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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Pronounced on: 21.01.2025***

\+ **FAO(OS) (COMM) 61/2019**

NEXT GENERATION BUSINESS POWERS SYSTEMS LTD ..... APPELLANT

versus

TELECOMMUNICATION CONSULTANTS INDIA LTD ..... RESPONDENT

Advocates who appeared in this case:

For the Appellant : Mr. T.S. Ahuja, Mr. Varun S Ahuja and Ms. Ridhi Kapoor, Advocates.

For the Respondent : Mr. Ratan K Singh, Sr Advocate with Mr. Nikhlesh Krishnan, Ms. Ritika Priya, Mr. Abhishek Bhushan Singh, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE TARA VITASTA GANJU

JUDGMENT

TARA VITASTA GANJU, J.:

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PREFACE

1. The present Appeal has been filed by the Appellant under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "A&C Act"] against the judgement dated 22.01.2019 passed by the learned Single Judge of this Court in OMP (COMM) 17/2017 captioned ***Telecommunication Consultants India Ltd. v. Next Generation Business Power Systems Ltd.*** [hereinafter referred to as "Impugned Judgment"]. By the Impugned Judgment, the learned Single Judge has partly upheld an award dated 23.08.2014 [hereinafter referred to as "Arbitral Award"] passed by the learned Sole Arbitrator.

2. An Appeal was also filed by the Respondent before this Court being FAO(OS)(COMM) 171/2019 captioned ***Telecommunication Consultants India Ltd. (TCIL) v. NGBPS Ltd.*** By an order dated 28.05.2024, the Appeal filed by the Respondent was dismissed by this Court with directions for the release of the amounts deposited by the Respondent before the Court in favour of the Appellant.

3. At the outset and as is recorded in the order dated 16.05.2019 passed by the Coordinate Bench of this Court, the challenge in the present Appeal was confined by the Appellant to only three findings;

(i) The claim for deducted/withheld amount of Rs. 60,01,890/- with interest thereon;

(ii) The claim for amounts deducted in the 31st quarter in respect of Annual Technical Support (ATS) for Rs. 14,64,203/-;

(iii) The claim for an amount deducted in the sum of Rs. 35,00,000/- in respect of 32nd quarter.

4. The Government of Gujarat [hereinafter referred to as "GOG"] awarded to the Respondent a contract for Third Party Inspection of the Gujarat State Wide Area Network Project including performance level monitoring and reporting by an agreement dated 15.03.2002 [hereinafter referred to as "GSWAN Project"]. Subsequently, the Respondent entered into an agreement with the Appellant dated 18.04.2002 for providing sub-consultancy for the GSWAN Project of GOG [hereinafter referred to as "Agreement"]. The dispute between the parties arose in respect of this Agreement for sub-consultancy services to the Respondent.

5. The salient terms of the Agreement were that the Agreement would remain in operation for a period up to 14.04.2010 (almost 8 years) with a provision for extension of the Agreement. In terms of Clause 11 of Schedule IV of the Agreement, the Appellant was entitled to collect quarterly guaranteed revenue payments in the sum of Rs. 35,00,000/- for a period of 8 years or 32 quarters against invoices raised from time to time.

6. Upon termination/expiry of the Agreement on 14.04.2010, a third-party agency called M/s PCS Technology Ltd. [hereinafter referred to as "PCS"] was appointed by GOG to take over the GSWAN Project.

7. It is the case of the Appellant that the disputes arose after the 20th quarter as up to then, the Respondent was making timely payments to the

Appellant. However, between 21st to 31st quarter, the Respondent illegally retained an amount of Rs. 60,01,890/- from the payments due.

8. A demand notice was served upon the Respondent on 12.07.2010 demanding an amount of Rs. 1,30,01,890/-. Subsequently, on 29.07.2010, the Respondent invoked the bank guarantee which was available as security in the sum of Rs. 14,00,000/- with the Respondent.

9. An Arbitrator was appointed to adjudicate upon the disputes between the parties [hereinafter referred to as "Sole Arbitrator"]. The Appellant made the following claims against the Respondent:

(i) Claims for payment of the bill amounts illegally and unlawfully withheld by the respondent; Rs. 60,01,890/- together with interest thereon @ 15.5% p.a. till the date of payment.

(ii) Claim for payment of guaranteed quarterly payment of Rs. 35,00,000/- for the quarter of 15th Jan 2010 to 14th April 2010.

(iii) Claim for Rs. 35,00,000/- for continuing to deploy support and technical staff and rendering services for familiarization and training of the employees of newly appointed Contractor M/s PCS Technology Limited and handing over GSWAN Project to the new contractor for the period 15th April 2010 to 14th July 2010.

(iv) Claim for payment of Rs. 14,00,000/- on account of encashment of Bank Guarantee by the respondent.

(v) Claim for release of Assurance Bank Guarantee of Rs.3,50,000/- lying with respondent.

(vi) Claim for Rs. 21,630/- on account of amounts withheld by the Respondent from the bills of the claimant for the FY 2009-2010 on account of interest against which TDS certificate is issued to the Respondent.

(vii) Claim for interest @ 15.5% p.a. on the amounts found due under Claims (ii) to Claim (vi) above till the date of payment to the claimant.

(viii) Costs of the Arbitration Proceedings.

9.1 These Claims were contested by the Respondent. It was contended by the Respondent that the Appellant was found to be lacking in its expertise, ability and resources from the beginning, but from 21st quarter, it failed to perform part of its duties and obligations, which led to the GOG issuing show cause notices for the deficiencies and imposing penalties on the Respondent. Since GOG deducted amounts on payments made to the Respondent, the Respondent proportionately deducted the payments made by it to the Appellant. It was contended that the Respondent has made the payment under the Agreement less the deductions on account of non-performance of the contractual obligations by the Appellant and the consequent imposition of penalty by GOG.

10. By the Arbitral Award, the Sole Arbitrator found that the Appellant is entitled to recover a sum of Rs. 1,18,28,385/- which was made up of the following:

(i)	Refund of amount withheld from Quarters 21 to 24 and 26 to 31	Rs. 51,81,755/-
(ii)	Payment for Quarter 32	Rs. 35,00,000/-
(iii)	Dues for the extended period of services	Rs. 17,25,000/-
(iv)	For performance bank guarantee wrongly encashed	Rs. 14,00,000/-
(v)	On account of TDS	Rs. 21,630/-
	Total	**Rs. 1,18,28,385/-**

10.1 Directions for the release of Bank Guarantee of Rs. 3,50,000/- were also passed. The Sole Arbitrator awarded interest at the rate of 15.5% per annum with effect from 01.08.2010 till payment on the awarded amounts. Costs in the sum of Rs. 1,00,000/- were also awarded to the Appellant.

11. The Arbitral Award was challenged by the Respondent under Section 34 of the A&C Act. The learned Single Judge after examining the claim of the parties held that the Appellant is not entitled to a refund for the period for quarters 21st to 24th and 26th to 31st, except that amount which is in excess of the amount deductible under Clauses 4 and 6 of Schedule IV of the Agreement. The Impugned Judgment also set aside the finding which awarded a sum of Rs.14,64,203/- towards ATS for the e-health suite software which was awarded to the Appellant as well. The claim for 32nd quarter in the sum of Rs. 35,00,000/- was also set aside by the learned Single Judge. The remaining claims were however not interfered with.

CONTENTIONS OF THE APPELLANT

12. Learned Counsel for the Appellant has contended that the Appellant was not a party to the agreement between the Respondent and GOG and cannot be penalised for the arbitrary action of the principal employer of the Respondent and for the inability of the Respondent to resolve its disputes with GOG. The Appellant contended that it rendered services 24 x 7/365 days for 8 years under the Agreement and submitted detailed monitoring reports to the Respondent. There was no deficiency pointed out in monitoring services by the Respondent during this period.

Thus, it was contended that the Respondent is liable to make complete payment to the Appellant.

12.1 It was further contended that the Agreement contained a Clause for guaranteed revenue to be paid to the Appellant and that the Clause in the Agreement could not be interpreted to mean that the payment to the Appellant would only be made once it was received from GOG.

12.2 In addition, it was contended by the learned Counsel for the Appellant that the Arbitral Award was not opposed to public policy of India and thus did not merit any interference by the learned Single Judge.

12.3 Lastly, it was averred by the learned Counsel for the Appellant that the contention of the Respondent that the Appellant was required to provide annual technical services/upgradation to the Respondent, is not correct. The Agreement did not contain any contract of maintenance nor provide for any obligation on the part of the Appellant. The Appellant had already provided the "e-health" software suite to the Respondent and during the tenure of the Agreement between the parties, the software worked satisfactorily. The Sole Arbitrator examined the documents and found that the Annual Technical Support of the software was not a contractual obligation and thus held that the deduction of Rs. 14,64,203/- was not warranted. This finding could not be interfered with.

12.4 The Appellant relied upon a judgment of a Coordinate Bench of this Court in the matter titled as ***National Projects Construction Corporation Limited v. Harvinder Singh and Company.***[1] wherein, in a

[1] 2018 SCC Online Del 9573

similar back-to-back agreement between two parties the Coordinate Bench held that there was no privity of contract of the sub-contractor with the principal contractor and that interpretation of the clauses to disentitle the sub-contractor of payment merely because the principal employer did not pay the contractor, would be grossly unjust.

CONTENTIONS OF THE RESPONDENT

13. Learned Counsel for the Respondent, on the other hand, has contended that GOG awarded the agreement for the GSWAN Project to the Respondent and that the agreement itself provided that the payment would be released upon receipt of payment from GOG. Since GOG deducted the payments of the Respondent for the services rendered, the Respondent was bound to proportionately deduct such payment from the invoices of the Appellant being a *"back-to-back"* contract.

13.1 The Respondent also contended that the GSWAN Project was a back-to-back contract on the basis of which the Agreement was entered into with the Appellant, and that the Respondent deducted the proportionate penalty and costs incurred by it in deploying manpower and cost of the Annual Technical Support of the "e-health suite" software support [hereinafter referred to as "ATS"]. It was further stated that the payment for the last quarter had not been received from GOG due to the failure of the Appellant in updating the "e-health suite" software to the latest version and handing over the same as per the Agreement. Thus, it was contended that the Appellant was in breach of its obligations and that the deductions made by the Respondent were on account of the breach of the Agreement by the Appellant.

13.2 Learned Counsel for the Respondent has contended that all payments were to be made to the Appellant at the end of each quarter upon receipt of payment by the Respondent from GOG. Relying on Clause 9 and 11(e) of Schedule IV of the Agreement, it was stated that the Clause set out that the payment would be released within a week of receipt of payment by the Respondent from GOG. Thus, the Agreement provided for the deductions on account of deduction by GOG.

13.3 Learned Counsel for the Respondent further averred that the deduction in the amount of Rs. 14,64,203/- made on account of non-provision of ATS were wrongly granted by the Sole Arbitrator. Clause 15 of Schedule IV of the Agreement required the Appellant to transfer without any liability, all of hardware, software, manuals, titles and any other related works to the Respondent. In addition, the Appellant had acknowledged its liabilities to make ATS support in terms of the minutes of meeting dated 09.11.2009 and the letter dated 17.11.2009. Since services were not provided, the Respondent had no option but to make the deduction.

13.4 So far as concerns the non-payment of amounts of Rs. 35,00,000/- for the 32nd Quarter, learned Counsel for the Respondent contended that GOG withheld payments of the Respondent for the last Quarter pending upgradation of the "e-health suite" software license and complete transfer, keeping in view the back-to-back arrangements between the parties in the absence of release of payment for 32nd Quarter to the Respondent by GOG, the payment was rightly withheld by the Respondent.

13.5 Lastly, it was contended that the Arbitral Award was patently illegal and the learned Single Judge rightly interfered with the same under the purview of Section 34 of the A&C Act. It was contended that ***National Projects Construction*** case relied upon by the Appellant is distinguishable on its facts.

14. In Rejoinder, the Appellant submitted that there was no breach on its behalf. It was contended that the deduction of ATS was whimsical as the Agreement between the parties was already over by 02.06.2010 and once the Agreement came to an end, the Appellant was not under any obligation to provide for services or any software/ATS beyond the contractual period. Thus, there cannot be any deduction on account of ATS.

14.1 It was additionally contended that the Agreement with the Respondent was to provide third party monitoring for which purpose it purchased software. The Appellant purchased the latest version of the "e-health suite" software in the year 2007 and the software was configured with the hardware provided to the Respondent. The Appellant was under no obligation to provide an updated version of the software since the software was sufficient for rendering services under the Agreement and there was no provision in the Agreement for the same.

15. After examining the Arbitral Award, the learned Single Judge proceeded to give a finding that some of the claims of the Appellant could not be sustained, which finding has been challenged by the Appellant.

ANALYSIS AND FINDINGS

16. As stated above, the Appellant has confined its challenge in the present Appeal to the three (3) findings of the learned Single Judge in the Impugned Judgment wherein part of the claims awarded by the Arbitral Award have been set aside.

CLAIM FOR DEDUCTED WITHHELD AMOUNT OF RS. 60.01 LACS WITH INTEREST

17. The Sole Arbitrator after examining the pleadings and documents between the parties found that there was no dispute between the parties that the Appellant has been submitting its invoices for the quarterly payments and had received full payment up to the 20th quarter. But thereafter, deductions were made from 21st to 31st quarter by the Respondent in view of the fact that the Respondent's payments were deducted by GOG.

17.1 The Sole Arbitrator examined the clauses of the Agreement and found that the scope of work that was to be rendered by the Respondent to the GOG had an additional responsibility. Upon a comparison between the Agreement, of the Appellant and the Respondent and the contract for the GSWAN Project between the Respondent and GOG, it was found that the GSWAN Project agreement had an additional Clause – Clause 11. While the Appellant was required only to "assist" the Respondent, the Respondent had the additional obligation of providing consulting on networking issues. It is apposite to extract paragraph 17 of

the Arbitral Award which discusses this below:

> *"17.* ***Comparison of scope of work mentioned in the agreement between the parties and that of the agreement between the respondent and Govt. of Gujarat shows that duty of the claimant was to 'assist' the respondent in executing its responsibilities as detailed in clauses 1 to 10 but clause 11 of the agreement between the respondent and Govt. of Gujarat was not incorporated in the agreement between the parties****. Clause 11 is reproduced below:*
>
> > *"11. – TPA will act as not only TPA but consultant to the GoG on various networking issues till the currency of the agreement."*
>
> *From the above it is evident that work assigned to the claimant was* ***confined to assisting the respondent in discharge of its duties as TPA only, and job of consultancy on networking issues has not been assigned to it****. The opening lines of agreement between the parties also specify that this agreement is for providing sub-consultancy to the respondent for Third Party Inspection for GSWAN including Performance Level Monitoring and Reporting.* ***Schedule 1 thereof also specifies that service charges payable to the claimant were as sub-consultancy fee for Third Party Inspection of the Gujarat State Wide Area Network.*** *"*
>
> [Emphasis is ours]

17.2 The Sole Arbitrator further held that as per the Clause 11 of Schedule IV of the Agreement, use of term *"Guaranteed Payment"* in letter of intent dated 11.04.2002 and the Agreement specifies the intention of the parties and it is not linked with, nor is made subject to the payments to be received by Respondent from GoG, and as such the clear wording and intention of the parties, needs to be given effect.

18. The learned Single Judge disagreed with this finding. It was held by the learned Single Judge that Clause 11 of Schedule IV of the Agreement uses the term *"Guaranteed Revenue Payment"*. However, since Clause 11 states that payments will be released "*within a week of receipt of TCIL payment from GOG",* it should be interpreted to mean

that the Appellant was only entitled to receive payment if and when the payment was received from GOG and not otherwise.

18.1 The learned Single Judge further held that Clause 11 of Schedule IV of the Agreement uses the term *"Guaranteed Revenue Payment"* as per Schedule I of the Agreement. However, since Clause 11 goes on further to state that the Appellant would submit its bills based on the Respondent's quarterly bill to GOG, the Clause would thus mean that the Appellant would be entitled to receive payment *"only if and when"* the payment is received from GOG by the Respondent. Therefore, if there is some dispute between the Respondent and GOG, the Appellant would not be entitled to receive such payment. The learned Single Judge further relied on a communication dated 27.05.2009 sent by the Appellant to the Respondent, wherein the Appellant admitted that the Agreement is a *"back-to-back"* agreement. The learned Single Judge thus found that the Sole Arbitrator had not made reference to this communication of 27.05.2009 while interpreting Clause 11 of Schedule IV of the Agreement, and thus, has misinterpreted the Agreement between the parties. The relevant extract of the Impugned Judgement is set out below:

> *"35. A reading of the above finding would clearly show that in the opinion of the Arbitrator, the words,* ***'on receipt of payment by TCIL' cannot be read as 'only on' or 'only if' payment is received by TCIL****. The Arbitrator further holds that adding the term 'Guaranteed' to the payment clause in the Agreement between the parties has to be given its due meaning / import and specifies the intention of the parties and the same is not linked with nor made subject to payment to be received by TCIL from the GoG.*
>
> *xx xx xx*
>
> *43. In the present case, Schedule I prescribed a fixed quarterly payment to be made by the petitioner to the respondent. It was in that light that*

Clause 11 of Schedule IV uses the term 'Guaranteed Revenue Payment *as per Schedule I'. Clause 11, however, in no ambiguous terms further goes on to state that the petitioner would submit its bills based on sub-consultant (respondent) quarterly bill to GoG and payment to the respondent shall be released 'within a week of receipt of TCIL payment from GoG'.* ***Such clause, therefore, can only mean that the respondent would be entitled to receive payment from the petitioner only if and when the petitioner receives the payment from GoG****.*

xx xx xx

45. In terms of the above referred judgments, ***therefore, the respondent was not entitled to receive payment in case, for some dispute, the petitioner does not receive such payment from the GoG****.*

xx xx xx

54. The above letter is a ***clear acknowledgment of the respondent that the Contract was on a back to back basis and that the petitioner was entitled to withhold amounts payable to the respondent in case such amounts are withheld by GoG from the petitioner****. The Arbitrator has clearly not made any reference to the said document while interpreting Clause 11 and has clearly misinterpreted the Contract between the parties as one prescribing the time for making of the payment as against the entitlement of the respondent to receive such payment."*

[Emphasis is ours]

19. On the aspect of withholding an amount of Rs. 60,01,890/-, the learned Single Judge relied upon the judgment of High Court of Hong Kong Special Administration and the United States Court of Appeals, which were cited by the Respondent, to interpret *"back-to-back"* payment in a contract and gave a finding that it is a matter of interpretation of a particular clause in the agreement that determines whether the clause provides for condition of (back to back) payment or merely fixes a time for such payment upon receipt of the payment from the principal employer. The relevant extract of the Impugned Judgement is below:

"36. In Timlee Construction (supra), the High Court of Hong Kong was interpreting an Agreement providing for 'back to back payment'. The Court held that the interpretation of any term used in a particular

contract must depend on the circumstances in which the Agreement is made. 'Back to back payment' does not have a particular meaning commonly used in the trade and therefore, there is no applicable principle of law to favour one interpretation over the other. ***Ultimately, the task of the Court is to ascertain, objectively, what the parties had meant by the use of that expression in the circumstances of the Agreement.*** *Having said so, the Court thereafter interpreted the said term in the factual background of that case.* ***This judgment clearly shows that there is no fixed interpretation to the terms used in the Agreement and, keeping in view the circumstances in which the Agreement is made and depending upon the intent of the parties, the words can mean either the time for payment or the entitlement to payment.***

xx *xx* *xx*

41. A reading of the ***above judgments that have been relied upon by the counsel for the petitioner would clearly show that though it is a matter of interpretation of a particular clause to determine whether the clause in the Agreement provides for a condition for payment to the sub-contractor or merely fixes a time for such payment,*** *the clauses prescribing that the payment shall be made to the sub-contractor on receipt of the same from the principal employer have been interpreted as prescribing a subcontractor's entitlement to receive payment and not the time for payment."*

[Emphasis is ours]

19.1 The learned Single Judge while discussing the examination of the Agreement by the Sole Arbitrator as well as the evidence led by the parties gave its finding that the Respondent was permitted to make quarterly deductions. The learned Single Judge also placed reliance on Clause 9 and 11 of Schedule IV of the Agreement to hold that these Clauses show a *"back-to-back"* arrangement between the parties and the Appellant was bound to perform all the obligations under these clauses. The learned Single Judge thus disagreed with the findings of the Sole Arbitrator and reversed the interpretation given by the Sole Arbitrator that there was no *'back-to-back arrangement'* between the parties.

20. The Agreement between the parties comprises of four Schedules.

Schedule I is the Schedule of Remuneration; Schedule II sets out the Documents which form part of the Agreement; Schedule III is the Scope of Work; and Schedule IV is General Terms and Conditions. In order to examine the contentions of the parties, this Court has examined these Schedules. While Schedule I refers to the remuneration to be paid to the Appellant, the scope of work is set out at Schedule III. Schedule IV comprises of the additional terms of the contract between the Appellant and the Respondent. Schedule II sets out the documents which form part of the Agreement and include the agreement dated 15.03.2002, which was executed between GOG and the Respondent [hereinafter referred to as the "GSWAN contract"].

20.1 The Sole Arbitrator examined the Scope of Work as set out in the Agreement and compared the same to the Scope of Work in the GSWAN contract between the Respondent and the GoG and found that the GSWAN contract with GoG has an additional obligation - Clause 11, while the Scope of Work in Schedule III in the Agreement between the Appellant and the Respondent had 10 clauses. Thus, upon a comparison of the scope of work in both the Agreements, the Sole Arbitrator found that the Respondent had additional work. This has been explained in paragraph 17 of the Arbitral Award which is reproduced in paragraph 17.1 above.

20.2 The learned Single Judge, on the other hand, relied on Clause 11 of Schedule IV, General Terms and Conditions, to state that the obligations of the Appellant and Respondent were a *"back-to-back arrangement"* in terms of this clause.

21. As per the Agreement, the Scope of Work is set out not in Schedule IV but in Schedule III. A comparison of the Scope of Work as is present in the two Agreements (between Appellant & Respondent and Respondent & GOG) shows that the Scope of Work under Schedule III of the GSWAN contract between GoG and the Respondent was more comprehensive. While the Agreement between the Appellant and the Respondent was essentially *"to assist",* the contract between the Respondent and GoG, was to oversee/monitor/coordinate etc. In addition, Clause 11 of Schedule III of GSWAN contract imposed an additional obligation upon the Respondent.

21.1 To better appreciate this, it is apposite to extract Schedule III, Scope of Work of Agreement between Appellant and Respondent as well as the Scope of Work as set out in the GSWAN contract between GoG and Respondent which are reproduced below:

> **AGREEMENT BETWEEN GOG AND RESPONDENT**
>
> *"SCHEDULE-III :* ***SCOPE OF WORK***
>
> *1.* ***To oversee the operational performance of the GSWAN*** *in accordance with the technical and operational requirements prescribed in the Concession Agreement signed between GoG and the operator. Suitable software/ hardware tools should be procured and commissioned for performing NETWORK PERFORMANCE SERVICE LEVEL MANAGEMENT.*
>
> *2.* ***To monitor the network*** *on regular basis and coordinate with the Operator for resolution in the event of any problem.*
>
> *3.* ***To coordinate with Telecom department*** *to provide uninterrupted leased lines for proper communication.*
>
> *4.* ***To provide regular MIS*** *reports relating to the uptime, downtime on weekly, monthly and quarterly basis.*
>
> *5.* ***To certify the Network availability*** *for various activities based on the*

agreed parameters. This certificate has to be provided on quarterly basis on which the Quarterly Guaranteed revenue would be released to the Operator.

6. ***To design, procure, supply, install, commission and manage the NETWORK PERFORMANCE SERVICE LEVEL MANAGEMENT (NPSLM)*** *software, including all programs needed to deliver all functionality as specified in the technical specifications in the Bid document no. GSWAN/TPI/2001-2/ITD/03 DT 26/12/2001.*

7. ***The scope of work will focus on deploying, establishing and managing (including) reporting, certifying, etc.) a fully functional PMLM****. GoG should be able to utilize the above functionalities for:*

a) Discovering elements

b) Ensuring accurate element information

c) Organizing elements into groups

d) Scheduling regular reports on those elements

e) Making available the reports to internal users as well as customers via its web interface.

f) Ensuring reports generated would be able to address the needs of different level of users/audience.

g) Ensuring that the web interface would be able to provide a comfortable level of information access security.

8. The third party agency (TPA) shall also under take inspection, verification/acceptance of the goods and services related to GSWAN/SCAN and SICN networks or any other IT network belonging to the State and certify the invoices for the same as desired by the GoG from time to time.

9. The vendor shall also be responsible for forecasting on the traffic congestion in the network and shall advise GoG in time for undertaking necessary up gradation of bandwidth in order to optimize the resources and services.

10.Vendor (TPA) shall also advise GoG on human resources developmental requirement and advice on the training modules for various categories of the officials in the administration.

*11.****TPA will act as not only TPA but consultant to the GoG on various***

networking issues till the currency of the agreement."

*** *** ***

AGREEMENT BETWEEN APPELLANT AND RESPONDENT

"SCHEDULE-III: SCOPE OF WORK

1. ***To assist TCIL*** *in overseeing the Operational performance of the GSWAN in accordance with the technical and operational requirements prescribed in the Concession Agreement signed between GoG and the Operator. Suitable Software/hardware tools should be procured and commissioned for performing NETWORK PERFORMANCE SERVICE LEVEL MANAGEMENT.*

2. ***To assist TCIL*** *in monitoring the network on regular basis and coordinate with the Operator for resolution in the event of any problem.*

3. ***To assist TCIL*** *in coordinating with Telecom department to provide uninterrupted leased lines for proper communication.*

4. ***To assist TCIL*** *in providing regular MIS reports relating to the uptime, downtime on weekly, monthly and Quarterly basis.*

5. ***To assist TCIL*** *in Certifying the Network Availability for various activities based on the agreed parameters. This certificate has to be provided on Quarterly basis on which the Quarterly Guaranteed Revenue would be released to the Operator.*

6. ***To assist TCIL*** *in Designing/ Procure, Supply, install. Commission and manage the NETWORK PERFORMANCE SERVICE LEVEL MANAGEMENT (NPSLM) software, including all programs need to deliver all functionality as specified in the technical specifications in GoG's Bid Documents No. GSWAN/TPI/2001-2/ITD/03 dt 26/12/2001.*

7. The scope of work will focus on deploying, establishing and managing (including reporting, certifying, etc) a fully functional PMLM. TCIL/ GoG should be able to utilize the above functionalities for:

a) Discovering Elements.

b) Ensuring accurate element information.

c) Organizing elements into groups.

d) Scheduling regular reports on those elements.

e) Making available the reports to internal users as well as customers via its web interface.

f) Ensuring reports generated would be able to address the needs of different level, of users/ audience.

g) Ensuring that the Web interface would be able to provide a comfortable level of information access security.

8. The sub consultant to Third Party Agency (TPA) shall also undertake ***Inspection, Verification & Acceptance of the Goods and services related to GSWAN/SCAN*** *and SICN networks or any other IT Network belonging to the state and certify the invoices for the same as desired by the TCIL from tiem [sic: time] to time. TCIL shall provide the relevant documents.*

9. The sub consultant shall also be responsible for forecasting on the traffic congestion in the network and shall advice TCIL in time for undertaking necessary up-gradation of bandwidth in order to optimize the resources and services.

10.Sub ***consultant shall also advice TCIL on human resource developmental requirement and advice*** *on the training modules for various categories of the officials in the administration."*

[Emphasis is ours]

21.2 From a plain reading of the Scope of Work of GSWAN contract, it is seen that there was additional responsibility on the Respondent, *vis a vis* GoG and although the Appellant was to provide services to the Respondent for the GSWAN Project, its primary obligation was to assist the Respondent. The responsibility of ensuring that the work is completed was on the Respondent including of acting as a consultant. Clearly, the Respondent did have additional Scope of Work and the work of the Appellant was clearly defined and distinct from that of Respondent's.

22. The learned Single Judge has relied upon Clause 9 of Schedule IV of the Agreement in support of its finding that the Appellant was

required to fulfil all responsibilities of the Agreement between the Respondent and the GoG. Clause 9 of Schedule IV of the Agreement is reproduced below:

> *"9. NGBPSL shall fulfil the roles and responsibilities stated in the agreement signed between TCIL & GOG related to providing third party inspection for the GSWAN project in addition to the terms and condition stated above."*

22.1 As stated above, the Scope of Work of the Appellant in the Agreement was defined and although overlapping from that of the Respondent in the GSWAN contract, it was distinct. The GSWAN contract also shows that the remuneration being received by the Respondent for the services rendered is Rs. 44,184,50/- for each of the 32 quarters while the Appellant was to receive Rs. 35,00,000/- for each quarter. The additional remuneration clearly was for the additional services to be rendered by the Respondent to GoG.

23. Clause 11 of Schedule IV (General Terms and Conditions) of the Agreement also sets out certain important facets of the contract between the parties, including in relation to payment terms. These are reproduced below:

> *"11. PAYMENT TERMS*
>
> ***Guaranteed Revenue payment as per Schedule I***
>
> ***Bills shall be raised and sent*** *to GGM (NW&TC), TCIL for certification and payments.*
>
> *As consideration for implementing the terms of this agreement and providing satisfactory service to TCIL and its user organizations, the* ***NGBPSL shall be paid guaranteed Revenue on quarterly basis as specified in the Schedule-I.*** *At the end of each quarter after adjusting 10% advance payment on pro-rata basis* ***in 32 (thirty two) quarterly instalments together with interest.***

The advance paid in terms of schedule-I of this agreement shall bear an ***interest of 12% on reducing balance of advance.***

The NGBPSL's ***request for payment shall be made at the end of each quarter on submission of invoices along with the following supporting documents and on receipt of payment by TCIL****:*

a. Performance statistics.

b. Log of network parameters along with Service Down time calculation and Uptime percentage

c. Any other document necessary in support of the service performance acceptable to GoG.

d. As sub-consultant NGBPSL is not liable for service tax payment. The same shall be accounted by TCIL.

e. The TCIL would submit its bill based on sub-consultant quarterly bill to GOG within a week and payment to NGBPSL shall be released within a week of receipt of TCIL payment from GOG*.*

f. If TCIL fails to make the payment required by this Agreement when due, ***the underpayment shall bear Interest rate plus 350 basis points*** *from the Due date of payment until the date of payment in full. If the Due Date of Payment falls on Sunday or holiday, the next business day shall be the last day on which payment can be made without interest charges being assessed….."*

[Emphasis is ours]

23.1 Clause 11 of Schedule IV of the Agreement begins with stating that the guaranteed revenue payment shall be as per Schedule I. In addition, it sets out that the guaranteed revenue shall be paid on a quarterly basis and in advance. Clause 11 further provides that a request for payment shall be made by the Appellant by submitting invoices along with documents in support. This Clause also sets out that the Appellant shall be paid a guaranteed amount on a quarterly basis at the end of each quarter after adjusting the advance payment received, on a pro-rata basis

in 32 quarterly instalments.

24. In order to better appreciate the agreed payment methodology, it is requisite to read Clause 11 of Schedule IV of the Agreement with Schedule I of the Agreement. Schedule I of the Agreement provides the *"Schedule of Remuneration"* and is reproduced below:

> *"**SCHEDULE-I :** SCHEDULE OF REMUNERATION*
>
> *M/s NGBPSL SERVICE CHARGES*
>
> *M/s NGBPSL will charge the following as the sub-consultancy fee for Third Party Inspection of the Gujarat State Wide Area Network;*
>
> *A) **Equal Quarterly Payment Charges (for a period of 8 years or 32 quarters)***

Amount in Figure (Rs.)	*Amount in words (Rs)*
Rupees 35,00,000.00	*Rupees thirty five lakhs only.*

> *Terms and Conditions*
>
> *• 10% advance payment, to be adjusted on pro-rata basis every quarter.*
>
> *• TCIL will provide service tax numbers and other details to NGBPSL.*
>
> *• **Payment will be governed as per clause 11 (payment terms) of this agreement.***
>
> *• NGBPSL will commence the project within 30 days from signing of the agreement."*
>
> [Emphasis is ours]

24.1 Schedule I of the Agreement sets out the equal quarterly payment of Rs.35 lacs for 8 years/32 quarters with 10% advance payment and that the payment will be governed as per Clause 11 of Schedule IV of the Agreement. Clause 11(e) of Schedule IV of the Agreement provides that the Respondent would submit its invoices of consultancy to GOG within

a week and the payment to the Appellant shall be released within a week from the receipt of payment to GOG. Clause 11(f) of Schedule IV sets out interest for delay at the lending rate plus 350 basis points as payable by the Respondent to the Appellant. Clause 11 of Schedule IV of the Agreement sets out the *"payment terms"* and refers the term "*guaranteed revenue payment"* as per Schedule I of the Agreement.

25. It is evident from a reading of the provisions above, that the Appellant was required to be a sub-consultant to the GSWAN Project, however, it had its separate understanding with the Respondent for receipt of payments and for its obligations. The term *"guaranteed payment"* is used in Clause 11 of Schedule IV and is referenced in Schedule I of the Agreement. It further provides that the payment is to be made to the Appellant at the end of each quarter on submissions of an invoice and documents. The Clauses also set out that interest for delayed payment will be made as well. There is no provision which states that in the event the payment is not received by the Respondent from GOG, the Appellant shall not be paid. In the absence of such a provision and on a plain reading of the remaining Clauses, we are unable to hold that the Clauses of the Agreement provide for 'no payment' to the Appellant if 'no payment' was received by the Respondent from GOG.

26. The learned Single Judge has also placed reliance on a communication sent on 27.05.2009 by the Appellant to hold that there was an admission of *"back-to-back"* contract in this communication by the Appellant. We are unable to agree. The communication dated 27.05.2009 was sent by the Appellant requesting the Respondent to release its wrongly withheld amounts. This communication almost reads

as a plea by the Appellant for the release of its amounts by stating that it should be given atleast the proportionate amounts which have been received by the Respondent from GoG.

27. A Coordinate Bench in ***National Projects Construction*** case which judgment has been upheld by the Supreme Court[2] while discussing a similar *"back-to-back"* contract, it was held that the clauses of the contract cannot be interpreted in such a way, so as to disentitle a party from the payment of their work merely because the payment was not received from the principal employer. It was further held that the party deducting the amounts may have a grievance and the right to prosecute the principal employer separately, however the same cannot be allowed to spill over to entail deductions. The Courts would be hesitant to interfere unless such award is patently illegal being injudicious and contrary to the settled position of law. The relevant extract of ***National Projects Construction*** case is below:

> *"24. We are in entire agreement with learned Sole Arbitrator, as well as with the learned Single Judge, that there was no privity of contract between the respondent and CONCOR. The various clauses, on which Mr. Bhambhani relies, merely stipulate that, out of the payment received by the appellant from CONCOR, the appellant was entitled to deduct its profit and commission, before making payment to the respondent.* ***These clauses cannot be interpreted in such a way, as to disentitle the respondent to payment for work rendered by it, as instructed of the appellant and in accordance with the agreement between the appellant and the respondent, merely because the appellant did not receive payment from CONCOR.*** *Any such interpretation would be grossly unjust, inequitable and against public policy, as it would amount to holding that the services rendered, and work done, by the respondent for the appellant, in terms of a bilateral contract duly drawn up between them, would have to be treated as rendered gratis, without any payment*

[2] judgment dated 17.09.2018 in SLP (C) No. 24254/2018, captioned National Projects Construction Corporation Limited v. Harvinder Singh and Company.

therefor. Such an interpretation, needless to say, cannot be adopted or accepted, by any court of law. ***The appellant may conceivably have its rights against CONCOR, which it would have to prosecute separately; the grievances of the appellant against CONCOR cannot, however, be allowed to spill over and engulf the respondent, leaving the respondent effectively in the lurch.***

xxx xxx xxx

46. It is apparent, therefore, that, while interference by court, with arbitral awards, ***is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated****.."*

[Emphasis is ours]

28. The Sole Arbitrator, after examining the evidence and the provisions of the contract between the parties interpreted the Agreement in a plausible manner. The learned Single Judge, itself noted that the finding of the *"back-to-back"* contract is subjective in nature and is based on the interpretation of the particular clauses. As such, it was incumbent upon the learned Single Judge, to not supplant its own interpretation of the clauses as to override the plausible interpretation taken by the Sole Arbitrator, after a detailed examination of the evidence placed before it. On an examination of the contractual provisions as set out above, this Court does not find the Sole Arbitrator's decision to be injudicious.

29. The Supreme Court in ***Hindustan Construction Co. Ltd. v. NHAI***[3] recapitulated the prevailing view that Courts should not customarily interfere with arbitral awards that are well reasoned, and

[3] (2024) 2 SCC 613

contain a plausible view. The Supreme Court observed, that judges, by nature, may incline towards using a corrective lens, however, under Section 34 of the A&C Act, this corrective lens is inappropriate especially under Section 37 of the A&C Act. It was held that the errors in interpreting a contract ought not to be interfered with lightly and judicial interference should be avoided unless absolutely necessary, ensuring the arbitrator's decision remains final and binding. The relevant extract of the ***Hindustan Construction*** case is below:

> *"26. The prevailing view about the standard of scrutiny — not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand — and not interfered with, (save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily choose the path of least interference, except when absolutely necessary).* ***By training, inclination and experience, Judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34.*** *So viewed, the Division Bench's approach, of appellate review, twice removed, so to say (under Section 37), and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible — and this Court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.*
>
> *27.* ***For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly…"***
>
> [Emphasis is ours]

CLAIM FOR ATS SUPPORT OF RS. RS.14,64,203/-

30. The Appellant had made a claim that the amount payable for the 32nd Quarter had not been released since *"e-health suite"* software's annual technical support (ATS) was not given, even the Bank Guarantee was encashed by the Respondent on this ground. It was the contention of the Appellant that the Agreement did not provide for any contract of maintenance for the e-health suite software and that it worked satisfactorily during the entire duration of the Agreement. However, in view of GOG raising this issue in the meeting on 09.11.2009, the Respondent agreed to provide ATS to GOG, and this obligation was foisted upon the Appellant.

31. It was averred by the Respondent during arbitral proceedings that the GSWAN Project monitoring was under risk and if there was a software failure the entire GSWAN Project would collapse. The Sole Arbitrator examined and interpreted the contract between the parties and based on the evidence led gave a finding that there was no agreement for this additional ATS obligation. The Sole Arbitrator also examined the Minutes of Meeting, and found that GOG insisted on an ATS and the Respondent under coercion and economic duress agreed, as its payment was made subject to the ATS. It was held by the Sole Arbitrator, that what the Appellant had agreed to under the Agreement, was already provided for and that the GSWAN Project was functional without any failure. Paragraphs 24 and 25 of the Arbitral Award, which set out these findings, are extracted below:

> *"24. Amount of last quarter has not been released for want of ATS/up-gradation of e-health suite. On this aspect Sh. P.N. Jain, Director of the claimant has testified in his Affidavit dt. 22.01.2013* ***that it was nowhere***

in the contract that any contract of maintenance has to be entered into with OEM/CA; that the claimant company maintained it and e-Health suite worked satisfactorily during the entire contract period and even thereafter and there was no complaint whatsoever.

The respondent in its letter dated 03.03.2010 to GoG has also stated that the Annual Technical Support (ATS) was not a part of the Agreement. In its letter dated 29.03.2011 to PS/DST Gujarat State, the ***respondent has specifically mentioned that there was no responsibility on it under the agreement regarding ATS, however for releasing the legally payable amount, GoG unilaterally raised the issue of Annual Technical Support for which representative of the respondent agreed under coercion and economic duress,*** *the respondent never voluntarily agreed to provide ATS as it was not part of the contract. This finds support from Minutes of Meeting dated 09.11.2009 which show that GoG agreed to consider release of withheld amounts subject to updating the network Monitoring Software by taking ATS till the end of contract period. In these circumstances the respondent had agreed to obtain ATS and for this GoG issued S.C.N. dated 17.02.2010 to which the respondent sent reply dated 03.03.2010 stating that ATS was not part of the Agreement but as required by GoG, action for taking ATS from M/s CA has been initiated. When the claimant wrote to M/s CA, it asked for huge amount on account of lapsed period since 2008 as well, while agreement period was near completion.*

There is therefore force in the submissions of Ld. Counsel for the petitioner that though the petitioner may have agreed to obtain the ATS in the meeting dated 09.11.2009 but it was not its contractual obligation and asking for ATS in the last year of contract is not understood and was not binding on the petitioner and legally cannot be made ground for withholding its guaranteed dues. ***It is further worth noting that as per Minutes of Meeting dated 09.11.2009, GoG insisted for ATS stating that the respondent had put GSWAN monitoring under great risk, for instance, if there is software failure, entire GSWAN monitoring would collapse, while it is nobody's case that any such eventuality ever occurred.***

25. ***The agreement between the parties nowhere contains any obligation on the part of the petitioner to obtain ATS and this stand has also been taken by the respondent in its letter to GoG. The claimant had upgraded e-health suite in the year 2007 which was approved by the respondent and there is no dispute regarding the fact that it served satisfactorily till the end of the contract period*** *and was being used by the successor. In the circumstances withholding of amount of last quarters is not justified."*

[Emphasis is ours]

32. The learned Single Judge disagreed with these findings of the Sole Arbitrator. The learned Single Judge after undertaking an examination of the Minutes of Meeting with GOG held on 09.11.2009 [hereinafter referred to as 'MoM"] and the correspondence between GOG and the Respondent, held that the Appellant failed to provide ATS or get the software upgraded and did not transfer the software to the Respondent and ultimately in favour of GOG. It was held by the learned Single Judge, that the fact that no actual loss or breakdown was reported due to failure of the upgraded software was not relevant and gave a finding that ATS was an obligation of the Appellant.

33. The learned Single Judge further relied on Clause 15 of Schedule IV of the Agreement to hold that since it was an obligation of the Appellant to transfer all software, the obligation also entailed providing of ATS. The learned Single Judge interpreted the MoM and the letters sent by GOG on 17.11.2009 and 18.01.2010 to hold that the Appellant had the obligation to provide the ATS, and struck down the claim of Rs. 14,64,203/-, which was awarded to it by the Sole Arbitrator. It was held by the learned Single Judge that the Respondent is entitled to retain a sum of Rs. 14,64,203/- deducted for the ATS from the payments due to the Appellant. The relevant extract of Impugned Judgement is below:

> *"60. I am unable to agree with the above findings.* ***The correspondence exchanged between the GoG, the petitioner, and the respondent alongwith the Minutes of Meeting held on 09.11.2009 and 23.04.2010 clearly suggests that GoG was insisting on the software being upgraded for purposes of transfer to GoG.*** *It is not disputed by the respondent, in fact, it is the submission of the respondent that the software was transferred to the GoG. In the letter dated 28.01.2010, the respondent had represented that it had already taken action for taking ATS from M/s CA, the proprietor of the software. The assertion of the counsel for the petitioner that the representative of the respondent was not only present*

in the meeting held on 23.04.2010 ***but also agreed to provide the update and upgraded licence of the software, has not been denied*** *by the respondent. It is not the case of the respondent that the GoG did not insist on the upgraded version of the software at a later stage or released the payment to the petitioner.*

61. In terms of ***Clause 15 of the Agreement****, reproduced above, it was the obligation of the respondent to transfer all software in favour of the petitioner.*

62. ***In a meeting held on 09.11.2009,*** *wherein Sh. P.N. Jain, CEO of the respondent was also present alongwith representative of GoG and the petitioner,* ***GoG insisted for the petitioner/respondent to take the ATS*** *for the software as failure to do so can put the GSWAN monitoring under great risk…*

xx *xx* *xx*

67. The respondent, ***however, did not take the ATS or get the software upgraded and instead, by the letter dated 26.07.2010 informed the petitioner that no physical form / hardcopy of the licence had been issued in favour of the respondent by M/s CA India Technologies Pvt. Ltd. and that the licence is part of the software itself****.*

xx *xx* *xx*

71. From the above exchange of correspondence, it is further evident that though the petitioner had sought to advance the plea of the respondent that it was not liable to take the ATS for the software, GoG stoutly refuted such stand and insisted that in terms of the Agreement the upgraded version of the software had to be transferred in its name. No fault can be found in such insistence. The fact that no actual loss or breakdown was reported due to failure of the respondent to take the ATS or the upgraded software is not relevant. ***Once there is such obligation cast on the respondent, it could not have escaped such liability****."*

[Emphasis is ours]

34. We are unable to agree. The Agreement did provide that the Appellant will undertake the sub consultancy based on the GSWAN Contract between the Respondent and GOG. However, it did not provide for ATS or any annual technical services in Schedule III (Scope of Work), which has been reproduced in paragraph 21.1 above. Clause 15

of Schedule IV of the Agreement only provides for transfer of the software and hardware. This is distinct from the provision of maintenance of the software and is not included in Clause 15 of Schedule IV of the Agreement, which reads as under:

> *"15. Transfer of Title*
>
> *On termination of agreement/service or at the end of 8 years, the sub consultant will transfer, without any liability, all Hardware, Software, Manuals, titles and any other related works to TCIL."*

34.1 The transfer of software, hardware and manuals does not include the annual maintenance of the Software, which is an additional obligation agreed to by the Respondent at the very end of the tenure of the 8 year contract.

35. This Court also examined the GSWAN contract to ascertain whether there is any clause for the provision of an annual maintenance of the software/hardware system under the GSWAN Project. Clause 1 of Schedule III (Scope of Work) in the GSWAN contract was to oversee the *"operational performance"* and to procure software/hardware for the network performance. The obligation to provide for additional or updated software in the last year of the contract was not present, nor was a clause present to provide for annual maintenance of the software. Undisputably, in the last few months of the contract, the GoG required the Respondent to provide for the annual maintenance of the software.

36. The MoM and the communication addressed by GoG to the Respondent dated 17.11.2009 [hereinafter referred to as "letter of 17.11.2009"] has also been examined by the Court. The MoM records that the representatives of GOG and the Respondent were present to

discuss various issues of the GSWAN Project. One representative of the Appellant was also present during the meeting. Paragraph 4 of the MoM discusses the issue of the release of the Respondent's quarterly payment which was withheld while Paragraph 5 of the MoM discusses the ATS for the e-health suite products provided by the Respondent.

36.1 The MoM records that the Respondent requested for release of amounts (payments) since it discharged its duties as per the requirement of GOG. The Respondent also refers to the GSWAN contract to state that the penalty deduction cannot exceed 5% of the quarterly amount and that the excess amount deducted should be released to the Respondent. The MoM however records that the GOG will consider release of withheld amounts subject to updating of GSWAN network by the Respondent and the Respondent undertaking the work of ATS till the contract period ends. It also records that the Respondent has agreed to make the payment of the cost of the missing equipment. Clause 4 of the MoM is set out below:

> *"4.* ***Release of amount deducted from TCIL's quarterly payment****:*
>
> - *Penalty/Withheld amount: ED(T)* ***requested for release of all amount deducted from TCIL's quarterly payments since TCIL was & is discharging its duties as per the requirement of GoG*** *and as per the agreement signed between TCIL & GoG. Secretary (DST) mentioned that* ***the amounts deducted towards penalty cannot exceed 5% of the quarterly amount for which GoG agreed to reconsider*** *the release of excess amount deducted on receipt of representation from TCIL. Secretary (DST) also stated that* ***GoG will consider release of withheld amounts subject to TCIL (i) updating the network Monitoring Software (already working) by taking Annual Technical Support (ATS) till the contract end period and (ii) making payment of one third of the cost of missing TULIP/NIC equipment****.*
>
> - *Outstanding Service Tax: GoG will do the needful for release of the same.*

- *Excess TDS deducted: GoG will do the needful for release of the same."*

[Emphasis is ours]

37. On the aspect of ATS, the MoM records that the Respondent has agreed to immediately obtain ATS for the *"e-health suite"* products and to upgrade them to the latest version and maintain them up to 15.04.2010. The relevant extract is below:

> *"5. Annual Technical Support (renewal, up gradation & support) of CA e Health Suite products:*
>
> *The issue of Annual Technical Support (renewal, up gradation & support) of CA e Health Suite products provided by TCIL as per the agreement was also discussed. Secretary DST informed that CA eHealth products purchased by TCIL in February 2007 has not been upgraded since last 2 years.* ***In the absence of Annual Technical support from the Software provider of CA health suite, M/s TCIL has put GSWAN monitoring under great risk.*** *For instance, if there is software failure, entire GSWAN monitoring would collapse and Government of Gujarat will not be able to monitor the SLA with BOOT operator.* ***ED(T) TCIL therefore agreed to immediately obtain Annual Technical Support (renewal, up gradation & support) for CA e Health Suite products installed by TCIL to the latest version and maintain the same up to 15/4/2010."***
>
> [Emphasis is ours]

38. It is evident from Paragraph 4 of the MoM that the GOG imposed a unilateral condition on the Respondent to undertake additional obligations to receive payment of the amounts due to it, and the Respondent agreed to such obligation. While this may have had the effect of amending the contract between the Respondent and the GOG, the imposition of such a condition clearly could not have been part of the Agreement between the Appellant and the Respondent since it was imposed on the Respondent on 09.11.2009 while the Agreement was

executed between the Appellant and the Respondent on 18.04.2002. The MoM also does not record any agreement/consent of the Appellant.

38.1 Paragraph 5 of the MoM records that the Respondent had agreed to *"obtain"* Annual Technical Support (ATS) and to upgrade the *"e-health suite"* products and to upgrade them to the latest version and maintain them up to 15.04.2010. This condition was then foisted upon the Appellant and its failure to do so led to the withholding of their payment and deductions.

39. The Appellant has explained that they had provided the software and hardware for the GSWAN Project as updated when set-up and that the system was operational. If GoG needed additional support, it would have negotiated an amendment. Instead, they insisted that the Respondent provide the same to receive complete payment.

40. The letter of 17.11.2009 relied upon by the Respondent is a *inter se* communication between GOG and the Respondent setting out the fact that in the absence of e-health suite software, the GSWAN monitoring system was at risk. Clearly, the Respondent agreed to undertake additional work for GOG however, there was no *"back-to-back"* agreement between the Appellant and the Respondent for this amendment to their Agreement, which, as stated above, was for the provision of the Hardware, Software and Manuals. In the light of abovementioned discussion, we find merit in the findings of the Sole Arbitrator.

CLAIM FOR 32ND QUARTER

41. So far as concerns the claim for payment of the amount due for 32nd quarter, the Sole Arbitrator found that the said payment too will be covered by *"Guaranteed Payment"***.** The Sole Arbitrator relied upon the letter of intent dated 11.04.2002 executed by the Respondent, and Schedule I and Clause 11 of Schedule IV of the Agreement to hold that the payment was guaranteed and not based on receipt of payment from GOG by the Respondent. The relevant extract of Arbitral Award, wherein the payment for the 32nd quarter has been discussed, is below:

> *"18. As per* ***letter of intent dated 11.04.2002*** *the petitioner has been selected as Sub-Consultant to perform Third Party Inspection of GSWAN/SCAN at the* ***rate of quarterly guaranteed payment of 35 lakhs as agreed upon*** *after the negotiation and was called upon to sign the agreement immediately and to start deliverables immediately and also depute engineers for performance.* ***Schedule I of agreement dated 18.04.2002 stipulates that the petitioner will charge 35 lakhs for each quarter as Sub-Consultancy Fee for period of 8 years or 32 quarters and payment will be governed as per Clause 11 (Payment Terms)*** *with the title Guaranteed Revenue Payment as per Schedule, stating the mannerism i.e. the NGBPSL's request for payment shall be made at the end of each quarter on submission of invoices alongwith the supporting documents namely performance statistics, log of network parameters alongwith Service Down time calculation and Uptime percentage and any other document necessary in support of the service performance acceptable to GoG, on the basis of which TCIL will submit bill to GoG within a week and payment to the petitioner shall be released within a week of receipt of TCIL payment from GoG. Insertion of words "on receipt of payment by TCIL" in this fourth sub para of Clause 11 is apparently out of place, as this sub-para mentions about request to be made by the petitioner for payment on submission of invoices alongwith the supporting documents which are detailed thereunder.* ***This nowhere says that payment to the petitioner is subject to receipt of payment by TCIL from GoG. The words "on receipt of payment by TCIL" cannot be read as 'only on' or 'only if' payment is received by TCIL****.*
>
> ***Use of term "Guaranteed Payment" in letter of intent and the agreement specifies the intention of the parties and it is nowhere linked with, nor made subject to the payments to be received by TCIL from GoG, except laying down time limit within which TCIL is to release payment to the petitioner****. One is not to read words which are not there in the agreement between the parties. Section 28(3) of the Indian Arbitration and*

Conciliation Act 1996 mandates that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract between the parties. ***The contract dated 18.04.2002 entered into between the parties does not make release of guaranteed revenue payment to the petitioner subject to receipt of payment by the respondent from its principal. Adding the term "Guaranteed" to the payment clause in the agreement between the parties has to be given its due meaning/import.***

19. Ld. Counsel for the respondent has pointed out that as per schedule II of the agreement between the parties, agreement between TCIL with its principal GoG has been made part of the agreement in addition to the terms and conditions prescribed in the agreement between the parties and as per clause 11 the guaranteed revenue payment is consideration for implementing the terms of this agreement and providing satisfactory service to TCIL, and its user organizations and there are letter of GoG-on record showing that services rendered were not satisfactory. Those letters have been written by GoG to TCIL, who in turn communicated the same to the petitioner, but despite TCIL forwarding the explanation given by the petitioner, its principal GOG has imposed penalty and withheld amount. It is pertinent to note that the petitioner is not party to agreement between the respondent and its principal and though the agreement between them has been made part of agreement between the parties, despite that the agreement dated 18.04.2002 between the parties to this case lays down specific stipulations in this regard which will govern the rights and obligations between the parties and will have over-riding effect over terms on the point if any between the respondent and its principal."

[Emphasis is ours]

42. The learned Single Judge found that since there was no decision on this aspect, it would be appropriate to leave this issue open for the parties to agitate in appropriate arbitration proceedings, since the exact reasons and amounts deductible as penalty and costs for the forfeiture of the 32nd quarter have not been separately dealt with by the Sole Arbitrator. The relevant extract of the Impugned Judgement reads as follows:

"77. The above being finding of fact recorded by the Sole Arbitrator, cannot be interfered with by this Court in exercise of its powers under Section 34 of the Act. However, at the same time, I have already held that the software was not transferred to the petitioner/GoG by the respondent.

> *The Arbitrator, having held that the respondent was not in breach of the Agreement even on account of non-upgradation of software, has not quantified the loss suffered by petitioner/GoG on account of non-upgrading/transferring the eHealth Suite Software, which is stated to be one of the reasons for withholding the complete amount.* ***Moreover, as all the exact reasons and amounts deductable as penalties/costs thereof for the forfeiture of the entire quarterly amount have not been separately dealt with by the Arbitrator, and this Court having limited jurisdiction under Section 34 of the Act, I deem it appropriate to leave the issue of amount payable for the 32nd quarter open for the party(ies) to agitate in appropriate arbitration proceedings."***
>
> [Emphasis is ours]

43. We are unable to agree with the findings of the learned Single Judge on this aspect either. The Sole Arbitrator interpreted Clause 11 of Schedule IV of the Agreement, which provides for payment for services rendered as per Schedule I for each quarter and held that what the claimant (Appellant) sought for, is its consulting fees for the 32nd Quarter. As discussed above, the Sole Arbitrator examined the Agreement and the GSWAN contract between the Respondent and GOG for the GSWAN Project and found that there was an additional obligation upon the Respondent which was not found in the Agreement. In addition, the Sole Arbitrator interpreted the Clause 11 of Schedule I of the Agreement to hold that the Clause does not say at any place that the payment to the Petitioner is subject to receipt of payment by the Respondent from GOG. It was held that the words *"on receipt of payment by TCIL"* cannot be read as "only on" or "only if" payment is received by the Respondent. The Sole Arbitrator further found that the term guaranteed payment specifies the intention of the parties and it has not been made subject to the payments received from GOG and thus is to be paid.

43.1 This Court has also examined the two agreements and on an examination of Schedule I of the Agreement, which is the Schedule of Remuneration and its sub-clauses, has found that the interpretation of the term "guaranteed payment", used in Clause 11 of Schedule IV and referred to in Schedule I of the Agreement, reflects this understanding.

44. The Sole Arbitrator interpreted the clauses of the Agreement and awarded this amount based on its interpretation. The interpretation is not perverse and nor patently illegal. As stated above, the contract between GOG and the Respondent was unilaterally amended by GOG which obligations were then sought to be imposed by the Respondent upon the Appellant. The Sole Arbitrator examined the contractual provisions and the evidence led and found that these additional obligations did not form part of the Agreement and held that the Appellant was entitled to its guaranteed payment. Thus, we hold that this aspect has been adjudicated upon and does not require further examination.

CONCLUSION

45. An Award may be challenged on the grounds of patent illegality apparent on the face of the Award, provided that such challenge is not on the ground of erroneous application of law or of the re-appreciation of the evidence. The Supreme Court in ***DMRC Ltd. v. Delhi Airport Metro Express P. (Ltd.)***[4] has while discussing the powers of a Court under Section 34 of the A & C Act held the following:

> *"34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court.* ***In addition to the grounds on which an arbitral award can be***

[4] (2024) 6 SCC 357

assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, *such as the award in the present case. Under Section 34(2-A) of the Arbitration Act,* ***a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.***

35. ***In Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*** *, a two-Judge Bench of this Court held that* ***although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it.*** *This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction.* ***The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:***

(i) based on no evidence;

(ii) based on irrelevant material; or

(iii) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when *for instance the award contains no reasons at all, so as to be described as unreasoned."*

[Emphasis is ours]

46. From an examination of the Arbitral Award as has been set out above, we do not find that the grounds for interference under Section 34 and 37 of the A&C Act have been made out. The Arbitral Award is based on an interpretation of the contract between the parties and on the examination of the evidence produced and does not merit any interference by the Court. Where the Arbitrator has assessed the evidence and material placed before him, the Court while considering the objections to the Award, the Court does not sit as a Court of Appeal or

re-appreciate and re-assess the evidence. Unless there is a patent illegality or perversity, interference by the Court is not warranted. Merely because another view is possible, the Court will not interdict the Award. The Courts should only interfere if such Award *"portrays perversity unpardonable"* under Section 34 and 37 of the A&C Act. Reference is made to the Supreme Court's decision in the ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.***[5]

47. Mere erroneous interpretation of a clause by a Sole Arbitrator does not call for an interference of the Award on the ground of patent illegality. The perversity should be as such which goes to the root of the matter.

48. In the present case, the Sole Arbitrator after an examination of the contractual provisions between the parties found that the Respondent was not justified in making the deductions that were made by it citing *'back to back arrangements'*. The Sole Arbitrator also found that the Respondent is not entitled to withhold amounts from quarterly payments guaranteed to the Appellant without resorting to the procedure stipulated in Clauses 3, 4 and 6 of Schedule IV of the Agreement. The Sole Arbitrator held that the Respondent never invoked the said clauses of the Agreement on account of failure to perform the work and is therefore not entitled to make deductions from the quarterly payments of the Appellant. This Court has found the Appellant to be entitled to the "*guaranteed revenue*" payment in terms of Schedule I and Schedule IV of the Agreement. On the aspect of the deduction of payment of the

[5] (2019) SCC OnLine SC 1656

Appellant for the 32nd Quarter, this Court has found the deductions made by the Respondents to be unjustified as well. In addition, it was held by the Sole Arbitrator that the Agreement did not provide for any contract of maintenance and the imposition on the Appellant by the Respondent was unilateral.

49. In view of the aforegoing discussions, this Court finds no ground for interference with the Arbitral Award. The Impugned Judgment is accordingly set aside.

50. The Appeal is allowed. Given the circumstances, however, the parties shall bear their own costs.

TARA VITASTA GANJU, J

VIBHU BAKHRU, ACJ

JANUARY 21, 2025/r/*ha*