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

Judgment Reserved on: 03.05.2018

% Judgment Pronounced on:30.08.2018

\+ **FAO(OS) (COMM) 35/2018 & CM APPLS. 8307/2018 & 11962/2018**

VEDANTA LTD ..... Appellant

Through: Mr. P. Chidambaram, Sr. Adv., Mr. Dhruv Mehta, Sr. Adv. with Ms. Ranjana Roy Gawai, Ms. Vasudha Sen, Mr. Arjun Asthana & Mr. Parinay T. Vasandand, Advs. versus

SHENZHEN SHANDONG NUCLEAR POWER CONSTRUCTION COMPANY LTD ..... Respondent

Through: Mr. C.S. Vaidyanathan, Sr. Adv. with Ms.Meenakshi Arora, Sr. Adv. with Mr. Ranjit Prakash, Mr. Kamal Nijhawan, Mr. Anshuman Pande & Ms. Mahima Sareen, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K.CHAWLA

S.RAVINDRA BHAT, J.

1. This appeal, by Vedanta Ltd (hereafter "Vedanta") under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") questions the judgment of a learned single judge, dismissing its petition under Section 34 of that Act. The petition challenged the award of an arbitral tribunal, (dated 9th November, 2017).

2. The facts of the case are that Vedanta was granted environmental clearance for its existing plant i.e. Alumina Refinery of 1 MTPA in Lanjigarh, Orissa. The Alumina Refinery with 1 MTPA in Lanjigarh, Orissa along with captive power plant of 75MW, were operational since 2007. The respondent (hereafter "Shenzhen"), a Chinese company, provides energy infrastructure construction services. It offers power plants and construction and maintenance services; it also designs procurement and construction work with reference to the Power Plant Project. It belongs to the SEPCO group of companies. Vedanta is engaged in the business of production of metallurgical grade aluminum and other aluminum product. It had an alumina refinery of capacity of 1 MTPA and captive power plant of 75 MW at Lanjigarh, Kalahandi District, Orissa for which the environmental clearance was granted on 22.09.2004. Vedanta wished to expand the capacity of the refinery from 1 MTPA to 5 MTPA and a corresponding increase in generation capacity of its power plant from 75 MW to 300 MW. To this end, it applied, on 03.10.2007 to the Ministry of Environment and Forests (hereafter called "MoEF") for environmental clearance; on 12.03.2008 it was issued the Terms of Reference. Later, without obtaining the requisite environmental clearance for the expansion, on 06.04.2008 Vedanta issued a letter of intent (LOI) to Shenzhen for design, engineering, manufacture, supply, custom clearance, transportation, uploading, civil works, storage, erection, testing, commissioning and performance of guarantee test of co-generation power plant comprising of 05 units on turn-key basis. Resultantly, four contracts were entered into on 22.05.2008: (i) Offshore Engineering and Technical Services Contract. (ii) Offshore Supply Contract. (iii) Onshore Services

and Construction Contract and (iv) Onshore Supply Contract. These shall be hereafter collectively called "the contracts". In addition to these contracts, Shenzhen, on the same day (22.05.2008) executed a guarantee agreement. Further, in terms of the EPC Contracts, Shenzhen submitted performance bank guarantee amounting to 10% of the EPC Contract price and also submitted advance bank guarantee again amounting to 10% of the EPC Contracts.

3. The said EPC Contracts contained an arbitration clause. Shenzhen started the project work on 01.05.2008. It raised invoices from time to time towards the construction of the project according to payment schedule as agreed upon and stipulated in the contract, and the payments were being made by Vedanta, except for withholding the amount towards meeting the last three milestones and for quality guarantee. The payments were to be released to Shenzhen in terms of clause 4.3 of Schedule 4 of the EPC Contracts. Similar clauses are there in all the EPC Contracts, and one of such clauses being clause 4.3 of the Onshore Supply Contract is reproduced herein below:

> *"4.3. Payment Terms:*
>
> *4.3.1 Subject to any deductions from the Contract price as per Contract the supplier shall been titled to receive the Contract price in the following manner:*
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> *4.3.1.1 Supply of Plant & Equipment Spares*
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> *4.3.1.1.1 10% Advance against submission of Advance Bank Guarantee of equal amount and Performance Bank Guarantee of 10% the Contract price.*

4.3.1.1.2 10% against receipt of material at site on pro rata basis at per billing schedule to be approved by the purchaser.

4.3.1.1.3 5% against the mechanical completion (pro rata for each unit).

4.3. 1.45% against successful synchronization (pro rata for each unit)

4.3.1.1.5 10% against successful completion of PG test (prorated for each unit) except for the5thunitwhich shall be released after demonstration of integrated performance of all the units."

4. Shenzhen started working towards the execution of the contracts both in respect of services and construction Contracts and also for services Contracts. In execution of such Contracts, several steps were taken by Shenzhen, and on completion of different steps, invoices were raised in terms of the payment. In these circumstances Vedanta, by a letter dated 28.08.2010, instructed Shenzhen to suspend all construction activities on construction site with immediate effect and further instructed that the work be resumed only after the receipt of a resumption notice from it; a similar letter followed (to Shenzhen) on 15.09.2010 in which Vedanta suspended the work of the project till 01.12.2010. These letters cited the reason for suspension as *"unforeseen circumstances"* and did not cite any other ground.

5. It transpired, however, that these letters of suspension were issued by Vedanta in the light of the MoEF's office memorandum dated 19.08.2010 which gave certain clarification with respect to the mandate of obtaining prior environmental clearances and action in the form of a

decision of the MoEF dated 24.08.2010 whereby it decided on the question of grant of forest clearance in Kalahandi and Rayagada Districts of Orissa for Bauxite Mining in Lanjigarh Bauxite Mines and also found that Vedanta commenced the construction activities without obtaining prior environmental clearance from the competent authority in terms of the Environment Impact Assessment Notification 2006 under the Environment Protection Act, 1986, which amounted to a serious violation of the said Act. On 31.08.2010, MoEF asked Vedanta to show cause why construction activity was undertaken without obtaining its prior environmental clearance. After completion of the proceedings initiated by show cause notice, an order dated 20.10.2010 was passed withdrawing the Terms of Reference issued earlier for expansion of the alumina refinery from 1 million to 6 million metric tons per annum and from 75 to 300 MW captive power plant. MoEF also directed Vedanta to maintain status quo at the site and not to carry on any further construction at the site. Vedanta challenged these orders dated 24.08.2010 and 20.10.2010 by filing a writ petition (No. 19605/2010) before the Orissa High Court. The writ petition was dismissed by the Division Bench of the High Court by an order and judgment dated 19.07.2011. The High Court, in para 43 of the judgment, held that Vedanta's construction work for expansion project without obtaining environmental clearance violated the mandate of ETA Notification, 2006 and, therefore, that withdrawal of the Term of Reference was justified. Vedanta's review petition against that judgment was dismissed by order dated 19.01.2012. These orders remained unchallenged and attained finality.

6. After the suspension notice issued by Vedanta (on 28.08.2010) to Shenzhen, several communications were exchanged between the parties, including the demands made by the Shenzhen for the dues and maintenance charges. Ultimately, Shenzhen terminated the Contracts and gave 30 days advance notice by notice dated 25.02.2011 taking recourse to power vested in it under the Contracts and called upon Vedanta to pay the outstanding dues as mentioned in the said notice. Subsequently, by letter dated 11.12.2012 Shenzhen informed Vedanta that it would withdraw their employees and staff, deployed for the project at the site, with effect from 17.12.2011. By a notice dated 23.02.2012 Shenzhen called upon Vedanta to pay the outstanding dues set out (in the notice). Later, on 17.12.2011 Shenzhen demobilized majority of the officials. Upon Vedanta's failure to pay the said amounts, Shenzhen approached the Bombay High Court under Section 9 of the Act seeking interim protections and on 18.04.2012 issued arbitration notice for commencement of the arbitration proceedings. Shenzhen's petition under Section 9 was dismissed by the Learned Single Judge of the High Court by its order dated 25.04.2012 in Arbitration Petition No.448/2012. However, on appeal the Division Bench vide its judgment and order dated 12.12.2012 (in A. No.341/2012) partly allowed the appeal and directed Vedanta to furnish security to the Claimant for a sum of ₹l87 crores. This order was challenged by Vedanta before the Supreme Court by filing SLP (Civil) No.49/2013. However, that Petition was dismissed by the Supreme Court on 22.07.2013. Vedanta, complying with the Bombay High Court's order furnished a Bank Guarantee for an amount of ₹ l87 crores which was kept alive.

7. These events led to the disputes, which were referred to in the decision in the arbitration before the tribunal. In the arbitration proceedings, Shenzhen claimed that in terms of the clauses of the EPC Contracts, it was the obligation of Vedanta to obtain the Environmental and Forests Clearance for the project and it had represented to Shenzhen that it had obtained all the necessary statutory permissions and clearances required to be obtained by it for setting-up of the projects. Shenzhen relied upon several clauses of the EPC Contracts, being Clause 1.3.6 of the Scope of Work under Schedule 1 of the Onshore Services and Construction Contract, Clause 1.3.5 of the Schedule 1 of the Offshore Supply Contract and Clause 1.7.6 of the Schedule 1 of the Offshore Engineering and Technical Services. One of those similar clauses was as follows:

> *"1.3.6: Following statutory approvals:*
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> - *Water allocation approval.*
> - *State Pollution Control Board Approval.*
> - *Civil Aviation clearance for chimney.*
> - *Environment Sm Forest Clearance.*
> - *State Electricity Board clearance under Section 44 of the Indian Electricity Act.*
> - *Techno-Economic Clearance from CEA, if applicable."*

8. Vedanta relied on recital B of the Guarantee Agreement, which states that *"the owner/purchase represents, warrants and declares that it has obtained and/or obligation to obtain all necessary statutory permissions/clearances required to be obtained by the owner/purchaser*

for setting up the Facility and will arrange necessary finance in relation to the project." Shenzhen alleged that Vedanta had never informed it about the true nature of the suspension, in order to willfully conceal the failure, lapses and breaches on the part of the latter in obtaining the requisite prior environmental clearance before setting up of the project; it was never informed about the receipt of notice dated 24.08.2010 and the order of 20.10.2010 and instead by letters dated 28.08.2010 and 15.09.2010, it was only informed that the project was being suspended on account of 'unforeseen circumstances'. It further alleged that Vedanta, while concealing and not disclosing the true and correct facts, assured it that as and when the work would resume, Vedanta would cover all the costs incurred by Shenzhen on account of suspension of the work. That letter (dated 28.08.2010) *inter alia*, states as under:

> *"Due to some unforeseen circumstances, you are advised to suspend all the constructions activities at site with immediate effect for next fifteen days from the date hereof. Upon receiving the resumption notice from us, you should promptly restart the work."*

9. The relevant portion of the said letter dated 15.09.2010 reads as follows:

> *"Due to some unforeseen circumstances, you are advised to further suspend all the constructions activities at site with immediate effect till 01.12.2010. Upon receiving the resumption notice from us, you should promptly restart the work. You are also instructed to demobilize all your construction resources from site. We further assure you that after the resumption of work a Variation Order covering reasonable costs if any due to suspension and appropriate adjustment for the Completion Schedule will be issued as per the terms & condition of our Contract"*

Shenzhen alleged that Vedanta was obliged under the contracts to inform the true nature of the suspension of the projects and relied on clause 31.2.1 of Contract for Offshore Engineering and Technical Services and similar clauses in other three Contracts. The said clause reads as follows:

> *"The owner may suspend the work in whole or in part at any time by giving the Contractor notice in writing to such effect stating the nature, the date and the anticipated duration of such suspension..."*

10. It was alleged that despite repeated reminders, the monthly maintenance charges during the suspension were not paid. Shenzhen also alleged that the work on the project was suspended without any default on its part. Despite this Vedanta did not make payments towards construction in terms of the EPC Contracts or monthly maintenance charges during suspension in spite of Shenzhen's several requests; it therefore issued notice of 30 days for the termination of contract on 25.02.2011; the notice also called upon Vedanta to pay the amounts, which according to it, were due. Shenzhen justified the termination and rescission of the EPC Contracts, relying on clause 31.2.3 of the Offshore Engineering and Technical Services, clauses 42.2.3 of the Onshore Services and Construction Contract and Clause 35.2.3 of the Offshore Supply Contract and the Onshore Supply Contract. The clause reads as under:

> *"If such suspension continues for more than 180 (one hundred and eighty) days at the end of the period the Contractor shall be, by a further 30(thirty) days prior notice, entitled to terminate the Contract and owner shall pay to the Contractor 105% (One hundred five percent) of the cost incurred by the Contractor till the date of termination as compensation after*

adjusting payments already made till the termination. No consequential damages shall be payable by the purchaser to the supplier in the event of such suspension."

11. Shenzhen also alleged that no reply was received by it to the said notice and instead Vedanta paid an amount of ₹ 5,59,07,995/- and EURO 419290 only to it. Shenzhen claimed that on the date of the termination of the contracts, the project was 79.39% complete, with the design and procurement being nearly 100% complete and the construction activities being complete up to 65.19%. Therefore, it made claims towards the following:

(i) Pending payments under the EPC Contracts.

(ii) Additional direct costs.

(iii) Compensation/damages towards direct losses.

The claim petition sought an award for ₹4,472,106,315 and US $ 2,380,000 and EURO 121,723,214 along with *pendente lite* and future interest at the rate of 18% per annum until payment. Shenzhen also claimed *pendente lite* and future interest at the rate of 18% per annum and cost of the arbitration.

12. Vedanta disputed the claim and argued that Shenzhen was at default and had failed to complete the project in terms of the Schedule of completion of work as agreed to by the parties, which has led to the situation of suspension. It was alleged that in terms of the EPC Contracts and as per Schedule of completion, the entire plant was to be commissioned by 28.02.2010. Thus, the situation of suspension would have never arisen if Shenzhen had completed the project within time. The

notice for suspension of work issued by MoEF was considerably later than the time scheduled for commissioning of the project. Vedanta also argued that the claim was not maintainable since the suspension was due to change in law which is a *force majeure* and would entitle it to invoke the variation clause. Vedanta states that, in terms of the understanding of the industry and the existing rules and regulations, it was not necessary to seek environmental clearance prior to the commissioning of the project. The MoEF has sought to change the prevailing understanding by Office Memorandum dated 19.08.2010 which amounts to change in law. It was also affirmed that the judgment passed by the Orissa High Court confirmed Vedanta's case that there was a change in law. Vedanta also stated that clause 35.2.3 of the Contract between the parties runs contrary to the essence of the Contract and renders all other important clauses of the Contract such as force-majeure and variation clauses as nugatory, otiose and defeating the very essence of the contract. It was averred that the said clause 35.2.3 should be declared null and void in as much as Vedanta did not intend to have such a drastic clause in the Contract and in any eventuality, the said clause is unconscionable and is contrary to the provisions of the Contract Act and the public policy.

13. In addition to entering the defense, Vedanta sought rejection of the claim by moving the tribunal under Section 16 of the Arbitration and Conciliation Act. That application was disposed of vide order dated 02.12.2013, while framing the said issue raised by Vedanta as the preliminary issue. The preliminary issues framed were whether clause 35.2.3 of the Agreement between the parties is unconscionable, being

contrary to the provisions of the Contract Act and public policy. Vedanta also contended that the termination clause could have been invoked only within 22 months from date of the commencement of the project, and as the said period has lapsed, the same cannot be invoked.

14. Without admitting liability, Vedanta further averred that it shall be liable to make payment only for the work done by Shenzhen/supplier till the time of such *force majeure* and there is no provision for consequential damages under the suspension and termination clause. Vedanta also asked that the statement of defense/reply be treated as a counter claim and in the end, has claimed for passing of an award in a sum of ₹ 24,58,34,89,367.00 along with *pendete lite* and future interest at the rate of 18% per annum until the date of payment. It relied on clause 31.5 of the Onshore Supply Contract, in the event of termination owing to force majeure event, submitting that the eventuality had commenced. Clause 31.5 is reproduced herein-below:

> *"If force majeure event continues beyond the period of 6 (six) months from the beginning of the Force Majeure Event or prevent the supplier from performing its obligations under the Contract for an aggregate period of more than 9 (Nine) months, the parties shall mutually decide further course of action. If mutual settlement cannot be arrived at within 30(thirty) days, either party shall have the right to terminate the Contract. In the event of such termination, the purchaser shall be liable to make payment for all works done by the supplier till the time such force majeure had commenced and the supplier shall be liable to hand over all works and supplies completed pursuant to the Contract till the date of termination due to force majeure."*

15. Vedanta stated that Shenzhen's claim was raised towards refund of the cost incurred by the Claimant including the amounts paid to it along with damages on the ground that as the Claimant has abandoned the project midway, the work which has been done by the Claimant is of no use to the Claimant.

The award

16. The dispute, which was referred to a tribunal, under the Act, was considered; the parties relied on documents and also on the testimony of witnesses whose depositions were relied upon by them. The tribunal in its impugned award, rejected Vedanta's arguments and held, *inter alia*, as follows:

> *"84. The fact that the aforesaid amount was withheld by the Respondent has not been denied by the Respondent in its defence. Further, the Respondent in its cross examination has categorically admitted that the Respondent has withhold the said amount and was also deducting/adjusting TDS and WCT on the gross value of the invoices. (Reference Q. No. 65 and 88 to RW-2). The Respondent has further admitted the fact that the invoices were being raised only for the completed work. (Reference Q.80 to 82 to RW-2). The Respondent has further admitted that the originals of the invoices were with the Respondent and the Respondent has placed the same on the record of the Tribunal. (Reference Q. No. 121 and to RW-2). The Respondent has further admitted that the Claimant has also furnished the supporting documents in support of the said invoices. (Reference Q. No. 46 to 49 to RW-2).*
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> *85. It is not in dispute that it is only due to the indefinite and prolonged suspension of the work and consequent termination that the Claimant has not been able to achieve the last three milestones and as such there has been no default on the part of*

the Claimant. It is also not in dispute that the Claimant has completed the entire work towards the amount claimed under the invoices as the invoices were raised only for the work which was 100% completed. Therefore, in view of subsequent development and as the facts stand today, it is not possible to do and complete the last three milestones, which is also an admitted position.

86. It is also not in dispute that invoices have been raised in terms of the billing schedule already agreed between the parties and comprises the cost of equipment along with other costs to be incurred by the Claimant. One consolidated amount was agreed for the same and there was no separate bifurcation. In a question put by the Tribunal, the Respondent has further admitted the fact that the invoices value will include the actual cost of the equipment and other costs to be incurred by the Claimant. (Reference Q. 57 to 60 to RW-2). Thus, the Respondent at is at stage cannot contend that the Claimant is not entitled to the invoice amount and is only entitled to any other lesser amount, which the Respondent has failed to specify.

87. There cannot be any dispute of the fact that invoices could be raised by the Claimant only when the works in that regard were completed in their entirety or where entire supplies were made. Consequently, the Claimant in the present case also raised all the 225 invoices only after full and entire completion of work and complete supplied were made. Despite the said fact 20% of the full payment was not made/withheld as the last three milestones at that stage were not completed or performed. However, due to subsequent development of suspension of the work by the Respondent and thereafter termination of the Contracts in terms of the Contracts, the last three milestones cannot be achieved any more. The blame for the same cannot be put on the Claimant as discussed earlier and it was entirely due to the fault of the Respondent. Therefore, the Claimant cannot be denied payment for the jobs already completed and done. The amounts therefore, which the Claimant is entitled to in accordance with the terms of the Contracts are required to be paid.

> *88. Accordingly, in our opinion the Claimant is entitled to the said amount. The Claimant has filed a detailed chart of 225 invoices and the amounts due under the respective invoices which have not been denied. These invoices are supported by the supporting documents like deductions of TDS and WCT on the gross value of the invoices. Accordingly, we hold that the Claimant is entitled to an amount of Rs. 444,897,088/- and Euro 22,588,029 as principal amount due and payable by the Respondent under the 225 invoices."*

Challenge to the award and the impugned judgment

17. Before the learned Single Judge, in proceedings under Section 34 of the Act, Vedanta relied on clause 35.2 of the contract to say that in case of termination of the contract by the supplier i.e. Shenzhen, pursuant to the suspension of the contract/work ordered by the purchasers i.e. the petitioner herein, it would be entitled to 105% of the *"cost incurred by the supplier"*. It was argued that the tribunal, instead of awarding the *"cost incurred by the respondent"*, considered the price of the contract, which would certainly be more than the cost and, therefore, the award is liable to be set aside. Vedanta's grievance was that in absence of the proof of any loss suffered by Shenzhen, the tribunal could not have awarded 105% of the price of the contract in its favour. In support of this contention, Vedanta relied upon the definition of *"contract price"* provided in the contract, as well as the payment schedule agreed between the parties.

18. The single judge noticed that although the condition talked of "costs incurred by the supplier", that did not preclude the supplier from claiming only the "costs" of the work, but that its intention was to restrict Shenzhen's right only to the work been done by it till the date of termination. It was also held that clause 35.1.2 entitled the purchaser to

terminate the contract at any time after giving a notice of not less than one month and without assigning any reason. The consequence of such termination is again provided as the entitlement of the respondent to 105% of the "costs incurred by the supplier" till the date of termination, as compensation after adjusting payments already made till the termination. It was further held that a co-joint reading of clauses 35.1.2 and 35.2.3 disclosed that "costs" used in those clause(s) was not in the literal sense of the word but in the commercial sense of the word and that *"Commercial contracts between the parties have to be read in a commercial sense."*

Arguments in appeal

19. Mr. P. Chidambaram, learned counsel for Vedanta urged this court to upset and set aside the impugned judgment of the learned single judge and also set aside the tribunal's award. He characterized the findings recorded by the tribunal – with respect to interpretation of the contractual terms as unreasonable and perverse. Underlining that the court would not ordinarily interdict interpretation of contract, by an arbitral tribunal, it was emphasized that yet there may be circumstances where a plain reading of the contract juxtaposed with the findings discloses such unreasonableness or perversity of the kind, that goes into the root of the issue, which in fact amounts to patent illegality, calling for interference under Section 34 of the Act.

20. It is argued that the Single Judge exceeded his jurisdiction in interpreting "cost" in Clause 35.2.3 of the EPC Contract as "Contract Price". It is argued that the principle of construction that unless there is an ambiguity, it would not be open to the Court to depart from the normal

rule of construction, which is that the intention of the legislature vis-a-vis contract should be primarily to gather from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and considered on surrounding circumstances and constitutionally proposed practices have been ignored by the impugned judgment. Senior counsel urged that the legal maxim *contractus ad mentem, partium verbis notatum intelligendus,* i.e., a contract is to be understood according to the intention of the parties, expressed-in words (Morgan) and thus deserves to be interfered with. It is argued that the single judge failed to appreciate that the explicit terms of a contract are always the final word with regards to the intention of the parties. The multi-clause contract *inter se* the parties has, thus, to be understood and interpreted in a manner that any view, on a particular condition of the contract, should not do violence to another part of the contract. It is submitted that the impugned order is in the teeth of the decision of the Supreme Court judgment in *Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation Ltd. (PSPCL) & Ors* 2017 SCC 1239. Counsel also relied on the judgment reported as *Laxminarayan and Anr. v Returning Officer and Ors* 1974 (3) SCC 425 where the court held that "incurred" means "actually spent". It was also urged that clause 35.2.3 only speaks of "the cost incurred by the Supplier", which enabled Shenzhen, upon correct invocation of the condition, to be entitled to only the actual cost borne by it, and not the contract price.

20. Counsel relied on the dictionary meaning of "cost" under Black's Law Dictionary, 9th Edition - "The amount paid or charged for something;

price or expenditure". Another relevant phrase or expression would be *"cost of completion"*. Black's Law Dictionary sets out the meaning of *"cost of completion"* as *"An element of damages based on the expenses that would be incurred by the non-breaching party to finish the promised performance"*. Meaning of the word "incur" as set out in Black's Law Dictionary, 9th Edition is *"To suffer or bring on oneself (a liability or expense)"*.The Ld. Single Judge as well as the tribunal failed to appreciate that contract price includes elements of profits, fluctuations in inflation, etc. apart from the cost incurred. It is claimed that the single Judge failed to take into account the fact that throughout the Arbitral proceedings, Shenzhen had time and again attempted to prove its actual cost incurred for various works and supplies, thereby reflecting their clear understanding of Clause 35.2.3 where under it could seek 105% of actual cost incurred by it as compensation, subject to adjustment of payments already made. It was only during the final arguments, when Shenzhen changed its stance and gave up its claim under Claim III and demanded 5% of Contract Price instead of cost incurred. It was also submitted that the Single Judge incorrectly placed reliance on the decisions in *Antaios Cia Naviera S.A. V. Salen Rederierna* A.B. [1985] A.C. and *Philips and Strathan v. Dorintal Insurance Ld*. [1987] 1 Lyod's as the context of the said decisions were completely different from the facts and circumstances in the present case.

21. It is submitted that Shenzhen was responsible for bringing about the situation of suspension by delaying the project; therefore, the question whether Claimant had rightly invoked Clause 35.2.3 to terminate the

contract is a serious triable issue. However, no evidence was led by CW-1 on the interpretation or understanding of the claimant of clause 35.2.3. In the evidence affidavit, dated 21.01.2015 of CW-1 at Para 19 page 25, it is stated that "as per Clause 35.2.3 of the Contract, it was claimed that Shenzhen was entitled to terminate the Contract in an event the period of suspension has exceeded 180 days". Further, in additional witness affidavit dated 28.01.2015 of CW-1 at paras 13 and 15, reference is made to Clause 35.2.3 which according to the Claimant became effective since suspension continued for more that 180 days. The stand adopted by CW/1 appears to be that the right to terminate under Clause 35.2.3 comes to play irrespective of the reason of suspension. It was urged that Vedanta's understanding of Clause 35.2.3 is provided in the Evidence Affidavit dated 10.03.2015 of RW-2 at Paras 16 to 18.

22. Mr. Chidambaram also relied upon Clause 31.5 of the contract and stated that in case of *force majeure* events where the contract is terminated, the purchaser i.e. Vedanta has been made liable to make the payment for all the supply done by the supplier till the said *force majeure* commenced. He stated that this condition, uses a different terminology as compared to Clause 35.2.3 and consequently a different meaning has to be given to the two consequences, and "costs" as used in Clause 35.2.3 cannot mean the same as "payment for all supplies done", as used by the parties in Clause 31.5.

23. On behalf of Shenzhen, it was argued that that invoices could be raised by it only when the supplies and works were completed *in their entirety* or if entire supplies had been made. Shenzhen, accordingly, issued

225 invoices only after full and complete accomplishment of work and whole supplies were made. Notwithstanding this fact 20% of the full payment was not made and was withheld as the last three milestones at that stage were not fulfilled. Nonetheless, due to subsequent suspension of the work by Vedanta and thereafter, termination of the contracts in terms of the arrangement and agreements of parties, the last three milestones could not be achieved. The blame for this could not laid on the Shenzhen and it was entirely due to Vedanta's fault. Thus, Shenzhen could not be denied payment for the works previously finished and done. The amounts therefore, which Shenzhen was entitled to in accordance with the contractual terms were due legitimately and legally to it.

Analysis and Conclusions

24. Clause 35 of the Agreement, which is the focus of the dispute in this case, is extracted hereafter as follows:

> *"35. Termination und Suspension*
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> *35.1 Termination*
>
> *35.1.1 The Purchaser may at any time on breach of this Contract by the Suppliers under Clause 32.1 hereof, give them a written notice of such breach. If the Supplier do not commence appropriate measure within a period of 30 (thirty) days after issuance of such notice to remedy that breach, then the Purchaser may terminate this Contract at any time thereafter stating therein the date of termination. The Supplier shall then be liable the Purchaser in accordance with Clause 32.3 hereinabove.*
>
> *35.1.2 The Purchaser reserves the right to terminate the Contract at any time by giving a notice of no less than 1 (one) month without assigning any reason. The Supplier shall stop*

the performance of the Contract from the date of termination and hand over all the drawings, documents, plant and equipment including all the rights of work to the Purchaser. The Purchaser shall pay to the Supplier 105% (one hundred and five percent) of the cost incurred by the Supplier till the date of termination as compensation after adjusting payments already made till the termination. No consequential damages shall be payable by the Purchaser to the Supplier in the event of such termination.

35.1.3 If the Purchaser fails to pay to the Supplier any undisputed payment as required hereunder and such failure continues for 45 (forty five) days after written notice thereof has been given to the Purchaser by the Supplier, then the Supplier shall give 10 (ten) days prior notice to the Purchaser and thereafter may suspend any Works or part thereof as per Clause 35.2 thereof.

35.2 Suspension

35.2.1 The Purchaser may suspend the work in whole or in part at any time by giving Supplier notice in writing to such effect stating the nature, the date and the anticipated duration of such suspension. On receiving the notice of suspension, the Supplier shall stop all such work which the Purchaser has directed to be suspended with immediate effect. The Supplier shall continue to perform other work in terms of the Contract which the Purchaser has not suspended. The Supplier shall resume the suspended work as expeditiously as possible after receipt of such withdrawal of suspension notice.

35.2.2 During suspension, the Supplier shall be entitled to receive from the Purchaser a Variation Order covering reasonable costs if any due to suspension and appropriate adjustment for Completion Schedule, and other terms and conditions of the Contract.

35.2.3 If such suspension continues for more than 180 (one hundred and eighty) days, at the end of the period, the Supplier shall be by a further 30 (thirty) days prior notice, entitled to

terminate the Contract and Purchaser shall pay to the Supplier 105% (one hundred and five percent) of the cost incurred by the Supplier till the date of termination as compensation after adjusting payments already made till the termination. No consequential damages shall be payable by the Purchaser to the Supplier in the event of such suspension."

25. As is evident, Clause 35.2.1 permits Vedanta to suspend the work wholly or in part, at any time by giving the notice in this regard to the supplier. Clause 35.2.3 stipulates that if the suspension continues for more than 180 days, the supplier (i.e. Shenzhen)*"shall be entitled to terminate the contract"* by giving 30 days' prior notice to the purchaser (Vedanta). The outcome of the termination is stipulated in Clause 35.2.3; in such event, Vedanta (the purchaser)is to pay to the supplier *"105% (one hundred and five percent) of the cost incurred by the Supplier till the date of termination as compensation after adjusting payments already made till the termination"*. Although this condition uses the expression *"costs incurred by the supplier"*, the single judge was of the considered view that the supplier was not entitled only to the "costs" of the work done, but that the condition (i.e. the stipulation) was intended to *"limit the right of the respondent only to the work that has been done by it till the date of termination."* It is this interpretation that is the bone of contention in this case; the appellant, Vedanta, asserts that "costs" qualified with the expression "incurred by the supplies" means, plainly only costs and actual costs. It also underlines that when the expression is plain and unambiguous, the scope for its interpretation is limited and that the court

should not import notions alien to the makers of the contract, i.e. parties to the agreement.

26. The record disclosed that the claimant (Shenzhen) was not informed of the reason for the indefinite suspension of work. Vedanta does not appear to have been upfront about its non-compliance with law; its argument was that a *force majure* condition occurred. Shenzhen exercised its option to terminate the contract. At that stage, it was unable to achieve the last three milestones- because of the indefinite suspension. Clearly, the tribunal was correct in concluding that these circumstances revealed that there was no default on the part of Shenzhen. Shenzhen also completed the entire work towards the amount claimed under the invoices as they were issued i.e. for the work which was 100% (or wholly) completed. The tribunal found, factually that invoices were issued in terms of the billing schedule previously agreed to by the parties and encompasses the equipment cost and other costs to be borne by Shenzhen. A consolidated amount was agreed upon (under the contract) for this purpose. The tribunal had specifically asked Vedanta, on this aspect, and the latter had admitted that the invoice values *included the actual cost of the equipment and other costs to be incurred by the Claimant;* (the tribunal refers to this in the award at Q. 57 to 60 to RW-2). It was therefore held that Vedanta could not argue that Shenzhen was not entitled to the invoice amounts and was only entitled to other reduced amounts.

26. This court finds the reasoning of the tribunal, in this regard to be determinative of the factual controversies:

"Consequently, the Claimant in the present case also raised all the 225 invoices only after full and entire completion of work and complete supplied were made. Despite the said fact 20% of the full payment was not made/withheld as the last three milestones at that stage were not completed or performed. However, due to subsequent development of suspension of the work by the Respondent and thereafter termination of the Contracts in terms of the Contracts, the last three milestones cannot be achieved any more. The blame for the same cannot be put on the Claimant as discussed earlier and it was entirely due to the fault of the Respondent. Therefore, the Claimant cannot be denied payment for the jobs already completed and done. The amounts therefore, which the Claimant is entitled to in accordance with the terms of the Contracts are required to be paid.

88. Accordingly, in our opinion the Claimant is entitled to the said amount. The Claimant has filed a detailed chart of 225 invoices and the amounts due under the respective invoices which have not been denied. These invoices are supported by the supporting documents like deductions of TDS and WCT on the gross value of the invoices. Accordingly, we hold that the Claimant is entitled to an amount of Rs. 444,897,088/- and Euro 22,588,029 as principal amount due and payable by the Respondent under the 225 invoices."

27. As far as the argument that the Single Judge's findings are contrary to decisions of the Supreme Court, in *Nabha Power Ltd. (NPL)* and *Laxminarayan* are concerned, it would be necessary to examine the context of those judgments. In *Nabha Power* the question urged was "operation cost" mentioned in clause 2.7.1.4(3) of the RFP and referred only to the cost towards operating and maintenance of power plant, and could not refer to any cost associated with the cost of coal, which is a part of the energy charges. The Supreme Court examined 'business efficacy to the transactions' test intended by the parties who are businessmen in the interpretation of contractual terms, and referred to various judgments,

such as *Shir law v. Southern Foundries* (1926) L.D.3 (that such an exercise should be undertaken with care); *The Moorcock* (1939) 2 KB 206; *Hancock v. B. W. Brazier (Anerley) Ltd.* [1966] 1 W.L.R. 1317; *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454 (that *"... no warranty ought to be implied in a contract unless it is in all the circumstances reasonable,"*). Reference was also made to *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 which held that it is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. The court also cited *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, which held: *"If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."*The Supreme Court partly accepted the plea of implied terms, in holding that certain elements of costs could be included; it also added that:

> *"It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy*

charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

28. As far as *Laxminarayan* is concerned, the dispute was with respect to costs awarded in an election appeal. The court reasoned as follows:

"It may be observed that the word 'incurred' occurs both in section 96 and section 119. 'Incurred' means "actually spent". The petition was dismissed by the High Court under cl. (a) of s.98. Accordingly, it was incumbent on the High Court to award costs to Dhote. But he is entitled to only such costs as are shown to have been incurred by him. Admittedly, there is no proof of payment of any fee to counsel by Dhote. So he is not entitled to the amount of Rs. 400/- per diem awarded by the High Court. However, he will be entitled to any other costs which are shown to have been incurred by him."

This court is of the opinion that the above decision is hardly of any assistance for the interpretation of the terms of contract in this case.

29. The learned single judge has relied on *MSK Projects (I) (JV) v State of Rajasthan* (2011)10 SCC 573; *Rashtriya Ispat Nigam Ltd v Dewan Chand Ram Saran* (2012) 5 SCC 306 and *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49. All these have held that barring completely untenable and unconscionable interpretations of contractual terms, the courts would not substitute contract constructions in arbitral awards as that issue falls within the exclusive domain of an arbitral tribunal. Recently, this principle and the rule of least interference (with an award) was articulated in *Sutlej Construction Ltd. v Union Territory of Chandigarh* (2018) 1 SCC 718, as follows:

> *"11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice". (Associate Builders v Delhi Development Authority (2015) 3 SCC 49).*
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> *12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of re appreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with."*

30. The award and the impugned judgment do not disclose any patent illegality, for the above reason; they also do not reveal that the tribunal adopted a procedure, that shocks the conscience of this court, or arrived at findings that no reasonable person, placed in the situation of an arbitral tribunal, given the material that was before it, would have rendered. The appeal consequently has to fail; it is dismissed without order on costs. All interim orders stand vacated; the amount deposited shall be appropriated by the succeeding party i.e. the respondent.

S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

AUGUST 30, 2018