

(2014) 12 BOM CK 0129

In the Bombay High Court

Case No : Appeal (L) No. 372 of 2014 in Arbitration Petition No. 952 of 2013

Oil and Natural Gas Corporation Ltd.

APPELLANT

Vs

Dolphin Drilling Ltd.

RESPONDENT

Date of Decision : 20-12-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 24, 28, 31, 31(3), 31(7)
Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 23

Citation : (2014) 12 BOM CK 0129

Hon'ble Judges : Mohit S. Shah, C.J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Pradeep Sancheti, Sr. Counsel, Darshit Jain and Pratik Gandhi i/b The Law Point, Advocate for the Appellant; Rahul Narichania, Sr. Counsel, Shardul Thacker, Sunilkumar V.N. and Pratiksha Avhad i/b Mulla and Mulla and Craigie Blunt and Caroe, Advocate for the Respondent

Judgement

B.P. Colabawalla, J.—In this Arbitration Appeal under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), the Appellant (ONGC) seeks to challenge the order dated 26th March, 2014 ("impugned order") passed by the learned Single Judge dismissing the Appellant's Arbitration Petition filed under section 34 of the Act. The Appellant filed the Petition under section 34 of the Act that took exception to the Arbitration Award dated 23rd April, 2013 ("impugned Award") passed by the Arbitral Tribunal under which the Respondents were granted certain money claims (both in USD as well as INR), interest and costs.

2. Under an Agreement dated 17th October, 2003 ("Agreement") entered into between the Appellant and the Respondent, the Appellant agreed to take on charter hire the Respondent's Deep Water Drilling Rig (Belford Dolphin) alongwith services on an integrated basis. Under the said Agreement, the Respondent agreed to perform drilling operations for and on behalf of the Appellant in the offshore waters of India. Though the Agreement was signed on

17th October 2003, the Agreement became operative from 1st August, 2003. The primary term of the Agreement was for a period of three years from the date of commencement but the same was extended under the provisions of the Agreement upto 10th April, 2007.

3. As disputes arose between the parties in relation to this Agreement, the same were referred to arbitration. Before the Arbitral Tribunal, the Respondent herein was the Claimant and the Appellant was the Respondent. The claims made by the Respondent before the Arbitral Tribunal generally fell under the following heads:-

- (1) Claim in respect of equipments "Lost in Hole" (LIH);
- (2) Claim in respect of Day Rate and Integrated Services invoices;
- (3) Claim for a wrongful deduction from the invoice for De-mobilisation fees;
- (4) Interest on delayed payments in relation to claims mentioned in items (1) to (3) above as well as on invoices that were paid, but belatedly; and
- (5) Claim for extension of contract and Quantum Meruit.

4. At the outset it should be mentioned that as far as item 5 is concerned, i.e. the claim regarding extension of contract and Quantum Meruit, the Arbitral Tribunal dismissed the same. The Respondent herein has not challenged the Arbitral Award and in view thereof, no arguments have been advanced by either party with reference to this claim.

5. Be that as it may, in answer to the aforesaid claims, the Appellant herein filed its statement of defence. On the basis of the pleadings before it, the Arbitral Tribunal framed the following issues:-

"A (i) Whether the Claimant is entitled to the claim of US \$ 3,019,476.25 and Rs. 5,48,603.85 on account of Lost in Hole (LIH) value of its equipments under Clause 16.3 of the Agreement?

(ii) Whether disputing by the Respondent of the Claimant's LIH invoices is barred by lapse of time under Clause 7.4 of the Agreement?

(iii) Whether the Claimant is entitled to interest amount of US \$ 15,98,728.92 and Rs. 2,93,174.60?

(iv) Whether the claim has been rightly rejected by the Respondent as the invoices related to payments on account of operational lapse, failure of Contractor's equipments, loss or damage by normal wear and tear and loss due to negligence of the Claimant?

(v) Whether the Respondent has rightly refused the payments under Clause 16.3 of the Agreement?

(vi) Whether the claims on account of LIH are barred by limitation as having been preferred beyond three years of the cause of action?

B(i) Whether the Claimant is entitled to US \$ 3,27,902 on account of Demobilisation Fee being the amount short-paid by the Respondent?

(ii) Whether the Claimant is entitled to interest @ 12 % per annum from 12-05-2007 (the date falling 30 days after the receipt by the Respondent of the invoice)?

(iii) Whether the Respondent has rightly made the recovery of US \$ 3,27,901.58 from the Claimant's Demobilisation Fee Invoices on account of Non-operating Day Rate (NODR) from Equipment Breakdown rate (EBDR)?

C(i) Whether the Claimant is entitled to US \$ 8,566,761.29 on account of Day Rate?

(ii) Whether under Clause 7.4 of the Agreement, the Respondent's right to question part of Day rate Invoices is barred by time?

(iii) Whether the Claimant is entitled to payment of US \$ 15,538,411.26 on the principle of quantum meruit for the services rendered (performance of the Rig) between 13-02-2007 and 10-4-2007?

(iv) Whether the Claimant is entitled to interest (for the period upto 16-06-2010) amounting to US \$ 5,895,125.36?

(v) Whether the Agreement was automatically extended under Clause 1.3 of the Agreement and the extended period was added to the primary term of the Agreement?

(vi) Whether the extended period falls within the duration of the Agreement?

(vii) Whether the Claimant is entitled to payment only at the Contract Rate for such extended period?

(viii) Whether the Claims are barred by limitation as having been preferred beyond three years of the accrual of cause of action?

D(i) Whether the Respondent was obliged to settle the Claimant's invoices within 15 days under Clause 7.1 of the Agreement?

(ii) Whether the Respondent has delayed in settling/payment of Claimant's invoices?

(iii) Whether the Claimant is entitled to payment of US \$ 2,557,970.93 and Rs. 1,42,94,905.09 on account of interest @ 12 % per annum for delayed payment of invoices under Clause 7.1 read with Clause 16.3 of the Agreement?

E(i) Whether the Claimant is entitled to an Award of US \$ 30,010,521.72 and Rs. 1,48,43,508.94 as set out in Schedule 7 of the Statement of Claim?

(ii) Whether the Claimant is entitled to future interest (from the date of filing of the Claim) @ 12 % per annum?

F. Costs?"

6. The Respondent (Original Claimant) in support of its case, led evidence of its witnesses who were cross-examined by the Appellant. Similarly, the Appellant's witness was also examined in support of its case who, in turn, was cross-examined by the Respondent.

7. After hearing the parties and considering the terms of the Agreement as well as the evidence on record (both documentary and oral), the Arbitral Tribunal in paragraph 79 of the impugned Award, answered the aforesaid issues as follows:-

"79. The issues are answered as follows:-

A(i) The Claimants are entitled to US \$ 2,955,563.38 and INR 5,48,603.85 together with interest thereon @ 4 % per annum in respect of each invoice set out in Schedule 1 of the Statement of Claim which is payable in dollars except invoice 510-058. Interest shall be paid from 30th day after the date of the invoice till the date of the award. Interest @ 12 % per annum for the above period shall be paid on invoices in INRs.

(ii) No.

(iii) Interest shall be calculated as per answer to issue A(i). The same is payable by the Respondent to the Claimant.

(iii) See the discussion hereinbefore.

(iv) No except for invoice 510-058.

(v) No.

B(i) Yes.

(ii) The Claimant is entitled to interest @ 4 % per annum from 12.05.2007 till the date of the award.

(iii) No.

C(i) The Claimant is entitled to USD 8,565,790.60 as the claim for USD 970.69 (invoice 510-373) is not pressed.

(ii) No.

(iii) No.

(iv) The Claimant is entitled to interest on the amount payable under each invoice which remained unpaid for the period starting from 30 days after the date of the invoice till payment, @ 4 % per annum on USD payments and @ 12 % per annum on INR payments. On the unpaid demobilisation fee, interest will be paid @ 4 % per annum from 12.05.2007 till the date of the award. In respect of invoices paid in part or in full before 24.12.2005, the claim for interest is barred by limitation.

(v) Yes.

(vi) Yes.

(vi) Yes.

(vii) No, except for claim for interest on invoices paid/partly paid prior to 24.02.2005.

D(i) No, for reasons set out earlier. The invoices should have been settled within a reasonable period of 30 days.

(ii) Yes.

(iii) See the answer to issue C(iv).

E(i) As above.

(ii) The Claimant is entitled to interest from the date of commencement of arbitration upto the date of the award @ 4 % on USD claims, and @ 12 % on INR claims. But if the award amounts are not paid within 3 months of the date of the award, interest will be paid by the Respondent to the Claimant @ 4 % per annum on amounts in USD, and @ 12 % per annum on amounts in INR from the date of the award till payment.

F The Respondent shall pay to the Claimant costs fixed at Rs. 39,63,885 and USD 997,565."

8. After answering the issues as set out above, the Arbitral Tribunal, in paragraph 80 of the impugned Award directed the payment of certain amounts as follows:-

"80. There will, therefore, be an award in favour of the Claimant and against the Respondent in the following terms:

i) The Respondent shall pay to the Claimant USD 2,955,563.38 and INR 5,48,603.85.

ii) The Respondent shall pay to the Claimant USD 8,565,790.60.

iii) The Respondent shall pay to the Claimant USD 327,902.

iv) The Respondent shall pay to the Claimant interest on delayed payments; interest to be determined as per paragraphs 73 to 76 hereinabove.

v) The amounts in (i), (ii) and (iii) above in USD shall be paid with interest thereon @ 4 % per annum for the period starting from 30 days from the date of each invoice till the date of the award. For the amount in INR, interest will be paid as aforesaid but at the rate of 12 % per annum.

vi) If the above amounts in (i), (ii), (iii), (iv) and (v) are not paid within three months from the date of the award, the same shall carry interest @ 4 % on USD claims and @ 12 % on INR claims with effect from the date of the award."

9. In addition to the aforesaid claims, the Arbitral Tribunal further awarded costs in favour of the Respondent (Original Claimant) quantified at Rs. 39,63,885/- and USD 997,565/-. In terms of INR, the costs awarded come to approximately Rs. 6.5 crores.

10. Being aggrieved by the impugned Award, the Appellant herein preferred an Arbitration Petition under section 34 of the Act before the learned Single Judge raising various contentions and prayed for setting aside the impugned Award. After hearing the parties and going through the record, the learned Single Judge by a very elaborate order and judgment dated 26th March, 2014 dismissed the Arbitration Petition, save and except in so far as it related to awarding interest on interest as set out in paragraph 80 (vi) of the impugned Award. As far as the direction given in paragraph 80(vi) of the impugned Award regarding interest is concerned, the learned Single Judge set aside the said direction in so far as the impugned Award granted interest on interest. In other words, the learned Single Judge held that no further interest can be awarded on item (v) of paragraph 80 of the impugned Award. We may mention here that there is no challenge to this part of the order of the learned Single Judge by the Respondent herein and therefore as far as this part of the impugned order is concerned, the same has now attained finality and the impugned Award stands modified to that extent. The Appellant (ONGC), being dissatisfied by a major part of this order in so far as it upheld the impugned Award, is before us in Appeal under section 37 of the Act.

11. Before dealing with the rival contentions, we have to be mindful of the fact that this Appeal is from an order of the learned Single Judge passed under section 34 of the Act substantially upholding the Award passed by the Arbitral Tribunal. It is now too well settled that a challenge to an Arbitral Award is based on certain limited parameters and the Court hearing a challenge under section 34 of the Act is not sitting in Appeal over the Award. The scope of challenge therefore under section 34 of the Act is limited and the grounds on which an Award can be challenged have been the subject matter of several judicial pronouncements of the Supreme Court which we shall now refer to briefly.

12. In the case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , the Supreme Court, after relying upon its earlier decision in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , held thus:-

58. In Renusagar Power Co. Ltd. Vs. General Electric Co., this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., (for short "ONGC"). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,

wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, this Court, apart from the three grounds stated in *Renusagar* [1994 Supp (1) SCC 644], added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See *State of Rajasthan and Others Vs. Basant Nahata*, .)

61. In *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, this Court observed: (SCC pp. 727-28, para 31)

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar* case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

62. We are not unmindful that the decision of this Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. (See The Law and Practice of Arbitration and Conciliation by O.P. Malhotra, 2nd Edn., p. 1174.)

13. In the case of ONGC Ltd. Vs. Garware Shipping Corpn. Ltd., , the Supreme Court inter alia held that there was no proposition that the Courts would be slow to interfere with the arbitrators' Award even if the conclusions were perverse and even when the very basis of the arbitrators' Award was wrong. Paragraph 30 of the said judgment reads as under:-

"30. There is no proposition that the courts could be slow to interfere with the arbitrator's award, even if the conclusions are perverse, and even when the very basis of the arbitrator's award is wrong. In any case this is a case where interference is warranted and we set aside the norms prescribed by the arbitrator as upheld by the learned Single Judge and the Division Bench."

14. Once again, the Supreme Court in the case of Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, , culled out the grounds on which the Court can interfere with an Award under section 34 of the Act. Paragraphs 20 and 21 of the judgment read thus:-

"20. In Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, the following principles laid down in paras 13 and 14 are relevant for the disposal of the present case: (SCC pp. 450-51)

"13. This Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects

the rights of the parties, open to interference by the court under Section 34(2) of the Act. This Court observed: (SCC pp. 718 & 727-28, paras 13 & 31)

"13. The question, therefore, which requires consideration is--whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of

the parties. Under sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be-- whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

31. ... in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case Renusagar Power Co. Ltd. Vs. General Electric Co., it is required to be held that the award could be set aside if it is patently illegal. The result would be--award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

14. The High Court did not have the benefit of the principles laid down in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

15. In view of the above judicial pronouncements, one thing is clear. Interference by the Court under section 34 of the Act is limited and it is only in certain circumstances that the Court can interfere with the Award passed by the Arbitral Tribunal. If an Award is contrary to the substantive provisions of law or the

provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the Contract, the same would be patently illegal and open to interference by the Court under section 34 of the Act. For instance, if the Arbitral Tribunal has not followed the mandatory provisions prescribed under sections 24, 28 or 31(3) which affects the rights of the parties, such an Award would be liable to be interfered with by the Court under section 34 of the Act. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and therefore the Award is patently illegal which could be set aside under section 34 of the Act. The principles on which an Award can be interfered with, have been very eloquently set out in paragraph 21 of the judgment of the Supreme Court in the case of Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, and therefore we see no need to reproduce the same again in this judgment.

16. We may hasten to add that the question of interpretation of the contract is within the scope and jurisdiction of the Arbitral Tribunal and the Court will not interfere with the Award merely because in its opinion, the interpretation that is sought to be put on a particular clause of the Contract was incorrect. If the interpretation is a plausible one, then the Courts will not interfere with the Award under section 34 of the Act. It is only when the Award is contrary to the terms of the contract, will the court interfere with the same. In other words, if only one interpretation is possible, then the court would be justified in interfering with the Award on the ground that it is contrary to the terms of the contract, and not otherwise.

17. Keeping these principles in mind, we shall now proceed to examine the challenge to the impugned Award in so far as the Arbitral Tribunal granted the claims of the Respondent in respect of various invoices and which have been upheld by the learned Single Judge in the impugned order.

CLAIM IN RESPECT OF EQUIPMENTS "LOST IN HOLE" (LIH):-

18. The first claim before the Arbitral Tribunal was in respect of equipments Lost in Hole (LIH). Before dealing with the individual invoices under this claim, it would be necessary to set out the clauses in the Agreement in relation thereto. Clause 16 provides for loss or damage to the equipment or the Hole. It is common ground before us that for the purposes of this claim, clauses 16.1 and 16.3 are relevant and read thus:-

"16.1 LOSS OF CONTRACTOR'S DRILLING UNIT

Except as otherwise specifically provided in this Agreement, any damage to or loss of the Drilling Unit (which, for the purpose of this Article 16.1 shall be deemed to include all Contractor's and its subcontractors equipment) and regardless of the cause or reason for said loss, shall be the loss of the Contractor, its underwriters or insurers and Contractor indemnifies Operator, its co-licensees and its and their affiliate companies, agents, employees, invitees, servants, their underwriters or insurers (other than Contractor's) and their employees against

any claim whatsoever or responsibility for any damage to or loss of the Drilling Unit or any other equipment or property of Contractor or Contractor's sub-contractors furnished or intended for use in the operations hereunder undertaken.

16.3 LOSS OR DAMAGE TO CONTRACTOR'S DOWN HOLE EQUIPMENT:-

Operator shall reimburse Contractor for loss of or damage to Contractor's down hole equipment, as under, provided that such loss or damage is not occasioned by normal wear and tear or negligence on the part of the Contractor.

(a) In the case of Contractor's down hole equipment being damaged, Operator shall reimburse Contractor such repair cost, provided however, that Operator shall not be required to reimburse Contractor any amount greater than that which would have been due had such equipment been lost and, therefore, calculated under sub-section (b) herein below:-

(b) In the case of Contractor's down hole equipment being lost, Operator will reimburse Contractor an amount limited to the original cost (FOB nearest port) reduced by depreciation at the rate of 10 % per year to be proportioned for each completed month from the date of purchase of the lost equipment/tool subject to maximum depreciation of 50%. The contractor should declare the cost alongwith the date of purchase of each equipment Unit with documentary evidence prior to mobilization of the Drilling unit. The above declared cost and date of purchase shall be taken for working out their claim for Lost in hole of their equipment."

19. Clause 16.1 inter alia provides that except as otherwise specifically provided in this Agreement, any damage to or loss of the Drilling Unit (which for the purpose of Article 6.1 shall be deemed to include all the Contractor's and its sub-contractors' equipment) would be to the account of the Contractor. This would be regardless of the cause or reason for the said loss or damage. The exception as mentioned in clause 16.1 is inter alia set out in clause 16.3 which deals with loss or damage to the Contractor's Down Hole Equipment. The said clause inter alia stipulates that loss or damage to the Contractor's Down Hole Equipment would be reimbursed by the Operator (ONGC) provided such loss or damage was not occasioned by normal wear and tear or negligence on the part of the Contractor. In other words, if any Down Hole Equipment was lost or damaged during drilling operations, then the Contractor was entitled to be reimbursed for the same by the Operator (ONGC), unless of course, the loss or damage was occasioned either due to (1) wear and tear of the equipment or (2) negligence on the part of the Contractor.

20. Under clause 16 of the Agreement, the Respondent herein (claimant) made a claim under 14 invoices, the details of which are given at page 10 of the impugned Award. The Arbitral Tribunal allowed the claim with reference to 13 invoices and rejected the claim with reference to one invoice (Invoice No. 510-058). The rejection of this invoice has not been called into question before the learned Single Judge and therefore the findings with reference to the same by the Arbitral Tribunal have attained finality. With reference to the claim for

equipments Lost in Hole, Mr. Sancheti, the learned Sr. Counsel appearing on behalf of the Appellant, called into question before us only 10 invoices, the details of which are as follows:-

It would therefore be necessary to look at each of these invoices and the findings given by the Arbitral Tribunal in relation thereto to ascertain whether the Arbitral Tribunal had misdirected itself in granting the amounts as mentioned in the aforesaid invoices based on the parameters pronounced by the Supreme Court elaborated earlier.

INVOICE NO. 510-208 (Sr. No. 1)

21. At the outset, Mr. Narichania, the learned senior counsel appearing on behalf of the Respondent submitted that there was no challenge to this invoice in the Arbitration Petition filed before the learned Single Judge under section 34 of the Act. He therefore submitted that the Appellant cannot be allowed to challenge the claim under this invoice now in appeal before us. On perusing the Arbitration Petition, we find this submission of Mr. Narichania to be well founded. Despite several invoices being specifically challenged in the Arbitration Petition, there is no specific challenge to the amounts granted under this invoice. However, since the learned Single Judge has taken into consideration the challenge to this invoice, we too shall examine the same to see if the conclusions reached by the Arbitral Tribunal in relation to grant of the claim under this invoice, suffers from any perversity or patent illegality which would entitle this Court to interfere with the Arbitral Award.

22. This invoice relates to an incident which took place on 29th March 2004 during the drilling operations, when the drills" string got stuck and could not be released. The string was sheered at free point resulting in the loss of equipment below the free point in the Well. An item-wise list of the equipments Lost in Hole was filed before the Arbitral Tribunal and there is no dispute either with reference to the list of equipments lost or the value thereof. The Appellant attributed the loss due to the Respondent's negligence in proper planning and designing of the Well, which according to the Appellant, was the reason why the string got stuck and could not be released. According to the Respondent, as per the Agreement, the design of the Well was the responsibility of the Appellant and the Respondent's role in that regard was purely advisory in nature. After considering the relevant clauses of the Agreement as well as the evidence led by the respective parties in this regard, the Arbitral Tribunal came to the conclusion that no particulars of negligence were disclosed by the Appellant in its evidence. In view thereof, the Arbitral Tribunal held that the Respondent herein was entitled to the amounts mentioned in the said invoice under clause 16.3 of the Agreement. The learned Single Judge, after hearing the parties and perusing the impugned Award, came to the conclusion that the Arbitral Tribunal has given its findings on the basis of appreciation of evidence led by the parties before it. This essentially being a matter of appreciation of evidence and the conclusions drawn by the Arbitral Tribunal on the basis of the reasoning indicated in the impugned

Award, do not appear to suffer from any infirmity, was the finding of the learned Single Judge.

23. Mr. Sancheti, the learned Senior Counsel appearing on behalf of the Appellant, submitted that the Arbitral Tribunal as well as the learned Single Judge were in grave error in shifting the burden of proof on the Appellant to establish negligence on the part of the Respondent. Mr. Sancheti submitted that the reasoning given by the Arbitral Tribunal whilst rejecting invoice No. 510-058, ought to have been the reasoning given for rejecting this invoice also, as well as all other invoices with reference to the claims made for equipments "Lost in Hole". He submitted that the Arbitral Tribunal having held that "there was no satisfactory evidence as to unusual and unanticipated circumstances intervening to speed up the setting of cement" in relation to invoice No. 510-058 (which claim was rejected by the Arbitral Tribunal), failed to apply the same test whilst granting the claim under this invoice as well as all other invoices under this claim. The Arbitral Tribunal committed a patent error in not asking and answering this crucial question which resulted in patent contradictions in the Award, was the submission.

24. We do not agree. Invoice No. 510-058 related to operations of cementing down a Well. After cementing was completed, the drills" string was required to be pulled out of the Hole before the cement set. Whilst doing the actual cementing, the cement hardened faster than anticipated and the string could not be pulled out and had to be cut leaving 17 strands inside the Hole. The Arbitral Tribunal held that there was no clear evidence about the reason and/or the cause for which the cement hardened faster than anticipated and neither was there any satisfactory evidence as to any unusual or unanticipated circumstances that caused the speeding up of the setting of the cement. Taking into consideration the evidence before it, the Arbitral Tribunal held that it was reasonable to conclude that the faster setting of the cement was on account of a mistake in either making the cement mix or the down hole temperature and/or other conditions, especially in view of the fact that it was the responsibility of the Respondent for preparing the cement mix and the failure of the cement to set faster than anticipated, would have to be attributed to the Respondent. It is therefore clear that the reasoning given by the Arbitral Tribunal for rejecting the claim under Invoice No. 510-058 was due to the Respondent's mistake and/or negligence. This was a finding of fact given by the Arbitral Tribunal in relation to this invoice. We therefore cannot agree with the submission of Mr. Sancheti that this reasoning ought to have been adopted by the Arbitral Tribunal with reference to all other invoices in relation to claims for equipments "Lost in Hole". Whether a particular equipment was Lost in Hole and for what reason would necessarily depend upon the facts and circumstances prevalent at the time of loss or damage. We therefore find no substance in this argument.

25. On going through the findings of the Arbitral Tribunal in relation to invoice No. 510-208 as well as the impugned order, we are of the firm opinion that the

findings of the Arbitral Tribunal were based on the evidence on record and therefore the learned Single Judge rightly declined in interfering with the Award as it would have been an exercise of re-appreciating the evidence that was led before the Arbitral Tribunal. It is pertinent to note that in relation to this invoice, it was not the case of the Appellant that the equipments Lost in Hole, were due to any wear and tear. It was the specific case of the Appellant that the equipments that form the subject matter of this invoice, were Lost in Hole due to the negligence of the Respondent (Contractor). In such circumstances, to deny the claim of the Respondent herein and to take it out of the purview of clause 16.3 of the Agreement, it was for the Appellant to establish before the Arbitral Tribunal that the Respondent was negligent, due to which the equipments were Lost in Hole. As noted by the Arbitral Tribunal, the Appellant gave absolutely no particulars of the negligence and it was in view thereof that the Arbitral Tribunal granted the amounts claimed under this invoice. We do not think that the approach of the Arbitral Tribunal or that of the learned Single Judge can be faulted in this regard. We therefore find no infirmity in the impugned order in upholding the Award in relation to this invoice.

INVOICE NOS. 510-214 AND 510-215 (Sr. Nos. 2 & 3)

26. These invoices deal with a part of the string being left in the Hole and the equipment being lost. In respect of this loss, under invoice No. 510-214, the claimant made a claim of USD 584,149.03 and under invoice No. 510-215 made a claim for Rs. 1,78,996. The claim under invoice No. 510-215 was in INR as it was for equipments that were locally sourced. On 11th May, 2004 while the rig was engaged in drilling at a depth of 4647 mtrs., the drill string torqued up on the bottom, the pressure pump increased and the Hole backed off. The rig resorted to jarring operations for 4 1/2 Hrs to free the string without any success. At this point, the hydraulic hose used to operate the elevator on the rig derrick burst, and had to be repaired before string could be pulled out of the Hole. The string was thereafter put into slips, i.e. it was fixed on another piece of equipment which prevented the drill string falling free and down the Hole. After the hose was replaced, the string was put back on the elevator. When the string was pulled out, it was found that a part of the string was left in the Hole and the equipment was lost.

27. Before the Arbitral Tribunal it was the case of the Appellant that the setting the string in slips in a floating vessel during stuck condition was an operational lapse which resulted in the pipe twisting off and hence these two invoices were not payable. In other words, the Appellant once again attributed negligence on the part of the Respondent to deny the claim under these invoices. Both the parties led evidence in this behalf. The Respondent sought to explain in its evidence the reason for torquing up of the string and the rig resorting to the operation of jarring which was an aggressive action necessarily putting the string at risk. The Respondent explained in evidence that this operation was the only possible response to the situation at hand and that the parting of the string was

not occasioned by any negligence on the part of the Respondent. On the other hand, the Appellant's witness gave his own reasons for parting of the string and explained alternative ways in which operations could have been carried out. After perusing the evidence led by the parties, the Arbitral Tribunal came to a finding that it was difficult to accept this part of the testimony of the Appellant considering the contradictory answers he had given in this connection in the cross-examination. The Arbitral Tribunal also found that no such case of alternative methods was put by the Appellant to the Respondent and that the explanation given by the Respondent in its affidavit of evidence was not challenged in cross-examination. In view thereof, the Arbitral Tribunal, as a matter of fact, found that this loss was not on account of the Respondent's negligence. Once again even in relation to these invoices, we find that the claims therein have been granted purely on the basis of the facts of the case and the appreciation of evidence by the Arbitral Tribunal. The Arbitral Tribunal, after considering all the relevant material before it, including the evidence led by the parties granted the claim under these 2 invoices. We do not find that the conclusions reached by the Arbitral Tribunal suffer from any perversity or patent illegality that would enable us to interfere. In view thereof, we do not find any infirmity either in the impugned Award or the order of the learned Single Judge in relation to these invoices. The learned Single Judge was therefore fully justified in upholding the Award in relation to these invoices.

INVOICE NOS. 510-217 AND 510-222 (Sr. No. 4 & 7)

28. Both these invoices are in relation to an incident that took place on 17th July 2004 whilst drilling operations were on in the Well GSDW-2A. Invoice No. 510-217 was for USD 3,95,341.15 and Invoice No. 510-222 was for INR 49,101. The Claim under Invoice No. 510-222 was in INR as it related to locally sourced material/equipments. This incident is in relation to the string parting at the saver sub-pin and a portion thereof that fell to the bottom. Exactly how the incident took place has been set out in detail by the Arbitral Tribunal in paragraph 28 of the impugned Award. It was the case of the Respondent that the string had stalled out and stopped turning as the resistance reached, exceeded the maximum torque of the string. The string was then pulled up and in the course of this exercise, the sub-pin broke. The reason given by the Respondent's witness for the sub-pin breaking, was due to excess torque having been applied because the torque is always set at 75% on the weakest part of the string as a safety factor. The Respondent further deposed that the sub-pin did not break on account of any defect because it was so certified and was also tested after the incident and the remaining part of the material was found to be sound. On the other hand, the Appellant suggested in its affidavit of evidence that the failure was due to wear and tear of the equipment and therefore the cause of the equipment Lost in Hole was not considered reimbursable. It was on this ground that the Appellant refused to pay the amounts under the aforesaid invoices. The Arbitrators, after appreciating the evidence led by the parties, came to a finding that there was no material to support the Appellant's submission that all parts of

the sub-pin suffered from wear and tear. They came to this conclusion on the basis that there was no material to show how long this equipment had been used after its manufacture in order to establish wear and tear. Whilst dealing with the claim under these invoices, the learned Single Judge held that the Arbitral Tribunal, on the appreciation of evidence led by the parties, allowed the claim and that the same appeared to be perfectly in order.

29. Mr. Sancheti however submitted that the Arbitrators had committed a patent illegality inasmuch they had inverted the burden of proof on the Appellant. According to Mr. Sancheti, this was concluded case of wear and tear and therefore, the Appellant was fully justified in denying the claim under these invoices. We do not find any substance in the submission of Mr. Sancheti that the Arbitrators had committed any patent illegality by inverting the burden of proof as sought to be suggested by him. Under clause 16.3, the Respondent was entitled to be reimbursed by the Appellant, the value of any equipment that was Lost in Hole save and except on account of (i) wear and tear or (ii) the negligence of the Respondent. In relation to these invoices, it was the specific case of the Appellant that the equipments were Lost in Hole due to wear and tear. Despite this specific case, the Appellant was unable to establish the same with evidence. If the Appellant denied the claim of the Respondent on the basis of wear and tear, it was for the Appellant to establish the same by leading appropriate evidence. Admittedly, they failed to do so as has been held by the Arbitral Tribunal. We therefore cannot agree with the submission of Mr. Sancheti that the Arbitral Tribunal had committed any illegality by requiring the Appellant to prove the wear and tear on the equipment before the claim could be denied. We find that the Arbitral Tribunal in fact was correct in its approach and had asked and answered the correct question in coming to the conclusion that it did. The Award therefore does not suffer from any perversity and/or illegality (patent or otherwise) that would entitle us to interfere with the same. Therefore, in our view, no fault can be found in the order of the learned Single Judge upholding the Award in relation to these invoices.

INVOICE NOS. 510-220 AND 510-221 (Sr. 5 & 6)

30. These two invoices deal with an incident that took place on 9th February 2005. During drilling operations, a section of a 5" drill pipe parted at 3448 mtrs and the equipment was Lost in Hole. Invoice No. 510-220 was in the sum of USD 966,702 and Invoice No. 510-221 was for INR 4,02,005 which was in respect of locally sourced equipment that was lost in the same incident. The facts and the evidence in relation to this incident have been set out in detail by the Arbitral Tribunal in paragraph 29 of the impugned Award. The reason for the equipment being Lost in Hole was due to the string failure at the weld between the 5" pipe body and the box connection. The Arbitral Tribunal noted that the documentation in this regard showed that this was a very clean break along the line of the weld. The Respondent's witness in its deposition attributed this loss probably to a latent defect in the pipe and this was a manufacturing fault and not visible on

inspection. The Respondent's witness was not questioned on this evidence. The Appellant, on the other hand, contended that the failure of the drill pipe joint at the weld occurred on account of the joint becoming weaker due to wear and tear. Hence once again, the Appellant denied the claim of the Respondent on account of wear and tear of the equipment. The Arbitral Tribunal, after perusing the evidence of both the parties as well as the documentation in this regard, including the metallurgical report of the test that was done on the pipe, came to the conclusion that there was no material to show how long the equipment was in service and which was a sine qua non for establishing wear and tear. The Arbitral Tribunal therefore held that the denial of the claim on account of wear and tear was not supported by evidence and had to be rejected.

31. Mr. Sancheti submitted that admittedly the equipment was Lost in Hole due to a latent defect in the pipe. This itself amounted to wear and tear and therefore the Arbitrators could not have granted the claim under the aforesaid invoice, was the submission. We find this argument wholly without merit. A latent defect is something which is a defect that cannot be noticed to the naked eye. It certainly can be even in a brand new equipment. On the other hand, wear and tear necessarily means that the equipment has been used for a while and due to its wear and tear has stopped functioning and/or broken down. It is therefore clear that the latent defect in the pipe can never be equated to its wear and tear, as even a brand new equipment can break down and/or fail due to a latent defect. This being the case, we find no substance in the argument that a latent defect in the pipe amounted to its wear and tear. It is also important to note that it was not the case of the Appellant before the Arbitral Tribunal that a latent defect in the pipe amounts to wear and tear. In fact when specifically questioned in cross-examination with reference to this issue, the Appellant's witness stated that he could not comment on the statements of the Respondent's witness to the effect that the weld did not part on account of wear and tear and that the same was entirely indicative of a manufacturing fault, obviously not visible on inspection to those on the rig. On this ground also we cannot take countenance of the argument in view of the fact that the same was never put-forth before the Arbitral Tribunal. Once again, we find that this is purely a matter of appreciation of evidence which is entirely in the realm of the Arbitral Tribunal's jurisdiction, and therefore, interference under section 34 of the Act is neither permitted nor warranted in the present case.

32. Mr. Sancheti next submitted that admittedly there was a defect in the pipe which caused the incident and therefore the Appellant was justified in not making payment of the said invoice. In this regard, he placed reliance on clauses 2.1(b), 3.6(1) and 6.1 of the Agreement. Firstly, we do not find this argument being canvassed either before the Arbitral Tribunal or before the learned Single Judge. The gist of the argument of the Appellant before the Arbitral Tribunal was simply that the equipment was Lost in Hole due to wear and tear. The Appellant was unable to establish this on evidence before the Arbitral Tribunal. Not having canvassed this point before the Arbitral Tribunal or before the learned Single

Judge, it would be highly unfair to the Respondent to allow the Appellant to canvass this point in appeal before us. Be that as it may, in any event of the matter, we do not find that the clauses relied upon by Mr. Sancheti would carry the case of the Appellant any further. Clause 2.1(b) deals with general conditions regarding the Drilling Unit. Clause 3.6(1) deals with the Contractor maintaining its equipment in sound and efficient operating condition. The said clause further provides that if the services of the Contractor become unsatisfactory or the general standard of performance of work is materially reduced because of a defective drilling pipe or by Contractor's negligence, the Operator (Appellant) shall give the Contractor (Respondent) written notice specifying the causes of dissatisfaction and to correct the specified deficiencies within 15 days failing which the Operator would have the right to terminate the Agreement on the terms and conditions specified in the said clause. Clause 6.1 on which reliance has been placed, stipulates that the Contractor was to perform visual inspection in respect of all materials and appliances furnished by the Operator and invite the attention of the Operator to any apparent defect observed therein so that the Operator may replace such defective material or appliances. In fact, the clause further provided that the Contractor would not be liable for any loss or damage, resulting from the use of materials or appliances furnished by the Operator containing latent defects. We fail to see how any of these clauses come to the aid of the Appellant in refusing to pay the above invoices. As set out earlier, clause 16.3 clearly provides that the Contractor shall be reimbursed for all its equipments Lost in Hole save and except in two situations viz. (1) when the equipment was lost due to wear and tear or (2) due to negligence on the part of the Contractor. There is no third category that is set out under clause 16.3 that would entitle to the Appellant to deny the claim of reimbursement. Even on reading the three clauses relied upon by Mr. Sancheti, we cannot spell out any such third category which can be read into clause 16.3. In this view of the matter, this argument too is without any substance and stands rejected. In this view of the matter, we do not find any infirmity either in the impugned Award or in the order of the learned Single Judge upholding the Award in relation to these invoices.

INVOICE NO. 510-364 (Sr. No. 8)

33. This invoice relates to two incidents, one which occurred on 28th September, 2004 and the other on 13th October, 2006. In the incident of 28th September 2004, one motor from the drilling assembly was lost in Hole whereas in the incident of 13th October 2006, a motor was twisted off and Lost in Hole due to high torque in the Well. Both the parties led evidence in relation to these two incidents. The Arbitral Tribunal noted that the Respondent's witness had explained what could have caused the aforesaid incidents and noted that the Respondent's witness had deposed that the loss was not occasioned by any wear and tear or negligence. The Arbitral Tribunal further noted that the Respondent's witness had not been cross-examined in this regard. On the other hand, there was no evidence at all from the side of the Appellant to establish either a case of

wear and tear or that of negligence. In fact, the Arbitral Tribunal noted that the period of service of the piece of equipment which was lost, was not known and which was a sine qua non to establish a case of wear and tear. In this view of the matter, after appreciating the evidence led by the parties, the Arbitral Tribunal granted the claim under the aforesaid invoice.

34. It is trite law that the Arbitral Tribunal is the sole judge of both the quality and quantity of evidence led before it. This Court under section 34 of the Act cannot sit in appeal and re-appreciate the evidence. We find that on the basis of the evidence led before the Arbitral Tribunal, the findings do not suffer from any perversity or patent illegality that would entitle this Court to interfere with the Award. The findings, being based purely on appreciation of evidence, cannot be faulted and neither can this Court interfere with the same under section 34 of the Act. In this view of the matter, we find that the learned Single Judge did not commit any error in upholding the Award in relation to this invoice.

INVOICE NOS. 510-375 AND 510-376 (Sr. No. 9 & 10)

35. Once again, even in relation these invoices, Mr. Narichania, the learned senior counsel appearing on behalf of the Respondent submitted that there was no challenge to these invoices in the Arbitration Petition filed before the learned Single Judge under section 34 of the Act. He therefore submitted that the Appellant cannot be allowed to challenge these invoices now in appeal before us. In relation to these invoices also, we find this submission of Mr. Narichania to have considerable merit. Despite several invoices being specifically challenged in the Arbitration Petition, there is no specific challenge to the amounts granted under these invoices. However, here too, since the learned Single Judge has considered the challenge to these invoices, we too shall examine the same to see if the conclusions reached by the Arbitral Tribunal in relation thereto, suffer from any perversity or patent illegality which would entitle this Court to interfere with the Arbitral Award.

36. These invoices relate to the incident that took place on 8th February, 2007 when a section of the Heavy Weight Drill Pipe (HWDP) sheered off in the middle of the tube 1.5 mtrs above the pin end. This was not at any weld but in the body of the pipe itself. The explanation given by the Respondent's witness that there was a latent defect in the pipe section, which caused the pipe shear. This evidence was not challenged in the cross-examination by the Appellant. Instead, the Appellant once again contended that the break down of the drills' string was due to normal wear and tear and which caused the pipe to shear off and hence these invoices was not payable. On perusing the evidence of both the parties, the Arbitral Tribunal came to the conclusion that the Appellant's witness had no personal knowledge of the incident and there was no record in support of the suggestion that the incident took place due to normal wear and tear. In this view of the matter, the Arbitral Tribunal allowed the claim and granted the amounts in the aforesaid invoices. In this case also, we find that the claim has been granted purely on the basis of the evidence led by the parties before the Arbitral Tribunal

and we do not find that the Award suffers from any perversity or patent illegality that would entitle us to interfere with the same. In this view of the matter, we find that the learned Single Judge was fully justified in upholding the Award in relation to these invoices.

CLAIM IN RESPECT OF DAY RATE AND INTEGRATED SERVICES INVOICES:-

37. The second claim was in respect of Day Rate invoices and Integrated Services invoices. Under the Agreement, the Appellant was required to pay to the Respondent for work performed, services rendered, material and equipments supplied etc. at the rates specified in clause 3 of the Agreement read with Exh. D to the said Agreement. The rates contained in clause 3 were based on the Respondent's operations being conducted on a seven day week and a 24 hour working day. In relation to this claim, the relevant clauses read thus:-

"3.0 COMPENSATION TO CONTRACTOR

3.1-----

3.2-----

3.3-----

3.4 DAY RATE

Under this Agreement Contractor will be entitled to an applicable day rate at all times from the time of commencement of Agreement (as per Article 1.1) till the expiry of the Charter Hire period as per Article 1.2, except otherwise provided for in this Agreement.

3.4.1 RIG OPERATING DAY RATE (RODR):

Contractor shall be paid a Rig Operating Day Rate (RODR) of USD 191,700 (US Dollars One Ninety One Thousand Seven Hundred only) from the Commencement Date and at all times during the term of the Agreement, except when specifically otherwise provided for in this Agreement.

3.4.2 RIG NON-OPERATING DAY RATE (NODR):

Contractor shall be paid an Rig Non-Operating Day Rate (NODR) of USD 182,115 (US Dollars One Eighty Two Thousand One Hundred Fifteen only) when the Drilling Unit is not operating either due to waiting for materials to be provided by Operator/orders/instructions/programme/waiting for the integrated Services/waiting on weather/waiting for cement to set or carrying out fishing operations (not due to Contractor's equipment and tools) except where otherwise provided for in the Agreement.

3.4.3-----

3.4.4 INDIVIDUAL SERVICE DAY RATE (SDR):

Contractor shall be paid individual Service Day Rate (SDR) for all the services

covered under Integrated Services from the Commencement Date and at all times during the term of the Agreement, except when specifically otherwise provided to in this Agreement as per the rates given at Exh. D.

3.4.5-----

3.4.6 RIG AND INTEGRATED SERVICES BREAKDOWN

3.4.6.1 RIG BREAKDOWN

During the term of the Agreement, if operations hereunder are suspended due to breakdown of or need for repairs to Contractor's equipment of Drilling Unit or due to destabilisation of the Drilling Unit due to whatever reasons and if such failure results in the operations being materially affected, Contractor shall be paid at the Rig Equipment Break Down Rate of USD 182,115 (US Dollars One Eighty Two Thousand One Hundred Fifteen Only) up to a maximum of 32 hours as compensation per calendar month. Beyond the said 32 hours daily compensation shall not be payable to the Contractor until operations are recommenced at which time the applicable rate shall again come into force.

In addition Contractor shall be allowed a period of 48 hours per year which shall be paid at Non Operating Day Rate and can be utilized by the Contractor at any time during the Agreement period at its discretion. The said period of 48 hours will be allowed to be pro-rated during automatic extension (spilling beyond the primary term) or during any Agreement extension (as per article 1.3(a) of the Agreement). Beyond the above-mentioned permissible period, zero rate will be applicable for Drilling Unit.

3.4.6.2 INTEGRATED SERVICE BREAK DOWN:

If any of the services covered in the integrated Services is/are not operating as per its intended operations due to which the Drilling unit can not perform its intended operations then the Service Day Rate (SDR) quoted for that particular service shall not be paid for such period."

38. Clause 3.4.1 deals with the Rig Operating Day Rate ("RODR") and stipulates that this rate (USD 191,700) would be payable at all times (save as otherwise specifically provided) from the Commencement Date of the Agreement. In other words, RODR would be applicable/payable unless of course some other rate was applicable/payable under the Agreement. The other clauses under clause 3.4 and particularly clauses 3.4.2 and 3.4.6.1 with which we are concerned, are the exceptions to clause 3.4.1 which provide for different rates to be applicable/payable depending on the contingencies as set out in the said clauses. Clause 3.4.2 (being one of the exceptions) on the other hand deals with the Rig Non-Operating Day Rate ("NODR") and specifies that the Respondent shall be paid the NODR of USD 182,115 when the Drilling Unit is not operating either due to waiting for materials to be provided by Operator/orders/instructions/programme/waiting for the Integrated Services/waiting on weather/waiting on cement to set or carrying out fishing operations (not on account of the Contractor's

equipments and tools), except where otherwise provided for in the Agreement. In other words, if the Drilling Unit was not operating due to any of the conditions mentioned in clause 3.4.2, then the Respondent would be paid the NODR. Clause 3.4.4 deals with Individual Service Day Rate ("SDR") which was for services covered under the Integrated Services, from the commencement date and at all times during the term of the Agreement, except when specifically otherwise provided for in the Agreement, as per the rates given at Exh. D to the Agreement. Clause 3.4.6.1 deals with Rig and Integrated Services Break Down rate ("EBDR") and inter alia provides that if the operations are suspended due to break down or need for repairs to Contractor's equipment of the Drilling Unit or due to destabilization of the Drilling Unit due to whatever reasons, and if such failure results in the operations being materially affected, the Contractor shall be paid at the EBDR of USD 182,115 upto a maximum of 32 hours as compensation, per calendar month. Beyond the said 32 hours, no compensation would be payable to the Contractor until operations are recommenced, at which time the applicable rate shall again come into force. In other words, if the operations were suspended due to break down of or need for repairs to the Contractor's equipment of the Drilling Unit or due to destabilization of the Drilling Unit, then the Respondent would be paid the same rate as the NODR except that it would be capped to a maximum of 32 hours per calendar month. Beyond a period of 32 hours, the Respondent would be paid no compensation. Clause 3.4.6.2 inter alia provides that if any of the services covered under the Integrated Services are not operating as per its intended operations, the Service Day Rate (SDR) for that service (as set out in Ex. D to the Agreement) would not be paid for such period. Exh. D to the Agreement specifies different types of Integrated Services and the rate at which each of these services have to be paid for.

39. Having noted the relevant clauses in the Agreement, we shall now examine the individual invoices under which claims were made by the Respondent before the Arbitral Tribunal. According to the Respondent, it raised several invoices upon the Appellant for the work done at the rates applicable under clause 3. According to the Respondent, the Appellant wrongly withheld and/or deducted certain amounts payable under these invoices and therefore, a claim with reference to the same was made before the Arbitral Tribunal. In relation to these invoices, Mr. Sancheti, the learned Senior Counsel appearing on behalf of the Appellant, submitted a chart in relation to the invoices that were really called in question before us. The details of these invoices are as follows:-

Before dealing with these invoices individually, it would be relevant to also note the provisions of clause 7 of the Agreement which reads thus:-

"7.0 PAYMENT

7.1 TIME OF PAYMENT

Operator shall make payment under this Agreement within 15 (fifteen) working days from the date of receipt of an invoice from Contractor, subject always to

Operator's right to require Contractor to furnish it with satisfactory evidence of the validity and prior payment by Contractor of all labour and materials incurred by Contractor and charged to Operator.

Should Operator withhold any payment out of the invoice claim, it shall give reasons for withholding of such amount from the invoice.

The amount not in dispute is to be paid within the above 15 working days period.

7.2 INVOICE PRESENTATION:

Invoices, accompanied by copies of the original vouchers, records, receipts or other supporting evidence for the work performed or the expenses incurred during each month, shall be presented to Operator's office on or before the tenth (10th) of each succeeding month or soon thereafter."

40. Clause 7 inter alia provides that the Appellant is to make payment under the Agreement within 15 working days from the receipt of the invoice from the Respondent subject always to the Appellant's right to require the Respondent to furnish with it satisfactory evidence of the validity and prior payment by the Respondent of all labour and materials incurred by the Respondent and charged to the Appellant. The clause further provides that should the Appellant withhold any payment out of the invoices claimed, it shall give reasons for withholding such amount from the invoice. This clause is of some importance as will be seen later in the judgment whilst dealing with each individual invoice. Having noted the relevant clauses in the Agreement, we shall now deal with individual invoices with reference to the Day Rate and Integrated Services Claim.

INVOICE NO. 510-204 (Sr. No. 1):-

41. This invoice relates to the work done by the Respondent in the month of July 2005. The claim with reference to this invoice is really with reference to the payment of Bonus under the Agreement. During this month at various times the auxiliary derrick was undergoing maintenance. Under Clause 3.10.2, if the Non Productive Time (NPT) in a period of one calendar month, excluding Rig Move Time, was less than 2%, the Contractor was entitled to receive bonus payment as set out in the said clause. If the NPT was more than 2%, no bonus was payable. Clause 3.10.2 reads thus:-

"3.10.2 BONUS-PENALTY:-

The Bonus-Penalty shall be applicable as per "Non Productive Time (NPT)" of the contract. This NPT shall be the accumulated duration due to equipment break down of Rig, due to defective well materials supplied by Contractor that prevents normal operations from continuing, if the operation is waiting on materials to be supplied by Contractor, if the delay in operation is due to a fault or omission of the Contractor, due to break down of any of the Integrated Services provided by the Contractor.

If $NPT < 2\%$ in a period of one calendar month excluding Rig Move Time,

Contractor to receive bonus payment upto maximum of USD 500,000 on pro-rata basis. If NPT is more than 2 %, no bonus is payable.

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.....

....."

42. As per the provisions of the aforesaid clause, in this invoice, the Respondent claimed a sum of USD 264,784.94 as bonus on the basis that the NPT during the month of July 2005 was less than 2%. The Respondent, however, treated a period of 14.5 hours in this month as being on account of Rig break down (clause 3.4.6.1). As the total period of break down in the month came to less than 32 hours, this change of calculations by the Appellant had no effect on the Day Rate payable to the Respondent for this month. However, by booking 14.5 hours as break down, the NPT increased to 2.89 % and therefore the Appellant denied to the Respondent its claim for bonus. This 14.5 hours were treated by the Appellant as being on account of Rig break down because during this period, the auxiliary derrick was undergoing maintenance. The Arbitral Tribunal in paragraphs 39 and 40 of the impugned Award noted the evidence led by the parties. Firstly, the Arbitral Tribunal noted that the auxiliary derrick was offered by the Respondent to the Appellant, but the Appellant did not avail of this facility and did not agree to pay any amount for the same. It was for this reason that in the technical specifications the auxiliary derrick was not included in the list of equipments to be provided by the Respondent. The Tribunal further noted that the said witness had deposed that this was the auxiliary derrick where the string, or parts of it, would be prepared in advance or where the string could be dismantled post-use in the main derrick. There was no cross-examination of the first witness of the Respondent on this point. On the other hand, the witness of the Appellant contended that the Rig had a double derrick capacity (a main derrick and an auxiliary derrick). In July 2005, the auxiliary derrick was not working for 14.5 hours during which period the main derrick was working in place of the auxiliary derrick. However, in his cross-examination, the witness of the Appellant had agreed that there was no reference to the auxiliary derrick in the Rig specifications. Though the witness claimed that in respect of the main derrick, critical path activities were suspended when the auxiliary derrick was not operational, he based this claim only on the basis of the Daily Drilling Reports (DDR's) which were neither disclosed nor produced before the Arbitral Tribunal. On the other hand, the second witness of the Respondent had deposed that the critical path activities were not suspended during the said 14.5 hours in July 2005. After considering the evidence of the parties, the Arbitrators came to a finding that there was no evidence available which would indicate that the Rig's normal critical path activities were affected in any way during the period when the maintenance operations of the auxiliary derrick were in progress. The Arbitral

Tribunal also came to a finding that the auxiliary derrick was excluded from the set of equipments that the Respondent had contracted to provide and therefore the time taken on the maintenance of the auxiliary derrick could not have any impact on the payment of bonus. In this light, the Arbitral Tribunal allowed the claim under this invoice.

43. Mr. Sancheti, the learned Senior Counsel appearing on behalf of the Appellant, submitted that the Arbitral Tribunal had gravely erred coming to a finding that there was no data available which would indicate that the Rig's normal critical path activities were affected in any way during the period when the maintenance operations of the auxiliary derrick were in progress. In this regard, he invited our attention to a letter dated 6th November 2006 addressed by the Appellant to the Respondent. We find that that the reliance placed on this letter is wholly misplaced and has nothing to do with the Rig's critical path activities. The said letter has been written for the purposes of extension of contract. For the month of July 2005, the annexure to the said letter shows 21.5 hours under the column "Repair". This letter in no way throws light on the fact that there was any data available which would indicate the Rig's normal critical path activities were affected in any way during the period when maintenance operations of the auxiliary derrick were in progress. It is pertinent to note that these 21.5 hours have not been taken into consideration for the purposes of the extension of the contract. This was the admitted position before us. It is further important to note that to substantiate the claim of the Appellant that the Rig's normal critical path activities were affected, the Appellant's witness based his claim solely on the DDRs, which were neither produced nor disclosed. It was not the case of the witness of the Appellant before the Arbitral Tribunal that the letter dated 6th November 2006 together with its annexures in any way reflected that the Rig's normal critical part activities were affected in the month of July 2005. It is in these facts that the Arbitral Tribunal came to the conclusion that there was no data available which would indicate that the Rig's normal critical path activities were affected in any way during the period when the maintenance operations of the auxiliary derrick were in progress. The said letter alongwith the annexures have in fact been considered by the Arbitral Tribunal whilst rejecting the claim of the Respondent in respect of extension of contract and Quantum Meruit (paragraphs 9 to 18 of the Award). We therefore find that the reliance placed on the aforesaid letter to assail the Award is wholly misplaced and without any merit.

44. Mr. Sancheti next relied upon the invoice which was produced by the Appellant before the Arbitral Tribunal (pages 129 and 130 of Volume I of the paper book). The said document shows handwritten changes made by the Appellant-ONGC increasing the break down time from 7 hours to 21.5 hours and other consequential changes. In this regard, we must note and it is an admitted fact that this document with handwritten changes was never sent by the Appellant to the Respondent. This document was disclosed for the first time in the statement of defense of the Appellant and there is nothing on record to show

or indicate that this document with the handwritten changes was admitted by the Respondent. In this view of the matter, the reliance placed on this document cannot carry the case of the Appellant any further. We may also note that clause 7.1 of the Agreement requires that should the Appellant withhold any payment under an invoice, it would give reasons for withholding of such amount. Thus, the burden lies on the Appellant to justify the deduction from the invoice and must give supporting reasons for the deduction. Upon receipt of the short payment, the Respondent had addressed a letter dated 14th September 2005 objecting to the said deduction on the ground that it was wrongfully deducted. Therefore, far from admitting the invoice with the handwritten changes (pages 129-130 of Volume I of the paper book), there is evidence on record to show that the said deduction was not accepted by the Respondent. In this view of the matter, we find that after considering the evidence led by the parties, the claim under this invoice was granted by the Arbitral Tribunal. We therefore do not find any infirmity either in the impugned Award or the impugned order whilst granting/upholding the claim under this invoice.

INVOICE NOS. 510-205 AND 510-212 (Sr. Nos. 2 & 3):-

45. These two invoices relate to the months of July and August 2005 and as indicated in the table earlier, short payment was made by the Appellant to the Respondent. It was the case of the Appellant that certain back up tools were not available on the Rig during certain periods in the month of July and August 2005 and hence the deductions were made. In relation to these invoices, the respective parties led their evidence which was considered by the Arbitral Tribunal. The Appellant's witness stated that the deduction in relation to Invoice No. 510-205 was for damages for breach of contract. A similar deduction was made from Invoice No. 510-212 on account of non-availability of back up tools from 20th June 2005 to 28th June 2005. On the other hand, the Respondent's witness deposed that only one tool was not available and there was no break down on the Rig due to non-availability of this one tool. After analyzing the provisions of the Agreement and the evidence led, the Arbitral Tribunal came to the conclusion that there was nothing in the Agreement which entitled the Appellant to deny the payment to the Respondent in this manner. If the deduction was made by way of damages, then if no damage was caused, there was no question of making any deduction, was the finding. It is pertinent to note that no evidence was led by the Appellant before the Arbitral Tribunal establishing their claim for damages and no particulars thereof were furnished. In this view of the matter, we find that there is no scope for interference with the impugned Award in so far as it granted the claim under these invoices to the Respondent and on the same parity of reasoning, no fault can be found in the order of the learned Single Judge upholding the Award in this regard. To be fair, we must state that though Mr. Sancheti did not give up this claim before us, he very fairly, and not to waste judicial time, did not seriously contest the claim granted under these invoices.

INVOICE NO. 510-350 (Sr. No. 5)

46. This invoice relates to the month of October 2006. In this invoice, the Respondent claimed only 78 hours for Rig breakdown in excess of 32 hours. The Appellant, however, claimed 382 hours for Rig breakdown over 32 hours by adding 304 hours relating to the period lost from the time the first Hole was stopped, up to the time the side-track Hole reached a depth of 4172 meters, as equipment breakdown time. The details of the incident have been set out in Paragraphs 43 to 45 of the impugned Award.

47. Briefly stated, on 13th/14th October, 2006 drilling was unable to proceed beyond the depth of 4172 meters because of high torque. The Bottom Hole Assembly (BHA) was racked back and it was found that the Positive Displacement Motor (Mud Motor), the bit sub and bit had been Lost in Hole. Thereafter efforts were made to fish out the lost material without any success, and therefore, the fishing operations were abandoned on 15th October, 2006. It was then decided to cement up the Hole and to drill a side-track. The cementing operations were carried out from 15th October to 21st October, 2006. The sidetrack drilling was started immediately thereafter and some time on 29th October, 2006 the side drilled Hole reached the same depth of 4172 meters as was reached on 14th October, 2006. The Arbitral Tribunal in Paragraph 45 of the Award took into consideration the evidence that was led by the respective parties. It took note of the evidence of the Respondent that the Mud Motor was not a part of the Drilling Unit and was part of the Integrated Services. Hence, there was no suspension on account of the failure of the Drilling Unit. According to the Respondent, the Drilling Unit was fully operational. The witness of the Appellant in cross examination stated that the Daily Drilling Report (DDRs) had not indicated that there was any suspension of the operation of the Drilling Unit. Taking this evidence and other documents into account, the Arbitral Tribunal held that Clause 3.4.6.1 (which capped the compensation payable to the Respondent at 32 hours in a calendar month) was not applicable. The Arbitral Tribunal came to a finding that this was not a case where there was any breakdown of the Contractor's equipment of the Drilling Unit and the only equipment to which breakdown could be attributed was the Mud Motor, and which was lost in the Hole. The Arbitral Tribunal, therefore, held that out of the entire period of 304 hours for which the Respondent withheld payment, 169 hours (the time spent in fishing for Mud Motor, bit sub and bit lost in the Hole) were required to be paid for under Clause 3.4.2 at the Non-operative Day Rate (NODR). In respect of the balance 213 hours for cementing and side tracking operations, since there was no negligence on the part of the Respondent, the Arbitral Tribunal held that the Respondent is, therefore, entitled to the NODR under Clause 3.4.2.

48. Mr. Sancheti drew our attention to this invoice along with its Annexures (Page Nos. 671 and 672 Vol-III of the Paper-Book) to contend that even according to the Respondent, no drilling activities were going on for the said period of 304 hours. He also drew our attention to the Daily Drilling Report (DDR) of 14th

October, 2006 which showed the drill time as zero. According to Mr. Sancheti, this important fact had been ignored by the Arbitrators whilst awarding the claim under this invoice. He further submitted that the Mud Motor for which the fishing operations were carried out was the equipment of the Contractor, and therefore, the amounts could not have been awarded under Clause 3.4.2 of the Agreement which specifically carved out an exception to fishing operations of the Contractor's equipments and tools. We find the submission of Mr. Sancheti to be incorrect in fact as well as in law. The DDR (at page no. 1481 of Vol-VII of the paper book) relied upon by Mr. Sancheti is wholly out of context. It is nobody's case that on 14th October, 2006 any drilling operations were going on. This is for the simple reason that from 14th to 15th October, 2006 efforts were made to fish out the lost material which operations were then abandoned at 1900 hours on 15th October, 2006. It is in this context that the Daily Drilling Report of 14th October, 2006 showed drill time as "0.0". The Respondent added 304 hours relating to the period lost from the time the first Hole was stopped, up to the time the side-track Hole reached a depth of 4172 meters. In fact, the DDR of 21st October 2006 and of subsequent dates, clearly indicate that drilling was going on. We, therefore, find that the reliance placed by Mr. Sancheti on the aforesaid DDR of 14th October, 2006 is wholly misplaced. Equally, we find the submission of Mr. Sancheti that the Mud Motor was the equipment of the Contractor and therefore fell within the exception of Clause 3.4.2 is also factually incorrect. The Appellant in the Arbitration Petition filed before the learned Single Judge, in Ground 6(S) stated that ".... "MUD MOTOR" was a part of the sub-contract in service.....". On a plain reading of Clause 3.4.2, it is clear that if the fishing operations were carried out due to the Contractor's equipment and tools, then the NODR would not be payable. In the present case, the Mud Motor does not appear to be the equipment of the Contractor but in fact that of the sub-contractor. In these circumstances, we do not find the submission of Mr. Sancheti to be factually correct. We may also note that this argument was never made either before the Arbitral Tribunal or before the learned Single Judge. This argument is being made for the first time in Appeal before us. We therefore, today cannot hold that the Mud Motor was the equipment of the Contractor, and therefore, the time spent for fishing out the Mud Motor was not payable under Clause 3.4.2 at the NODR. We, therefore, do not find any perversity in the Award when the Arbitral Tribunal came to a finding that for the time spent for fishing operations to recover the MUD MOTOR, the applicable clause would be 3.4.2.

49. Mr. Sancheti, then, next submitted that the Arbitral Tribunal totally misdirected itself in granting the claim of the Respondent under clause 3.4.2 even for the balance period of 213 hours which was spent for cementing and side-tracking operations. He submitted that the Arbitral Tribunal granted the said claim (with reference to 213 hours) on the basis that there was no negligence on the part of the Respondent. Clause 3.4.2 does not contemplate any question of negligence on the part of the Respondent and therefore the findings and conclusions reached by the Arbitral Tribunal on this count were perverse and

contrary to the terms of the contract, was the submission. At first blush though this argument appears to be attractive, on closer scrutiny, we find this argument also to be without any merit. As rightly submitted by Mr. Narichania, under Clause 7.1 of the Agreement, if any deduction was made in the invoice presented by the Respondent, the onus was on the Appellant to give reasons for making such a deduction. In the evidence led before the Arbitral Tribunal it was the specific case of the Appellant that the deduction was made applying Clause 3.4.6.1 which dealt with the Equipment Break Down Rate (EBDR). After considering the facts and the evidence before it, the Arbitral Tribunal held that Clause 3.4.6.1 was not applicable. In other words, the Arbitral Tribunal held that the reasons given by the Appellant for making the deduction from the invoice were held not to be sustainable. It would therefore follow, that the Appellant, unable to justify the deduction from this invoice, would have to pay the same to the Respondent. In view thereof, the Arbitral Tribunal was justified in granting the claim of the Respondent. We do not think that merely because the Arbitral Tribunal has held that there is no evidence of negligence, and which was not applicable for granting the claim under Clause 3.4.2, would entitle us to interfere in the impugned Award. Under Clause 7.1 of the Agreement, the burden lay on the Appellant to establish why a particular deduction was made from the invoice. It would therefore follow that if the Appellant failed to discharge that burden, the invoice would be payable.

50. In answer to the aforesaid argument of Mr. Narichania, Mr. Sancheti submitted that the Arbitral Tribunal has not placed any reliance upon any particular interpretation of the provisions of clause 7 of the Agreement and the Arbitral Tribunal has only considered the effect of clauses 3.4.1, 3.4.2 and 3.4.6 in relation to claims for Day Rate and Integrated Services invoices. He further submitted that even the impugned order of the learned Single Judge does not make any reference to clause 7. Therefore the argument of Mr. Narichania based on clause 7 to support the Award, were extraneous to the reasons given either in the impugned Award or in the order of the learned Single Judge, was the submission. He therefore submitted that no reliance can be placed on the aforesaid clause for the purpose of upholding the claims granted in relation to the Day Rate and Integrated Services invoices. We find this argument only to be partially correct. Whilst dealing with the claim in relation to the Day Rate and Integrated Services invoices, the Arbitral Tribunal at paragraph 37, has referred to clause 7.1 and has noted that these invoices were to be paid within 15 days of presentation. It therefore cannot be said that the attention of the Arbitral Tribunal was not drawn to the said clause. Though it is true that the Arbitral Tribunal has not dealt with the said clause in detail as we have in this judgment, that would not be a ground for interfering with the impugned Award. On reading and interpreting the said clause, we find that granting of the claims in relation to the Day Rate and Integrated Services invoices was fully justified by the Arbitral Tribunal and merely because the Arbitral Tribunal has not dealt with the said clause in detail, will not entitle the Appellant to assail the Award on that ground.

If we were to accept the submission of Mr. Sancheti, it would lead to upholding a technicality at the cost of doing justice between the parties. By taking recourse to clause 7, if the claims granted by the Arbitral Tribunal can be justified, we do not think that we can turn a blind eye and let a technicality override the interests of justice. In this view of the matter, we do not find any substance in this argument and therefore, stands rejected.

51. We find that even in relation to this invoice, the findings of the Arbitral Tribunal are purely based on facts and appreciation of evidence, which by no stretch of the imagination, can either be called perverse or suffering from any patent illegality that would entitle us to interfere with the same. In this view of the matter, we do not find that the learned Single Judge committed any error in upholding the Award in relation to the claim made under this invoice.

INVOICE NO. 510-351 (Sr. No. 6):-

52. This invoice is with reference to the same incident of October 2006 for which Invoice No. 510-350 was raised and which has been dealt with by us in the preceding paragraphs. This invoice related to non-payment of hire charges for Integrated Services. Before the Arbitral Tribunal, it was not seriously disputed that on merits, the outcome of this invoice would be the same as that of Invoice No. 510-350. Despite the same, the Arbitral Tribunal in paragraphs 46(b) to (d) independently examined the merits of this invoice and granted the claim thereunder. We have already indicated in the preceding paragraphs the reasons for upholding the claim made under Invoice No. 510-350 and on the same parity of reasoning, the claim under this invoice also would have to be upheld.

53. Be that as it may, Mr. Sancheti urged before us that the claim under this invoice pertained to services outsourced to a third party viz. "Schlumberger" and therefore no claim could have been made under this invoice without first establishing that the Respondent had incurred any liability towards the said third party. As that was not established before the Arbitral Tribunal, the Arbitral Tribunal had erred in granting the claim under this invoice, was the submission. Before the Arbitral Tribunal, the learned counsel for the Respondent submitted that how the disputes would be settled between the Respondent and the said third party in terms of the outsourcing agreement between the two of them, was not a concern of the Appellant herein. He further submitted that the claim in the arbitration against the Appellant herein was based on the Agreement between the Appellant and the Respondent. The Arbitral Tribunal found merit in this submission and therefore rejected the argument made on behalf of the Appellant that the Respondent had to establish that they had incurred any liability towards the third party before the claim could be granted. We find that the conclusion reached by the Arbitral Tribunal is certainly a plausible one and in any event cannot be said to be perverse or one that shocks the conscience of the Court or suffers from any patent illegality that would entitle us to interfere with the same. We therefore find no merit in the submission made by Mr. Sancheti and same stands rejected.

INVOICE NO. 510-357 (Sr. No. 7):-

54. This invoice relates to an incident which occurred in the month of November 2006. On 10th and 11th November 2006, the Drilling Unit was engaged in casing and cementing operations. After the cementing operations were over, the mandrel which is a piece of equipment used in cementation, was no longer in use. The Drilling Unit then commenced drilling through the cement on 13th November 2006 when the drilling could not make any progress. It was suspected that this was due to junk in the Hole. The entire incident in detail has been set out by the Arbitral Tribunal in paragraphs 47 and 48 of the impugned Award. The Respondent's invoice proceeded on the footing that there was no period of rig break down (EBDR) exceeding 32 hours in the month of November 2006. As against this, the Appellant however deducted 204.5 hours for rig break down exceeding 32 hours. Therefore, the total of 236.5 hours was claimed as break down time by the Appellant in the month of November 2006. The Arbitral Tribunal in this regard considered the evidence led on behalf of the Appellant. The Appellant in its second Affidavit of evidence took the stand that this incident was due to an operational lapse on the part of the Respondent and therefore denied the claim. The Arbitral Tribunal held that assuming the same to be the stand of the Appellant, no provision had been shown under which a deduction could be made on the ground of operational lapse. The Arbitral Tribunal further held that if this refers to the negligence of the Respondent, there was no evidence of such negligence. In view thereof, the Arbitral Tribunal awarded the claim of the Respondent under this invoice.

55. Mr. Sancheti once again assailed the Award on the ground that there was no discussion in the Award at all as to how this activity fell under clause 3.4.2 and at the rate (viz. NODR) at which the claim was granted to the Respondent. It is true that there is no real discussion in the Award as to how the claim under this invoice fell under clause 3.4.2. However, to our mind, this would not entitle the Appellant to impugn the Award on this ground. As stated earlier, clause 7.1 of the Agreement enjoined upon the Appellant to give reasons for withholding of any amount from the invoice presented by the Respondent. In the present case, it was the Appellant's specific case that the time spent during the incident which occurred in the month of November 2006 was due to an operational lapse and therefore no compensation was payable to the Respondent beyond the period of 32 hours. This contention of the Appellant was negated by the Arbitral Tribunal. Thus, under the Agreement, the burden lay on the Appellant to justify the deduction from the invoice with supporting reasons. If they failed to do so, the deduction was unjustified. If this be the case, then we find no perversity in the impugned Award in granting the claim under this invoice. In fact, on a conjoint reading of clauses 3.4.1, 3.4.2 and 3.4.6.1, it is clear that the Respondent was to be paid at the RODR at all times save and except as otherwise provided in the Agreement. It would therefore follow that if the Arbitral Tribunal came to a finding on the facts that clause 3.4.6.1 was not applicable and if we accept the contention of the Appellant that clause 3.4.2 was not applicable, then necessarily

the Respondent would have been entitled to claim compensation at the RODR under clause 3.4.1. Merely because the Respondent has claimed a lesser amount viz. under clause 3.4.2 and which has been granted by the Arbitral Tribunal, would not justify interference with the impugned Award. Therefore, we do not find any infirmity either in the impugned Award or in the order of the learned Single Judge in granting/upholding the claim under this invoice.

INVOICE NOS. 510-377 AND 510-378 (Sr. Nos. 8 and 9)

56. Both these invoices relate to an incident which took place on 11th January 2007. Whilst invoice No. 510-377 deals with payment for Day Rate, invoice No. 510-378 dealt with payment of Integrated Services. The incident that took place on 11th January 2007 has been set out in detail in paragraphs 51 to 53 of the Award. In the Respondent's invoice for January 2007, 535.5 hours were shown as chargeable at the NODR and 10.5 hours were shown in excess of 32 hours at the EBDR. On the other hand, the Appellant by its letter dated 17th May 2007 claimed that 425 hours in January 2007 were payable at half rate by reason of clause 16.5 of the Agreement. The Arbitral Tribunal once again noted the evidence led by the parties and rejected the contention of the Appellant. Here too, the Arbitral Tribunal came to the finding that there was no negligence on the part of the Respondent. In this regard, same submissions were advanced by Mr. Sancheti as were advanced in relation to Invoice No. 510-350 and 510-357. We have already dealt with these submissions in the preceding paragraphs of this judgment and on the same parity of reasoning, we find that the impugned Award requires no interference in relation to the claim granted under this invoice.

INVOICE NO. 510-398 (Sr. No. 10):-

57. This invoice is for the period April 2007 and was paid by the Appellant. However, the claim under this invoice relates to payment under Clause 4.5 of the Agreement under which the Contractor has to make available a minimum of two well-heads at all times to the Drilling Unit. The cost of the well-heads was to be reimbursed to the Respondent by the Appellant. Under Clause 4.6, reimbursement for well material was to be as per the actual consumption. According to the Appellant, by considering the actual consumption of the well-heads in the Well, the amount of US\$ 226,410 was paid in excess which was sought to be recovered. The Arbitral Tribunal, however, found that there was no evidence of such excess payment, and therefore, granted the claim under this invoice. We find that the claim granted herein was purely based on appreciation of the evidence that was before the Arbitral Tribunal and therefore gives us no scope to interfere with the impugned Award.

INVOICE NO. 510-344 (Sr. No. 4)

58. This claim is in respect of the invoice for the month of August 2006. The details of the incident that took place on 1st August, 2006 have been set out by the Arbitral Tribunal in paragraph 57 of the impugned Award. This invoice submitted by the Respondent for the month of August 2006 showed 17 hours as

Rig breakdown exceeding 32 hours. On the other hand, the Appellant claimed a deduction of 171.5 hours for Rig breakdown exceeding 32 hours. The Appellant made this deduction for the period 1st August, 2006 (2100 hours) to 9th August, 2006 (1500 hours) on account of the well-head H4 connector problem. The joint report signed by the representative of both the parties dated 30th August, 2006 indicated that there was successful unlocking and releasing of the H4 connector from the well-head. Furthermore, the pressure test certificate dated 24th January, 2007 stated that no wear and tear or defects were found in the connector. Both the parties led evidence before the Arbitral Tribunal in relation to this incident. The Respondent's witness deposed that there was a problem of disconnecting the H4 connector from the well-head even when the equipment was in full working order and there was no mishandling of the disconnection operation by the rig crew. He suggested some causes for the same. On the other hand, the witness of the Appellant stated that the failure of the H4 connector from disconnecting from the well-head was due to the malfunctioning of the H4 connector. As a finding of fact, the Arbitral Tribunal came to the conclusion that the H4 connector was functioning correctly. In the cross examination, only one question was put to the witness of the Respondent to which he answered that no drilling hours were lost due to this incident as drilling of the well had already been completed. After analyzing the evidence before it, the question asked by the Arbitral Tribunal was whether in such a situation Clause 3.4.6.1 dealing with the EBDR would apply. In paragraph 62 of the impugned Award the Arbitral Tribunal came to a finding that this incident was not covered by the provisions of Clause 3.4.6.1 and hence the claim under this invoice was payable by the Appellant to the Respondent.

59. Mr. Sancheti, the learned Senior Counsel appearing on behalf of the Appellant submitted that the facts narrated by the Arbitral Tribunal in paragraph 57 to 62 of the impugned Award would indicate that this was an incident that was covered under Clause 3.4.6.1 and not under Clause 3.4.2. He submitted that Clause 3.4.2 applied only when the Drilling Unit was not operating either due to (1) waiting for materials to be provided by the Operator/Orders/Instructions/Programme/waiting for the integrated services/waiting on weather/waiting on cement to set; or (2) carrying out fishing operations (not on account of Contractor's equipment and tools); and not otherwise. According to Mr. Sancheti as per the facts narrated by the Arbitral Tribunal this incident could never fall under Clause 3.4.2 and therefore necessarily fell under Clause 3.4.6.1. He further submitted that there was no discussion in the impugned Award as to how the present incident fell under Clause 3.4.2.

60. We find this submission without any substance. Firstly, as indicated earlier in the judgment, Clause 3.4.1 deals with the Rig Operating Day Rate (RODR) and stipulates that this rate will be payable at all times except as otherwise specifically provided (from the commencement date of the Agreement). In other words the RODR would be applicable/payable unless of course some other rate was applicable/payable under the Agreement. Clauses 3.4.2 and 3.4.6.1 are the

exceptions to clause 3.4.1 which provide for different rates to be applicable/payable depending on the contingencies as set out in the said clauses. We, therefore, do not find any substance in the argument of Mr. Sancheti that if the incident did not fall under Clause 3.4.2, it would necessarily fall under Clause 3.4.6.1. In fact, Clause 3.4.6.1 would be applicable provided the contingencies as set out in the said Clause, had been attracted. Therefore, it is not correct to say that merely because the incident did not fall under Clause 3.4.2, it ipso facto fell under Clause 3.4.6.1. In fact, if the incident did not fall under 3.4.2 and the Arbitral Tribunal has come to a finding that Clause 3.4.6.1. did not apply to the incident in question, then the Respondent would have been entitled to the RODR as mentioned in Clause 3.4.1 which is higher than what was claimed by the Respondent. In such a scenario, we do not find that the Arbitral Tribunal had in any way misdirected itself in allowing the claim in this invoice. At the cost of repetition, we must again reiterate that under Clause 7.1 of the Agreement, the onus lay on the Appellant to establish any deduction made by it from the invoice presented by the Respondent. The Respondent failed to discharge that burden and therefore the claim under the invoice was granted. We, therefore, do not see any infirmity in the impugned Award or in the order of the learned Single Judge by granting/upholding the claim under this invoice.

CLAIM FOR MAKING A DEDUCTION FROM THE INVOICE FOR DEMOBILIZATION FEES.

61. The third claim made before the Arbitral Tribunal was in relation to a wrongful deduction made by the Appellant from the invoice for payment of demobilization fees. Under clause 3.3 of the Agreement, the Appellant was liable to pay to the Respondent within 30 days of the expiry date as defined in clause 1.2, or within 30 days of the receipt of the invoice, whichever was later, the demobilization fees amounting US\$ 1,800,000. In the present case, the Appellant released the Drilling Unit on 10th April, 2007 and the Respondent raised its demobilization invoice on 12th April, 2007. There is no dispute that the amount mentioned under the invoice was payable to the Respondent. However, the Respondent paid only a sum of US\$ 1,472,098/- leaving a balance of US\$ 327,902.00. The aforesaid deduction was sought to be justified by the Appellant by its letter dated 29th November, 2007 wherein the Appellant informed the Respondent that it was holding this balance unpaid amount against the Respondent's invoice for the month of February 2007 towards 46 hours of fishing. It was the case of the Appellant that on scrutiny of the "Lost in Hole" claims, it was found that in February 2007, the parting of a drill pipe had taken place and was attributable to normal wear and tear. Hence, 46 hours taken for the fishing operations due to a part of the drill string having been left in the Hole, were liable to be paid at the EBDR i.e. at zero rate. In the said invoice of February 2007 (Invoice No. 510-394 wrongly mentioned as 510-384 in the Award), the Respondent had treated these 46 hours as payable at the NODR. The Appellant had paid this invoice in full but on realizing their alleged mistake, deducted US\$ 327,902 and adjusted it against the invoice for demobilization fees.

62. The Arbitral Tribunal recorded that it was an accepted fact by both the parties that in this month (February 2007), 46 hours were spent in fishing. According to the Appellant, the parting of the drill pipe was on account of normal wear and tear. The Arbitral Tribunal came to a finding that there was no evidence before it that the string was lost because of any wear and tear, and therefore, the Appellant had rightly paid the said invoice. The Arbitral Tribunal further found that the said deduction was not merely on account of the alleged wrong payment at the NODR but also on account of penalty. This was not explained by the Appellant, and therefore, in any event, the Arbitral Tribunal came to a finding that such a deduction could not be upheld and the Appellant was liable to pay the full amount of the demobilization fees.

63. We find that the claim granted under this invoice also related purely on questions of fact and appreciation of evidence. There has been nothing pointed out to us to show or indicate that the claim granted under this invoice is either perverse, suffers from any patent illegality, is contrary to the terms of the contract or one that shock conscious of the Court. In this view of the matter, we do not find any infirmity either in the Award or in the order of the learned Single Judge granting/upholding claim under this invoice.

CLAIM REGARDING INTEREST:-

64. That brings us to the question regarding the claim for interest which was hotly contested by both the parties. For the pre-award period, the Arbitral Tribunal granted interest on 2 counts. Firstly the Arbitral Tribunal granted interest on delayed payment i.e. on invoices though paid, but belatedly. This was granted as per the formula set out in paragraphs 73 to 76 of the impugned Award. Secondly and in addition thereto, the Arbitral Tribunal also granted interest on the claims for:- (1) equipments "Lost in Hole"; (2) claims for Day Rate and Integrated Services invoices; (3) claim for a wrongful deduction made from the invoice of De-mobilisation Fees; and (4) interest on delayed payment i.e. on invoices though paid, but belatedly. In other words, as far as item (4) is concerned, the Arbitral Tribunal granted interest on interest. The interest awarded on the USD amounts was at 4 % p.a. for the period starting from 30 days from the date of each invoice till the date of the Award and at the rate of 12 % p.a. on the amounts awarded in INR. The Arbitral Tribunal also awarded interest for the post-award period at the same rates on the entire amount under the Award, with effect from the date thereof.

65. As far as interest being granted upto the date of the Award is concerned, i.e. for the pre-award period, Mr. Sancheti, the learned Senior Counsel appearing on behalf of the Appellant, submitted that by virtue of clause 28.6 of the Agreement, the grant of interest was completely prohibited. There was an express clause (clause 28.6) which barred the granting of interest, was the submission of Mr. Sancheti. Mr. Sancheti submitted that in view of this express bar, the Arbitral Tribunal could not have awarded any interest, and by granting the same, the Arbitral Tribunal had acted directly contrary to the terms of the

contract which opened up the Award to interference and/or challenge.

66. On the other hand, Mr. Narichania, the learned Senior Counsel appearing on behalf of the Respondents, submitted that the findings of the Arbitral Tribunal were based purely on the interpretation of clause 28.6. The interpretation put on the said clause by the Arbitral Tribunal being a plausible one did not call for any interference under section 34 of the Act. In these circumstances, Mr. Narichania supported the Award and the order of the learned Single Judge.

67. To understand the controversy, it would be necessary to reproduce clause 28.6 which reads as under:-

"28.6 It is also a term of the Agreement that neither party to this Agreement shall be entitled to the interest on the amount of award."

68. Interpreting this clause, the Arbitral Tribunal came to a finding that no interest would be payable from the date of the Award, i.e. for the post-award period. (paragraph 77 of the Award). The principal submission made by Mr. Sancheti was that the words "on the amount of award" appearing in clause 28.6 of the Agreement related only to the principal sum awarded and not the interest. In this regard, heavy reliance was placed on the judgment of the Supreme Court in the case of State of Haryana and Others Vs. S.L. Arora and Company, , and more particularly paragraphs 17, 18, 24 & 24.1 thereof. The said paragraphs are reproduced hereunder:-

"17. The Arbitration and Conciliation Act, 1996 on the other hand, contains a specific provision dealing with the power of the Arbitral Tribunal to award interest. The said provision is incorporated in subsection (7) of Section 31 which deals with the form and contents of arbitral awards. The said sub-section (7) is extracted below:

"31. (7)(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

18. Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest. The use of the words "where and insofar as an arbitral award is for the payment of money" and use of the words "the Arbitral Tribunal may include in the sum for which the award is made, interest ... on the whole or any part of the money" in clause (a) and use of the

words "a sum directed to be paid by an arbitral award shall ... carry interest" in clause (b) of sub-section (7) of Section 31 clearly indicate that the section contemplates award of only simple interest and not compound interest or interest upon interest. "A sum directed to be paid by an arbitral award" refers to the award of sums on the substantive claims and does not refer to interest awarded on the "sum directed to be paid by the award". In the absence of any provision for interest upon interest in the contract, the Arbitral Tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period.

24. As there is some confusion as to what Section 31(7) authorises and what it does not authorise, we will attempt to set out the legal position regarding award of interest by the Arbitral Tribunals, as emerging from Section 31(7) of the Act.

24.1 The provision for interest in the Act is contained in Section 31 dealing with the form and contents of arbitral award. It employs two significant expressions "where the arbitral award is for payment of money" and "the Arbitral Tribunal may include in the sum for which the award is made, interest ... on the whole or any part of the money". (emphasis supplied) The legislature has thus made it clear that award of interest under sub-section (7) of Section 31 [and award of costs under sub-section (8) of Section 31 of the Act] are ancillary matters to be provided for by the award, when the Arbitral Tribunal decides the substantive disputes between the parties. The words "sum for which the award is made" and "a sum directed to be paid by an arbitral award" contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs."

69. Relying on the aforesaid paragraphs, it was the submission of Mr. Sancheti that the words "sum for which the award is made" and "a sum directed to be paid by an arbitral award" contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs. The learned counsel therefore submitted that even under clause 28.6, the words "on the amount of award" would have to be interpreted only to mean the substantive claims (the principal sum awarded, and not the interest). If the words are so interpreted, then it was clear from the said clause that no interest could be awarded on the principal sum, was the submission of Mr. Sancheti.

70. To our mind, everything would depend on what meaning is to be given to the word "award" appearing in clause 28.6 of the Agreement. If the word "award" in clause 28.6 was to be interpreted to mean only the substantive claims, then the submission of Mr. Sancheti is well founded and the Arbitral Tribunal would be barred on awarding any interest on the substantive claims. On the other hand, if the word "award" appearing in clause 28.6 included not only the principal sum (substantive claims), but also interest thereon, then clearly what would be barred under clause 28.6 would be the post-award interest as interpreted by the Arbitral Tribunal.

71. It is true that in S.L. Arora's case (supra), the Supreme Court has in no uncertain terms held that the words "a sum directed to be paid by Arbitral Tribunal" refers to the award of sums on the substantive claims and does not refer to interest awarded on the "sum directed to be paid by the Award". The Supreme Court came to the aforesaid finding after analyzing the provisions of sections 31(7)(a) and (b) of the Act, which specifically empower the Arbitral Tribunal to award/grant interest in certain situations. However, the matter does not rest here. It was brought to our notice that the correctness of this judgment was called into question before the Supreme Court in the case of Hyder Consulting (Uk) Ltd. Vs. Governor State of Orissa Tr. Chief Eng., . In the aforesaid case, the Supreme Court doubted the correctness of ratio laid down in S.L. Arora's case (supra) and therefore referred the matter to a three Judge Bench for consideration. Paragraphs 3 to 6 of the said judgment reads thus:-

"3. Mr. C.A. Sundaram, learned Senior Counsel for the petitioners, submits that the observations in State of Haryana and Others Vs. S.L. Arora and Company, that the decisions of this Court in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , and U.P. Cooperative Federation Ltd. Vs. Three Circles, were passed on inadvertent erroneous assumption and these judgments are per incuriam in holding that interest awarded on the principal amount up to the date of award becomes the principal amount and, therefore, award of future interest thereon does not amount to award of interest on interest are not justified.

4. Mr. C.A. Sundaram, learned Senior Counsel, referred to the decisions of this Court in Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., and Central Bank of India Vs. Ravindra and Others, in support of his argument that the view taken by this Court in State of Haryana and Others Vs. S.L. Arora and Company, that Section 31(7) of the Arbitration and Conciliation Act, 1996 (for short "the Act") does not authorise and enable the Arbitral Tribunals to award interest on interest from the date of the award is not the correct view.

5. The learned Senior Counsel for the appellants also submitted that the view taken by this Court in State of Haryana and Others Vs. S.L. Arora and Company, that the award of interest on cost was not permissible under Section 31(7) of the Act is inconsistent with the decision of this Court in U.P. Cooperative Federation Ltd. Vs. Three Circles, .

6. Having regard to the above submissions, we are of the view that it would be appropriate if these appeals are heard by a Bench of three Judges."

72. After the judgment was reserved in this Appeal, the Respondent moved this court to place this Appeal on board for directions when it was pointed out to us that in the case of M/s. Hyder Consulting (UK) Ltd. v/s. Governor, State of Orissa, through Chief Engineer¹ a three Judge Bench of the Supreme Court had the occasion to consider the correctness of the ratio laid down in S.L. Arora's case (supra) and by a majority view of 2:1 held that S.L. Arora's case (supra)

does not lay down the correct law. The majority view of the Hon"ble Mr. Justice S.A. Bobde and the Hon"ble Mr. Justice Abhay M. Sapre held that S.L. Arora's case (supra) was wrongly decided. The Hon"ble Mr. Justice S.A. Bobde held thus:-

"2. It is not possible to agree with the conclusion in S.L. Arora's case that Section 31(7) of the Act does not require that interest, which accrues till the date of the Award, be included in the "sum" from the date of Award for calculating the post-award interest. In my humble view, this conclusion does not seem to be in consonance with the clear language of Section 31(7) of the Act.

3. Sub-section (7) of Section 31 of the Act, which deals with the power of the Arbitral Tribunal to award interest, reads as follows:

"Sub-section (7)

@@(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

4. Clause (a) of sub-section (7) provides that where an Award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the Award is made. In plain terms, this provision confers a power upon the Arbitral Tribunal while making an Award for payment of money, to include interest in the sum for which the Award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the Award is made. To put it differently, sub-section (7)(a) contemplates that an Award, inclusive of interest for the pre-award period on the entire amount directed to be paid or part thereof, may be passed. The "sum" awarded may be principal amount and such interest as the Arbitral Tribunal deems fit. If no interest is awarded, the "sum" comprises only the principal. The significant words occurring in clause (a) of subsection (7) of Section 31 of the Act are "the sum for which the award is made." On a plain reading, this expression refers to the total amount or sum for the payment for which the Award is made. Parliament has not added a qualification like "principal" to the word "sum," and therefore, the word "sum" here simply means "a particular amount of money." In Section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award.

10. In this view of the matter, it is clear that the interest, the sum directed to be paid by the Arbitral Award under clause (b) of subsection (7) of Section 31 of the

Act is inclusive of interest pendente lite.

13. Thus, it is apparent that vide clause (a) of sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the "sum" of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-award period vide clause (b) of subsection (7) of Section 31 of the Act, at which stage the amount would be the sum arrived at after the merging of interest with the principal; the two components having lost their separate identities.

15. In the result, I am of the view that S.L. Arora's case is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the Award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon Award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the Award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language."

(emphasis supplied)

73. Thus the Hon"ble Mr. Justice S.A. Bobde has in no uncertain terms held that S.L. Arora's case (supra) is wrongly decided. It is further held by The Hon"ble Mr. Justice S.A. Bobde that the Arbitral Tribunal may award interest on the sum directed to be paid by the Award, meaning a sum inclusive of the principal sum adjudged and the interest. As laid down in the said judgment, we must also not lose sight of the intention of enacting this provision, viz. to encourage early payment of the awarded sum and to discourage the unusual delay, which accompanies the execution of the Award in the same manner as if it were decree of the Court under section 36 of the Act.

74. The Hon"ble Mr. Justice A.M. Sapre whilst entirely agreeing with the judgment and reasoning of the Hon"ble Mr. Justice S.A. Bobde, gave certain further reasons in his concurring judgment. The Hon"ble Mr. Justice A.M. Sapre, after analyzing the provisions of section 31(7)(a) and (b) held thus:-

5. Section 31(7)(a) of the Act deals with grant of pre-award interest while sub-clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance of the award. Pre-award interest is at the discretion of Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of statute-the only difference being that of rate of interest to be awarded by the

Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act, i.e., 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.

6. Section 31(7)(a) employs the words "...the arbitral tribunal may include in the sum for which the award is made interest...". The words "include in the sum" are of utmost importance. This would mean that pre-award interest is not independent of the "sum" awarded. If in case, the Arbitral Tribunal decides to award interest at the time of making the award, the interest component will not be awarded separately but it shall become part and parcel of the award. An award is thus made in respect of a "sum" which includes within the "sum" component of interest, if awarded.

7. Therefore, for the purposes of an award, there is no distinction between a "sum" with interest, and a "sum" without interest. Once the interest is "included in the sum" for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. The interest component then loses its character of an "interest" and takes the colour of "sum" for which the award is made.

8. There may arise a situation where, the Arbitral Tribunal may not award any amount towards principal claim but award only "interest". This award of interest would itself then become the "sum" for which an award is made under Section 31(7)(a) of the Act. Thus, in a pre-award stage, the legislation seeks to make no distinction between the sum award and the interest component in it.

9. Therefore, I am inclined to hold that the amount award under Section 31(7) (a) of the Act, whether with interest or without interest, constitutes a "sum" for which the award is made."

(emphasis supplied)

75. It is thus clear that the majority view of the Supreme Court in the case of Hyder Consulting (UK) Ltd. (supra), has now clearly laid down that S.L. Arora's case was wrongly decided and the words ".....the sum for which the award is made....." appearing in section 31(7)(a) of the Act does not only relate to substantive claims (principal sum) but also the interest awarded.

76. If we were to apply this interpretation to the word "award" in clause 28.6 of the Agreement, then it is clear that what is barred under the said clause is only interest for the post-award period and not for the period from the date when the cause of action arose till the date of the award. There is yet another reason for this. If we were to interpret the words "A sum directed to be paid by an arbitral award" in section 31(7)(b), to mean only the award of sums on substantive claims as sought to be contended by Mr. Sancheti, it could lead to startling

results. For instance, in a given case, there may be no claim before the Arbitral Tribunal for the principal sum (substantive claims) but a claim only for interest. If the words "A sum directed to be paid by an arbitral award" were to be interpreted only to mean the "principal sum" (substantive claims and not the interest component), then the Arbitral Tribunal would not be able to award any sum whatsoever to the Contractor even though the contract was silent on the issue of payment of interest on delayed payments. We do not think that the Legislature contemplated such an absurd result whilst enacting the provisions of section 31(7)(a) and (b) of the Act. Keeping this proposition in mind as well as the ratio of the majority view of the Supreme Court in the case of *Hyder Consulting (UK) Ltd.* (supra), if one was to read clause 28.6 of the Agreement, the intention is clear. What was sought to be barred under the Agreement was the post-award interest. In this view of the matter, we do not find that the impugned Award suffers from any infirmity in awarding to the Contractor viz. *Dolphin Drilling Ltd.* interest either (i) on the invoices though paid but belatedly; or (ii) on the invoices that were unpaid, and for which a claim was made, and allowed by the Arbitral Tribunal. The Arbitrators construed the clause of the contract and in our view, rightly, before awarding interest. In any event, the interpretation put on clause 28.6 by the Arbitral Tribunal is certainly a plausible one which requires no interference. We therefore do not find any force in the submission of Mr. Sancheti that the word "award" appearing in clause 28.6 is to be construed as "principal sum" and not "principal sum plus interest".

77. Notwithstanding the aforesaid, Mr. Sancheti submitted that this was an Agreement that was entered into between two parties who were well versed with the law and had the advantage of legal assistance before drafting and entering into the aforesaid Agreement. He submitted that the interpretation put on clause 28.6 of the Agreement by the Arbitral Tribunal would effectively render the said clause invalid and/or otiose inasmuch as under section 31(7)(b) of the Act, the parties cannot contract out of the said provision. In other words, Mr. Sancheti submitted that the discretion granted to the Arbitrators to award interest for the post-award period was entirely in the realm of the Arbitral Tribunal and the same could not be negated by a contract to the contrary. He therefore submitted that this being the position in law, on the principles of interpretation of contract, the clause ought to be interpreted in such a way so as to save the clause rather than to render it invalid. In this regard, Mr. Sancheti placed reliance on the following judgments of the Supreme Court:-

- (1) *The Union of India (UOI) Vs. D.N. Revri and Co. and Others*, ;
- (2) *Owners and Parties interested in the The Owners and Parties Interested in the Vessel M.V. Baltic Confidence and Another Vs. State of Trading Corporation of India Ltd. and Another*, ;
- (3) *Citibank, N.A. Vs. TLC Marketing PLC and Another*, ; and
- (4) *Life Insurance Corporation of India and Another Vs. Shri Dharam Vir Anand*, .

78. As far as the first three judgments are concerned, they all relate to the arbitration clause in the contract. It is in this context that the Supreme Court has held that a contract is a commercial document between the parties and it must be interpreted in such a manner so as to give efficacy to the contract rather than to invalidate it. There is no quarrel with the aforesaid proposition. However, we do not find in these judgments a proposition that if a clause in the contract is unambiguous and on a plain reading can afford only one construction, yet one has to strain and labour on interpretation to save the said clause from invalidation. The Court cannot supply words into the contract, which would change the meaning thereof, under the guise of interpretation. If the clause is clear and unambiguous and would be void as it stands, so be it. There is no question of trying to interpret the said clause in a different way merely to ensure that the same is not rendered invalid and/or otiose. To our mind, on a plain reading of clause 28.6, what the clause bars is post-award interest. As rightly submitted by Mr. Sancheti himself, the said clause would be void as the parties cannot contract out of the provisions of section 31(7)(b). Therefore, despite this clause, the Arbitral Tribunal would be empowered to grant interest for the post-award period and which in fact the Arbitral Tribunal has done in the impugned Award. In fact, on the basis of the three judge bench judgment of the Supreme Court in *M/s. Hyder Consulting (UK) Ltd.*'s case (supra) even the direction given by the Arbitral Tribunal in paragraph 80(vi) of the Award, in so far as it granted interest on interest, could not be called into question. However, the learned Single Judge set aside the direction given in paragraph 80 (vi) of the Award only in so far as it sought to award interest on interest. Though on the basis of *M/s. Hyder Consulting (UK) Ltd.*'s case (supra), the aforesaid finding of the learned Single Judge may not be correct, we decline to interfere with the same on the ground that the Respondent before us has not challenged the order of the learned Single Judge. In this view of the matter, we find that the granting of interest by the Arbitral Tribunal and as partially modified by the learned Single Judge in the impugned order, does not require any interference in appeal.

CHALLENGE TO THE AWARD OF COSTS:-

79. The last challenge to the impugned Award was on the costs awarded by the Arbitral Tribunal in favour of the Respondent. The Arbitral Tribunal at paragraph 78 of the Award recorded that the Respondent had substantially succeeded in its claims and that the defenses raised by the Appellant were found by and large to be unsustainable. The rule that "costs should follow the event" would apply, was the finding of the Arbitral Tribunal and therefore it held that the Respondent was entitled to costs from the Appellant.

80. Before the Arbitral Tribunal, the Respondent filed its statement of costs, the details of which are as under:-

*Rounded upto nearest Rupee **Rounded upto nearest Dollar

81. Out of the total costs claimed by the Respondent, the Arbitral Tribunal

disallowed the amount of USD 27,197 shown as consultancy fees in Statement E above. Similarly, the Arbitral Tribunal disallowed the expenses in the sum of USD 308,041 incurred on account of the Respondent's representatives attending the Arbitral meetings, and as reflected in Statement F above. Subject to the above, the Arbitral Tribunal allowed costs in favour of the Respondent quantified at Rs. 39,63,885 and USD 997,565 respectively.

82. Mr. Sancheti submitted that out of the total claims made before the Arbitral Tribunal, claims of about USD 12 million were allowed and one claim of USD 15.5 million (for extension of contract and claim on the basis of Quantum Meruit) was rejected. Despite the Arbitral Tribunal dismissing more than half the total claim (in monetary terms) of the Respondent, the entire costs were saddled on the Appellant, was the submission of Mr. Sancheti. According to him, this is despite the fact that the Arbitral Tribunal held that "costs shall follow the event". He submitted that though the principle had been mentioned in the impugned Award, the same had not been followed by the Arbitral Tribunal. The Arbitral Tribunal had undertaken no exercise to apportion the costs, especially in view of the fact that more than half the claim had been rejected and therefore the Award of costs was one which shocked conscience of the Court. On the issue of costs, Mr. Sancheti relied upon the judgment of the Supreme Court in the case of State of Jammu & Kashmir and Another Vs. Dev Dutt Pandit, , and more particularly paragraph 23 thereof, which reads thus:-

"23. When claims are inflated out of all proportions not only that heavy cost should be awarded to the other party but the party making such inflated claims should be deprived of the cost. We, therefore, set aside the award of cost of Rs. 7500 given in favour of the contractor and against the State of Jammu and Kashmir."

83. In the facts of the present case, Mr. Sancheti submitted that looking to the fact that more than 50% of the claim was rejected by the Arbitral Tribunal (which was for approximately USD 15.5 million), it can be easily inferred the same was highly inflated and therefore no costs ought to have been awarded in favour of the Respondent.

84. Mr. Sancheti then relied upon the judgment of the Supreme Court in the case of Sanjeev Kumar Jain Vs. Raghbir Saran Charitable Trust and Others, . Mr. Sancheti laid stress on paragraphs 23 and 38 of the judgment which read thus:-

"23. There is one more aspect which requires serious consideration. What is the meaning of the words "actual realistic costs" assuming that costs could be awarded on such basis? Whether it can be said that Rs. 45,28,000 said to have been incurred (made up of Rs. 29,73,000 paid to Mr. S, Senior Advocate; Rs. 14,41,000 paid to Mr. G, Senior Advocate; Rs. 85,500 paid to Mr. M, Advocate; Rs. 16,750 paid to Mr. V, Advocate and Rs. 11,750 incurred as miscellaneous expenses) was the "actual realistic cost" of an appeal against an interim order in a suit for injunction? The actual realistic cost should have a correlation to costs

which are realistic and practical. It cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high-charging lawyers. If the logic adopted by the High Court is to be accepted, then the losing party should pay the costs, not with reference to the subject-matter of the suit, but with reference to the fee paying capacity of the other side.

38. Clause (a) of Section 31(8) of the Arbitration and Conciliation Act, 1996 ("the Act", for short) deals with costs. It provides that unless otherwise agreed by the parties, the costs of an arbitration shall be fixed by the Arbitral Tribunal. The Explanation to sub-section (8) of Section 31 makes it clear that "costs" means reasonable costs relating to (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. Clause (b) of Section 31(8) of the Act provides that unless otherwise agreed to by the parties, the Arbitral Tribunal shall specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the amount of costs or method of determining the amount, and (iv) the manner in which the costs shall be paid. This shows that what is awardable is not "actual" expenditure but "reasonable" costs."

85. Relying on the aforesaid judgment, Mr. Sancheti submitted that in any event of the matter, the costs awarded have to be realistic and reasonable. In the present case, according to Mr. Sancheti, the costs alone come to a whopping figure of approximately Rs. 6.5 crores (if taken at today's exchange rate of the US Dollar) which itself is a figure that was unreasonable and that should shock the conscience of the Court. This is more so when half the claim is disallowed by the Arbitral Tribunal, was the submission of Mr. Sancheti.

86. On the other hand, Mr. Narichania, the learned Senior Counsel appearing on behalf of the Respondent submitted that awarding of costs was entirely within discretion of the Arbitral Tribunal and unless it is established that the discretion has been exercised perversely, the Court would not interfere with the same. In the facts of the present case, the learned Single Judge did not find the discretion exercised by the Arbitral Tribunal in granting costs to be perverse. In these circumstances, no interference was called for in this Appeal, was the submission. On the issue of dismissal of the claim of the Respondent regarding Quantum Meruit, Mr. Narichania submitted that merely because one claim was rejected (irrespective of its quantum), did not mandate the lowering of the costs being granted to the Respondent. He submitted that the claim for Quantum Meruit was jut one out of 29 claims made before the Arbitral Tribunal. Considering the amount of time spent to prove these 29 claims/invoices and the quantum of evidence led by the Respondent's witness which also encompassed the claim for Quantum Meruit, the award of costs was not disproportionate. He submitted that as far as the claim of Quantum Meruit was concerned, the arguments and evidence in relation to this claim hardly took one hour of hearing whereas substantial time was expended whilst granting the other claims of the

Respondent. According to Mr. Narichania, it is also an admitted fact that when the bill of costs was submitted by the Respondent to the Arbitral Tribunal, the quantum thereof was never objected to by the Appellant or their Advocates. In this view of the matter, Mr. Narichania submitted that the award of costs to the Respondent was well within the discretion of the Arbitral Tribunal which by no stretch of the imagination can be called perverse. For all the aforesaid reasons, Mr. Narichania submitted that no interference was called for in the impugned Award in so far as it granted costs in favour of the Respondent.

87. On going through the impugned Award in so far as it awarded costs in favour of the Respondent as well as the impugned order of the learned Single Judge, we indeed find that the costs awarded are a very large sum. The costs in Statements A, B, C and D were awarded in full and a part of the costs claimed in Statement E were also awarded (to the extent of USD 57,075). Despite the fact that the Arbitral Tribunal noted that "costs shall follow the event", we find no apportionment of the costs in the Arbitral Award. In fact, as noted earlier, the costs claimed in Statements A, B, C and D have been awarded in full by the Arbitral Tribunal despite the fact that more than half the claim of the Respondent before the Arbitral Tribunal was rejected. This being the position, we do not think that it was fair to the Appellant to saddle it with the entire costs as was sought to be done in the impugned Award. Indeed the figure awarded as and by way of costs comes to a whopping figure of approximately 6.5 crores (taking into consideration today's exchange rate of the US Dollar). This figure is indeed one that would shock the conscience of the Court and unless there was proper reasoning for awarding such heavy costs, we are unable to uphold the Award to this extent. Considering that half the claim of the Respondent was rejected by the Arbitral Tribunal, and the ratio of the judgment of the Supreme Court in the case of Sanjay K. Jain (supra) wherein the Supreme Court has held that the actual realistic costs should have a co-relation to the costs which are realistic and practical, and cannot be a fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high charging lawyers, we are of the view that the costs awarded by the Arbitral Tribunal ought to be reduced to 2/3rd of what has been granted in the impugned Award. We think that this formula would meet the ends of justice looking to the facts and circumstances of the present case. In fact, the Supreme Court in the very same judgment has further held that the costs means the reasonable costs relating to (1) the fees and expenses of the Arbitrators and witnesses; (2) legal fees and expenses; (3) any administrative fees of the institution supervising the arbitration and (4) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. This shows that what is awardable is not the actual expenditure but reasonable costs. We therefore find that in the facts and circumstances of the present case, it would be just and reasonable if the costs awarded by the Arbitral Tribunal are reduced to 2/3rd of what has been granted in the impugned Award. In other words, the Respondent would be entitled to costs of Rs. 26,42,564/- and USD 665,037. To this extent, the impugned award stands modified by this

judgment.

88. To sum up therefore, the challenge to the impugned Award as modified by the order of the learned Single Judge, fails on all counts with the exception of the costs being awarded by the Arbitral Tribunal which stands reduced to 2/3rd of the costs granted in the impugned Award. The appeal is disposed of in the aforesaid terms. In the facts and circumstances of the case, there shall be no order as to costs.

89. After the judgment is pronounced, the learned counsel for the Appellant prays for continuance of the interim stay which was granted when the appeal was admitted.

90. The learned counsel for the Respondent-claimant opposes the prayer and submits that the Appellant having lost before the Arbitral Tribunal, in Arbitration Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 and thereafter in Appeal before this Court under section 37 of the said Act, if this Court is inclined to grant stay, it should be on condition of depositing the full amount as per the Arbitral Award together with interest and costs as modified by this Court.

91. At the time of admitting the Appeal, we had granted interim stay on condition that the Appellant deposits 50 % of the award amount together with interest and we had permitted the Respondent-claimant to withdraw USD 1 million in view of the fact that the certain invoices were not contested as recorded in the order of the learned Single Judge. For the balance amount deposited, we had allowed the Respondent-claimant to withdraw the amount on furnishing security to the satisfaction of the Prothonotary and Sr. Master of this Court. The same was not withdrawn at that time by the Respondent.

92. Even though the appeal is dismissed, at the request of Mr. Sancheti, we continue the interim stay against execution of the award for period of eight weeks from today. However, since the Respondent has succeeded, we permit the Respondent-claimant to withdraw the balance amount deposited in this Court, without furnishing security but on giving an undertaking to this Court that if directed, the Respondent-claimant will redeposit the amount with interest at such rate as directed by the Supreme Court.

1Civil Appeal No. 3148 of 2012 decided on 25th November, 2014.