

(2015) 01 DEL CK 0152
In the Delhi High Court
Case No : O.M.P. 304/2007

MC-ROTEM-MELCO Consortium

APPELLANT

Vs

Delhi Metro Rail Corporation Limited

RESPONDENT

Date of Decision : 05-01-2015

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 28(3), 34
Sales of Goods Act, 1930 — Section 64A

Citation : (2015) 6 AD 305 : (2015) 217 DLT 11

Hon'ble Judges : Vipin Sanghi, J.

Bench : Single Bench

Advocate : Parag Tripathi, Senior Advocate, Anuj Berry, Malak Bhatt, Manu Nair and Sagar Suri, for the Appellant; M.G. Ramachandran, Rakesh Agarwal, Pulkit Agarwal, Advocates and A.S. Rao, Law Officer, DMRC, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") has been preferred to assail the interim/partial award dated 04.04.2007 passed by a three member arbitral tribunal. The dispute between the parties arose out of the differences pertaining to the quantum of deduction that could be made from the fixed lump sum price of the project, on account of exemption from customs duties and other indirect taxes (i.e. the excise duty component of the indirect taxes) granted by the Government of India in relation to the project. According to the petitioner-contractor the agreed declared amounts of the deductions, that were permissible under the contract, were limited to Rs. 206.4 cr. as per clause 4 of the "contract agreement" between the parties. The learned arbitral tribunal, on the interpretation of the clauses of the "General Conditions of Contract" (hereinafter "GCC") along with the "contract agreement" has held that the respondent is entitled to deductions in excess of the said amount on the basis of the "actual

benefits" accrued to the petitioner on account of exemptions. It is this aforementioned finding of the learned arbitral tribunal which is the crux of the present dispute.

BRIEF FACTS:

2. The petitioner is a consortium between, Mitsubishi Corporation, Rotem (formerly known as "Korea Rolling Stock Corporation) and Mitsubishi Electric Corporation. The consortium was formed for the purpose of executing the project of "Design, Manufacture, Supply, Testing and Commissioning of Passenger Rolling Stock Contract RS-1 for Mass Rapid Transport System (MRTS) Phase one" (hereinafter "the project") for the Delhi Metro Rail Corporation Ltd. (DMRC).

3. Around the month of October 1999, the petitioner was selected as a "pre qualified bidder" for the project. Consequently, the respondent issued a "Notice of Invitation to Tender" (hereinafter the NIT) to the Petitioner. The NIT enclosed the tender documents describing the scope of the work and the terms and conditions for the contract. Annexure 2 to the "Instructions to Tenderers" attached to the NIT, contained stipulations with respect to the fixed lump sum price nature of the contract. Further clause 2.3 of the aforementioned instructions expressly provided that the respondent was making efforts to obtain waiver of the taxes and duties for the project.

4. The final bid of the petitioner was opened by the respondent on 14.08.2000. The petitioner was declared the lowest bidder. Consequently, the respondent commenced negotiations with the petitioner on the financial and technical offer/bid of the petitioner. The negotiations between the parties culminated in the petitioner's final proposal to the respondent. The respondent vide letter dated 24.01.2001 requested for a "final lump sum price" and the petitioners "best and lowest negotiated financial lump sum offer". The petitioner vide its reply dated 25.01.2001 submitted its final proposal which also contained the quantified and declared amounts of custom duty and other indirect taxes which formed part of the fixed lump sum price. The respondent vide its letter dated 25.04.2001 sought for confirmation with respect to the payment of taxes/duty as detailed out by the petitioner in the 25.01.2001 letter, and the same was confirmed by the petitioner by letter dated 26.04.2001.

5. Thereafter a "Letter of Acceptance" (hereinafter LOA) dated 02.05.2001 was issued to the petitioners and the contract was awarded to them. The petitioners conveyed their unconditional acceptance of the same vide letter dated 03.05.2001. Subsequent to the issuance of the LOA by the respondent, the parties executed the contract agreement on 22.05.2001. As per the contract agreement the respondent agreed to pay to the petitioner an amount of INR. 3,110,439,836 and US\$ 2,60,997,269 equivalent to INR. 14,563,000,000 as the total fixed lump sum cost of the work to be carried out by the petitioner, subject to adjustments in accordance with the provisions of the GCC. The aforesaid fixed lump sum price included taxes, royalties, fees, cess, octroi and other levies etc.

and any tax to be deducted at source, except those specifically excluded by sub clauses (a), (b) and (c) of clause 4 (ii) of the contract agreement.

6. On 1st April 2003, the Government of India, issued three notifications under the Central Excise Act 1944, the Customs Act 1962 and the Customs and Tariff Act 1975 completely exempting payment of customs duty, excise duty and other indirect taxes for all items of equipments-including machinery and rolling stock, procured by or on behalf of DMRC for use in Delhi MRTS projects.

7. On May 6, 2003 the petitioner addressed a letter to the General Consultants for the respondents, expressing their desire to discuss the procedure to adjust the contract price in view of the aforesaid exemption notifications issued by the Ministry of Finance, for customs and excise duties. The discussion was proposed with reference to clause 13.1 of GCC and clause 26 of SCC.

8. On July 18, 2003 the General consultants of the respondent communicated to the petitioner that any customs duty exemption certificate issued for a value in excess of INR 1290 million will be to the benefit of the respondent. The petitioner by its letters dated August 7, 2003 and August 21, 2003 refuted the aforesaid claim that the respondent was entitled to any amount in excess of INR 2064 million on account of exemption from payment of taxes and duties specified in clause 4 of the Contract Agreement. Consequently, dispute arose between the parties with regard to the amount which the respondent is entitled to claim towards adjustment.

9. As the parties failed to arrive at an amicable settlement, the matter was referred to arbitral tribunal leading to the present impugned interim/partial award.

10. The tribunal upheld the respondents stand, and vide the impugned award dated 4.04.2007 held as follows:

"In the circumstances, therefore, we allow counter claim (b) of the respondent. Accordingly the claimant is directed to render true and full account of all the transactions of import, manufacture and purchase, which would have been subjected to levy and payment of Customs duty, Excise duty and other Indirect taxes in India as well as the rates of such duties/taxes prevalent as on the latest date of the submission of the tenders along with supporting documents within two months, with advance copies to the respondent. We also direct the claimant to disclose the actual benefit derived by it on account of exemption of Customs Duty, Excise Duty and other Indirect Taxes within the same time. The Respondent shall file its reply along with supporting documents within two months thereafter."

11. Before proceeding further, it would be expedient to extract the relevant portions of the germane clauses of the Contract Agreement and the GCC, which are as follows:

"CONTRACT AGREEMENT"

Clause 4: VALUE OF WORK AND COMPLETION TIME:

"The Employer agrees to pay for the total cost of the Works and the Contractor agrees to accept the sums mentioned below in the following currencies, to be the total cost for the Work carried out by him as part of his obligations, responsibilities and liabilities under and according to the provisions and obligations imposed on him by the Contract.

Fixed Lump Sum Price

(i) Rupees three thousand one hundred and ten million, four hundred and thirty nine thousand, eight hundred and thirty six (IRs. 3,110,439,836); and

(ii) In the foreign currency of United States Dollars two hundred and sixty million, nine hundred and ninety seven thousand, two hundred and sixty nine (US \$ 260,997,269);

Subject to adjustment in accordance with the provisions of GCC.

The above fixed lump sum price includes all taxes, royalties, duties, fees, cess, octroi, other levies, etc., and any tax to be deducted at source, except:

- (a) Customs Duty on the first fifteen offshore manufactured trains and mock-up.
- (b) The Excise Duties, (after availing MODVAT) as well as Sales Tax on the finished 45 trains indigenously manufactured.
- (c) Customs Duties on the Imported Spares, Jigs, Fixtures, Special Tools and Testing and Diagnostic Equipment etc., and Excise Duties and Sales Tax if any on the indigenously finished Spares, Jigs, Fixtures, Special Tools, and Testing and Diagnostic Equipment sourced in India.

x x x x x x x x x

There shall be no liability of the Employer for the Customs Duties, Excise Duties, and Sales Tax on components and equipment installed in the indigenously manufactured Cars, Spares, Jigs, Special Tools and Testing and Diagnostic Equipment."

(emphasis supplied)

(The above underlined stipulation has been referred to by the Arbitral Tribunal as "Primary Term Y")

"The above Fixed Lump Sum Price, in addition to other taxes, also includes the following amounts of Taxes and Duties:

The Contractor shall pay the Employer the difference between the declared amounts of Import Tax and Customs Duty and other Indirect Taxes, as stated above, and the actual amounts paid to the concerned authorities, should these be less. In the event that the actual amounts are greater than the declared amounts, the Contractor shall be fully responsible for the additional amounts."

(emphasis supplied)

(The above underlined stipulation has been referred to by the Arbitral Tribunal as "Primary Term X")

GENERAL CONDITION OF CONTRACT:

Clause 13.1: "Unless otherwise stated in the Special Conditions of Contract, the Employer shall pay to the Contractor a fixed lump sum Contract Price subject to any adjustments thereto in accordance with these Conditions. Except as otherwise expressly provided, the Employer shall not be required to pay interest on any money claimed by the Contractor, nor for the Employer's Representative's failure in certifying any payment due or payable to the Contractor.

The Contract Price shall not be adjusted in respect of any increase or decrease of cost to the Contractor in carrying out the Works by reason of:

- (a) An alteration in the rates of wages or allowances payable to labour or a change in the conditions of employment thereof;
- (b) A change in the cost of Materials (whether for the permanent or temporary works), consumable stores, fuel or power;
- (c) A variation in the rates of freights or insurance;
- (d) Variations in the incidence of landing charges;
- (e) A variation in the cost of any other matter or thing of whatsoever nature except as stated in this sub clause.

The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from changes in Custom Duties, Excise Duties, Sales Taxes and legislations of India, made after the latest date of submission of Tender. Such legislation means any law, order, regulation or by-law having the force of law, which affects the Contractor in the performance of his obligations.

In the event of exemption or reduction of Customs Duties, Excise Duties, Sales Tax or any other Cess/Levy being granted by the Government in respect of the Works, the benefit of the same shall be passed on to the Employer."

(Emphasis supplied)

Clause 1.6: "Priority of the Documents:

The documents forming the Contract are to be taken as mutually explanatory of one another. If there is an ambiguity or discrepancy in the documents, the Employer's Representative shall issue any necessary clarification or instruction to the Contractor, and the priority of the documents shall be as follows:

- (a) The Contract Agreement;

- (b) The Letter of Acceptance;
- (c) The Outline Design Specifications (Design Criteria) and Outline Construction Specifications;
- (d) The Employer's Requirements;
- (e) The Tender;
- (f) The Special Conditions of Contract (SCC);
- (g) The General Conditions of Contract (GCC);
- (h) The Schedules;
- (i) The Contractor's Proposal; and
- (j) Any other document forming part of the Contract."

SPECIAL CONDITIONS OF CONTRACT:

CLAUSE 26: ADDITIONAL CLAUSE:

"RECORD OF TAXES, DUTIES ETC:

"The Contract shall maintain complete records in respect of payments made for taxes, duties, octroi, and other levies payable to various authorities and advise the Employer complete details of such payment every month. These details will be kept separately for:

- (a) Customs Duties on 15 offshore manufactured and Mock-Up;
- (b) Excise Duties (after availing MODVAT) and Sales Tax on the finished trains;
- (c) Customs Duties on the imported components and equipments installed in the indigenously manufactured Cars;
- (d) Excise Duties and Sales Tax on the indigenous components and equipments installed in the indigenously manufactured Cars;
- (e) Similar details as in a, b, c and d above should be kept in respect of Spares, Jigs, Fixtures etc; and
- (f) Any other taxes, duties etc. paid.

These records shall remain open for inspection by the Employer/Employer's Representative at any time. Should the Employer obtain a waiver for the above taxes, duties etc. in full or part thereof, the Contractor will be advised on the process to be followed to obtain refund of such taxes etc., from the concerned authority.

The Contractor shall arrange for the remittance of the refund so obtained to the Employer. In case of failure by the Contractor to remit the refund to the Employer, the same will be recovered by the Employer from the amounts due for

payments to the Contractor or as debt due from the Contractor. If the Contractor fails to take the required action to obtain refund, the Employer may take action in accordance with the sub clauses 15.1 and 15.2 of General Conditions of Contract.

(Emphasis supplied)

12. The main contention of the Petitioner before the Arbitrator to sustain its claim was that the liability of the claimant, according to clause 4 of the Contract Agreement, to reimburse the respondent will extend only to the extent of, and not more than, INRs. 129,000,000 on account of Import Tax and Custom Duty and to the extent of INRs. 774,000,000 on account of other Indirect Taxes, i.e. INR 2064 million in the aggregate. The Claimant was also to bear the risk of paying the taxes and duties in excess of INRs 2064 million in event of their increase.

13. The Respondent opposed the above contention by relying on clause 13.1 of the GCC read with clauses 20 and 26 of the SCC. Clause 13.1 of the GCC says that in event of exemption of Customs Duty, Excise Duty, Sales Tax or any other cess and levy being granted in respect of the works, equipment, etc, the benefit of the same shall be passed on to the employer.

14. The Arbitral Tribunal rejected the claim of the Claimant. The reasoning given by the Tribunal, while rejecting the claim, reads as follows:

"56. Since the penultimate and last para of clause 13.1 of the GCC specifically deal with the situation arising from exemption from taxes and duties and adjustment of the lump sum price on account of increase or decrease in taxes and duties resulting from the change in the rates thereof after the latest date of submission of tender, such a situation will fall outside the purview of "the primary term (x)" of clause 4 of the contract agreement. "The primary term (x)" of clause 4 of the contract agreement being of a general nature will not apply to the change or variation in the rate of taxes or exemption from taxes and their impact as it is the penultimate and the last para of clause 13.1 of GCC, which expressly, directly and specially deals with such a situation. General provision must give way to the special provision. The area covered by the penultimate and last para of clause 13.1 of the GCC is excluded from the aforesaid "primary term (x)" of clause 4 of the contract agreement, which applies to a situation created by the variation in the outflow of taxes and duties depending upon increase or decrease in the value of goods imported for the work in question and not on account of variation in the rate of taxes and duties.

57. It is also well settled that effort should be made to give effect to every clause of the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. In case the clause merely limits or qualifies without destroying altogether the obligations created by another clause, the two are to be read together and effect is to be given to each one of them. In an agreement where clauses are capable of two interpretations, one of

which would validate a particular clause in the instrument and the other would render it ineffective or meaningless, void or dead letter the former is to be adopted. Effort must be made to harmonise and not to destroy the various clauses of the agreement. Thus if by a particular construction the clause is rendered futile, ineffective, nugatory such a construction should not be resorted to unless the clause cannot be supported by anything in the contract. The correct approach must be to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the general provision in such a manner as to leave the ground for the more specific one to operate. Thus applying the maxim *Specialia Generalibus Derogant*, i.e. the special provision derogates from the general, both the provisions, namely, penultimate and last paras of clause 13.1 and "the primary term (x)" of clause 4 can operate, but in their own fields.

58. In order to appreciate the difference between "the primary term (x)" of clause 4 of the contract agreement and the penultimate and last paras of clause 13.1, we may juxtapose them and in the light of the aforesaid analysis sum up their scope and ambit:-

59. In nutshell, the penultimate and last paras of clause 13.1 will apply to the contingencies arising from exemption from taxes and duties or increase or decrease in taxes and duties resulting from the change in the rates of taxes after submission of the tender. Such a situation will not be covered by "the primary term (x)" of clause 4 of the contract agreement. This primary term will apply where due to change in the value of imported equipments, components etc. there is variation in the actual amounts of tax paid to the concerned authorities. We must clarify that this analysis is confined only to "the primary term (x)" of clause 4 and penultimate and last paras of clause 13.1 and their impact and inter-play on each other.

60. Assuming that clause 13.1 to the extent pointed out by the learned senior counsel for the claimant is in conflict with the aforesaid primary term (y) of clause 4 of the contract agreement, the later shall prevail over the former to the extent of conflict or incongruity. Therefore, all that will happen is that the penultimate para of clause 13.1 to the extent of the liability of the respondent to pay the difference between the enhanced taxes and duties and the taxes and duties payable on the latest date of submission of the tender will be inoperative. But in so far as the rest of the penultimate para of clause 13.1 is concerned, there is no conflict with clause 4 of the agreement. It also needs to be noted that the penultimate para of clause 13.1 is somewhat a reflection of Section 64A of the Sales of Goods Act, 1930. That, however, does not make any difference to either the interpretation of the primary term (y) of clause 4 of the contract agreement or the penultimate and last paras of clause 13.1 of the GCC. This term of Clause 4 of the contract agreement is a permissible departure from Section 64A of the Sales of Goods Act, 1930 in as much as it absolves the respondent from any liability from payment of the taxes, whether they fall or

rise. In *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, it was, inter alia, held that in the case of increase in duties seller would be entitled to recover the same from the buyer provided there was no contract to the contrary, by which he had been precluded from claiming such enhanced duty after the date of the contract. To the same effect is the decision of the Delhi High Court in *Ajudhia Distillery Vs. Delhi Administration and Another*, cited by the learned senior counsel for the claimant. Therefore, parties can enter into a contract where the seller is precluded from claiming increase in the rate of duty after the date of the contract.

61. We now need to focus our attention to clause 26 of the SCC, which requires the contractor to maintain complete record in respect of the payments made on account of taxes, duties, octroi and levies to various authorities and apprise the employer of the complete details of such payments per month. It also caters to a situation where the employer obtains waiver of the taxes and duties etc. in full or part thereof. In such an eventuality the contractor is required to remit the refund so obtained to the employer and in the event of the failure of the contractor to remit the refund to the employer the same is liable to be recovered by the employer from the amounts due for payment to the contractor. Thus this clause specifically postulates that the benefit of waiver of taxes and duties will be available to the employer. It also provides the procedure to be followed for the purpose of making available the benefit to the employer by the contractor.

62. Clause 13.1 of the GCC and Clause 26 of SCC are part and parcel of the overall agreement between the parties and cannot be wished away. These clauses were not deleted and were allowed to co-exist with clause 4 of the contract agreement. In case primary terms (x) and (y) of clause 4 were meant to cover the contingencies created by exemption or waiver notifications, Clause 13.1 of the GCC and Clause 26 of the SCC would have been deleted from the contract.

63. By its letter no MKM-01-0112 (2) dated January 12, 2001, the claimant proposed reduction of price but did not insist on deletion of clause 13.1 of the GCC or clause 26 of the SCC. The learned senior counsel attributed this to the fact that the respondent was not inclined to agree to the changes in the GCC and SCC. In order to bring home the point the learned senior counsel referred us to the letter of the respondent dated December 28, 2000. In this letter, which was in response to the letters of the Claimant dated December 11, 2000 and December 19, 2000, the respondent informed the claimant that it was not acceptable to the respondent to agree to the changes suggested by the claimant in the SCC or the GCC. But in spite of the aforesaid letter of the respondent, the claimant in the very letter no. MKM-01-0112(2) dated January 12, 2001, and another letter no. MKM-01-0124(2) dated January 25, 2001, had suggested modification in certain clauses of the GCC and SCC. It also required deletion and addition of certain clauses. These letters show that the claimant was not deterred by the letter of the respondent dated December 28, 2000, in asking for

amendment or modification or changes in the GCC and SCC etc.

64. In the letter of the claimant no. MKM-01-0124(1) dated January 25, 2001, which contained proposal for price reduction, there was no demand for deletion of Clause 13.1 of the GCC and Clause 26 of the SCC. Again in its subsequent letter dated April 26, 2001, the claimant did not ask for modification or deletion of Clause 13.1 of the GCC and Clause 26 of the SCC.

65. The LOA dated May 2, 2001 was accompanied by annexures consisting of amendment to ITT/GCC/SCC/employer's request. The claimant while acknowledging the receipt of the LOA dated May 2, 2001, by its letter dated May 3, 2001, confirmed its unconditional acceptance by returning the LOA duly signed by it. This means the claimant agreed to abide by clause 13.1 of the GCC and clause 26 of the SCC. As a result of the acceptance of the LOA in toto some amendments were carried out in the GCC and SCC but Clause 13.1 of the GCC and Clause 26 of the SCC were not amended and remained unaffected and untouched. Therefore, these clauses are part of the agreement and have to be given effect to.

66. It needs to be emphasized that exemption from the Customs Duty, Excise Duty and other Indirect Taxes was granted on all equipments including machinery and rolling stock procured by or on behalf of the DMRC for use in Delhi MRTS Project. The exemption was meant for the benefit of the respondent. Having regard to clause 13.1 of the GCC and clause 26 of the SCC, the claimant by its letter dated May 6, 2003, to the General Consultants for the respondent, expressed its desire to discuss the procedure for adjusting the contract price in view of the exemption notifications. This shows that at one stage it was the understanding of the claimant that clause 13.1 of the GCC and clause 26 of the SCC were applicable in the context of the exemption of Customs Duty and Excise Duty on all equipments procured by or on behalf of the DMRC for use in Delhi MRTS Project. Since that was the understanding as late as May 6, 2003, it does not stand to reason how the intention of the claimant could be different from it, while entering into contract with the respondent on May 22, 2001. Therefore, the learned senior counsel for the claimant is not right in asserting that it was the intention of the contracting parties that in the event of exemption from payment of taxes and duties clause 13.1 of the GCC and clause 26 of the SCC will not apply.

67. The learned senior counsel for the claimant submitted that only through the mechanism of deduction of taxes and duties to the tune of Rs. 2064 million lump sum price of the work was reduced. We have pondered over the submission of the learned counsel for the claimant. The argument does not seem to be correct as the price reduction was also achieved through other means as well. This is apparent from the letter of the claimant dated January, 25, 2001. The relevant part of the letter reads as under:

"Price reduction by US\$4,800,000 and by Rs. 41,280,000 have been made for

adoption of R22 for refrigerant of air conditioner and incorporated into the above revised price.

Price reduction by Rs. 142,599,072 has been made as the MKM's special consideration of goodwill to DMRC and incorporated into the above revised price."

68. We are also not impressed by the submission of the learned senior counsel for the claimant that the exemption from payment of Customs Duty and Excise Duty being in the contemplation of the parties, before the execution of the contract, the whole price reduction mechanism was intended to be dependent upon and subject to the grant of exemption from taxes. There is no doubt that the Claimant from the very beginning had been proposing in its various communications that the taxes and duties be either exempted or be borne by the respondent. This is evident from the various letters of the claimant dated Feb. 23, 2000, December 11, 2000, December 19, 2000, January 12, 2001 and January 25, 2001. It appears that subsequently the claimant abandoned this condition. This is obvious from the answers of the claimant contained in its letter dated April 26, 2001. These answers were in response to the letter of the respondent dated April 25, 2001. The material replies given by the claimant read as follows:

"We accept and confirm the following:

(1) we will pay to the Employer the difference between Rs. 1,290 million and the actual total amount of Customs Duty to be borne by us under the Contract, should this be less, and

(2) in the event that such actual amount is greater than Rs. 1,290 million, we will bear the excess.

Meantime, we request the Employer to consider to adopt for RS1 Contract the same conditions applied to other packages already contracted.

(vii) Re: Other Indirect Taxes:

We accept and confirm the following:

(1) we will pay to the Employer the difference between Rs. 774 million and the actual total amount of other indirect taxes to be borne by us under the Contract, should this be less, and

(2) in the event that such actual amount is greater than Rs. 774 million, we will bear the excess.

We agree and confirm that the questions under your letter GC/RS1/GCC/6323 dated April 25, 2001, and our responses under this letter will be incorporated in the Contract upon mutual agreement. Other questions and responses to be included in the Contract shall be discussed."

69. The fact that the proposal in respect of the reduction of taxes was not made subject to the grant of exemption stands further clarified from the Letter Of

Acceptance (LOA) dated May 2, 2001, which makes it incumbent on the part of the claimant to pay the difference between the declared amounts of Import Tax and Customs Duty and other Indirect Taxes and the actual amounts paid to the concerned authorities, should these be less. This obligation of the claimant was not made subject to the grant of exemption from the payment of taxes and duties. Even otherwise the liability of the claimant to pay the aforesaid difference could not be made subject to exemption from taxes and duties as that would have been incompatible with the aforesaid obligation.

70. The fact that the claimant confirmed the LOA unconditionally by its communication dated May 3, 2001, fortifies the position that the reduction of contract price by deduction of specified amount of taxes was not subject to the grant of exemption from payment of taxes. There is nothing in clause 4 of the contract agreement which shows that the reduction in the lump-sum price of the contract on one of the counts of the deduction of the specified amount of taxes and duties was not made conditional on the grant of exemption or waiver from payment of taxes. Therefore, the argument of the learned senior counsel for the claimant that the whole exercise of price reduction was based on the assumption of exemption from payment of taxes and duties cannot be sustained. While holding so, we do not discount the fact that there was an expectation that the taxes and duties may be exempted. Clause C2.3 of the Instructions to Tenderers to which our attention was drawn for the purpose of showing that it was being contemplated from the outset that there could be partial or complete exemption or waiver of taxes, itself provides that in case of such exemption or waiver the contractor will be advised of the process to be followed to obtain the refund from the concerned authorities and the contractor shall arrange for the remittance of the refund to the employer. This being so, the fact that clause 13.1 of the GCC and clause 26 of the SCC were kept intact also indicates that the parties wanted to reserve the right of the employer (respondent) to claim the benefit of the exemption in case it comes through. As clause 4 of the contract agreement stands, unless words are added to it, it cannot be held that clause 4 supplies to the situation created by the exemption notifications. Clause 13.1. of the GCC and clause 26 of the SCC, which deal with exemption from payment of taxes and duties cannot be ignored, as otherwise it will amount to creating a new contract. We cannot permit demise of these two very vital clauses or emasculation of their content. These clauses have been deliberately retained in the agreement to cover contingencies that may be created by the exemption notifications, which were in the contemplation of the parties."

15. The submission of the Petitioner is that the award made by the Arbitral Tribunal is patently illegal as the interpretation adopted by the Tribunal is contrary to the express terms of the Contract Agreement viz. Clause 4 of the Contract Agreement, and the said interpretation is such that it cannot be said to be a plausible one, i.e. one of the several possible interpretations of which the said clause is capable. The Petitioner submits that the interpretation adopted by the Tribunal breaches section 28(3) of the Act.

16. Learned senior counsel for the petitioner, Mr. Parag Tripathi, submits that the Tribunal failed to appreciate that the clause 4 of the Contract Agreement superseded clause 13.1 of the GCC with regard to the payment of lump-sum price and fixation of liability towards the customs and excise duties. GCC is a document which was contained in the Notice for Invitation of Tender and was a general provision applicable to all person/entities who participated in the tender process including the petitioner. Clause 13.1 of GCC is a mere embodiment of S. 64A of the Sale of Goods Act 1963 into the GCC. However, after the finalisation of the lump-sum price and pursuant to extensive negotiations between the parties, the position existing under clause 13.1 of GCC was altered/departed from, leading to the formulation of clause 4 of the contract agreement. He further submits that the object behind insertion of clause 4 was three fold: (i) the fixed lump-sum price shall include the customs duties and other indirect tax component of INR 2064 million (ii) the respondent shall not be liable towards any customs duties, excise duties or indirect taxes (iii) in case the actual amounts paid towards tax by the petitioner are less than the "declared amount" i.e. INR 2064 million, the petitioner shall pay the difference to the respondent but, on the other hand, if they are more than the "declared amount" then the petitioner was to bear the burden of the same. The petitioner also relies on clause 1.6 of GCC - which prescribes the priority of documents. Whereas the contract agreement is enlisted as the top priority, the SCC and GCC are enlisted much below in priority.

17. Mr. Tripathi submits that the interpretation of clause 4 of the contract agreement adopted by the Arbitral Tribunal - to the effect that it shall not apply in the case of a complete exemption on payment of customs and excise duty, is not borne out from a plain reading of the said clause. He submits that clause 4 of the contract agreement would apply whether, or not, any tax exemption is granted. He further submits that the tax exemption came into force with effect from 01.04.2003 and was prospective in nature.

18. Mr. Tripathi submits that, as a matter of fact, the petitioner had paid Rs. 17.76 crores towards indirect taxes. Therefore, factually, clause 4 of the contract agreement would apply. Mr. Tripathi further submits that the contract agreement was the special provision and would prevail over the GCC - which were general provisions/conditions of contract, and not the other way round. He submits that the use of the phrase "subject to adjustment in accordance with the provisions of GCC" in clause 4 of the contract agreement does not imply that a specific term of the contract agreement dealing with adjustment for changes in indirect tax liability must be read as subordinate to the general term addressing a similar issue in the GCC.

19. On the other hand, learned counsel for the respondent submits that the Arbitral Tribunal came to a clear finding that clause 4 of the agreement applies when there is no exemption, remission or reduction of customs duty, excise duty or other indirect taxes. In such a situation, the contracted price is limited in a manner that DMRC will pay to the petitioner towards taxes-maximum of INR

2064 million. If the actual taxes are in excess of INR 2064 million, they were to be borne by the petitioner. Clause 4 has no application when there is an exemption, remission or reduction of custom duty etc. and this aspect is covered by clause 13.1 of the GCC and clause 26 of the SCC. The scope of clause 13.1 of GCC and clause 26 of SCC is clear - that whatever benefit accrues on account of such exemption, should be passed onto the DMRC. That obligation is not restricted to INR 2064 million.

20. Respondent submits that the award in question does not suffer from any patent illegality, and the interpretation adopted by the Tribunal qua Clause 4 of the Contract Agreement, Clause 13.1 of GCC read with clause 26 of the SCC, is a plausible interpretation.

21. A bare perusal of the impugned award would show - as is evident from the submissions of the parties recorded herein above, that the impugned award merely seeks to interpret the contractual clauses in question. In such a situation, the scope of interference by the Court in proceedings under Section 34 of the Act is extremely limited. The Court would interfere with the interpretation of a contractual clause - as adopted by the Arbitral Tribunal, only if the adopted interpretation is such that it goes contrary to the express contractual terms; is such that no reasonable person would adopt, or; is patently perverse or absurd. Thus, the issue that arises for consideration is whether the view of the Arbitral Tribunal is a plausible view in the facts of the present case.

22. In *The National Thermal Power Corp. Vs. R.S. Avtar Singh and Co. and Another*, this court held that when the view adopted by the arbitrator is a plausible view, then the court cannot interfere with the decision made. It observes as follows:

"22. It was also submitted by the counsel appearing for the petitioner that the execution of work was completed in all respects up to stage three and so the learned arbitrator should not have allowed escalation so far payment relating to stages 4 and 5 as per Clause 48.1.0 of the agreement is concerned. The aforesaid submission relates to interpretation of Clause 48.1.0. of the agreement. It is settled law that the interpretation of the contract is a matter for the arbitrator, on which court cannot substitute its own decision. It is held in a decision of the Supreme Court in *Sudershan Trading Co. v. The Govt. of Kerala* reported in AIR 1989 SC 809 that if on a view taken by a contract, the decision of the arbitrator on certain amounts awarded, is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Even in the decision of the Supreme Court in *Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority*, it was held by the Supreme Court that if two views are possible, out of which one view is accepted by the arbitrator, which is plausible, the same cannot be interfered with by the court exercising jurisdiction under Section 30 and 33 of the Arbitration Act of 1940. Therefore, even under the provisions of Sections 30 and 33 of the 1940 Act, such a submission of the counsel for the petitioner could not have been accepted. In the 1996 Act, said

interpretation given by the arbitrator cannot be assailed by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, as none of the clauses empowers the court to deal with the same."

23. The Supreme Court in *State of U.P. Vs. Allied Constructions*, held that:

"4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine. Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering."

24. In *National Highways Authority of India v. Som Datt Builders-NCC-NEC (JV) and Ors.* in FAO(OS) 427 of 2007 decided on 17.11.2009, this Court observed as follows:

"21. We are conscious of the fact that primarily it was for the Arbitral Tribunal to interpret the contractual terms and that if the interpretation adopted by the Arbitral Tribunal is a plausible interpretation i.e. if it is one of the various interpretations that could reasonably be given to the contract, then the Court would not interfere with the award merely because, according to the Court's understanding, another interpretation is preferable. However, it is equally well settled that if the interpretation adopted by the Arbitral Tribunal in respect of the contractual terms is so unreasonable that no reasonable person would adopt, which is so unfair and unreasonable as to shock the conscience of the Court, the illegality is one which goes to the root of the matter and is not merely a trivial illegality and the interpretation of the contractual terms goes contrary to the contractual terms themselves and is patently incorrect, the court while hearing the objections to such an award, would be justified in interfering with such an award and setting aside the same (See *ONGC Ltd. (supra)* paragraphs 55 and 56)."

25. Thus, the court would interfere with the arbitral award, if the interpretation adopted in the making of the award is neither plausible, nor reasonable, and is in conflict with the terms of the contract agreement. If the interpretation adopted by the arbitrator is not the only possible view, it being one of the several plausible views-without any patent illegality in the conclusions drawn by the arbitrator, it is beyond the scope of jurisdiction of this court under section 34 of the Act, to interfere with the award.

26. Clause 4 of the contract agreement itself provides that the total cost of the works is "subject to adjustment in accordance with the provisions of GCC". Therefore, the submission of the petitioner with regard to priority of documents, in my view, loses significance. If the intention of the parties was that clause 4 of the Contract Agreement should override Clause 13.1 of the GCC, there was no need to retain Clause 13.1 of the GCC, or provide in clause 4 of the Contract Agreement that the fixed lump sum price is subject to adjustment in accordance with the provisions of the GCC. Clause 4 of the contract agreement itself having stipulated that the total cost of work is subject to adjustment in accordance with the provisions of GCC, the terms of the GCC- including clause 13 thereof, have to be read side by side with clause 4 of the contract agreement itself. There is no question of ignoring clause 13 of the GCC by giving preference to clause 4 of the Contract Agreement. Clause 4 of the contract agreement proceeds on the basis that the petitioner contractor assumed a total liability of Rs. 1,290,000,000/- and Rs. 774,000,000/- as import tax and customs duty, and other indirect taxes in India, respectively, in its computation while making its final bid. Clause 4 does not say that the liability of the Petitioner Contractor qua reimbursement of taxes/duties would be limited to Rs. 2064 million. In fact, clause 4, read with clause 13.1 of the GCC show that the fixed lump sum price itself was subject to adjustment in accordance with provisions of the GCC. In the contract, there is nothing to suggest that if the amounts assumed by the petitioner to be payable on account of the aforesaid taxes (i.e. Rs. 2064 million) was less than actual liability that would have been incurred - had the exemption notifications not been issued, the petitioner would be entitled to retain with itself the amount of taxes actually saved on account of the exemption notifications.

27. The Arbitral Tribunal cannot be faulted with the interpretation adopted by it as all terms of the contract - be they a part of the contract agreement or the SCC or GCC have to be given a meaningful interpretation and none of them can be wished away. On a conjoint reading of clause 4 of the contract agreement with clause 13.1 of the GCC, it becomes evident that if the saving on account of payment of taxes and duties exceeds the amount declared by the petitioner (of Rs. 1,290,000,000/- and Rs. 774,000,000/-), such saving on account of taxes and duties has to be passed on to the employer, i.e. the respondent. Whether, or not, the petitioner indeed had to bear any amount of indirect taxes as claimed by it (of Rs. 17.76 crores) is a matter of detail and would, at the highest, entitle the petitioner to adjustment to that extent.

28. Clause 13.1 of the GCC in no uncertain terms, inter alia, provides that the contract price shall be adjusted to take account of any increase or decrease in costs resulting from change of customs duties, excise duties, sales tax and legislations of India, made after the latest date of submission of tender. It further goes on to state that in the event of exemption or reduction of customs duties or excise duties, sales tax or any other cess levy being granted by government in respect of the works, the benefit of the same shall be passed on to the employer, namely, the DMRC. Similarly, clause 26 of the SCC, inter alia, provides that "Should the employer obtain a waiver for the above taxes, duties etc. in full or part thereof, the contractor will be advised on the process to be followed to obtain refund of such taxes etc. from the concerned authority. The Contractor shall arrange for the remittance of the refund so obtained to the Employer. In case of failure by the Contractor to remit the refund to the Employer, the same will be recovered by the Employer from the amounts due for payment to the Contractor or as debt due from the Contractor. If the Contractor fails to take the required action to obtain refund, the Employer may take action in accordance with Sub-Clauses 15.1 and 15.2 of General Conditions of Contract." Pertinently, the Petitioner itself invoked clauses 13.1 of the GCC and 26 of the SCC when it sent the communication dated 06.05.2003 to the General Consultant of the Respondent. Therefore, the Tribunal rightly rejected the stand of the Petitioner that clauses 13.1 of the GCC and 26 of the SCC give way to clause 4 of the Contract Agreement.

29. There is another way to look at the situation. The petitioner cannot take advantage of its own miscalculation (assuming that to be the case), at the inception stage, with regard to the amount of customs and excise duties payable on the contracted supplies. If the petitioner proceeded to assume a lower amount of liability towards customs, excise and other duties and taxes, than that which was actually payable (prior to grant of exemption), and to declare the amount computed by it (though presumably erroneously), it cannot seek to profit on account of later exemption notifications, by claiming that the only amount which could be deducted on account of grant of exemptions is the declared amount of excise and customs duties etc., and not the actual saving made by it. It is to deal with such a situation that clause 13.1 of the GCC and clause 26 of the SCC were inserted in the contract, and clause 4 which stipulates the total cost of works was specifically made subject to adjustment in accordance with the provisions of the GCC.

30. The GCC in clause 13.1 very clearly states that if any benefit arises due to exemption in Custom Duty or Excise Duty to the claimant, the said benefit should be passed on to the employer, when it states:

"In the event of exemption or reduction of Customs Duties, Excise Duties, Sales Tax or any other Cess/Levy being granted by the Government in respect of the Works, The benefit of the same shall be passed on to the Employer."

31. If the intention of the parties, at the time of entering into the contract was

not to pass on the benefit, beyond INRs 2064 million, to the employer in case of grant of any tax/duty exemption at a later stage, they would not have included clause 13.1 in the GCC, which forms part of the Contract. It was inserted with an aim to avoid any confusion as to who the beneficiary will be, if during the existence/course of the contract, any tax/duty exemption is granted by the Government. In my opinion, the Tribunal has rightly interpreted clause 4 of the contract agreement and clause 13.1 of the GCC.

32. It is settled law that if the arbitrator has applied his mind to the pleadings, the evidence adduced before it, and the terms of the contract, the court would not reappraise the matter as if it were an appeal. Interpretation of contractual terms is a matter within the domain of the arbitrator. Even if the interpretation adopted by the arbitrator is not the only possible view, it being a plausible view-without any patent illegality in the conclusions drawn by the arbitrator, it is beyond the scope of jurisdiction of this court under section 34 of the Act to interfere with the award on this aspect.

33. In view of the aforesaid discussion, I am of the view that there is no merit in these objections of the Petitioner. Accordingly, the same are dismissed, leaving the parties to bear their respective costs.