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

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Date of Decision: 12 February, 2024

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O.M.P. (COMM) 513/2022 & I.A. 22203/2022

MEIDEN T&D INDIA LIMITED

..... Petitioner

Through: Mr. Samiron Borkataky, Ms. Kritika
Angirish and Mr. Ikshvaaku Marwah, Advocates

versus

PCI LIMITED

..... Respondent

Through: Mr. Upinder Singh and
Ms. Sharanya Bhatnagar, Advocates**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') on behalf of the Petitioner, laying a challenge to the arbitral award dated 11.07.2022 and additional award dated 31.08.2022 passed by the learned Sole Arbitrator whereby an amount of Rs.1,95,48,107/- has been awarded in favour of the Respondent including pendente lite interest till the date of filing of the instant petition on 28.11.2022. Petitioner herein was the Respondent and Respondent herein was the Claimant before the Arbitrator and parties are hereinafter referred to by their litigating status before this Court for the sake of convenience.

2. Factual matrix to the extent relevant for adjudication of this petition is that Petitioner was incorporated on 09.09.2008 under the Companies Act,



1956 in the name of 'Prime Electric Limited' by Mr. Surinder Mehta and Mr. Rohan Mehta as a subsidiary of the Respondent Company and a part of the Prime Group. Both were also appointed as Directors on the Board of the then Petitioner Company. The name 'Prime Electric Limited' was later changed to 'Prime Meiden Limited' on 22.05.2014 and since June, 2016, major shareholding was owned and controlled by Meidensha Corporation, Japan ('Meidensha'). The two main business verticals of the Petitioner were manufacturing high-quality power transformers and managing Engineering, Procurement and Construction projects for electrical sub-stations etc. Respondent Company was incorporated under the Companies Act, 2013 and forms part of the Prime Group of Companies, primarily established by Mr. Surinder Mehta and subsequently joined by Mr. Rohan Mehta and is also the lawful owner of the Prime Tower.

3. In the year 2013, on account of seeing the potential and superior technology of the Petitioner, Meidensha, a Company incorporated under the laws of Japan, approached the Petitioner and the Respondent with a proposal to invest in the Petitioner. Pursuant to negotiations, an Investment Agreement dated 31.03.2014 was executed with the Petitioner and other shareholders of the Petitioner, by virtue of which Meidensha paid Rs.144,99,99,988.15/- to the Petitioner for subscribing to 2,80,74,115 equity shares of Rs.10/- each constituting 23 per cent of the paid-up equity share capital of the Petitioner and acquiring one compulsorily convertible debenture with a face value of Rs.95 crores. Meidensha also entered into a Technical Transfer Agreement dated 31.03.2014 with the Petitioner, in terms of which Meidensha *inter alia* provided proprietary technical information and license to the Petitioner relating to design, manufacture, assembling, testing and sale of oil immersed power transformers for Railway facilities.



4. After the acquisition of minority stake, Respondent and other majority shareholders continued to manage and operate the Petitioner. As a result of continuing financial losses and working capital crunch, it was decided that Meidensha will acquire majority shareholding to enable it to secure debt facilities or arrange necessary working capital and a Share Purchase and Share Holders Agreement ('SPSHA') was executed on 01.06.2016 between Meidensha, Petitioner Company, Respondent Company and other majority shareholders of the Petitioner, incorporating Covenants with respect to rights and obligations of the parties as shareholders of the Petitioner, which was further amended on 28.06.2016.

5. Pursuant to the aforesaid agreement, Meidensha paid Rs.168,78,42,250.56/- to the Respondent and other majority shareholders and its shareholding increased from 23% to 60% of the paid-up equity share capital on account of purchasing 4,28,82,171 equity shares, each having a face value of Rs.10/-. The compulsory convertible debenture held by Meidensha was converted to one equity share of the Petitioner. Clause 6.1 of SPSHA provided the mechanism for purchase by the Respondent of the remaining 40% equity share capital of the Petitioner by way of five subsequent share purchase transactions from year 2017 till 2021, each comprising 8% of the paid-up equity share capital of the Petitioner and as stated in the petition, Meidensha today holds 100% shares in the Petitioner company.

6. The dispute between the parties referred for arbitration arose in respect of fully furnished premises comprising of an area of 5892 sq. ft., forming part of Prime Tower, 287-288, Phase-2, Udyog Vihar, Gurgaon and comprising of part of the ground floor, part of the 6th floor and part of the 7th floor of the Prime Tower, (hereinafter referred to as the 'licensed premises'). In view of the business relationships between the parties, a



Service Facility Agreement ('SFA') was executed on 01.06.2016 between the Petitioner and the Respondent, wherein it was agreed that licensee shall pay service charges to the tune of Rs.5,50,000/- per month to the licensor on or before 7th day of every English calendar month in advance. It was further agreed that service charges will be increased by 30% specifically to a sum of Rs.7,15,000/- per month (service tax payable by the licensee who was also obliged to deduct the TDS) w.e.f. 01.10.2018 and the obligation to pay electricity, power backup and telecommunication charges on monthly basis was on the licensee, which was to be billed by the licensor as per actual usage, each month. SFA was valid for a period of 72 months, extendable with the mutual consent of the parties and contained an arbitration clause, providing that in case of disputes between the parties, which they are unable to resolve amicably, the same shall be referred to a Sole Arbitrator, to be appointed mutually by both parties.

7. As per the case set up by the Respondent, possession of the licensed premises was handed over to the Petitioner on 01.06.2016 and since then Petitioner was using the licensed premises for its Corporate office. Service charges were duly paid by the Petitioner for the period 01.06.2016 to 30.09.2018, however, thereafter from the month of October, 2018 when it became liable to pay the enhanced charges, the default started. Petitioner paid Rs.5,50,000/- for the month of October, 2018 and thereafter consistently defaulted in paying the entire amount of service charges and totally failed to pay the utility charges from February, 2020. Several emails were sent by Mr. Vijay Sarpal, erstwhile Director of the Respondent to Mr. Hiroaki Wakui, Director Finance of the Petitioner regarding the non-payment, but to no avail.

8. At this stage, it would be relevant to refer to another set of disputes between the parties which arises out of two projects of public utilities, Uttar



Haryana Bijli Vitran Nigam ('UHBVN') and Dakshin Haryana Bijli Vitran Nigam ('DHBVN'). It is this dispute which forms the foundation of the claim of set-off by the Petitioner, which shall be adverted to hereinafter. As per the Respondent, prior to Meidensha investing in the Petitioner, Respondent had given a bid for projects of DHBVN/UHBVN on behalf of the Petitioner. Under these projects, Respondent had to construct a 33KV sub-station and 33/11KV line in line, in lieu of which Respondent issued back-to-back Bank Guarantees ('BGs') in favour of UHBVN and DHBVN. Pursuant to a mutual understanding, Respondent sub-contracted the work of supply of material for construction under the projects to the Petitioner and placed a purchase order, for which Petitioner issued back-to-back Performance Bank Guarantees ('PBGs') in favour of the Respondent. Invocation of BGs furnished by the Petitioner in favour of the Respondent formed the genesis of the Petitioner raising two Debit Notes and the claim of set off against the liability of the Petitioner to pay service/utility charges under the SFA.

CASE OF THE PETITIONER:-

9. Disputes arose between the shareholders of the Petitioner i.e. Meidensha and Respondent in early 2017 and amongst other unlawful acts, Respondent wrongfully restrained the personnel of the Petitioner Company from accessing the licensed premises and hindered the day-to-day functioning of the Company, which is evident from several e-mails exchanged between the parties. While the disputes were pending with respect to the service charges and access to the premises etc., Respondent unlawfully asked the Petitioner to bear the BG renewal charges in relation to BGs furnished by the Respondent in favour of DHBVN/UHBVN. While Petitioner renewed the BGs furnished by it in favour of the Respondent for the said projects in time, however, it did not yield to the unjust demand for



payment of bank renewal charges for BGs furnished by the Respondent, as there was no contractual obligation to do so and this was communicated to the Executive Director of the Respondent vide e-mail dated 26.10.2018. Regrettably, Respondent did not renew the BGs furnished by it in favour of DHBVN/UHBVN, which in turn invoked the BGs furnished by the Respondent prior to expiry thereof. Despite the Respondent being solely responsible to renew the BGs in favour of DHBVN/UHBVN and Petitioner having timely renewed the BGs furnished by it on a back-to-back basis, Respondent mischievously invoked the BGs furnished by the Petitioner. In view of this wrongful invocation by the Respondent, Petitioner issued two Debit Notes on 10.10.2018 viz. Debit Note No. 1/2018-19 for Rs.1,22,78,028/- and Debit Note No. 1/2018-19 for Rs.1,30,24,418/- (aggregating to Rs.2,53,02,446/-) to recover the losses incurred by the Petitioner due to Respondent's inaction to renew the BGs on time. Petitioner informed the Respondent that it was entitled to adjust the said amount against the amounts due to the Respondent towards service charges under the SFA. Several communications were exchanged between the parties regarding the service charges payable under the SFA and the set-off against the Debit Notes, but Respondent did not set-off the amounts under the Debit Notes.

10. As the disputes between Meidensha and Respondent, relating to alleged impediments in the operations of the Petitioner were pending before National Company Law Tribunal ('NCLT') and National Company Law Appellate Tribunal ('NCLAT'), Contempt Petition No. 11/2017 was filed in Company Case (AT No. 21/2018) and an interlocutory application No. 1032/2017 was filed in Company Appeals No. 397-399/2017 by the Petitioner. Pursuant thereto, on 20.12.2018 NCLAT issued directions to Mr. Rohan Mehta to ensure that no one from the Petitioner Company was



restrained from entering the licensed premises. In flagrant violation of this order, Mr. Rohan Mehta again obstructed the entry of the Company Secretary and the HR Head of the Petitioner on 04.01.2019 and again on 04.02.2019. It was only after the second order of the NCLAT on 08.02.2019 that the HR Head was permitted to enter the licensed premises.

11. In view of obstructions and hinderances by Mr. Surinder Mehta and Mr. Rohan Mehta in the day-to-day functioning of the Petitioner and the hostile environment at the licensed premises, coupled with the fact that bank accounts of the Respondent were classified as NPA by Canara Bank and Punjab National Bank and constructed possession of Prime Tower was taken over by the latter Bank under the provisions of SARFAESI Act, 2002, Management of the Petitioner proposed shifting of its Corporate office to new premises at DLF Cyber City. Proposal was duly approved vide Board Resolutions dated 05.06.2019, 15.11.2019 and 23.09.2020. Respondent's officers, however, obstructed the shifting so that it could continue charging the service charges. In fact, Respondent's officers also approached the lessor of the premises proposed for shifting at Cyber City and misrepresented that no transfer of the Corporate office of the Petitioner could take place without Respondent's approval.

12. Upon outbreak of COVID-19 Pandemic, licensed premises were closed owing to lockdown in March, 2020 but when the lockdown was lifted phase-wise from May, 2020, Petitioner wrote to the Respondent on 09.05.2020 and 12.05.2020 that it intended to re-open the office from 18.05.2020 and requested that all required safety measures be taken. Despite correspondence in this context, only limited access was permitted on one day in November, 2020 and Meidensha had to file a Company Application No. 5/2021 in Company Petition (ND) No. 369/2017, whereupon an order was passed by NCLT on 05.03.2021 holding that



Respondent will have no right to create any hindrance or obstruction preventing the employees etc. of the Petitioner from entering the licensed premises. At this stage, Respondent found another ingenious way to hinder access, by demanding the outstanding service charges and after extensive correspondence and an emergent need to have an office workspace, it was decided during a Board meeting on 30.03.2021 to terminate the SFA and pursuant thereto, SFA was finally terminated by the Petitioner on 31.03.2021 with immediate effect. In furtherance thereto, Petitioner's HR Head Mr. Hussain sent a communication to the Respondent on 01.04.2021 intimating that its personnel would be visiting the premises on 06.04.2021 for collecting the records and other belongings and that no hinderance should be created. Respondent created several hurdles in this also and Petitioner had to approach NCLT once again. On 05.08.2021, NCLT directed the Respondent to permit Petitioner's personnel to access the licensed premises on 12.08.2021, to collect its records, documents and other belongings, however, Petitioner was unsuccessful in removing its belongings and till date all documents including corporate records, IT assets etc. are lying at the Prime Tower.

CASE OF THE RESPONDENT:-

13. On 01.06.2016, Petitioner including its shareholders and Meidensha entered into SPSHA in terms of which Meidensha acquired majority shareholding in the Petitioner Company. Additionally, it was agreed between the parties that Meidensha would purchase the remaining equity shareholding of the Petitioner Company from its shareholders including the Respondent Company, Mr. Surinder Mehta and Mr. Rohan Mehta, in multiple tranches over a period of five years. Last 8% of the shareholding of Petitioner was transferred to Meidensha on 30.09.2021 and presently, the entire shareholding of the Petitioner is owned by Meidensha.



14. In view of the business relationships between Meidensha and Prime Group in respect of the Petitioner, parties herein separately and independent of SPSHA also entered into an SFA, in terms of which Respondent granted license to the Petitioner to use and occupy the licensed premises for a monthly consideration of Rs.5,50,000/- with 30% increase in service charges i.e. Rs.7,15,000/- per month from 01.10.2018. Importantly, SFA contains an arbitration clause wherein exclusive jurisdiction was given to the Courts at Delhi and it was also stipulated in the SFA that Respondent could not terminate the Agreement insofar as it held shares in the Petitioner Company.

15. Possession of the licensed premises was handed over to the Petitioner on 01.06.2016, from which date itself it started using the same for its Corporate office. Petitioner was also permitted to use common service and facilities including infrastructure, maintenance, security, parking etc. for operation of their office. Between 01.06.2016 and 30.09.2018, the service charges were duly paid by the Petitioner, however, it paid only Rs.5,50,000/- for the month of October, 2018 as against Rs.7,15,000/-. From November, 2018 Petitioner consistently defaulted in paying the due amount of service charges and totally failed to pay the utility charges from February, 2020. Consequently, several e-mails were issued by the Respondent to the Petitioner seeking payment of the outstanding dues.

16. On 26.10.2018, Mr. Wakui responded to the e-mails claiming that Petitioner had suffered a loss of Rs.2,53,02,446/- on account of alleged wrongful invocation of the BGs by the Respondent and this was due to default of the Respondent in extension of its own BGs in favour of DHBVN/UHBVN and Petitioner was thus entitled to reimbursement, for which two Debit Notes dated 10.10.2018 had been issued. On this score, it



was claimed that no amounts were payable by the Petitioner until the loss of Rs.2,53,02,446/- was set-off. Significantly, Petitioner never disputed or refuted its liability to pay service charges to the Respondent, on which amounts they had in fact deducted the applicable TDS and deposited the same with the Government.

17. Prior to entry of Meidensha as an investor in the Petitioner Company, Respondent and Petitioner had entered into an Understanding whereby Respondent bid for DHBVN/UHBVN projects on behalf of the Petitioner to ensure that they qualify for the bid. Accordingly, Respondent had issued BGs on behalf of the Petitioner and simultaneously Petitioner had issued BGs in favour of the Respondent, making the entire transaction a back-to-back BG transaction. Subsequently, when the Petitioner became a subsidiary of Meidensha, upon acquiring majority shares, these EPC projects were also taken over by the Petitioner on back-to-back basis, being a part of the business-in-hand of the Petitioner. During this entire period, BG extension charges were regularly paid by the Petitioner to the Respondent. However, when a similar request was made in October, 2018, Petitioner failed to pay the charges, due to which Respondent was unable to extend the BGs in favour of DHBVN/UHBVN, resulting in the invocation of the BGs by the said Authorities. To cover its losses, Respondent was compelled to invoke the existing BGs issued in its favour by the Petitioner and therefore, the invocation of BGs by the Respondent is a transaction distinct and different from the disputes relating to the service charges in the instant matter and there is no connection between the two.

18. Respondent never accepted the Debit Notes and wrote several emails to the Petitioner to pay the outstanding service charges since October, 2018 and on 04.01.2021, Respondent was compelled to issue a legal notice seeking recovery of Rs.2,90,93,527/- on account of unpaid service and



utility charges under the SFA and disputing the claim of set-off. However, no response was received from the Petitioner. Since the SFA contained an arbitration clause, Respondent invoked arbitration vide notice dated 25.01.2021 under Section 21 of 1996 Act and on 22.02.2021, Petitioner while replying to the notice refused to appoint anyone out of the three Arbitrators proposed by the Respondent and instead proposed the name of a different Arbitrator, which was not acceptable to the Respondent. Thereafter, Respondent filed an application on 17.03.2021 before this Court under Section 11 of the 1996 Act for appointment of an Arbitrator with respect to disputes arising under the SFA. On 24.03.2021, this Court appointed a Sole Arbitrator to adjudicate the disputes between the parties. On 31.03.2021, Petitioner terminated the SFA but failed to pay the outstanding dues of the Respondent. On 12.08.2021, Respondent granted complete access of the required floors to the Petitioner to remove their belongings and collect the documents and a total of 141 cartons were taken away by Petitioner's representatives. Petitioner was thus in possession of the licensed premises till 12.08.2021.

19. On 11.07.2022, the Arbitrator passed a detailed award partially in favour of the Respondent whereby *inter alia* the claim of set-off by the Petitioner was rejected and service charges from November, 2018 to May, 2020 along with differential amount of Rs.1,65,000/- for the month of October, 2018 were awarded in favour of the Respondent. Pursuant thereto, on 25.07.2022, Respondent issued a demand notice to the Petitioner claiming Rs.2,06,34,575/- in terms of the award including interest from 04.01.2020 to 11.07.2022, GST and the legal costs awarded. On 10.08.2022, Petitioner filed an application under Section 33 of the 1996 Act seeking some corrections in the award and the Arbitrator passed an Additional Award dated 31.08.2022, revising the award to the extent of



making some typographical corrections, as also specifically mentioning the date of 17.05.2020 in the operative part of the award as well as the body of the award, more particularly, under issues No. (iii) and (vii). On 17.10.2022, Respondent issued a revised demand notice in terms of the additional award but instead of honouring the award, Petitioner has challenged the same by way of present objections.

CONTENTIONS RAISED ON BEHALF OF THE PETITIONER:-

20. The Arbitrator lacked the jurisdiction to entertain the disputes referred. The SFA permitted invocation of arbitration only for issues arising thereunder while the actual dispute between the parties was the validity of the set-off claimed by the Petitioner, which did not fall within the garner of the SFA and/or the Arbitrator erred in holding that the monthly license fee was payable by the Petitioner for the period 01.10.2018 to 17.05.2020 ignoring the fact that the amounts had been lawfully set-off against a certain and definite sum of Rs.2,53,02,446/-, reflected in the Debit Notes. The impugned award contains decisions on matters beyond the scope of reference to the Arbitrator. On 25.01.2021, Respondent had invoked arbitration alleging that Petitioner had failed to pay the monthly service charges under SFA. Petitioner objected to the invocation and pointed out that the dispute was not with respect to the service charges under the SFA but whether the set-off claimed by the Petitioner was valid. Petitioner's stand has always been that service charges, if at all payable, were to be lawfully and validly set-off against the demanded amount of Rs.2,53,02,446/- under the Debit Notes raised owing to unlawful invocation of BGs by the Respondent and that the two issues are so interconnected that they have to be treated as a part of one transaction. Petitioner filed a Pre-Institution Mediation and Settlement application under Section 12A of the Commercial Courts Act, 2015 praying *inter alia*



for a relief of declaration that claim of the Petitioner to set-off the rentals and other charges payable by the Petitioner under the SFA against the Debit Notes for wrongful invocation of BGs is legal and binding on the Respondent. Petitioner filed its Statement of Defence on 09.08.2021 before the Arbitrator along with an application under Section 16 of the 1996 Act, raising a plea to the jurisdiction of the Arbitrator, pointing out that SFA allows invocation of arbitration only for issues arising thereunder and not on the validity of set-off and the set-off claim was pending in the Pre-Institution Mediation proceedings, in which Respondent was not participating and thus the proceedings before the Arbitrator be terminated, being without jurisdiction.

21. On 02.09.2021, Petitioner instituted a commercial suit being CS(COMM) No. 410/2021 for a declaration that set-off is lawful, legal and binding on the Respondent and since this issue was pending before the Court, it was beyond the remit of the Arbitrator to adjudicate on the same. Despite this, the Arbitrator not only continued with the arbitration proceedings but also returned a finding on the merit on the plea of set-off holding that the two Debit Notes had not even a remotest connection with the separate and distinct contract i.e. SFA, which contained an arbitration clause and therefore, Petitioner could not have set-off the outstanding amount of service and utility charges payable in terms of the SFA with the amount due towards back-to-back BGs invoked by the Respondent. Reliance was placed by the Petitioner on the judgment of the Supreme Court in *Jitendra Kumar Khan and Others v. Peerless General Finance and Investment Company Limited and Others*, (2013) 8 SCC 769, where the Supreme Court held that whether a claim of equitable set-off would be allowable or not will depend on the evidence adduced before the Court and therefore, once the issue of validity of set-off was pending trial, the



Arbitrator ought to have kept away from adjudicating on merits on this issue. The impugned arbitral award thus deserves to be set aside under Section 34(2)(a)(iv) of the 1996 Act as it contains decision on matters beyond the scope of the Arbitrator's jurisdiction.

22. There were several back-to-back arrangements entered into between Petitioner and Respondent in respect of projects awarded to the Respondent by State Government Utilities such as DHBVN/UHBVN and Petitioner was a sub-contractor in each of these contracts. Respondent was required to furnish BGs to DHBVN and UHBVN and Petitioner's obligation was only to provide back-to-back BGs to the Respondent. Petitioner fulfilled its part of the obligations and renewed the BGs furnished in favour of the Respondent for all the projects in a timely manner but did not accommodate the unjust demand of the Respondent to renew its BGs in favour of DHBVN/UHBVN, in absence of any contractual obligations to do so and this was duly communicated vide e-mail dated 26.10.2018. Regrettably, Respondent did not renew its BGs despite being solely responsible to renew and Petitioner cannot be penalised for Respondent's inaction and omission. After the Respondent illegally invoked the BGs, Petitioner issued two Debit Notes to recover the losses incurred due to this act of the Respondent. Therefore, Petitioner is entitled to a set-off of the ascertained sum of Rs.2,53,02,446/- against the service charges payable to the Respondent. Additionally, Petitioner is entitled to set-off other debts due to the Petitioner from the Respondent i.e. Rs.50,00,000/- on account of the Petitioner having to forfeit the money provided by it by way of fixed deposit receipt as security in respect of BG issued by the Respondent in favour of Paragon Cables, cable supply vendor for DHBVN Projects at Dadri and Faridabad and Rs.13,25,83,560/- in respect of invoices raised by the Petitioner for work done in relation to the two projects.



23. Without prejudice to the preliminary objection to the jurisdiction of the Arbitrator, the impugned award cannot even otherwise sustain in law. Arbitrator failed to consider Petitioner's submission that Respondent did not mitigate the purported outstanding service and utility charges claimed by way of damages/compensation for loss. Explanation to Section 73 of the Indian Contract Act, 1872 casts a burden upon the person complaining of breach of contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. Law imposes upon a party subjected to injury, a duty of mitigating the losses to the extent possible. Reliance was placed on the judgments in *Pannalal Jugatmal v. State of Madhya Pradesh*, AIR 1963 MP 242; *Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Another*, AIR 1962 SC 366; *A.K.A.S. Jamal v. Moolla Dawood, Sons and Company*, AIR 1915 PC 48 and *Manju Bagai v. Magpie Retail Ltd.*, 2010 SCC OnLine Del 3842. Respondent has neither discharged the obligation to mitigate the purported loss endured by it nor demonstrated that it did not possess any means of remedying the inconvenience caused by non-performance of the contract in consonance with Section 73 of the Contract Act. Nothing prevented the Respondent from terminating the SFA, which stipulated that if conditions mentioned therein are violated by the licensee, licensor shall have the right to cancel the agreement and evict the licensee.

24. Respondent and its promoters deliberately, on one pretext or the other prevented access to the Petitioner in the licensed premises despite orders passed by NCLT and NCLAT and therefore, for most period the licensed premises remained unutilized/unoccupied by the Petitioner. Looking at the fact that Petitioner was not granted access and there were obstructions and hinderances to its officers and clients as well as Respondent's bad financial condition, on account of which constructive



possession of its property was being taken over by the Bank under the SARFAESI Act, 2002, a conscious decision was taken by the Petitioner through a Board Resolution to shift its Corporate office to an alternate premises at DLF Cyber City, Gurugram. However, every effort was made by Respondent's personnel to prevent the shifting by not only physically blocking the ingress and egress to the premises but also misrepresenting to the proposed lessor so that they were dissuaded to lease their premises to the Petitioner. Thus, even otherwise, Respondent is not entitled to claim the alleged dues towards service charges under the SFA.

25. Learned Arbitrator has overreached his jurisdiction by awarding costs to the tune of Rs.25,00,000/- in favour of the Respondent without providing any reason to do so. Respondent has submitted a Memo of Cost along with the written submissions and claimed Rs.49,68,987/- towards legal expenses. No evidence whatsoever was led in support of this figure, randomly selected. The Arbitrator equally randomly awarded Rs.25,00,000/- by observing that since initial default was of the Petitioner, it would be appropriate to award some costs in favour of the Claimant. In *Union of India and Another v. Alcon Builders and Engineer Private Limited, 2023 SCC OnLine Del 160*, this Court has held that the mandate in Section 31(3) of the 1996 Act that an arbitral award must contain reasons, must pervade every part of the award including award of costs and thus awarding costs by a stroke of pen, without stating reasons thereof, would be in the face of Section 31(3), apart from being opposed to well-accepted canons of fairness and justice.

CONTENTIONS ON BEHALF OF THE RESPONDENT:-

26. The impugned award is a complete and well-reasoned award where each and every issue raised by the respective parties has been elaborately discussed and findings have been rendered on the basis of the documents



and evidence led before the Arbitrator as well as in consonance with law on the subject. It is a settled law that the 1996 Act is aimed at minimising supervisory roles of the Courts in arbitral processes and this Court cannot sit in appeal over the arbitral award by reassessing or reappreciating the evidence. If there are two plausible interpretations of the terms of the contract and one interpretation is rendered by the Arbitral Tribunal, this Court cannot reach a different conclusion. The Arbitral Tribunal is a sole Judge of the quality and quantity of evidence before it. [***Ref.: Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49 and UHL Power Company Limited v. State of Himachal Pradesh, (2022) 4 SCC 116***].

27. Without prejudice to the aforesaid submission, even on merits, no case is made out by the Petitioner warranting interference in the arbitral award. The Arbitrator has correctly recorded that at no stage, Petitioner disputed its liability to pay monthly service and utility charges in terms of the SFA and the only defence raised was its purported claim for set-off against non-related commercial transactions. The issue of jurisdiction was also rightly decided as the claims for recovery of outstanding amount of service or utility charges fell within the scope of SFA and was squarely covered under the arbitration clause, incorporated in the SFA by a mutual agreement between the parties, as an alternate dispute resolution mechanism. Pertinently, there was no provision of any kind of set-off against the service or utility charges under the SFA and the defence was misconceived. In any case, Petitioner has already raised a claim for recovery under the two Debit Notes against which defence of set-off was made and the civil suit is pending before this Court. The Arbitrator has correctly expressed his opinion that if after resorting to the arbitration proceedings, a party to the arbitration agreement seeks a civil remedy on



matters covered under the arbitration clause, only to mischievously defeat the genuine claims of the claimant, no arbitration will ever proceed. The defence of set-off was outside the scope of SFA as well as the arbitration clause and jurisdiction of the Arbitrator could not be ousted merely because a civil suit was filed by the Petitioner.

28. Arbitrator has also categorically observed that the ground of set-off was unilateral and was never acceded to by the Respondent. Most importantly, Arbitrator has rightly observed that the Debit Notes dated 10.10.2018 had no correlation to the SFA and invocation of the BGs by the Respondent pertained to totally different commercial contracts, awarded in favour of the DHBVN/UHBVN. Reliance was placed by the Arbitrator on the provisions of Order 8 Rule 6 CPC as well as the judgments of the Supreme Court holding that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction and are not connected in their nature and circumstances. Law with regard to legal set-off is also discussed by the Arbitrator observing that the claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both parties must fill the same character in respect of the two claims sought to be set-off, which parameters were not fulfilled by the Petitioner by raising a claim of set-off under the two Debit Notes, related to a wholly unconnected commercial transaction under which the BGs were invoked by the Respondent.

ANALYSIS:

29. It is not disputed between the parties that Respondent is the lawful owner of the licensed premises and it had granted license to the Petitioner to use and occupy the fully furnished premises including permission to use common service and facilities such as security, parking, cafeteria, common



areas etc. under the SFA executed between the parties on 01.06.2016, incorporating the terms and conditions of grant of license. The service charges at which the premises were licensed are also not in dispute. Petitioner as a licensee had agreed to pay service charges @ Rs.5,50,000/- per month and increased charges @ Rs.7,15,000/- per month w.e.f. 01.10.2018.

30. Prior to the execution of SFA, on 13.05.2013 and 02.07.2013, Respondent had given bids for DHBVN/UHBVN projects respectively for construction of 33 KV sub-station and 33/11 KV lines in line and to ensure performance of the contracts, Respondent had issued back-to-back BGs in favour of the two public utilities. Respondent in turn sub-contracted the work of supply of material for construction under the projects to the Petitioner and issued a purchase order for supply of equipment required for the project. Petitioner also issued a back-to-back PBG in favour of the Respondent.

31. It is equally undisputed that possession of the licensed premises was handed over to the Petitioner effective from the date of the execution of the SFA i.e. 01.06.2016 and Petitioner started using the licensed premises as a corporate office from the said day and was regular in making payment of service charges from 01.06.2016 @ Rs.5,50,000/- till September, 2018. It is an admitted position between the parties that for October, 2018, Petitioner paid service charge @ Rs.5,50,000/- instead of increased rate of Rs.7,15,000/- and from November, 2018, onwards till 31.03.2021, the date of termination of the SFA by the Petitioner, it failed to make any payment towards the service charges. Petitioner is also in default in payment of utility charges under the SFA w.e.f. February, 2020. It is this default in payment of service and utility charges which led to the Respondent invoking arbitration vide notice dated 25.05.2021. Neither party disputes



that it is only the SFA which contains an arbitration clause contemplating reference of disputes arising under the SFA to a sole arbitrator, to be appointed mutually by both parties with seat of arbitration at New Delhi, in case the disputes were not resolved amicably.

32. As there was no agreement between the parties on the sole Arbitrator, Respondent approached this Court under Section 11 of the 1996 Act for appointment of Arbitrator in Arbitration Petition No. 413/2021. This Court appointed the sole Arbitrator, who thereafter entered upon reference and Respondent filed its claim while Petitioner filed the Statement of Defence along with an application under Section 16 read with Section 32(2)(c) of the 1996 Act. The application was dismissed as not pressed on 18.08.2021 and it was agreed between the parties that the Tribunal shall frame issues on the jurisdictional objections raised by the Petitioner, at the time of framing the issues. The following issues were framed by the Arbitrator, out of which issues No. (i) and (ii) were jurisdictional issues and were decided together by the Arbitrator:-

“(i) Whether the Sole Arbitrator has no jurisdiction to try, entertain and decide the issue relating to purported non-payment of service charges under the Service Facility Agreement in view of proceedings filed by the Respondent before the Delhi High Court seeking declaration to declare the action of the Respondent lawful whereby Respondent has set off the outstanding service charges for the period from October, 2018 to May, 2020 against the two Debit Notes dated 10.10.2018? (OPR)

(ii) Whether the dispute raised by the Claimant in the present arbitration proceedings is beyond the scope of the arbitration clause in the Service Facility Agreement in view of right exercised by the Respondent to set off the outstanding service charges against two Debit Notes dated 10.10.2018 issued by the Respondent? (OPR).

(iii) Whether the Claimant is entitled to payment of entire outstanding service charges from the Respondent from the period October, 2018 to March, 2021 in terms of prayer para 73 (Sl. No. 1) of Statement of Claim? (OPC)

(iv) Whether the Claimant is entitled to grant of interest on the alleged outstanding amount of service charges @ 18% per annum in terms of



prayer para 73 (Sl. No. 2) of Statement of Claim, if so, at what rate and for what period? (OPC)

(v) Whether the Claimant is entitled to the grant of GST on the outstanding amount of service charges @ 18% per annum in terms of prayer para 73 (Sl. No. 3) of Statement of Claim? (OPC)

(vi) Whether the Claimant is entitled to entitled to claim utility charges under the Service Facility Agreement from the Respondent for the period commencing from 01.02.2020 till 15.03.2021 alongwith simple interest @ 18% per annum, GST charges and other charges for providing power including back, telecom communication centre etc. in terms of prayer para 73 (Sl. Nos. 5 to 7) of the Statement of Claim? (OPC)

(vii) Whether the Respondent Company is in breach of terms and conditions of the Service Facility Agreement on account of purported non-payment of service charges and utility charges? (OPC)

(viii) Whether the termination letter dated 31.03.2021 issued by the Respondent Company thereby terminating the Facility Agreement is legal, valid and has a binding effect on the parties? (OPR)

(ix) Whether the Claimant had denied access to the licensed premises to the Respondent due to the alleged breach of the Service Facility Agreement from May, 2018 till 31.03.2021, if so, its effect? (OPR)

(x) Whether Claimant is entitled to the award of pendent-lite interest, if so, at what rate of interest?

(xi) Whether the Claimant being a MSME registered company is entitled to post award interest @ 27% per annum on the award amount from the date of the award till the date of payment by the Respondent? (OPC)

(xii) Whether the Claimant / Respondent are entitled to award of costs and if so, to what extent?"

33. Issues No. (i) and (ii) were decided against the Petitioner by the Arbitrator holding that disputes raised by the Respondent relating to non-payment of service and utility charges fell within the scope and ambit of the arbitration clause forming part of the SFA and therefore, the Arbitrator appointed by the High Court had absolute jurisdiction to try, entertain and decide all issues in relation thereto and merely because a civil suit had been filed by the Petitioner, where one of the reliefs was for a declaration that its claim of set-off under the Debit Notes against the outstanding service charges under the SFA be declared legal and valid, did not take the claims



made by the Respondent under the SFA, outside the scope of the arbitration clause and hence the jurisdiction of the Arbitrator.

34. It is significant to note that Petitioner did not dispute before the Arbitrator and even today does not dispute before this Court its liability to pay the service and utility charges at the increased rates from October, 2018 to 17.05.2020 and the sole contention, as noted by the Arbitrator, is that the charges payable by the Petitioner are to be lawfully and validly set-off against a certain and defined sum of Rs.2,53,02,446/- under the two Debit Notes dated 10.10.2018, in respect of the bank guarantee charges relating to the sub-contracts with respect to the projects of DHBVN/UHBVN.

35. Perusal of the impugned award reflects that after a detailed analysis of the claims preferred by the Respondent, the Arbitrator has held that the entire dispute raised by the Respondent is with regard to recovery of outstanding amount of service and utility charges and squarely falls within the four corners of the SFA, which the parties had agreed to refer to arbitration and manifestly no dispute has been raised which does not fall within the scope and ambit of the SFA or which can be said to be non-arbitrable by the Arbitrator. The Arbitrator notes that Petitioner has not laid any challenge to the terms of the SFA or to the arbitration clause. Since the main plank of the defence of the Petitioner was its claim of set-off premised on the two Debit Notes, the Arbitrator examined the said stand in light of the provisions of Order 8 Rule 6 CPC and the legal principles of the doctrine of equitable set off and legal set off. Conscious of the fact and noting that provisions of CPC are inapplicable to arbitral proceedings under Section 19 of the 1996 Act, Arbitrator proceeded to decide the legitimacy of defence of set-off by referring to the principles of set-off under Order 8 Rule 6 CPC. Referring and relying on the principles enunciated by the



Supreme Court in several judgments alluded to by the Arbitrator, it was observed that for the purpose of seeking legal set-off, claims sought to be set-off must be for an ascertained sum of money and legally recoverable by the Claimant and both parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Drawing strength from the judgments of the Supreme Court in *Jitendra Kumar Khan (supra)*, *Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh and Others*, (1952) 1 SCC 436 and *Ashok Kumar Kalra v. Wing Cdr. Surendra Agnihotri and Others*, (2020) 2 SCC 394, the Arbitrator emphasised that the set-off must necessarily be of the same nature as the claim of the Plaintiff and arise out of the same transaction and even when a claim is founded on the doctrine of equitable set off of cross-demands, the demands must arise out of the same transaction or should be so connected in nature and circumstances that they can be looked upon as part of one transaction.

36. Applying the first principles of set-off settled by the Supreme Court, the Arbitrator rendered a finding that the two Debit Notes dated 10.10.2018 issued by the Petitioner have not even a remotest connection with the separate and distinct contract i.e. the SFA and therefore, Petitioner could not have set-off the outstanding amount towards service and utility charges payable in terms of the SFA with the alleged amount due to the Petitioner on account of back-to-back BGs allegedly wrongly invoked by the Respondent. The Arbitrator held that after the award of certain contracts by DHBVN/UHBVN in favour of the Respondent, it furnished BGs in their favour and when Petitioner was given a sub-contract by the Respondent to carry out the work of some of these projects, it had furnished back-to-back BGs in favour of the Respondent who invoked the same against which two Debit Notes were issued by the Petitioner and therefore, it was quite



manifest that the invocation of the BGs was in relation to independent commercial contracts entered into between the Respondent and the Petitioner. The Arbitrator reiterated that the concept of legal set-off envisaged under Order 8 Rule 6 CPC and of equitable set-off cannot attract to the facts of the present case as a set-off claim was not in the same transaction and was in fact a totally unrelated, unconnected, independent and distinct commercial transaction. The Arbitrator added that Petitioner had claimed to set-off the amount under the Debit Notes which was not a fixed but a fluctuating amount which was manifest from Petitioner's e-mail dated 24.01.2020.

37. Petitioner had raised another issue in the context of its claim for set-off that it had filed a suit before this Court *inter alia* seeking a declaration that the claim of set-off of rentals and other charges payable by the Petitioner to the Respondent against the Debit Notes for wrongful invocation of BGs is lawful, legal and binding on the Respondent and seeking a decree for payment of the outstanding amount of Rs.2,53,02,446/- and thus the Arbitrator should not adjudicate on the issue of set-off. The Arbitrator examined the issue at length by first referring to and extracting the relief clause in the suit, the relevant pleadings in the plaint, as also tracing the chronology of dates of filing the suit viz-a-viz. the proceedings before the Arbitrator. The Arbitrator noted that from the reliefs claimed in the civil suit, it was clear that Petitioner had claimed recovery of the amount under the two Debit Notes and as an alternative relief had prayed for a decree declaring the setting off against the two Debit Notes as lawful and legal and had also paid *ad valorem* court fee on the amount of Rs.2,53,02,446/-. Arbitrator recognized that the right to recover the amount under the allegedly wrong invocation of the BGs by the Respondent was always available to the Petitioner along with its claim for recovery of other



outstanding dues under various invoices raised by it for the works executed under the independent and distinct contracts awarded by the Respondent in favour of the Petitioner in terms of Petitioner's e-mail dated 26.10.2018. Having so observed, the Arbitrator significantly noted that Respondent had never agreed or given any consent, tacit or otherwise, to allow the Petitioner to claim set-off of the outstanding amounts under the SFA. As for filing of the suit, the Arbitrator observed that pre-mediation proceedings were filed by the Petitioner on 22.07.2021, followed by filing the suit on 16.08.2021, much after the appointment of the Arbitrator and even after filing of the Statement of Claim by the Respondent on 27.05.2021 and therefore, it was apparent that Petitioner had deliberately added the relief of declaration to claim ouster of jurisdiction and arbitrability of the dispute by the Arbitrator. Arbitrator was of the view that if the contention of the Petitioner that the filing of the suit ousted the Arbitrator's jurisdiction was accepted, then any interested party would defeat the arbitration clause by adding some reliefs in a civil suit, which are otherwise covered by the arbitration clause and then seek to oust the Arbitrator's jurisdiction and this would defeat the entire objective and Scheme of the 1996 Act. Arbitrator also notes that the NCLT vide order dated 05.03.2021 also negated the contention of set-off raised by the Petitioner after referring to principles of set-off under Order 8 Rule 6 CPC and relying on the judgment of the Supreme Court in *Jitendra Kumar Khan (supra)*. Arbitrator negated the contention of the Petitioner that the declaratory relief sought in the civil suit would be rendered infructuous if the Arbitrator proceeds to pass the award on the ground that filing of the suit post commencement of the arbitration proceedings was at Petitioner's own peril. Respondent had been cautioning the Petitioner that its claim of set-off was unilateral and illegal and once the issues raised by the Respondent fell within the scope of



arbitration clause, there was no reason that the arbitral proceedings should not continue.

38. Before proceeding to examine the jurisdictional issue and the claim of set-off by the Petitioner, it is imperative to examine and understand the contours and confines of the Court's power to review and interfere in arbitral awards. In this context, it would be useful to allude to the judgment of the Supreme Court in ***Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131***, relevant passages from which are as follows:-

“Contours of the Court's power to review arbitral awards

22. *The 1996 Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation and for matters connected therewith, by taking into account the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration and the UNCITRAL Conciliation Rules. One of the principal objectives of the 1996 Act is to minimise the supervisory role of Courts in the arbitral process. With respect to Part I of the 1996 Act, Section 5 imposes a bar on intervention by a judicial authority except where provided for, notwithstanding anything contained in any other law for the time being in force. An application for setting aside an arbitral award can only be made in accordance with provisions of Section 34 of the 1996 Act.*

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26. *A cumulative reading of the UNCITRAL Model Law and Rules, the legislative intent with which the 1996 Act is made, Section 5 and Section 34 of the 1996 Act would make it clear that judicial interference with the arbitral awards is limited to the grounds in Section 34. While deciding applications filed under Section 34 of the Act, Courts are mandated to strictly act in accordance with and within the confines of Section 34, refraining from appreciation or reappraisal of matters of fact as well as law. (See *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570]* , *Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd. [Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75]* and *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306]* .)*

27. *For a better understanding of the role ascribed to Courts in reviewing arbitral awards while considering applications filed under*



Section 34 of the 1996 Act, it would be relevant to refer to a judgment of this Court in Ssangyong Engg. & Construction Co. Ltd. v. NHAI [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] wherein R.F. Nariman, J. has in clear terms delineated the limited area for judicial interference, taking into account the amendments brought about by the 2015 Amendment Act. The relevant passages of the judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] are noted as under : (SCC pp. 169-71, paras 34-41)

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to



Section 48(2)(b)(ii) was added by the Amendment Act only so that *Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12]*, as understood in *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an



award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.”

28. *This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.*

29. *Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappraise evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.*

30. *Section 34(2)(b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement*



by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression “public policy of India” and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

31. In Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], this Court held that the meaning of the expression “fundamental policy of Indian law” would be in accordance with the understanding of this Court in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644]. In Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644], this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the “national economic interest”, and disregarding the superior Courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of “patent illegality” as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213].”

39. In **Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking**, (2023) 9 SCC 85, the aforesaid principles were reiterated. Setting aside the judgment of the Division Bench of this Court holding that the award was liable to be set aside on ground of perversity, the Supreme Court observed that the impugned judgment overlooked the principles laid down in **Associate Builders (supra)**, wherein the Supreme Court had held that a good working test of perversity was laid down in **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and**



Others v. M/s. Gopi Nath & Sons and Others, 1992 Supp (2) SCC 312 and *Kuldeep Singh v. Commissioner of Police and Others, (1999) 2 SCC 10*. In *Kuldeep Singh (supra)*, the Supreme Court held that a broad distinction has to be maintained between decisions which are perverse and those which are not. If the decision arrived at is without any evidence or evidence which is thoroughly unreliable, on which no reasonable person would act, the order would be perverse, but if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, findings of the Arbitrator would not be interfered with. In *Associate Builders (supra)*, the Supreme Court held that when a Court is applying the ‘public policy’ test to an arbitration 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 has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence when he delivers the award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

40. Coming first to the preliminary issue relating to the jurisdiction of the Arbitrator to entertain the claim of non-payment of service charges under the SFA, in view of the civil suit filed by the Petitioner before this Court, *inter alia* seeking a declaration that its claim of set-off is lawful, it needs to be noted at the outset that there is no dispute between the parties that SFA incorporates the arbitration clause, whereby parties agreed to refer the disputes arising under the SFA to a sole Arbitrator and for ready reference, the clause reads as follows:-

“That the Licensor and the Licensee have agreed that in case of any dispute arises the same shall be resolved amicably. In the event the parties are unable to resolve the dispute amicably then it shall be referred to sole arbitrator to be appointed mutually by both parties. The applicable law for



arbitration shall be Indian Arbitration & Conciliation Act 1996, as amended from time to time. The seat of arbitration shall be at New Delhi and arbitration shall be conducted in English. This agreement shall be subject to compliance of law of Indian & the courts at New Delhi shall have exclusive Jurisdiction.”

41. It is equally undisputed that the claims raised by the Respondent before the Arbitrator were in respect of service and utility charges under the SFA dated 01.06.2016 and as rightly observed by the Arbitrator, fall squarely within the four corners of the arbitration clause. Manifestly, Respondent had not raised any dispute, which either did not fall within the scope and ambit of the SFA or fell outside it and/or which was non-arbitrable. There is no challenge by the Petitioner to any of the terms of the SFA or the arbitration clause and going by the intention of the parties that in the event of any dispute arising under and/or out of SFA, they would resort to arbitration, no fault can be found with the finding of the Arbitrator that the claims of the Respondent for utility and service charges were within the jurisdiction of the Arbitrator. Relevant paragraph of the Award is as under:-

“52. On appreciation of the totality of the facts and the circumstances of the case, I am of the view, that the issue raised by the Claimant relating to non-payment of service and other utility charges totally falls within the scope and ambit of the arbitration clause forming part of the Service Facility Agreement and therefore, the arbitrator appointed by the Hon’ble High Court vide its order dated 24.03.2021 has absolute jurisdiction to try, entertain and decide all the issues relating to non-payment of service and other charges under the Service Facility Agreement. The disputes raised by the Claimant in the present arbitration proceedings are not beyond the scope of arbitration clause under the Service Facility Agreement, just because of filing of the Civil Suit by the Respondent, where one of the reliefs claimed by the Respondent is to seek declaration of its action of setting off the outstanding service charges against the two Debit Notes dated 10.10.2018 as legal & valid.”

42. Another argument on behalf the Petitioner was that the civil suit filed by the Petitioner seeking a decree of declaration with respect to its claim of set-off has been rendered infructuous by the finding in the award that Petitioner is not entitled to claim set off. The Arbitrator has rejected this



contention and rightly so, on the ground that the Petitioner chose to file the suit after the proceedings had started before the Arbitrator and did so at his own peril for which it must blame itself. Petitioner was throughout cautioned by the Respondent that the action to set-off was being taken by the Petitioner unilaterally without any consent from the Respondent and had nothing to do with the claims of the Respondent under the SFA and if a submission of this nature is accepted, no arbitration will ever proceed and a party in the wrong would, after filing a Statement of Defence, file a civil suit and seek stay of the arbitration proceedings. Respondent is right that unless the Petitioner is able to show that the claim for set-off arises lawfully under the SFA and is part of the same contract/transaction or that the Arbitrator has adjudicated claims outside the scope of the SFA, the mere filing of the suit for a declaration cannot bar the jurisdiction of the Arbitrator to decide claims arising out of and under the SFA. The contention of the Petitioner that since the issue of set-off is pending consideration before this Court, it would be impermissible to bifurcate the cause of action between the Arbitral Tribunal and before this Court, also has no merit. The dispute raised before the Arbitrator is wholly covered by the arbitration clause and the claim of set-off against the Debit Notes pertaining to invocation of BGs is wholly unrelated to the SFA and arises from different and distinct commercial contracts, relating to projects of DHBVN/UHBVN. Reliance on the judgment of the Supreme Court in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Another*, (2003) 5 SCC 531, is also misplaced as the judgment is distinguishable. In the said case, disputes concerned multiple parties over the same transactions and some of the parties were not parties to the arbitration agreement. Appellant had claimed relief against non-parties to the arbitration agreement and the Supreme Court was of the view that under Section 8 of the 1996 Act,



causes of action could not be bifurcated and non-parties cannot be included in the same arbitration. Quite contrary, in this case, Petitioner and Respondent are both parties to the arbitration clause under the SFA and the disputes/claims raised before the Arbitrator are covered under the arbitration clause.

43. Coming next to the claim of the Petitioner for set-off under the two Debit Notes pertaining to the invocation of BGs, which is the main plank of the objections to the arbitral award, the observations and the findings of the Arbitrator warrant no interference. Order 8 Rule 6 CPC incorporates the doctrine of set-off and for ready reference is extracted hereunder:-

“6. Particulars of set-off to be given in written statement.-(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off- The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.”

44. In Halsbury Law of India, ‘Set-off’ means a claim set against another. It is a cross-claim which partly offsets the original claim. It is an extinction of the debts, of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors of one another. Where there are mutual debts between the Plaintiff and the Defendant, one debt may be set against the other. In ***Jitendra Kumar Khan (supra)***, the Supreme Court, after referring to one of the earliest cases of the Supreme Court in ***Raja Bhupendra Narain Singha Bahadur (supra)***,



amongst other cases, has extensively dealt with the issue of legal set-off and doctrine of equitable set-off. Following passages from the judgment in ***Jitendra Kumar Khan (supra)***, will be instructive for this case:

“11. On a reading of the aforesaid Rule it is noticeable that certain conditions precedent are to be satisfied for application of the said Rule. Two primary conditions are that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum. Apart from the aforesaid parameters there are other parameters to sustain a plea of set-off under this Rule. As far as equitable set-off is concerned, it has been enunciated in *Clark v. Ratnavaloo Chetti* [(1865) 2 Mad HCR 296] that the right of set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction. The said principle has been reiterated by the Calcutta High Court in *G. Chishlom v. Gopal Chunder Surma* [ILR (1889) 16 Cal 711].

12. In *Bhupendra Narain Singha Bahadur v. Bahadur Singh* [(1952) 1 SCC 436 : AIR 1952 SC 201] it has been opined that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction and not connected in its nature and circumstances. It has been further stated therein that: (AIR p. 204, para 8)

“8. ... A wrongdoer who has wrongfully withheld moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amounts that ... have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it.”

13. In *Lakshmichand and Balchand v. State of A.P.* [(1987) 1 SCC 19] this Court has ruled that when a claim is founded on the doctrine of equitable set-off all cross-demands are to arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction.

14. In *Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd.* [(2004) 3 SCC 504] while referring to the concept of set-off, this Court has stated thus: (SCC p. 511, para 15)

“15. ‘Set-off’ is defined in *Black's Law Dictionary* (7th Edn., 1999) *inter alia* as a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes *Thomas W. Waterman* from *A Treatise on the Law of Set-Off, Recoupment, and Counterclaim* as stating:

‘Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was



also, formerly, sometimes called stoppage, because the amount to be set-off was stopped or deducted from the cross-demand.”

15. Thereafter, the learned Judges referred to sub-rule (1) of Rule 6 Order 8 and proceeded to opine thus: [*Karam Chand Thapar and Bros. (Coal Sales) Ltd. case [(2004) 3 SCC 504], SCC p. 512, para 18]*

“18. ... What the rule deals with is legal set-off. The claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debits and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so.”

16. From the aforesaid enunciation of law it is quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debits and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in *Dobson & Barlow Ltd. v. Bengal Spg. & Wvg. Co.* [ILR (1897) 21 Bom 126] and *Girdharilal Chaturbhuji v. Surajmal Chauthmal Agarwal* [AIR 1940 Nag 177].”

45. The Supreme Court in ***Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. and Others, (2004) 3 SCC 504***, held that mutual debts and credits or cross demands, to be available for extinction by way of equitable set-off must have arisen out of the same transaction or ought to be so connected in their nature and circumstances so as to make it inequitable for the Court to allow the claim before it and leave the Defendant high and



dry unless he files a cross suit. The Supreme Court also observed that plea in the nature of equitable set-off is not a right and it is the discretion of the Court to entertain it or not. This proposition was propounded by the Supreme Court in an earlier judgment in the case of *Lakshmi Chand and Balchand v. State of Andhra Pradesh, (1987) 1 SCC 19*. Perusal of the impugned award reflects that the Arbitrator has applied these principles laid down by the Supreme Court for the purpose of deciding if the claim of set-off could be laid by the Petitioner in the present arbitral proceedings and returned a finding that the two Debit Notes dated 10.10.2018 issued by the Petitioner have not even a remotest connection with a separate and distinct contract i.e. the SFA, which incorporates the arbitration clause and therefore the claims of the Petitioner under the Debit Notes, relating to alleged wrongful invocation of BGs, cannot be set-off against the service and utility charges payable by it under the SFA to the Respondent. The back-to-back BGs were not furnished by the Petitioner under the SFA and after the award of certain contracts by DHBVN/UHBVN in favour of the Respondent, BGs were furnished by the Respondent and when the Petitioner was given the sub-contract to carry out part of the work of these projects, Petitioner furnished back-to-back BGs in favour of the Respondent. The Arbitrator further held that the concept of legal set-off envisaged under Order 8 Rule 6 CPC and of equitable set-off is not attracted to the present case as the claim does not arise out of the same transaction and relates to a wholly unrelated, unconnected, independent and distinct commercial transaction. In view of the fact that the claims towards utility and service charges arise out of the SFA while the set-off claimed arises under separate commercial contracts, no infirmity can be found with this finding of the Arbitrator, applying the binding dictum of the Supreme Court that to seek set-off, two rival claims should arise from the same



contract or transaction and must flow from closely connected dealings and transactions. Even to attract the concept of legal set-off, the principal requirement is that the claims sought to be set-off must be an ascertained sum of money and legally recoverable by the claimant and secondly, both parties must fill the same character in respect of the two claims sought to be adjusted or set-off. A finding has been rendered by the Arbitrator that Petitioner has claimed to set-off the amount under the Debit Notes not against any fixed amount but a fluctuating amount, which is evident from the e-mail dated 24.01.2020 sent by Mr. Wakui and therefore, even a claim of legal set-off is not made out. The argument of the Petitioner that by rejecting the claim of set-off, the Arbitrator has rendered the civil suit filed by the Petitioner in this Court infructuous, in my view, is a misreading of the arbitral award. The Arbitrator has carefully and cautiously noted that the Petitioner has filed a civil suit seeking recovery of amounts under the sub-contract relating to projects by DHBVN/UHBVN and has extracted the relief clause. The Arbitrator also notes that a separate claim has been filed for recovery of Rs.17,59,45,656/- against certain outstanding amounts under the invoices as also for a relief of payment of Rs.2,53,02,446/- i.e. the amount under the Debit Notes. Therefore, the right of the Petitioner to recover the amounts under the Debit Notes has been left open by the Arbitrator and he has only rejected the claim of the Petitioner to set-off the same specifically against the utility and service charges, claimed by the Respondent and therefore, it cannot be urged that the civil suit is rendered infructuous.

46. It was also urged on behalf of the Petitioner that Respondent failed to discharge its obligation to mitigate the purported losses sustained by it on account of non-payment of service and utility charges under Section 73 of the Contract Act, which casts a burden upon the person claiming breach of



contract to show that he did not possess means of remedying the inconvenience caused by non-performance of the contract. Nothing prevented the Respondent to terminate the SFA if the conditions of the license deed were violated by the licensee. The legal principle is not open to any debate on mitigation of losses under Section 73 of the Contract Act, which is the relevant factor while assessing the loss suffered by an aggrieved party. However, the principle of mitigation can only apply where the loss is disputed by the opposite party. In the present case, it bears repetition to state that at no stage Petitioner disputed its liability to pay the monthly service and utility charges under the SFA or the amounts. In fact, Petitioner candidly admitted its liability to pay for the period October, 2018 to 17.05.2020 at the rates agreed between the parties and incorporated in the SFA and it only sought to set-off its claim under the two Debit Notes. This is evident from various passages from the Statement of Defence filed by the Petitioner, reference to which was made by the Arbitrator and which are as follows:

“65. There can be no quarrel to the legal principles settled in various judgments cited by Ld. Counsel for the Respondent that the party claiming damages must take all reasonable steps to mitigate the loss which he has sustained consequent upon the wrong of the party in breach, and if he fails to do so, despite being in a position to do so, he cannot claim damages for any such loss which he ought to have avoided by putting all reasonable efforts. The aspect of mitigation of loss as contemplated under Section 73 of the Contract Act is a relevant factor while assessing the loss suffered by the aggrieved party, but it is only in a case where such a loss is being disputed by the other party. In the facts of the present case, it is difficult to comprehend that the Claimant was required to prove that it has taken all reasonable steps to mitigate the losses by terminating the license of the Respondent due to non-payment of service and utility charges by the Respondent. In fact, the Respondent at no stage has disputed its liability to pay the monthly service and utility charges in terms of the Service Facility Agreement and it was very candid in admitting this fact that it had set off these charges as were payable w.e.f. October, 2018 to 17th May, 2020 by issuing the two Debit Notes dated 10.10.2018 for an amount of Rs. 2,53,02,446/- (Rupees Two Crores Fifty Three Lakhs Two Thousand Four Hundred Forty Six Only). Referring to some of the lines from the



Statement of Defence filed by the Respondent, it states as under:

Para 8 of preliminary objections

"The rentals payable under the Service Facility Agreement are being lawfully and validly set off by the Respondent Company against the certain and definite sum of INR 2,53,02,446/- as reflected in the Debit Notes and there is no merit in the Claimant's assertion that the set off by the Respondent Company ought to fail on this regard satisfied"

"91.

.....It is reiterated that access to an possession of the licensed premises has been deliberately denied to the Respondent Company by PCI since May 18th 2020 and therefore, no service charges / utility charges are payable for the said period. Further the Respondent at all times honoured its obligations under the Service Facility Agreement as the service charges were duly paid by the Respondent Company till October, 2018 and thereafter, validly and lawfully set off against the debts due from the Claimant to the Respondent Company."

"105.

..... This is without prejudice to the Respondent's position that even for the period from October, 2018 until May 17, 2020, there are no outstanding service charges or utility charges payable by the Respondent as the same have validly and lawfully set off against the two Debit Notes."

"107.

..... Further, for the period from October, 2018 until May 17, 2020, the service and utility charges payable have been validly and lawfully set off against the two Debit Notes."

47. In light of this defence, it is a misconceived argument on behalf of the Petitioner that the Respondent was obliged to discharge the obligation of mitigating the losses while claiming the utility and service charges under the SFA. As far as the argument that Respondent failed to take steps to terminate the SFA is concerned, there was an embargo placed on the right of the licensor under the SFA itself, which stipulated that so long as the licensor holds any share in the licensee company, it shall not be entitled to terminate the agreement at any time during the term of 72 months or the extended period thereafter. On the date of filing of the Statement of Defence by the Petitioner, Meidensha was holding 92% shares in the Petitioner company, while remaining 8% were held by the Respondent,



Mr. Surinder Mehta, Mr. Rohan Mehta and their relatives. The last tranche of shares held by the Respondent in the Petitioner company, as noted by the Arbitrator were transferred to Meidensha on 30.09.2021, which is an admitted position. Therefore, the Arbitrator rightly observed that Respondent was debarred from taking any step towards termination of the SFA prior to 30.09.2021. In these circumstances and in view of the fact that Petitioner was in occupation and possession of the licensed premises for the period October, 2018 till 17.05.2020 and service charges were agreed to be increased by 30%, specifically to a sum of Rs.7,15,000/- per month w.e.f. October, 2018, the Arbitrator held the Petitioner liable to pay the said monthly license fee from November, 2018 to May, 2020 and the differential amount of Rs.1,65,000/- for the month of October, 2018 and rightly decided Issue No.(iii) partially in favour of the Respondent and against the Petitioner.

48. Issue No. (iii) was connected with issue No. (ix), i.e. whether Respondent had denied access to the licensed premises to the Petitioner due to alleged breach of SFA from May, 2018 till 31.03.2021. This issue was decided in favour of the Petitioner and against the Respondent. As noted above, for the period November, 2018 to May, 2020, the Arbitrator held the Petitioner liable to pay the monthly licence fee @ Rs.7,15,000/- on the ground that Petitioner was in occupation and possession of the premises for the said period as per the terms of SFA and there was neither any dispute with regard to the jural and contractual relationship between the parties nor a dispute on the liability to pay the licence fee. Having so held, the Arbitrator accepted the case of the Petitioner that doctrine of suspension of rent would apply for the period between 18.05.2020 and 31.03.2021 on the ground that there was denial of access to the licensed premises, which had no connection with the defence set up by the Respondent that there was



lockdown by the Government on account of COVID-19 Pandemic. The Arbitrator in his detailed analysis relied upon several emails written by the Petitioner complaining of denial of access in this period and the losses suffered by the Petitioner on this score. Reference was also made to order dated 05.03.2021 passed by NCLT in Company Application No.5/2021 in pending Company Petition No. 369(ND) of 2017, whereby the Tribunal directed that unless and until Petitioner is evicted from the premises, in accordance with law, Respondent shall have no right to create any hindrance or restriction in entering the premises. Reference was also made to the cross-examination of Respondent's witness CW-1 in this regard. Referring to the judgments of the Supreme Court to the proposition that the doctrine of suspension of rent is premised on principles of justice, equity and good conscience whereby if the lessee is dispossessed by the lessor, the obligation of the lessee to pay rent to the lessor is suspended, the Arbitrator returned a finding that for the period 18.05.2020 to 31.03.2021, Respondent had deprived the Petitioner from the use of the licensed premises, not because of the lockdown conditions which already stood relaxed from May, 2020 but on the pretext of upgradation and maintenance of HVAC work and was belligerent and adamant in its approach to deny access. Deciding this issue, the Tribunal held the Petitioner entitled for suspension of rent for the aforementioned period. There is no challenge to this part of the award by the Respondent herein. Thus, wherever the charges were not payable by the Petitioner, the Arbitrator has held in its favour and this Court finds no scope of interference in the impugned part of the Arbitral award.

49. The next and the only other objection raised against the impugned award is with regard to costs of Rs.25 lacs, awarded by the Arbitrator in favour of the Respondent. Section 31A of the 1996 Act, introduced by Arbitration and Conciliation (Amendment) Act, 2015 contains provisions



for determination of costs and is extracted hereunder:-

*“31A. **Regime for costs.**—(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Civil Procedure Code, 1908 (5 of 1908), shall have the discretion to determine—*

- (a) whether costs are payable by one party to another;*
- (b) the amount of such costs; and*
- (c) when such costs are to be paid.*

Explanation. —For the purpose of this sub-section, “costs” means reasonable costs relating to—

- (i) the fees and expenses of the arbitrators, Courts and witnesses;*
- (ii) legal fees and expenses;*
- (iii) any administration fees of the institution supervising the arbitration; and*
- (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.*

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—

- (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or*
- (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.*

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

- (a) the conduct of all the parties;*
- (b) whether a party has succeeded partly in the case;*
- (c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and*
- (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.*

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—

- (a) a proportion of another party's costs;*
- (b) a stated amount in respect of another party's costs;*
- (c) costs from or until a certain date only;*
- (d) costs incurred before proceedings have begun;*
- (e) costs relating to particular steps taken in the proceedings;*



(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.”

50. It is no longer *res integra* that the Arbitral Tribunal has the discretion to award costs in terms of Section 31A, as the Section begins with non-obstante clause and has an overriding effect over any contrary provision contained in CPC. As a matter of record, Respondent claimed Rs.49,68,987/- as costs while the Arbitrator has awarded a sum of Rs.25 lacs. While determining the quantum, the Arbitrator has relied on the detailed calculation furnished by the Respondent for claiming the costs which included the expenses incurred, fees paid to the counsels, etc. The Arbitrator further held that the Petitioner was in default insofar as payment of service and utility charges under the SFA were concerned, while Respondent was in default in denying access to the licensed premises from 18.05.2020 till 31.03.2021 and therefore, counterbalanced the costs and awarded Rs.25 lacs as against the claimed amount. Applying the law on the subject, this Court finds no reason to interfere with the discretion exercised by the Arbitrator based on the details furnished by the Respondent to claim costs as also for the reason that Petitioner was at fault in delaying the payments. This Court in ***Union of India v. Om Vajrakaya Construction Company, 2021 SCC OnLine Del 5434***, has held that unlike the power of the Arbitral Tribunal to award interest under Section 31(7)(a) of the 1996 Act, which is subject to the contract between the parties, there are no such fetters on the discretion of the Tribunal to award costs under Section 31A of the 1996 Act. The judgment was upheld by the Division Bench in ***Union of India v. Om Vajrakaya Construction Company, 2023 SCC OnLine Del 1681***.



51. No arguments were addressed by either party on any other issue. Examining the objections raised by the Petitioner within the scope and ambit of the power of this Court as delineated and defined in the judgments of the Supreme Court, some of which are referred above and having carefully perused the award, the observations, findings and reasoning of the Arbitrator, this Court is of the view that Petitioner has been unable to make out a case warranting interference by this Court in the impugned arbitral award.

52. Petition is devoid of merits and is accordingly dismissed.

JYOTI SINGH, J

FEBRUARY 12th, 2024/shivam/kks