a).

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Furthermore, neither letter No. ADB/Vividh/73/2017-156 dated 24.07.2017 nor letter No. ADB/Vividh/73/2017-165/166 dated 08.08.2017 confirms that any "Suspension" notice under Clause 18 was issued to activate the Termination clause of the Contract.

The Tribunal addressed the clarification issued by the Respondent on 05/07/2018 via letter No. ADB/Vividh/73/2017-132, which referenced Clause 19.1.1 concerning termination of the contract. The Tribunal's decision is as follows:

Firstly, when contemplating a significant action like contract termination, the Respondent should be specific and adhere to the Contract's clauses in both letter and spirit.

The Tribunal determined that the termination notice issued via letter No. ADB/Vividh/73/2017-111 on 05/06/2018, terminating the contract under Sub-clause 19.1.1 (a), did not comply with the Contract Agreement as mentioned above. Even if termination under Subclauses 19.1.1 (e) and (f) were invoked, mandatory requirements should have been followed.

Termination under Sub-clause 19.1.1 (e): To enact termination under this sub-clause, which allows termination by the Client at its sole discretion and for any reason, the Respondent must provide at least sixty (60) calendar days written notice, which is mandatory. The Tribunal noted that such notice was not provided.

Termination under Subclause 19.1.1 (f): For termination to be valid under this sub-clause, the Respondent must provide at least five (5) calendar days written notice, which is also mandatory. Although the Respondent expressed dissatisfaction with some of the Claimant's staff almost seven months into the Contract, no specific reason or issue for termination seemed to have arisen. The Tribunal noted that no notice under this sub-clause had been provided to the Claimant.

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The Tribunal has determined that the Claimant has properly adhered to the procedures outlined by the UNCITRAL Rules 2013 and the Arbitration and Conciliation Act 1996. Furthermore, it is established that the claims are legally maintainable. The Statement of Claim is deemed valid, with no issues regarding non-joinder or mis-joinder. Additionally, the proceeding is not barred by principles such as waiver, acquiescence, or estoppel.

Based on the analysis provided, the Arbitral Tribunal held that it is evident that the Respondent failed to comply with the contractual requirements for termination. Consequently, the Tribunal

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concludes that the Respondent's actions were incorrect and improper. Statement of Claim (SOC-1) No. 1 is awarded in favor of the Claimant, and the Respondent's appeal is rejected.

I find that the learned Arbitral Tribunal has succinctly analyzed the issue of termination of the contract. It rightly held that the termination was incorrect, improper and accordingly illegal. In this respect, the learned counsel for the applicant failed to show that the findings of the learned AT is against any of the grounds mentioned in section 34 of the Arbitration and Conciliation Act making the award liable for being set aside.

VII. CLAIM No. 2

Claim no. 2- relates to Release of Amounts raised under Invoices submitted by the Claimant to the Respondent for Remuneration of the staff deployed during the Project.

It is argued by the applicant that the Arbitral Tribunal has allowed the Claimant's claim in a mechanical manner. However, it is the specific case of SHAJ, that there was negligence and breach of contract on the part of the Claimant. The contract was signed on November 2, 2016, and became effective on December 1, 2016. The Claimant asserts to have worked for 18 months and 5 days before the contract was terminated by the Respondent's letter dated June 5, 2018. During this period, the Claimant was required to provide various deliverables as outlined in the contract.

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The learned counsel for applicant pointed out the following deficiencies-

i. The Inception report was supposed to be submitted within one month, by January 1, 2017. However, only a draft report was submitted on April 17, 2017. This delay indicates a failure to submit the

document on time.

ii. Quarterly progress reports were required to be submitted within 10 days after the end of each quarter, every three months. The applicant asserts that only three reports were submitted during the entire contract period. These reports were allegedly submitted on June 29, 2017, November 13, 2017, and November 25, 2017. However, given the span of 18+ months, at least six reports should have been submitted. Additionally, even if these reports were considered, they were still significantly delayed beyond the specified deadlines.

Furthermore, even without acknowledging the submission of the mentioned reports, it is apparent from the Claimant's own records that these alleged three reports were significantly delayed. The first alleged report, was required to be submitted by April 10, 2017, but it is claimed to have been submitted on June 29, 2017. The second alleged report, was due by July 10, 2017, yet it was allegedly submitted on November 13, 2017. Similarly, the third alleged report, should have been submitted by October 10, 2017, but it was allegedly submitted on November 25, 2017.

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iii. Furthermore, according to the Claimant's own records, crucial documents such as the Annual report, Final Detailed project report, Road Safety Audit Manual, Drainage system design and maintenance manual, Manual on Social and Environment Safeguards, and Safeguard compliance checklists were not submitted within the stipulated 12-month period. Moreover, there are no records of these documents being submitted at all. This failure to adhere to the timeline for deliverables is evident from the comparative list provided in Volume II reports, indicating a lack of compliance. Additionally, this negligence is further evidenced by:

a. The inception report, which was required to outline the detailed project implementation arrangements, was to be submitted within a

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month of the contract's effectiveness. However, the Claimant submitted only a draft of the inception report four months after the contract commenced. This delayed submission violates the Contract agreement and Terms of Reference (TOR), indicating a failure to fulfill contractual obligations.

b. The submitted inception report failed to meet the requirements outlined in the TOR. Despite additional communication highlighting deficiencies, the report was not amended to address these shortcomings. Additionally, the deployed Team Leader failed to understand the project's objectives and importance, as acknowledged by the Claimant's management.

c. The Claimant's experts lacked the necessary professional skills to carry out their assigned tasks, necessitating their replacement with skilled specialists. Merely approving CVs without ensuring appropriate qualifications was insufficient.

d. The Claimant initially deployed only two personnel, and even after six months, the team had not been effectively mobilized. No office had been established, indicating a lack of proper preparation and organization.

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e. Effective mobilization of the Claimant's team, including specialists and staff, was repeatedly urged but not achieved. The Claimant continued to field inexperienced experts, hindering project progress.

f. The Claimant admitted that their experts lacked the required professional skills and indicated a reluctance to replace them with more qualified personnel. Despite acknowledgment of ineffective mobilization, no action was taken to rectify the situation.

g. Only a portion of the intermittent staff was mobilized, resulting in non-performance until termination, highlighting the Claimant's failure to fulfill contractual obligations.

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h. Despite being provided with necessary data and access to project records, the Claimant failed to justify its presence in the project and did not appoint all required personnel and experts, failing to benefit SHAJ as agreed.

i. The Claimant's Team Leader failed to understand the project's importance and role, disappointing SHAJ's expectations. This failure to comprehend their obligations misled SHAJ and the Tribunal.

j. Effective mobilization of the Claimant's team was never achieved, jeopardizing project outcomes.

k. Despite SHAJ's concerns being raised through various letters, the Claimant's response was unsatisfactory, indicating a lack of commitment to fulfilling contractual obligations.

l. A comparative list of mobilization of the Claimant's Team indicated significant delays, further demonstrating their failure to effectively mobilize resources.

m. Despite working for more than 18 months, the Claimant completed less than 1% of the contract work, with billing only accounting for 15% of the work. This discrepancy suggests potential illegal billing practices.

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n. There has been no improvement in SHAJ's portfolio, indicating a failure to meet project objectives.

o. The Claimant refused assigned work, claiming it to be additional work or variation, further indicating a breach of contract.

Thus, it is contended that by the learned counsel for the applicant that the Claimant's actions demonstrate complete negligence and breach of contract, with multiple instances of failure to fulfill contractual obligations and provide satisfactory deliverables.

It is further argued and submitted that the Arbitral Tri-

bunal's decision to base payments on invoices raised by the Claimant, despite no actual work being performed, is contested by SHAJ. SHAJ asserts that the Tribunal overlooked their submissions detailing discrepancies and inconsistencies in the invoices. SHAJ explicitly denied the validity of the invoices and their compliance with the contract terms in its Statement of Defense.

SHAJ raised doubts about the genuineness of the invoices for the following reasons:

i. In the Revised Statement of Claim, only 349 pages of alleged invoices were provided (from page number 815 to 1164 of RSOC). However, in the rejoinder, the number of invoices increased to 376 pages (from page number 987 to 1363 of Rejoinder). SHAJ notes that the increase in the number of pages has not been explained.

ii. There is a discrepancy in the total invoice amounts. While Claim No. 2 states the amount as USD 466,205 and INR 6,44,67,030, the amount payable under Claim No. 4 is mentioned as USD 401,470 and INR 5,50,96,376/-. SHAJ contends that no justification or supporting documents have been provided to account for this difference.

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The credibility of the invoice details presented on page 19 of the Statement of Claim is called into question by the applicant due to several inconsistencies:

a. Lack of invoice numbers for the 1st, 2nd, 3rd, 4th, and 18th invoices.

b. March 2017 invoice dated on the same day it was supposedly raised, March 6, 2017.

c. April 2017 invoice dated on the same day it was supposedly raised, April 11, 2017.

d. Discrepancy between the date of the March 2017 invoice as stated

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on page 19 of the Statement of Claim and the actual March 2017 invoice attached on page 1035 of the Rejoinder.

e. Discrepancy between the date of the April 2017 invoice as stated on page 19 of the Statement of Claim and the actual April 2017 invoice attached on page 1050 of the Rejoinder.

f. No indication of whether GST (Goods and Services Tax) was paid. Initially, it was asserted during arguments that GST was paid for some invoices but not for others, but later claimed that GST was paid for all invoices. However, there is no mention of GST payment in the Statement of Claim, and no evidence of GST payment is provided.

The validity of the invoices is disputed on several grounds by the applicant:

i. Invoices were issued for full-day attendance despite the personnel being mostly traveling, as evidenced by the Attendance register and boarding passes.

ii. The invoices should have been based on the actual time spent by each expert on project tasks, as specified in Clause 42 on page 235 of the RSOC. Generating invoices for time not spent on the project is deemed illegal and against the contract terms.

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Furthermore, the invoices are deemed invalid as they do not adhere to the contract requirements outlined in Clause 45 of the RSOC:

a. Lack of itemized invoices.

b. Failure to submit invoices within the stipulated 15-day period.

c. Absence of accompanying receipts with the invoices.

d. Inadequate supporting documents for the amounts payable.

e. Failure to submit separate invoices for expenses incurred in foreign and local currencies.

f. Failure to separate remuneration and reimbursable expenses in the invoices.

It is contended that as per Clause 45(c), payments were to be made within 60 days of receiving itemized invoices. Since itemized invoices were not provided, no payments can be made. Consequently, Claim No. 2 is not payable and should have been decided in favor of SHAJ. The Tribunal's decision to allow the claim without considering these factors is argued to be erroneous.

To this, the claimant/respondent has given detailed reply at the AT and argued at length in the court. The Claimant argued before the Learned Sole Arbitrator that it had provided services and raised invoices as per Clause 41.1(b) of the GCC from December 2016 to May 2018. The delay in invoicing for December 2016 to February 2017 was attributed to the setting up of office and mobilization. Despite several reminders and requests for payment, the Applicant did not make any payments and instead issued an unlawful termination notice. The Claimant explained that it ceased raising invoices after May 2018 due to the imminent termination and the obligation to deposit Service Tax and GST upon invoice issuance. Furthermore, the Claimant stated that the Applicant never raised objections to the invoices during the Contract period and only disputed them upon filing the Statement of Defense. The format of the invoices was deemed sufficient, and the Claimant asserted that it followed the terms of the Contract regarding expert attendance and billing. The Claimant argued that discrepancies in the invoices do not invalidate them, and by not objecting to the invoices, the Applicant is estopped from disputing them. Additionally, the Claimant emphasized its reputation and history of invoicing for services, suggesting that the Applicant deliberately avoided responding to the invoices to expedite termination.

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The learned Arbitral Tribunal has given detailed Findings,—

a. The Tribunal clarified that the page numbers referenced in the Revised Statement of Claim, aside from Annexure C - 7, are not considered part of the recognized document of the Claim, as most of its contents have been withdrawn. Therefore, the Respondent's arguments regarding these pages are deemed irrelevant to the current dispute.

b. Regarding the variance in the amounts stated under Claim No. 2 and Claim No. 4, the Claimant clarified that Claim No. 2 includes taxes like GST, which have already been paid, whereas Claim No. 4, related to profit from wrongful termination, does not include taxes as the payment is pending determination. This explanation is further supported by the method of invoicing submitted for payment.

c. The Tribunal observed that all invoices have been appropriately numbered, thus rejecting the contention raised by the Respondent. While acknowledging minor typographical errors in the Claimant's mention of invoice submission dates for March 2017 and April 2017 under Claim No. 2, the submissions in the Rejoinder are deemed accurate and accepted. There are no grounds to support the claim that the invoices have been fabricated or tampered with.

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d. The Tribunal asserts that the provisions outlined in Clause 34 of the GCC are explicit, allowing for remuneration during travel time for personnel to and from their destination. The Respondent's misunderstanding or misinterpretation of the Contract is apparent in this regard.

e. It is noted by the Tribunal that the breakdown of the Invoices complies with the requirements set forth in FIN - 3 Breakdown of Remuneration and FIN - 4 Breakdown of Other Expenses, Provisional

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Sums, and Contingency, which have been mutually agreed upon by both the Respondent and the Claimant.

f. Furthermore, the Tribunal acknowledges that the submitted Invoices are appropriately categorized under foreign and local currencies based on the expenses incurred, and they have been separately demanded for Intercontinental Consultant and Technocrat Pvt. Ltd. and Espana Consultants Pvt. Ltd.

g. The Tribunal observes that the Respondent did not express dissatisfaction, objection, or contradiction on the aforementioned issues during the Contract period until termination. Such grievances were only raised with the Arbitrator upon submission of the Statement of Defence. The Claimant was not informed or notified of any ineligibility for payment during the Contract duration. The sole instance of the Respondent alleging non-qualification for payment occurred on 05/07/2018, after the Contract's termination. The Tribunal finds no grounds or evidence to support the Respondent's claims. There is no evidence or justification to suggest that the invoices are fabricated, unauthentic, or baseless.

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h. The Respondent's (SHAJ) assertion that demands for payment were made only after termination is misleading. It is evident that the termination occurred on 05th June 2018, while invoices for payment were raised and submitted as early as 06th March 2017, as evidenced by the Claimant's submission.

i. The Tribunal notes that the Respondent did not refuse the invoices submitted at any point during the ongoing Contract.

j. It is highlighted by the Tribunal that the Contract Agreement between the Respondent and the Claimant is a "Time-Based" form of Contract. These Contracts involve payments based on fixed monthly fee rates and are made according to the actual time spent by person-

nel assigned to the works. The compensation for the Claimant is determined by agreed unit rates per month for its staff multiplied by the actual time spent on the assignment and reimbursable expenses based on actual expenses or agreed unit prices.

k. Reference is made to extracts from Clause 45(b), which stipulates that the Consultant must submit itemized invoices accompanied by receipts or appropriate supporting documents for the payable amount as per Clauses 44 and GCC 45 within a specified interval. According to Clause 45(c), such invoices are to be settled within 60 days after receipt by the Client. It's important to note that there is no requirement for a separate demand for payment, as argued by the Respondent. The submission of invoices itself constitutes a demand for payment.

l. Additionally, payment is the responsibility of the Client as per Subclause 40.1, which states that "in consideration of the Services performed by the Consultant under this Contract, the Client shall make such payments to the Consultant and in such manner as is provided in GCC F below." Under GCC F - Payments to the Consultant, Subclause 42.1 outlines that the Client is obligated to pay remuneration based on the time actually spent by each Expert in performing the Services, as well as other expenses, provisional sums, and contingency that are reasonably incurred by the Consultant. Moreover, Subclause 42.2 specifies that all payments should adhere to the rates set forth in Appendix C and Appendix D.

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m. The mutual rights and obligations of the Client (Respondent) and the Consultant (Claimant) are delineated in Article 2 of the Contract, particularly:

1. The Consultant is obliged to carry out the Services in accordance with the provisions of the Contract.

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2. The Client is obligated to make payments to the Consultant in accordance with the provisions of the Contract.

n. Regarding the work performed, the Claimant has completed several deliverables, including submitting a Draft Inception Report and Final Inception Report, conducting a "Third Party Road Safety Audit for RCD works," providing training sessions as per the "Calendar for Road Safety Training of RCD/NH Engineers in Jharkhand," and delivering presentations on various road safety topics. Additionally, Quarterly Reports, Weekly Progress Reports, and Road Safety Audits were conducted.

The Respondent has argued that the Claimant's personnel were not fully mobilized and lacked the necessary professional skills. However, the Tribunal notes that in consultancy contracts, not all personnel need to be deployed initially, and staffing is typically adjusted as needed. Furthermore, intermittent staff deployment is common. It is acknowledged that the personnel assigned by the Claimant were approved by the Respondent for their respective tasks.

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o. The Tribunal acknowledges that the Client did not raise any objections or denials regarding the payment of invoices listed under Claim No. 2 before the termination occurred. According to Sub-clause 45.1(c), the Client is obligated to settle the Consultant's invoices within 60 days after receiving them, accompanied by supporting documents. Only the portion of the invoice lacking satisfactory support may be withheld from payment. If any discrepancies are identified between the actual payment and the authorized costs incurred by the Consultant, the Client may adjust the difference in subsequent payments.

p. In accordance with the aforementioned sub-clause, submitted invoices must be paid even if discrepancies exist in the Interim Pay-

ment Certificates (IPCs). Despite this contractual requirement, not a single IPC has been paid. Therefore, the Tribunal decides to award the Claimant compensation in the amount of USD 4,66,205 and INR 6,44,67,031 to be paid by the Respondent on account of the submitted invoices.

q . The Tribunal notes that the Client has not raised any objections or denial on the payment of invoices submitted, as listed under Claim No. 2, during the period before the time termination took place. As per Sub clause 45.1 (c), the Client shall pay the Consultant's invoices within 60 days after receipt by the Client of such itemized invoices with supporting documents. Only such portion of the invoice that is not satisfactorily supported may be withheld from payment. Should any discrepancy be found to exist between actual payment and costs authorized to be incurred by the Consultant, the Client may add or subtract the difference from any subsequent payments.

r. As per above sub clause , submitted invoices are mandatorily to be paid even if some discrepancies exist in the IPCs. Despite such requirement prevailing in the Contract, not a single IPC had been paid. Hence, the Tribunal determines and allows the amount of USD 4,66,205 and INR 6,44,67,031 to be compensated to the Claimant by the Respondent on account of invoices submitted.

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I find that from the perusal of the award in respect of claim no. 2 and the arguments advanced by both sides, it is clear that it does not make out a case for setting aside the award. In this respect, the applicant failed to show that it is covered by the grounds mentioned therein.

VIII. CLAIM No. 3 :

Claim no. 3 relates to Non - payment for additional work undertaken by the Claimant on instruction of the Respondent.

The contention is raised by applicant regarding Claim No. 3, which concerns additional work allegedly undertaken by the Claimant. It is argued that no work beyond the scope of the agreement was got performed by SHAJ, and the Claimant failed to raise any invoices for approval indicating additional work. Additional work is defined as work within the scope but with increased quantity. The Claimant's failure to demonstrate performing any additional quantity of work is highlighted-

a. Road Safety Training: The Claimant's responsibilities included conducting workshops, seminars, and training sessions for RCD officials and other target groups as per the agreement.

b. Road Safety Audit of Roads: This falls within the scope of the agreement, and no additional work was undertaken.

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c. No work was conducted beyond the scope of the agreement as claimed. Additionally, the quality of the Claimant's work is criticized as unsatisfactory and unprofessional.

The agreement stipulates that modifications or variations in the scope of services require written agreement between the parties, which was not the case here. Moreover, the applicant derived no benefit from the alleged services, making the claim baseless. No invoices were raised for the alleged work, further undermining the claim's validity.

The Tribunal's decision to allow the claim without considering these arguments is deemed erroneous. It is asserted that even though the Tribunal acknowledged the work done by the Claimant

was within the agreement, it still erred in allowing the claim. Therefore, Claim No. 3 should be decided in favor of SHAJ.

Respondent/ claimant has given reply at the AT.

a. It was argued before the Learned Sole Arbitrator that the Respondent/Claimant provided services beyond the scope of the Terms of Reference (TOR). Specifically, the road safety training for NH Engineers and RCD (Road Construction Department) was not originally included in the Respondent/Claimant's services. The Respondent/Claimant informed the Applicant via letter No. 3443 dated 05.05.2017 that this additional work would require a variation to the contract. Furthermore, it was highlighted that there was no direct contractual agreement between RCD and the Respondent/Claimant.

b. The Applicant, in its letter dated 30.1.2017, requested the Respondent/Claimant to conduct a Road Safety Audit for RCD works exceeding a certain value. The Respondent/Claimant, in response via letter No. 3442 dated 05.05.2017, notified the Applicant that this task required additional services beyond the initial TOR and requested the preparation of a variation proposal.

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c. It was further argued that the Project Implementation Support Component was supposed to be conducted under the guidance of SHAJ (State Highways Authority of Jharkhand) Management. However, the Applicant demanded the Respondent/Claimant to provide non-key professionals for PIU (Project Implementation Unit) and PMU (Project Management Unit) as per a specific government notification and working arrangement. The Respondent/Claimant, in its letter dated 08.02.2017, responded to the Applicant's demands, stating that the financial and technical proposals did not account for these requirements. A separate financial proposal was submitted for addi-

tional staff, but the Applicant did not address the request.

d. The phrase "shall include, but not limited to" in Clause 11 of Section 7 of the ToR was argued not to encompass every possible task but rather to be reasonably interpreted. The Respondent/Claimant contended that it should not be expected to perform any work under Clause 11 that is not specifically mentioned therein and should be eligible to claim damages under Section 70 of the Contract Act.

The learned Arbitral Tribunal has given a detailed Finding on this point. The Tribunal notes that the works has been carried out. Such works that is not under the scope of TOR should have been carried out under a Variation to the Contract as rightly claimed by the Claimant. Therefore , the Claimant's claim amount of Rs . 67,48,000 / - for carrying out the road safety audit works is allowed.

I have "learned" through the analysis given by the learned AT. It has analyzed the matter and it rightly decided the claim.

IX. CLAIM Nos. 4, 5, 6, 7, 8, 9

Claim no. 4- Claim towards loss of profit on account of wrongful termination of Project Management Consultancy Services

Claim no. 5- On account of loss of Business opportunity because of termination of Project Management Consultancy Services

Claim no. 6- Payment of Interest on withheld amount under Claim No. 2 from the date when it was due till 14.08.2020.

Claim no. 7- Interest on amount payable to the Claimant under Claim No. 3 , 4 & 5.

Claim no. 8- Payment of Arbitration Costs

Claim no. 9- Payment of Interest from 15.08.2020 till the date of Award and future interest from the date of Award to actual date of payment.

It may be pointed out that once the claim no. 1, 2 and 3 are decided, the remaining claims will be consequential.

(i) As regards Claim No. 4 i.e Claim towards loss of profit on account of wrongful termination of Project Management Consultancy Services, the learned AT held that the Contract, when terminated by one Party, before the works are completed, does result in financial losses to the other Party. The fact that the termination of this Contract by the Respondent was wrong, unacceptable and without following due procedure of the provisions of Contract has been established under SOC No. 1. It is thus clear that the Claimant has suffered financial losses due to such termination.

In this regard , the Indian Contract Act , 1872 Section 73 and 74 contemplates that the Party that suffers damages due to breach by the other party is entitled to compensation for loss or damage caused by breach of Contract. In the present case, it is the Claimant that has suffered such damages. The learned AT further held that it is an accepted fact that, more the work is performed more is the overhead and profit margin acquired by a performer. It is also an established fact that any charge for professional services has a component of overhead and a component of profit.

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The learned AT referred several pronouncements by the Hon'ble courts in India where the Hon'ble courts have pronounced that the aggrieved party is entitled to claim the damages for loss of profit which it expects to earn by undertaking a contract, if the other Party entrusting the work is in breach of the Contract e.g. , case related to A.T. Brij Paul Singh & Ors . V. State of Gujarat [AIR 1984 SC 1703] as upheld by Hon'ble Apex Court.

The learned AT further mentioned that to substantiate his submissions, the Claimant has submitted his assessments of damages based on the certificate of a Charter Accountant (CA). As per An-

nexure C - 39 of SOC , the Charter Accountant has certified profitability of randomly selected supervision projects having executed by the Claimant on some other Projects. Such profitability has been depicted in the form of a table which shows profitability ranging from 29.70 % to 64.16 % for the FY 2020-21. As regards to certification by the Chartered Accountant, it should be noted that the certification is a historical data of the Claimant which is verified by a CA and is secured. Such data can be checked at any time at any moment to justify its reasonability. The Claimant maintains that based on the previous project appraisals their profit margin could be 25 % for this terminated Project. It is noted that the Claimant has asked for less profitability percentage than what has been certified by the Charter Accountant.

The Tribunal finds that the Claimant's Claim is reasonable and allows INR 6,27,41,094 / - and USD 6,39,208 / - on value of work lost as claimed by the Claimant due to illegal premature termination by the Respondent .

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The learned counsel for the applicant/SHAJ has vehemently raised this issue. It was contended that the learned AT relied on the report of CA which is a private document. It was argued that without examining the CA, the AT could not have taken its report on record and could not have relied upon.

It may be pointed out that a possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence. Thus, this findings may be wrong as to the quantity of awarding the amount, but still it does not permit this court to set aside the award for this reason.

(ii) Claim No. 5 is in respect of the Payment on account of loss of Business opportunity because of termination of Project Man-

agement Consultancy Services. As regards claim no. 5, the learned Arbitral Tribunal held that the Claimant claims that the consultancy services were terminated when the value of works amounting to Rs . 6,44,67,030 / - and USD 4,66,205 / - had been executed against the total service amount of Rs . 30,60,60,750 / - and USD 2,958,300 / -, thereby depriving the Claimant of consultancy services amounting to Rs. 24,15,93,720 / - and USD 24,92,095 / - .

In this respect, after analyzing the matter, the learned AT held that the Tribunal agrees with the Respondent. Giving example of having just been shortlisted in two ADB PMC Projects does not mean that the Claimant will be awarded those contracts. Further, the assumptions made are speculative, theoretical and imaginative without any basis. Hypothetical assessments cannot be justifiable when the issue is related to claims where the burden to prove lies with the Party who has been a sufferer. The Claimant has not been able to produce any proof or evidence to justify its claim. Business profits made from the projects can be established only after acquiring and completing the Project. The learned AT after detailed analysis, rejected the Claimant's claim regarding Claim No. 5 and was disallowed .

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(iii) Claim No. 6 is in respect of Payment of Interest on withheld amount under Claim No. 2 from the date when it was due till 14.08.2020. The learned Arbitral Tribunal has accepted that the Claimant is entitled to recover amount of USD 4,66,205 and INR 6,44,67,031 from the Respondent on Claim No. 2. The above amount is the billed amount in respect of services that is due to be paid by the Respondent as per Sub clause 45.1 (b) at an interval as stated in the GCC. Since, the Respondent had not paid any of the due amount, the Claimant is entitled to interest on Delayed Payment as per Sub clause 46.1 for the period of delay as claimed by the Claimant. It is noted

that as per Sub clause 46.1 of Special Conditions of Contract the agreed interest rate, between the parties, is 6 % per annum which implies for all currencies of payments.

However, the Tribunal noted that the calculations attached under Annexure C - 43 of the Statement of Claim No. 6 need to be modified as the Claimant has applied claim interest after 60 days from the date of submission of invoices. As per Sub clause 46.1 [Interest on Delayed Payments], interest shall be paid to the Consultant on any amount due if the Client delay payments beyond fifteen days after the due date of payment stated in Sub clause GCC 45.1 (c). Sub clause 45.1 (c) requires the Client to pay the Consultant's invoices within sixty (60) days after receipt by the Client of such itemized invoices. Therefore , to be eligible for interest a time period 75 days need to be taken into consideration. Thus, for the period up to 14.08.2020 which is time of appointment of Sole Arbitrator, interest claim amounting to INR 1,01,35,810 / - and USD 80,500 / - is allowed.

(iv) The Claim No. 7 is Interest on amount payable to the Claimant under Claim No. 3 , 4 & 5.

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The learned AT held that the decision under Claim No 3 , 4 & 5 has been made by the Tribunal. Variations should have been issued as per the Contract and the Respondent should have paid the Claimant for the works it had carried out as per Sub clause 45.1 (b) at an interval as stated in the Contract Agreement. Since, the Respondent had not paid any of the due amount, the Claimant is entitled to receive interest for Delayed Payment as per Sub clause 46.1. It is noted that under Sub clause 46.1 of Special Conditions of Contract the agreed interest rate between the Parties is 6 % per annum for all

currencies of payment .

The learned AT modified the calculations assigning the reason same as given in respect of claim no. 6.

It may be pointed out that the decision to claim no. 4, 5, 6, 7, 8, 9 are consequential to claim to claim no. 1, 2, 3. Once the claim nos. 1, 2, 3 are decided, the remaining claim were to be decided accordingly quantifying the claim and interests.

X. The learned counsel for the applicant has stated much in explicit terms about the award being against the Public policy and shocking to conscience but any person challenging the award is well aware that he is challenging the award U/s- 34 of the Arbitration and Conciliation Act 1996 which provides limited ground for assailing the award. There is no doubt that one of the grounds is that award should be against the public policy of India or it should be shocking to the conscience of the court so that no court can be convinced about the finding in such circumstances.

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Much of the argument is either devoid of merit or cannot be considered in isolation but taken together they may show that the award is not shocking to the conscience of the court and accordingly it can not be considered to be against the public policy as well.

Thus, the findings of the learned Arbitral Tribunal is upheld. Accordingly, the award dated 14.12.2021 passed by the learned Arbitral Tribunal is upheld. The application filed by the respondent/applicant is devoid of merit. Accordingly, this application is dismissed since it is devoid of merit. In the facts and circumstances of the case, the Parties shall bear their own cost. It is further directed that the ap-

plicant will bear the cost of sending back the record of the learned Arbitral Tribunal to the learned Arbitral Tribunal and will ensure the return of the learned Arbitral Tribunal's record.

Judgment Pronounced in Open Court.

Let a copy of this judgment be given to both sides free of cost.

Manoj Chandra Jha 16.03.2024

(Manoj Chandra Jha)
Addl. Judicial Commissioner-III -
cum- P.O. Commercial Court,
Ranchi.

Dictated and Corrected by me.

Manoj Chandra Jha 16.03.2024

(Manoj Chandra Jha)
Addl. Judicial Commissioner-III -
cum- P.O. Commercial Court,
Ranchi.
Dated 16th day of March, 2024.

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प्रस्तावित शुल्क 9-25
रु०..... पै०.....
प्रधान तुलना लिपिक
व्यवहार न्यायालय, राँची

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सच्ची प्रतिलिपि प्रमाणित

धारा 76, अधिनियम-I, सन्-1972
के अधीन अधिकृत

Date of Application 9/4/24
Date of Notification 9/4/24
Date of filing Requisites 9/4/24
Date of Ready 9/4/24
Date of Delivery 9/4/24