

(2020) 11 DEL CK 0005

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 125 Of 2020

Steel Authority Of India Limited (SAIL)

APPELLANT

Vs

Primetals Technologies India Private Limited (Formerly Known
As Siemens Val Metals Technologies Pvt.Ltd

RESPONDENT

Date of Decision : 03-11-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37
Commercial Courts, Commercial Division and Commercial Appellate Division of High
Courts Act, 2015 — Section 13

Citation : (2020) 11 DEL CK 0005

Hon'ble Judges : Manmohan, J;Sanjeev Narula , J

Bench : Division Bench

Advocate : V. Lakshmikumaran, Charanya Lakshmikumaran, Puneeth
Ganapathy, Ishita Mathur, P.C. Markanda, V.K. Sharma, Rajesh Markanda, Reema
Soni

Final Decision : Dismissed

Judgement

Sanjeev Narula, J

CM APPL. 25565/2020 (for exemption)

1. Exemption allowed, subject to just exceptions.

2. The application is disposed of.

CM APPL.25564/2020 (for condonation of delay)

3. For the reasons stated in the application, the delay of 8 days in filing the
present appeal is condoned.

4. The application stands disposed of accordingly.

FAO (OS) (COMM) 125/2020 & CM APPL. 25563/2020 (for Ad Interim stay)

5. This is an appeal under Section 37 of the Arbitration and Conciliation Act,

1996 (hereinafter referred as 'A&C Act') read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 against the impugned final order and judgment dated 16th March, 2020 passed by the learned Single Judge of this Court, whereby the objections filed by the Appellant under Section 34 of the A&C Act against the arbitral award dated 15th October 2019, passed by the learned Sole Arbitrator have been dismissed. By way of the award, the claims of the Respondent have been allowed.

Facts in brief

6. The facts have been noted and discussed at length both in the impugned judgment as well as the arbitral award. Therefore, for the disposal of the present appeal, we are noting only the bare essential facts, which are as follows: The Appellant, a Government of India undertaking, engaged in the business of inter alia manufacturing steel, awarded a contract for the setting up of a Coupled Pickling Line and Tandem Cold Mill at Bokaro Steel Plant to a consortium of M/s Siemens VAI Metals Technologies Pvt. Ltd. (now Primetals Technologies India Pvt. Ltd. and Respondent herein), M/s Siemens VAI Metal Technologies GmbH & Co, Austria and M/s McNally Bharat Engineering Co. Ltd. The parties entered into a contract bearing No. TC/M/AGT-963 on 3rd March, 2008, which specified the project commencement date as 3rd March, 2008 and the date of completion as 3rd September, 2010. The contract envisaged that Respondent would procure the items, as set out in the contract, from such manufacturers as identified by the Appellant and that the price of each item would include a) Basic Price, b) Excise Duty (ED) and c) Central Sales Tax (CST). The contract consisted of a summary price schedule which delineates the total amount chargeable by the Respondent and the minimum guaranteed CENVAT credit to be paid by the Respondent to the Appellant as Rs.33,06,70,252/-. During the continuation of the work under the contract, Respondent raised invoices seeking inter alia reimbursement of the input sales tax paid on purchases and of sales tax paid by sub-contractors/vendors, while executing the contractual work. The CENVAT credit passed on to the Appellant was Rs.19,70,32,185/-, as against the guaranteed amount of Rs.33,06,70,252/-. The Appellant refused to make any payment to the Respondent until necessary documents were submitted by the latter to confirm that the entire

guaranteed amount towards CENVAT credit would be passed on to the Appellant. The Appellant claimed that in terms of the price schedule as set

out in the contract, it was entitled to deduct the shortfall in CENVAT credit from the net contract price at serial No.15 of the summary price schedule.

On the other hand, Respondent's stance was that the deductions to the extent of shortfall in CENVAT credit could only be made from the gross

contract price at serial No.12 and not from the net contract price at serial No.15. In view of the opposing stances taken by the parties, the Respondent

invoked arbitration and the matter was referred to an Arbitral Tribunal comprising of a Sole Arbitrator.

7. The final award dated 15th October, 2019, was passed in favour of the Respondent, allowing all their claims. The concluding portion of the arbitral

award reads as under:

102. In the result,

(a) the claim of the principal amount Rs.2,82,73,811.35/- by way of reimbursement of CST is allowed. The sum of Rs.92,16,537.03/-, already

paid by the Respondent on being adjusted against this amount, the Claimant is entitled to the payment of the balance amount of

Rs.1,90,56,702.38/- together with interest thereon @ 14% per annum, from the date on which it had fallen due in terms of Clause 12.1.6 of

the GCC, till the date of actual payment. The counter claim of the Respondent for Rs.92,16,537.03/- is rejected.

(b) the Claimant's claim of the principal amount Rs.6,66,13,750/- against its RA Bill No.34 dated 04.09.2015 is allowed, together with

interest thereon @ 14% per annum from 23.10.2015 till 12.04.2019. Further, the Claimant is also entitled to interest @ 14% per annum on

the balance principal amount of Rs.5,93,64,168/- from 12.04.2019 till the date of actual payment. The counter claim of the Respondent for

Rs.5,01,47,637/- is rejected.

(c) the Claimant's claim of the principal amount of Rs.1,07,75,482.06/- against its RA Bill No.43 dated 20.03.2017 is allowed together with

interest @ 14% per annum thereon from 04.05.2017 till 05.12.2018. Further, the Claimant is also entitled to interest @ 14% per annum on

the balance principal amount of Rs.2,93,293.29/- from 05.12.2018 till the date of actual payment.

(d) costs as above.â??

8. The award was assailed by filing objections under Section 34 of A&C Act. However, after considering the contractual terms between the parties, the learned Single Judge did not find any merit in the contentions urged by the Appellant. Further, following the principles laid down by the Supreme Court in numerous judgments, relating to the extremely narrow scope of interference for exercising jurisdiction under Section 34 of the A&C Act, the learned Single Judge dismissed the objections and upheld the award, except to the extent that the awarded costs were reduced to 50% and further, the interest rate was reduced from 14% to 10%.

Contentions of the parties

9. Mr. V. Lakshmikumaran, learned counsel for the Appellant submits that both the award and the impugned judgment are patently erroneous as they overlook the settled principles of law governing the exercise of jurisdiction under Section 34 of the A&C Act. The award and the impugned judgment are in conflict with public policy, having rewritten the terms of the General Conditions of Contract (hereinafter referred as â??GCCâ?), rendering important clauses of the GCC nugatory , thus, violating fundamental policy and basic notions of justice. He further argued that the reasoning in the impugned judgment and the award detrimentally impacts the public exchequer and deserves to be set aside. The award is patently illegal as is manifest by a bare perusal of Arbitratorâ??s reasoning or the lack thereof. Mr. V. Lakshmikumaran further referred to Clause 14.5.6 of the GCC and argued that the said clause is unambiguous and its plain and literal meaning indicates that â??in case of any shortfallâ?? in the minimum guaranteed CENVAT credit, â??the shortfall shall be deducted by the employerâ?? [Appellant]. There are no exceptions or contingencies provided for in the said clause to avoid recovery of shortfall in the minimum guaranteed CENVAT credit. The above clause must be given literal interpretation and the learned Arbitrator ought to have considered what this clause literally states. The learned Arbitrator has given an irrational and arbitrary interpretation to the plain and unambiguous words of the clause and thereby defeated the intent of the parties.

10. Mr. V. Lakshmikumaran also referred to the impugned award, relevant portion whereof is extracted hereinbelow:

â??69â?|.â?|.The tax liability of the Employer/ Respondent, in any case, does not get altered by the variation in the guaranteed CENVAT

credit figure. For example, if in a project, the tax liability of the Employer is Rs.1 crore and the minimum guaranteed CENVAT credit as

declared by the Contractor is Rs.50 lakhs, and there is no shortfall in that amount, the Employer would avail the benefit of the CENVAT

credit and reimburse the Contractor to this extent. However, the Employer would still be required to pay the balance Rs.50 lakhs to the

Govt. in discharge of its overall tax liability in the project. In case, there is a shortfall of Rs.20 lakhs, the Employer would avail CENVAT

credit of that amount and would reimburse the Contractor to that extent. In such a case, in discharge of its total tax liability, the Employer

would be required to pay balance Rs.70 lakhs to the Govt. In the event of the CENVAT credit availed is higher than Rs.50 lakhs, say Rs.70

lakhs, the Employer would have to pay the balance amount of Rs.30 lakhs to the Govt., reimburse Rs.50 lakhs to the Contractor and share

the excess of Rs.20 lakhs in the ratio of 50:50 with the Contractor. In any case, therefore, by the shortfall in the declared minimum

guaranteed CENVAT credit, the Employer does not suffer any loss or prejudice vis-a-vis its tax liability. This assumes significance in the

facts of this case as well, in view of absence of any complaint or allegation by the Respondent about lack of quality in the supplies or

workmanship in the execution of the project In any case, the Respondent, has failed to demonstrate before this Tribunal, profit, if any, it

would have earned had there been no shortfall in the minimum guaranteed CENVAT credit or loss it has suffered in view of the shortfall. To

reiterate, it has also failed to demonstrate unassailingly, that the Claimant had earned profit due to such shortfall. In the above conspectus,

the imputation of the Claimant that the withholding of the payment of its RA Bill No.34 on the purported ground of shortfall in the Minimum

Guaranteed Amount of CENVAT Credit tantamounts to attempted double deduction to its prejudice cannot be brushed aside as wholly

unfounded.â??

He submitted that the aforesaid extract makes it evident that the learned Arbitrator has decided the issue on an erroneous presumption that since the

shortfall amount has not been collected from the Appellant, it has suffered no loss on that account. He submitted that this is factually incorrect, and the

Respondent has in fact collected this shortfall, albeit not in the garb of CENVAT credit. He submitted that in any event, there was no such condition

of "no loss" laid down in Clause 14.5.6 for making a deduction from recovery of shortfall in minimum guaranteed CENVAT credit.

11. Mr. V. Lakshmikumaran further argued that, undisputedly there was a shortfall in the minimum guaranteed CENVAT credit to the tune of Rs.

5,01,47,631/- and thus, the Appellant has justifiably deducted this amount from Respondent's bills in terms of Clause 14.5.6 of GCC and the

summary price schedule. Instead of upholding the deductions, the learned Arbitrator and the learned Single Judge have denied and nullified the

Appellant's right to make deductions as per Clause 14.5.6. He further argued that rewriting of Clause 14.5.6 is contrary to the intention of the

parties, contractual terms, and the provisions of law. The note at the bottom of the summary price schedule does not dilute the deductions under

Clause 14.5.6 and the learned Arbitrator has relied upon incorrect assumptions of crucial facts. Clause 14.5.6 serves to protect the public exchequer

by ensuring that the Contractor-Respondent is not enriched beyond the agreed net price mandated under Clause 11.2.1, however the same has been

nullified by the learned Arbitrator.

12. Per contra, Mr. P.C. Markanda, learned Senior Counsel appearing on advance notice on behalf of the Respondent, supported the award passed by

the learned Arbitrator and impugned judgment of the learned Single Judge and argued that the scope of the jurisdiction of this Court under Section 37

is extremely limited and none of the grounds urged by the Appellant are worthy of consideration. He submitted that accepting the contentions of the

Appellant would amount to the Court enforcing its opinion on the interpretation of the terms of the contract which is not permissible in view of the

settled law that it is the Arbitrator alone who has the jurisdiction to decide questions relating to interpretation of terms of the contract. Mr. Markanda

further argued that terms of the contract are crystal clear. The clauses unequivocally provide that the shortfall of CENVAT credit must be adjusted

from the gross contract price at serial No.12 and not from the net contract price at serial No.15. The Appellant could not arbitrarily and unilaterally

elect to deduct the same from the net contract price and, therefore, the view taken by the learned Arbitrator as upheld by the learned Single Judge

warrants no interference by this Court.

Analysis and findings

13. At the outset we wholeheartedly agree with Mr. Markanda that the jurisdiction of this Court while exercising appellate power to review the

judgment of the learned Single Judge that decides the objections under Section 34 of the A&C Act, is extremely limited. As an appellate court, we

would be inclined to intervene only in a situation wherein there is a manifest or patent error in the award and the view taken by the learned Single

Judge. We would not like to substitute our opinion even if there is another plausible view then what has been taken by the learned Single Judge at the

first instance. The Supreme Court in the case of Associate Builders v. Delhi Development Authority 2015) 3 SCC 49 has elaborately laid down the

scope of jurisdiction of the Court to interfere with the arbitral award while exercising power under Section 34 of the A&C Act. The Supreme Court

had observed that only the grounds specifically provided in Section 34 of the A &C Act can be relied upon to interfere with an arbitral award and held

that the Court would be justified in interfering with the merits of the award only when it is purported to be in conflict with the public policy of India.

The Court also considered different types of heads falling under the scope of 'public policy' in India, which inter alia includes patent illegality. It

was further observed that the Arbitral Tribunal must decide the dispute between the parties in terms of the contract and the construction of the terms

of the contract is primarily for an Arbitrator to decide and must not be interfered with, unless the Arbitrator construes the contract in such a way that

it could be said to be something that no fair minded or reasonable person could do. In the said judgment, the Court has further observed that when a

Court is applying the 'public policy' test to an arbitral award , it does not act as a court of appeal and consequently errors of fact cannot be

corrected. A possible view by the Arbitrator on facts must necessarily pass muster as the Arbitrator is the ultimate master of the quantity and quality

of evidence to be relied upon when he delivers his arbitral award. The abovementioned view of the Supreme Court in Associate Builders (supra) was

reiterated by the Supreme Court in Parsa Kente Collieries Limited v. Rajasthan

Rajya Vidyut Utpadan Nigam Limited AIR 2019 SC 2908. Thus, applying the law as laid down by the Supreme Court, while exercising jurisdiction as an appellate court, we have to, therefore, examine if the learned Single Judge has exceeded its jurisdiction while deciding the objections under Section 34 of the A&C Act.

14. On a reading of the impugned judgment, we find that the only contentions urged by the Appellant were with respect to the interpretation and giving effect to the terms of the contract. As per Clause 14.5.6 of the GCC, the Respondent was liable to provide the Appellant the 'Minimum Guaranteed CENVAT Credit' as mentioned in the contract. The Appellant was entitled to deduct the shortfall in the credit, if any, from the Total Contract Price charged from it. There is undisputedly a shortfall in minimum guaranteed credit of approximately Rs. 5 crores. Appellant deducted this amount against the running bills. Respondent contended that this was contrary to the terms of the contract and deductions could only be made against the gross contract price which according to them had indeed been done and therefore, deductions against the running bills was impermissible. Thus, the principal controversy before the learned Arbitrator and also the learned Single Judge, pertained to the deduction of shortfall in the CENVAT credit i.e., whether the Appellant was entitled to deduct the amount due from the gross contract price or the net contract price. The opposing stances of the parties gave rise to disputes that squarely fell within the domain of interpretation of the terms of the contract. This aspect is precisely and exclusively within the realm of the jurisdiction of the arbitral tribunal and law on this issue is no longer res integra, as has been summarized in *Rashtriya Ispat Nigam Ltd. v.*

Dewan Chand Ram Saran (2012) 5 SCC 306, as follows:

43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.*

[(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy

Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations

in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313) ""43. ..T. he umpire has

considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One

may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way

perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in

appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the

Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what

the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one

after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire

has to be accepted as final and binding.

(Emphasis supplied)

15. The learned Arbitrator after analysing the entire terms of the contract and the evidence on record categorically concluded that the deduction could

be made only from the gross contract price referred to at serial No.12. The learned Single Judge has carefully examined the observations of the

learned Arbitrator in this regard and did not find any infirmity with the same. The Court concluded that the only logical interpretation of the phrase

'contract price' for the purpose of Clause 14.5.6 is that any deduction on account of shortfall viz. the minimum guaranteed CENVAT credit had to be

made from the gross contract price at serial No.12 and not from the net contract price at serial No.15. The findings of the learned Single Judge on this

point are reproduced hereinbelow:

â??17. Upon a perusal of the relevant clauses, more specifically Clause 14.5.6 of

the contract, I find that the contract specifically envisages that in case of any shortfall in the CENVAT credit as against the minimum guaranteed CENVAT Credit, the same shall be deductible from the amount payable to the contractor. However, since this clause does not specify the amount from which the said shortfall would be deductible, the answer to this quandary lies in the note at the bottom of the summary price schedule appended to the contract. A plain reading of this note makes it evident that the only logical interpretation of the phrase 'contract price' for the purpose of Clause 14.5.6 of the contract is that any deduction on account of shortfall viz. the guaranteed CENVAT credit had to be made from the gross contract price at serial No.12 and not from the net contract price at serial No.15.

18. In the light of this position, I find no merit in Mr. Sethi's primary contention that the sum of Rs.5,01,47,631/- towards the admitted shortfall in CENVAT credit was required to be deducted from the net contract price mentioned at serial no.15 of the summary price schedule and not from the gross contract price mentioned at serial no.12 thereof. In fact, the petitioner's submission that a deduction from the gross contract price at serial No.12 also contemplated deduction from the net contract price at serial no.15 is in the teeth of the plain language employed in the contract.

19. I find that the learned Arbitrator has, after considering the summary price schedule as also the terms of the contract, come to a categorical conclusion that the deduction could be made only from the gross contract price referred to at serial no.12. Thus, I have no hesitation in concurring with the findings of the learned Arbitrator that any shortfall in the CENVAT credit payable by the Respondent, could be recovered only by making requisite deductions from the gross contract price mentioned at serial No.12 of the summary price schedule.â??

16. On the second issue regarding the reimbursement of CST paid by the Respondentâ??s sub-contractors/vendors, the learned Single Judge has independently and objectively examined the terms of the contract as is evident from the extracted portion of the impugned judgment.

â??20. The petitioner's challenge to the learned Arbitrator's directions with

respect to reimbursement of the CST paid by the Respondent's sub-contractors/vendors to the Respondent is equally meritless. I find that the learned Arbitrator has, after examining Clause 14.1 of the contract, concluded that the price agreed upon between the parties clearly includes all taxes to be reimbursed to the Respondent. Therefore, merely because some input taxes were not paid directly by the Respondent but by its sub-contractors/vendors in respect of goods used in the execution of the contract, the same could not be a ground for the petitioner to refuse reimbursement thereof to the Respondent.

21. It is thus evident that the learned Arbitrator has, after interpreting the various clauses of the contracts, including clause 14.1 of the GCC, arrived at a categorical conclusion that the Respondent was entitled to reimbursement of the CST paid by its sub-contractors/vendors, with which conclusion I find no reason to interfere. Even otherwise, when the findings of an award rest on an interpretation of the provisions of the contract between the parties, the Court, while examining the award under Section 34 of the Act, cannot interfere with the same, even if another interpretation is possible.â??

The learned Single Judge has held that the price agreed upon by the parties includes all taxes to be reimbursed to the Respondent, and merely because some input taxes were not paid directly by the Respondent but by its sub-contractors/vendors in respect of the goods used in the execution of the contract, would not be a tenable ground for the Appellant to refuse reimbursement thereof to the Respondent.

17. We do not find any perversity in the afore-noted analysis and conclusion. We also cannot say that the learned Arbitrator has travelled beyond his jurisdiction or has taken a view contrary to the terms of the contract or rewritten the terms of the contract, as Mr. Lakshmikumaran has sought to put

it. We cannot substitute our opinion in place of the interpretation given by the learned Arbitrator. Mr. Lakshmikumaran repeatedly urged that the

Appellant has no problem with respect to the observations of the learned Arbitrator regarding the deduction to be made. He submitted that as long as

deductions are held to be permissible, irrespective of the amount against which the same are to be made viz. gross contract price or net contract price,

Appellant would be satisfied with the findings. He urged that the Court must

clarify this aspect. This submission of Mr. Lakshmikumaran gives the impression that the learned Arbitrator has not permitted any deduction at all. We may note that this contention was not advanced before the learned Single Judge and therefore we cannot permit the Appellant to urge the same at this stage. Secondly, the findings and observations of the learned Arbitrator, paint an entirely different picture which contradicts the stand of the Appellant. The learned Arbitrator has observed that the Respondent herein (Claimant) had alleged that the Appellant herein (Respondent) did not pay the shortfall amount of Rs. 5.03 crores of CENVAT credit to it in the first place which amounts to deduction from the total contract price and besides the Appellant has also withheld the said amount from its RA Bill Nos. 34 and 43. The finding of the Tribunal on this issue is as under :

¶68. It is not denied by the Respondent in its pleadings, that the Total Contract Price has been reduced by the shortfall amount of Rs.5,01,47,637/- as contemplated by the 'Note' appended to the Summary Price Schedule.

(Emphasis supplied)

Thus, the case of Respondent herein has always been that the shortfall amount of Rs.5.03 crores has already been deducted from the total contract price and, therefore, it cannot be withheld from its bills as it would amount to double enrichment.

18. Further, when we put it to Mr. Lakshmikumaran to point out if it had been pleaded anywhere that an adjustment on shortfall of CENVAT credit has not been permitted at all, he was unable to draw our attention to any particular pleading to that effect. On the other hand, Mr. Markanda categorically stated that it was the admitted position of the Appellant that adjustment on shortfall of CENVAT credit had been permitted and our attention was drawn to para 73 of the Award which reads as under:-

¶73. A brief reference to the evidence on record would be additionally advantageous. The Claimant's witness, CW-1, in his cross-examination, reaffirmed that the Respondent had paid/ reimbursed the Claimant Rs,19,70,32,185/- on account of CENVAT and not Rs.

28,05,22,621/-. He also deposed, that the guaranteed amount of CENVAT credit may vary, depending upon the prevailing rate of tax/duty

and procurement price and that the amount of CENVAT credit is a notional

amount. He stated that the amount of CENVAT credit could vary, from Rs.33,06,70,252/- based on the rate of tax/ duty and procurement price. In reply to Question No.18 in cross-examination, that if the quantity of materials used varies from the quantity envisaged in the billing schedule submitted by the Claimant, whether the guaranteed amount of CENVAT credit would also vary, the witness replied that the factor of variance between the envisaged quantity and actual quantity, would be taken care of in the procurement price factor.

The Respondent's witness, RW-1, in reply to Question No. 44, in his cross-examination, admitted that the amount of Rs.19,70,32,185/- had been availed by the Respondent as CENVAT credit and that it had also reimbursed the said amount to the Claimant. The witness also admitted that, against Rs.19,70,32,185/-, the adjusted CENVAT credit had been computed by the Respondent at Rs.28,05,22,621/- by giving effect to tax variation Clause 14.6. The witness answered in the affirmative to the question, whether the minimum guaranteed CENVAT amount mentioned in the Summary Price Schedule of the Contract was not a firm amount and was subject to positive or negative variations depending upon the prevalent rate of tax/ duty. The witness also admitted, that Rs.5.01 crores had not been paid to the Claimant, as documents with regard thereto were not provided by it.

In answer to Question No. 55 in his cross-examination to the effect as to what was the loss sustained by the Respondent on account of non-submission of documents relating to minimum guaranteed CENVAT credit, the witness could not offer any comment with regard thereto. The witness also admitted that after December, 2015, a number of reconciliation meetings between the Claimant and the Respondent had been held. He stated that the Respondent could not release the payment of the RA Bills No. 34 and 43, as shortfall in minimum guaranteed CENVAT was recoverable and the Claimant had agreed to produce more documents to reduce the shortfall. In answer to Question No. 63, in his cross-examination to the effect that the Respondent could not have withheld any amount from Claimant's RA Bills on account of shortfall in minimum guaranteed CENVAT, the witness admitted that the agreement did not provide stages at which shortfall of minimum

guaranteed CENVAT could be recovered and as the Respondent had only these two bills of the Claimant available, payments thereof were

withheld pending reconciliation of shortfall of minimum guaranteed CENVAT.

74. It is thus apparent from a complete analysis of the materials on record, that though not authorized, by the Contract Agreement and the

GCC, the Respondent withheld the payment of the RA Bill No.34 dated 04.09.2015 along with RA Bill No. 43 dated 08.06.2017, on the

ground that the shortfall in the declared minimum guaranteed CENVAT was recoverable therefrom.â??

(Emphasis supplied)

Having said that, we would not like to be drawn into this controversy as, the contention being urged before us was clearly never raised before the

learned Single Judge, and the same is evident from a reading of the impugned judgment.

19. In view of the foregoing, the present appeal and the accompanying stay application is dismissed. No order as to costs.