JYOTI RAJESH MANE
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 1493 OF 2019
WITH
NOTICE OF MOTION IN COMMERCIAL DIVISION MATTERS (ST) NO. 2258 OF 2019

Municipal Corporation Of Greater Mumbai Mumbai (MCGM) through the Deputy Municipal Commissioner (E), having its office at Engineering Hib Building, 1st Floor, Dr. E. Moses Road, Worli, Mumbai, India 411018. ...Petitioner

Versus

Walter Bau AG (i.I.), a company incorporated under the laws of Federal Republic of Germany, represented by the Insolvency Administrator, Mr. Werner Schneider, Shukla acting through his Power of Attorney holder Mr. Anthony Moonjely, having its office at Strabag India Private Limied, 406, Southern Park, d2 District Centre, Saket, New Delhi, India 110017 (Authorised Representative of Dywidag International GmbH) ...Respondent

WITH
INTERIM APPLICATION (L) NO. 21373 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO. 1493 OF 2019

Mr. Yashodeep P. Deshmukh a/w. Mr. Shivprasad Borade and Ms. Pooja Yadav i/b. Komal Punjabi, for Petitioner.

Mr. Zal Andhyarujina Senior Advocate a/w. Mr. Gaurang Mehta a/w.Mr. Javed Gaya a/w. Ms. Akansha Agrawal a/w. Ms. Rhea Mehta and Ms. Vidya Choudhari i/b. Chamber of Javed Gaya, for the Respondent

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CORAM: AARTI SATHE, J.

RESERVED ON: 07 OCTOBER 2026
PRONOUNCED ON: 20 NOVEMBER 2026

P.C.

1. The present Petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), challenges the arbitral award dated 6th March 2018 (hereinafter referred to as the "impugned arbitral award"), the corrected arbitral award dated 11th September 2018 (hereinafter referred to as the "corrected impugned arbitral award"), and the majority arbitral award dated 12th April 2019 (hereinafter referred to as the "impugned majority arbitral award"), passed by the learned Arbitral Tribunal.

2. By way of the aforesaid impugned arbitral awards, the learned Arbitral Tribunal directed the Petitioner-Corporation to refund the amount of Rs. 5,50,00,000/- furnished as bank guarantee to the Respondent, together with interest at the rate of 12% per annum from 25th August 2006 until the date of payment.

3. Briefly, the facts are as follows:

i) The Petitioner-Corporation is the Municipal Corporation of Greater Mumbai, popularly known as Brihanmumbai Mahanagarpalika Municipal Corporation (MCGM), constituted under the Mumbai Municipal Corporation Act, 1888.

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ii) The Respondent is a company incorporated under the laws of the Federal Republic of Germany, represented by their Insolvency Administrator, Mr. Werner Schneider, acting through his Power of Attorney holder, Mr. Anthony Moonjely.

iii) The Petitioner-Corporation undertook the Bombay Sewage Disposal Project, which included civil works for the rehabilitation of the Bandra Collector Tunnel (hereinafter referred to as the "civil works"). For the said purpose, the Petitioner-Corporation invited bids from competent companies. The Respondent was one of the bidders for the aforesaid civil works.

iv) On 9th May 2000, the Petitioner-Corporation communicated the pre-qualification requirements for bidding. Thereafter, on 2nd August 2000, the Respondent submitted their bid for the aforesaid civil works, in accordance with the requirements stipulated by the Petitioner-Corporation.

v) On 16th October 2000, the Petitioner-Corporation issued a Letter of Acceptance (LOA) in favour of the Respondent. Thereafter, on 23rd October 2000, the Respondent commenced execution of the civil works.

vi) On 20th December 2000, a formal contract (hereinafter referred to as the "Contract") was executed between the Petitioner-Corporation and the Respondent. The civil works were completed on 18th July 2003, and the Petitioner-Corporation issued the Completion Certificate (CC) for the same on 22nd July 2003.

vii) Upon completion of the civil works, several disputes arose between the Petitioner-Corporation and the Respondent, which were referred to various

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Arbitral Tribunals in accordance with the arbitration clauses contained in the Contract.

viii) The disputes arising out of the contracts primarily concerned Contracts 2FF/3FF and the Contract and were referred to various Arbitral Tribunals. The arbitral awards passed by the respective Arbitral Tribunals were subsequently challenged before this Court by way of Arbitration Petition Nos. 591 of 2008, 592 of 2008, 593 of 2008, 226 of 2009, 227 of 2009, 228 of 2009, 1126 of 2010, 1137 of 2010, and 674 of 2011.

ix) The aforesaid Arbitration Petitions were allowed, and the respective arbitral awards challenged therein were set aside. The aggrieved parties thereafter preferred appeals against the aforesaid orders setting aside the arbitral awards before this Court, which are presently pending adjudication.

x) In connection with the execution of the Contract, the Respondent, through their predecessor entity, i.e., Dycherhoff & Widmann A.G. (hereinafter referred to as "D&W"), made a claim regarding Extension of Time (EOT) from the Engineer, Binnie Partners (India) Ltd. (hereinafter referred to as "Binnie Partners"), in July 2003, as the civil works had not been completed within the stipulated period.

xi) On 1st August 2003, Binnie Partners addressed a letter to the Petitioner-Corporation, informing them that D&W had sought EOT. Binnie Partners in the aforesaid letter further stated that in the event the extension was not granted to D&W, the Petitioner-Corporation would be entitled to recover liquidated damages amounting to approximately Rs. 5,50,00,000/-. Accordingly, Binnie Partners

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advised the Petitioner-Corporation in the aforesaid letter that it would be prudent for the Petitioner-Corporation to retain the security amount until the request for EOT was decided.

xii) By a separate letter dated 1st August 2003, addressed to D&W, Binnie Partners informed D&W that their claims for EOT were under consideration. Binnie Partners, in the aforesaid letter, further stated that as of the said date, EOT had been granted to D&W only until 17th January 2003, and pending the grant of any further extension, the Petitioner-Corporation might be entitled to recover liquidated damages. Binnie Partners also informed D&W that they were advising the Petitioner-Corporation to retain security equivalent to the amount of the potential liquidated damages.

xiii) On 11th August 2003, D&W addressed a letter to Binnie Partners in response to their letter dated 1st August 2003, contending that it would be inappropriate to withhold any amounts under Clause 47.1 of the Contract. D&W further reserved their right to claim costs for damages.

xiv) On 12th August 2003, the Petitioner-Corporation through a letter of even date requested D&W to furnish a bank guarantee for an amount of Rs. 5,50,00,000/- within seven days of receipt of the said letter, failing which the Petitioner-Corporation would encash the Performance Bank Guarantee, which was due to expire on 31st August 2003.

xv) On 13th August 2003, D&W responded to the aforesaid letter, contending that the work under Section III of the civil works had been ready for commissioning since 18th July 2003, but had not been commissioned until that

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date. Accordingly, D&W asserted that no liquidated damages could be levied in the absence of any resulting damage. D&W further requested the Petitioner-Corporation to issue a Taking-Over Certificate (TOC) for the Section III civil works, referring to the stipulated period of 21 days with reference to their letter dated 19th July 2003. D&W also stated that, under protest and without prejudice to their rights and contentions, they would arrange to extend the validity of the Performance Bank Guarantee for a further period of six months.

xvi) On 25th August 2003, the Petitioner-Corporation addressed a letter to D&W, stating that the renewed Performance Bank Guarantee would not be released until the issue of liquidated damages was finally determined. The Petitioner-Corporation further stated that the costs incurred towards the extension of the Bank Guarantee would not be reimbursed if liquidated damages were found to be leviable.

xvii) On 11th September 2003, Binnie Partners, in reply to the letter of D&W dated 11th August 2003 informed D&W that TOCs had been issued in respect of all three Sections of the civil works. Binnie Partners further observed that there appeared to be a gap between the period covered by the TOCs and the EOT granted, thereby giving rise to the possibility of levying liquidated damages under Clause 47.1 of the Contract. Thereafter, several letters were exchanged between Binnie Partners, the Petitioner-Corporation, and D&W in relation to the aforesaid issues.

xviii) In or about September 2005, a separate dispute relating to EOT and the expenses incurred by the Respondent in completing the civil works under the Contract was referred to an Arbitral Tribunal consisting of Mr. N.N. Shrikhande,

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Mr R.T. Atre, and Mr. Sharad Upasani (hereinafter referred to as the "Shrikhande Tribunal") for adjudication. During the pendency of the proceedings before the Shrikhande Tribunal, various correspondences were exchanged between the Petitioner-Corporation and D&W regarding the extension of the Bank Guarantee.

xix) On 21st August 2006, the Petitioner-Corporation, by their letter of even date, invoked and encashed the Bank Guarantee furnished by D&W on 2nd September 2004. It is the Respondent's contention that the Bank Guarantee was encashed while their claim for EOT in respect of the civil works was still pending adjudication before the Shrikhande Tribunal.

xx) On 23rd August 2006, Bank of India addressed a letter to the Petitioner-Corporation, informing them that D&W had requested an extension of the validity of the Bank Guarantee for a further period of one year, i.e., until 25th August 2007. Bank of India further clarified that they were not questioning or disputing the Petitioner-Corporation's right to invoke the Bank Guarantee. However, it sought the Petitioner-Corporation's consent to the proposed arrangement, whereby a fresh Bank Guarantee, valid until 25th August 2007, would be furnished in lieu of the existing guarantee.

xxi) On 23rd August 2006, Dywidag International GmbH, the successor to D&W, also addressed a letter to the Petitioner-Corporation, alleging that the Petitioner-Corporation had acted in breach of the contract and abused their powers by instructing Bank of India to encash the Bank Guarantee, despite D&W having expressed their willingness to extend the same by their letter dated 21st August 2006. Dywidag International GmbH further contended that the Bank Guarantee

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had been furnished as security for liquidated damages that might become recoverable, and that the issue of such damages was linked to their claim for EOT, which was then pending adjudication before the Shrikhande Tribunal. In the aforesaid letter, Dywidag International GmbH further stated that the Petitioner-Corporation had encashed the Bank Guarantee on the ground that Dywidag International GmbH was allegedly not the legal successor of D&W, an issue which was also sub-judice. Dywidag International GmbH in the aforesaid letter asserted that the Petitioner-Corporation had been duly informed of the succession by a letter dated 18th April 2002.

xxii) On 24th August 2006, the Petitioner-Corporation informed Bank of India that they were not agreeable to the proposed extension of the Bank Guarantee. Accordingly, the Petitioner-Corporation reiterated their request to Bank of India to encash the Bank Guarantee and remit the sum of Rs. 5,50,00,000/- to them forthwith.

xxiii) In view of the aforesaid encashment, Dywidag International GmbH filed an application under Section 17 of the Act before the Shrikhande Tribunal, seeking an order restraining the Petitioner-Corporation from encashing the Bank Guarantee and directing them to accept the renewal thereof. Dywidag International GmbH further sought a direction that in the event the Petitioner-Corporation encashed the Bank Guarantee, the amount received thereunder be returned to them to enable reinstatement of the Bank Guarantee.

xxiv) On 25th August 2006, Bank of India remitted the sum of Rs. 5,50,00,000/- to the Petitioner-Corporation by way of a pay order towards the encashment of the

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Bank Guarantee. The Petitioner-Corporation received the aforesaid amount as security against their potential claim for liquidated damages under the Contract.

xxv) On 13th September 2006, the Petitioner-Corporation addressed a letter to Dywidag International GmbH, stating that the Contract had been executed between D&W and the Petitioner-Corporation, and that Dywidag International GmbH had yet to establish their rights as the successor entity in respect of the works under the Contract. The Petitioner-Corporation in the aforesaid letter further contended that they had encashed the Bank Guarantee on the ground that D&W had failed to extend its validity.

xxvi) The Petitioner-Corporation also filed their reply to the application under Section 17 of the Act filed by Dywidag International GmbH before the Shrikhande Tribunal, opposing the reliefs sought in the said application.

xxvii) On 10th November 2009, Dywidag International GmbH, acting on behalf of the Respondent, addressed a letter to the Petitioner-Corporation, demanding repayment of the amount of Rs. 5,50,00,000/- and requesting the Petitioner-Corporation to accept a fresh Bank Guarantee for the said amount. Dywidag International GmbH also sought compensation on the ground that the encashment of the Bank Guarantee was illegitimate, unwarranted, and hasty, claiming interest at the rate of 12% per annum, compounded monthly.

xxviii) On 19th March 2010, in response to the letter dated 10th November 2009, the Petitioner-Corporation refused to refund the amount of Rs. 5,50,00,000/-, contending that Dywidag International GmbH had no authority to raise such a

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demand on behalf of the Respondent. The Petitioner-Corporation further stated that the issue was sub-judice, as the application under Section 17 of the Act filed by Dywidag International GmbH was pending adjudication before the Shrikhande Tribunal.

xxix) On 8th July 2010, Shrikhande Tribunal rejected the application filed under Section 17 of the Act. It held that the subject-matter of the application did not fall within the scope of the reliefs contemplated before it.

xxx) On 21st April 2011, Shrikhande Tribunal passed its final arbitral award in respect of the dispute concerning the EOT, *inter alia*, granting EOT of 163 days for the period from 5th February 2003 to 18th July 2003. Aggrieved by the aforesaid arbitral award, the Petitioner-Corporation filed Arbitration Petition No. 674 of 2011 before this Court.

xxxi) The Respondent also filed Arbitration Petition No. 700 of 2011, challenging certain findings in the arbitral award dated 21st April 2011 relating to the grant of additional costs.

xxxii) On 22nd September 2011, Dywidag International GmbH on behalf of the Respondent addressed a letter to the Petitioner-Corporation, contending that, in view of the Shrikhande Tribunal's arbitral award dated 21st April 2011 granting EOT in their favour, the amount of Rs. 5,50,00,000/- received by the Petitioner-Corporation upon encashment of the Bank Guarantee ought to be refunded, together with interest. Dywidag International GmbH also offered to furnish a fresh Bank Guarantee for the said amount.

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xxxiii) On 24th January 2013, the learned Single Judge of this Court allowed Arbitration Petition No. 674 of 2011 filed by the Petitioner-Corporation and set aside the arbitral award dated 21st April 2011 passed by the Shrikhande Tribunal.

xxxiv) By a separate order dated 24th January 2013, this Court also decided Arbitration Petition No. 700 of 2011 filed by the Respondent challenging certain findings of the arbitral award dated 21st April 2013. In the aforesaid order, this Court observed as follows:-

> ORAL JUDGMENT:
>
> As the impugned award which is challenged by the Petitioner in this Arbitration Petition itself is quashed and set aside by order dated 24 January 2013 in Arbitration Petition No. 674 of 2011, therefore, the present Petition is accordingly dismissed. There shall be no order as to costs.

xxxv) On 24th February 2014, arbitration proceedings in the present dispute commenced upon invocation of arbitration by Dywidag International GmbH on behalf of the Respondent by way of a letter addressed to the Petitioner-Corporation.

xxxvi) Upon completion of the pleadings, the learned Arbitral Tribunal passed the impugned arbitral award dated 6th March 2018 in respect of the encashment of the Bank Guarantee by the Petitioner-Corporation. By the said arbitral award, the Petitioner-Corporation was directed to refund the Bank Guarantee amount of Rs. 5,50,00,000/- together with interest at the rate of 12% per annum from the date of the claim, i.e., 6th August 2013 until payment.

xxxvii) On 2nd April 2018, the Respondent filed an application under Section 33 of Act, seeking correction of a typographical error in paragraph 25(c) of the

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impugned arbitral award. The Respondent contended that the date mentioned therein as 6th August 2013 ought to have been 25th August 2006.

xxxviii) By an order dated 11th September 2018, the learned Arbitral Tribunal allowed the Respondent's application and corrected the aforesaid date. Aggrieved by the said order, the Petitioner-Corporation also filed an application under Section 33 of the Act on 5th October 2018.

xxxix) On 12th April 2019 and 20th June 2019, the learned Arbitral Tribunal, by a majority of 2:1 rejected the application preferred by the Petitioner-Corporation under Section 33 of the Act. Aggrieved by the impugned arbitral award dated 6th March 2018, the corrected impugned arbitral award dated 11th September 2018, and the subsequent impugned majority order dated 12th April 2019 passed by the learned Arbitral Tribunal, the Petitioner-Corporation has filed the present Petition on 19th September 2019.

3. Learned counsel Mr. Yashodeep P. Deshmukh, along with Mr. Shivprasad D. Borade and Ms. Pooja Yadav, instructed by Ms. Komal Punjabi, appeared on behalf of the Petitioner-Corporation, while Mr. Zal Andhyarujina Senior Advocate, along with Mr. Gaurang Mehta, Mr. Javed Gaya, Ms. Akansha Agrawal, Ms. Rhea Mehta, and Ms. Vidya Choudhari, instructed by Chambers of Javed Gaya appeared on behalf of the Respondent.

4. Learned counsel appearing on behalf of the Petitioner-Corporation submitted that four issues arose for consideration in relation to the challenge to the impugned arbitral awards.

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5. On the issue of limitation, learned counsel for the Petitioner-Corporation contended that the impugned arbitral award was patently illegal and erroneous, inasmuch as the learned Arbitral Tribunal had failed to appreciate that the Respondent's claim for refund of the Bank Guarantee amount had been raised almost nine years after the date of its encashment. It was submitted that the Bank Guarantee had been encashed on 25th August 2006, of which the Respondent was admittedly aware. Therefore, if the Respondent considered such encashment to be illegal and sought recovery of the amount, they ought to have invoked arbitration within the prescribed period of limitation. The Petitioner-Corporation accordingly contended that the Respondent's claim was barred by limitation.

6. Learned counsel for the Petitioner-Corporation submitted that the cause of action for seeking refund of the encashed Bank Guarantee had arisen, or had at least sufficiently accrued, when the Bank Guarantee was encashed by the Petitioner-Corporation and when the Respondent allegedly suffered the corresponding loss. He contended that the arbitral award dated 21st April 2011 passed by the Shrikhande Tribunal did not give rise to a fresh cause of action, but merely adjudicated a connected issue concerning the Respondent's entitlement to EOT. Learned counsel on behalf of the Petitioner-Corporation further submitted that merely because the aforesaid arbitral award dated 21st April 2011 passed by the Shrikhande Tribunal strengthened the Respondent's case on merits, it did not follow that the period of limitation commenced only from the date of the aforesaid arbitral award. It was contended that a claimant could not ordinarily defer the

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commencement of limitation merely because the outcome of other proceedings might yield findings favourable to its case.

7. It was further contended that the learned Arbitral Tribunal had erroneously characterised the Respondent's claim as inchoate, without identifying the legal basis for such a conclusion or referring to any applicable provision of the Limitation Act, 1963. He submitted that even if the adjudication of the claim for EOT was relevant to determining whether the encashment of the Bank Guarantee was justified, there was no legal impediment preventing the Respondent from initiating arbitration proceedings in 2006 to challenge the encashment.

8. Learned counsel on behalf of the Petitioner-Corporation further submitted that the Respondent could have initiated separate arbitration proceedings or sought to incorporate their claim concerning the Bank Guarantee into the pending arbitral proceedings. Having failed to do so within the prescribed period of limitation, the Respondent's claim ought to have been dismissed as time-barred. It was therefore contended that the learned Arbitral Tribunal had erred in entertaining a stale claim and granting relief thereon, rendering the impugned arbitral award *ex facie* contrary to the provisions of the Limitation Act, 1963, and the Act.

9. Learned counsel for the Petitioner-Corporation further submitted that the impugned arbitral award dated 6th March 2018 was contrary to Section 31(3) of the Act, inasmuch as the learned Arbitral Tribunal had failed to record adequate reasons in support of its decision to grant relief in favour of the Respondent. It was particularly contended that the learned Arbitral Tribunal had failed to provide reasons for awarding interest from a specific date. He submitted that the mere

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existence of the learned Arbitral Tribunal's power to grant a particular relief could not dispense with the statutory requirement of recording reasons for the same.

10. Learned counsel on behalf of the Petitioner-Corporation further contended that the corrected impugned arbitral award dated 11th September 2018 travelled beyond the scope of Section 33 of the Act. It was submitted that the learned Arbitral Tribunal had not merely corrected a typographical error but had substantively modified the impugned arbitral award dated 6th March 2018 by replacing the date of 6th August 2013 with 25th August 2006 as the date from which interest was payable, as recorded in paragraph 25(c) of the impugned arbitral award dated 6th March 2018. According to learned counsel on behalf of the Petitioner-Corporation, this alteration substantially changed the financial and legal consequences of the impugned arbitral award by extending the period for which interest was payable by several years. He submitted that Section 33 of the Act permits the correction of computational errors, clerical or typographical errors, and errors of a similar nature, but does not authorise an Arbitral Tribunal to reconsider its reasoning or substantially alter the relief granted under the guise of correcting an error. In support of the aforesaid contention, learned counsel placed reliance on the decision of the Supreme Court in Gyan Prakash Arya v. Titan Industries Ltd.[1], submitting that the power of correction under Section 33 of the Act is confined to errors of arithmetical, clerical, or typographical nature, and could not be exercised to introduce a substantive alteration to an arbitral award.

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11. Learned counsel on behalf of the Petitioner-Corporation further submitted that the date of 6th August 2013 in the impugned arbitral award dated 6th March 2018 was not a mere typographical error warranting correction by the learned Arbitral Tribunal. Rather, the said date was intrinsically connected with the learned Arbitral Tribunal's substantive reasoning concerning the point at which the Respondent's right to seek the relevant relief had crystallised. It was contended that substituting the aforesaid date with 25th August 2006 affected the commencement of the interest period, the total interest payable, the relationship between the findings on limitation and interest, and the overall legal and financial consequences of the impugned arbitral award dated 6th March 2018.

12. Learned counsel for the Petitioner-Corporation further submitted that if the learned Arbitral Tribunal intended to award interest from the date of the claim, the relevant date ought to have been 14th April 2015, being the date on which the claim was filed, and not 25th August 2006, being the date on which the Bank Guarantee was encashed. It was contended that the learned Arbitral Tribunal had failed to delete or suitably modify the words "from the date of claim" while substituting the date in the corrected impugned arbitral award dated 11th September 2018, thereby rendering the operative direction inconsistent.

13. He also relied upon the minority opinion dated 12th April 2019 in support of the Petitioner-Corporation's contentions. It was submitted that the reasoning contained in the minority opinion demonstrated that the substitution of the date 6th August 2013 with 25th August 2006 was connected with a substantive determination rather than a mere typographical correction, and had the effect of

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substantially enlarging the period for which interest was payable. It was further contended that, since the learned Arbitral Tribunal had neither deleted nor suitably modified the words "from the date of claim", the corrected impugned arbitral award suffered from a material inconsistency and had been passed without properly considering the Petitioner-Corporation's objections. He submitted that any alteration of the date from which interest was payable required a reconsideration of the arbitral award on its merits and was, therefore, impermissible within the limited scope of Section 33 of the Act.

14. He further submitted that the learned Arbitral Tribunal had proceeded on an erroneous basis that the Respondent's claim was inchoate until the Shrikhande Tribunal adjudicated the claim for EOT, and that the Respondent's right to seek refund of the Bank Guarantee amount crystallised only upon the passing of the arbitral award dated 21st April 2011 in its favour by the Shrikhande Tribunal.

15. It was further contended that the learned Arbitral Tribunal had erroneously treated the Petitioner-Corporation's continued retention of the encashed Bank Guarantee amount as wrongful once the basis for claiming liquidated damages had ceased to exist. Learned counsel on behalf of the Petitioner-Corporation submitted that the learned Arbitral Tribunal had consequently awarded interest from the date of the claim as linked to the relevant arbitral award passed by the Shrikhande Tribunal, without properly appreciating the circumstances in which the amount had been retained. He emphasised that the Bank Guarantee had been furnished as security to protect the Petitioner-Corporation against its potential claim for liquidated damages arising from the delay in completion of the civil works. It was

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submitted that the encashment and retention of the amount had to be considered in the context of the contractual purpose for which the Bank Guarantee had been furnished, and the Petitioner-Corporation's apprehension regarding their entitlement to recover liquidated damages.

16. Learned counsel for the Petitioner-Corporation further submitted that the Respondent themselves had contended that the amount secured under the Bank Guarantee would become due and payable to the Petitioner-Corporation under the Contract upon the grant of an EOT. Until such determination, the amount could not have been utilised by the Respondent for any other business purpose. On this basis, it was contended that there was no justification for awarding interest from 25th August 2006, being the date of encashment of the Bank Guarantee, until the Respondent raised its claim following the arbitral award passed by the Shrikhande Tribunal. He accordingly submitted that the date of encashment of the Bank Guarantee could not, by itself, be treated as the determinative date for the commencement of interest. It was further contended that, in the impugned arbitral award dated 6th March 2018, the learned Arbitral Tribunal had consciously refrained from granting the Respondent's claim for interest in its entirety and in the form in which it had been sought. Therefore, substituting the date of 6th August 2013 with 25th August 2006 by way of correction under Section 33 of the Act was impermissible, and effectively altered the substantive relief originally granted.

17. Learned counsel for the Petitioner-Corporation further submitted that the corrected impugned arbitral award dated 11th September 2018 passed by the learned Arbitral Tribunal on the Respondent's application under Section 33 of the

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Act was unreasoned and a non-speaking order. It was contended that the parties had not agreed to dispense with the requirement of recording reasons and, therefore, the corrected impugned arbitral award was in violation of Section 31 of the Act.

18. It was further submitted that the project concerned sewerage and public infrastructure and was undertaken by the Petitioner as a public duty. He submitted that it was not an income-generating or commercial investment project, and that a high rate of post-award interest would therefore impose an excessive and unjustified burden on public funds. He further submitted that the delay in the proceedings was not solely attributable to the Petitioner, and that they had shown readiness to proceed with final arguments from an early stage and should not be penalized for periods of delay not caused by them.

19. *Per contra*, learned counsel Mr. Zal Andyarujina, Senior Advocate, appearing on behalf of the Respondent submitted that the issue concerning the Respondent's *locus standi* to initiate arbitral proceedings, including the question of whether the proceedings had been validly instituted, had already been considered and adjudicated upon by the learned Arbitral Tribunal, which had returned a reasoned finding in favour of the Respondent.

20. He further relied upon the order dated 31st October 2017 passed by the learned Single Judge of this Court in Commercial Arbitration Petition No. 433 of 2014, which has been upheld by the Division Bench of this Court by order dated 22nd December 2017 in Commercial Appeal (L) No. 92 of 2017, wherein it was held that the Respondent was the successor of the original contractor, i.e., D&W,

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and was, therefore, entitled to initiate the arbitral proceedings. Learned counsel on behalf of the Respondent further submitted that the aforesaid issue had subsequently been conclusively decided in favour of the Respondent by an order dated 26th August 2022 passed by the Division Bench of this Court in appeals under Section 37 of the Act arising out of various arbitration petitions between the parties to the present proceedings. It was contended that the said order had not been challenged and had, therefore, attained finality. The relevant paragraphs of the order dated 22nd December 2017 are reproduced below:-

> 31. The arbitral Tribunal was persuaded to frame points for consideration because, as before us and equally before the learned Single Judge, the plea of the MCGM was that the tender was received by one M/s. Dyckerhoff & Widmann A.G. of Germany (D&W). That entity was informed that its tender was accepted. The contract sum in respect of that contract was awarded to this entity which is styled as "original contractor". The MCGM contended that it awarded work to this entity for it found it to be fit for performing the work. It is then claimed by this entity that one M/s.Dywidag International GmbH was formed as 100% subsidiary of the original contractor. By the year 2000, one Walter Bau Holding Company, together with other companies, allegedly acquired majority of shares in the original contractor. With effect from 1s January, 2000, the business of the original contractor was allegedly transferred to M/s. Dywidag International GmbH. On 22nd March, 2000, a Contributory Agreement was alleged to have been executed by and between the original contractor and M/s. Dywidag International GmbH. Thus, the plea was, if the MCGM was not informed about any alleged Contributory Agreement by the original contractor, nor was any prior consent of the MCGM obtained before entering into the alleged Contributory Agreement, then, the subsequent events of the original contractor merging with M/s. Walter Bau are of no consequence. The agreement came to be entered into between the original contractor and M/s. Walter Bau on 17th May, 2001 by virtue of which, the name of the original contractor has been cancelled. Even all such arrangements were not to the knowledge of the MCGM. It is in these circumstances, the original contractor addressed the letter to the Chief Engineer of the MCGM. The Chief Engineer forwarded this letter to the Project Manager and thereafter, a note was prepared for the MCGM's Legal Department to render an opinion. The original contractor conveyed its desire to transfer the project to M/s. Dywidag International GmbH and sought guidelines in the matter. Thereafter, M/s. Dywidag International GmbH addressed a letter to the Law Officer and claimed that the change in the names be recorded. Thus, there was no application seeking permission for assignment of the contract, nor any permission being granted to do so. The Law Officer had no power from the original contractor to substitute M/s. Dywidag International GmbH, nor was any such approval granted by the Law Officer. Once the original contractor ceased to exist, having merged its identity with M/s. Walter Bau AG, then any correspondence by the MCGM with the original contractor, much less the arrangements inter se would not enable the original contractor/assignor to exercise the right to make a reference

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to arbitration. Some argument has been canvassed of M/s. Dywidag misusing the letterheads of the original contractor and corresponding with the MCGM. Further, there was another development, namely M/s. Dywidag International being acquired by Bau Holding Strabage, an Austrian Company. We are not concerned with this, for what we find is that though the MCGM may plead lack of knowledge about any arrangements inter se by the parties, yet, it corresponded with the original contractor and also entertained some correspondence with M/s. Dywidag International.

32. Yet it argued before the Tribunal and equally before the learned Single Judge that the assignor could not have invoked the arbitration. The Tribunal has dealt with these arguments in great details. It came to the conclusion that M/s. Walter Bau AG is the legal successor of M/s. Dywidag International, that the Insolvency Administrator has the necessary authority and power to pursue the claims arising out of the contract and refer the disputes to arbitration by invoking the arbitration agreement and that the Administrator has power to appoint Mr. Moonjely to pursue and represent the Administrator in the arbitration proceedings. We must at once clarify that we are not concerned with all the conclusions in para 16.2 of the award. We only made a reference to the plea which was raised before the learned Single Judge and equally reiterated before us. The plea on locus was that M/s. Walter Bau could not have invoked the arbitration agreement and can it be said to be the legal successor of the contractor. The learned Single Judge concluded that any arbitration clause is in its nature assignable. If the underlying contract can be, and stands assigned, there is no reason why an arbitration agreement forming part of it cannot or would not. The learned Single Judge made a reference to the legal principles and from the Hon'ble Supreme Court's judgment in the case of Khardah Company Ltd. vs. Raymon & Co. (India) Private Limited, reported in AIR 1962 SC 1810. In the backdrop of this legal principle, the learned Single Judge held that the respondent Walter Bau did not dispute before the arbitrators that it was the legal successor of M/s. Dywidag International-the original contractor. In other words, the parties proceeded on that footing. Both these entities were based in Germany and have, after following the legal procedure in that law, merged with each other with effect from 17h May, 2001. Thus, the original contractor merged its identity with Walter Bau. The definition of the term "contractor" appearing in the contract was referred to by the learned Single Judge to hold that even a legal successor in title is included therein. Thus, the learned Single Judge applied the principle that it was not for this Court to probe the merger of the two entities under German law. Once the arbitrator came to the conclusion, based on the documents produced that there was a right to pursue the claims vesting in the Walter Bau, therefore, the invocation was proper.

33. The MCGM however contended that though the original contract was with M/s. Dyckerhoff & Widmann, it was Dywidag which took over the contract, and the contract could not form the property of M/s. Dyckerhoff & Widmann. Hence, Walter Bau could not succeed to it. The learned Single Judge came to the conclusion that the MCGM's own case is that it never gave its consent to the assignment of the contract from the original contractor to M/s. Dywidag. The legal effect would, therefore, be that the contract remained with M/s. Dyckerhoff & Widmann and its ownership was never transferred to Dywidag. If that is so, Walter Bau is entitled to succeed to this contract as an admitted legal successor of the original contractor. Once the MCGM objected to the claim of Dywidag as a successor of the original contractor on the basis of want of its consent, in its own Arbitration Petitions filed from the earlier arbitration reference before the three-member arbitral tribunal, the MCGM impleaded Walter Bau as the successor in interest of the original contractor, then, it cannot now take a total somersault. Mr. Setalvad was critical of this observation by the learned Single Judge in para 5 of the order under Appeal.

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> However, we cannot pick one sentence from these observations and conclusions and read them in isolation. It is not a somersault which negates the stand of the MCGM, but the learned Single Judge in paras 5 and 6 analyzed the matter by referring to the admitted facts. The Contribution Agreement inter se was referred and the learned Single Judge came to this conclusion that if the original contractor remained bound and liable under the contract and entitled to enforce it, then, its legal successor could have stepped in and raised a dispute or exercised the right to seek arbitration.
>
> 34. We have perused carefully all the observations on this point from paras 4 to 7 of the order under Appeal and we do not find the ultimate conclusion to be vitiated by any legal principle to the contrary.
>
> 35. On the other hand, in the case of M.R. Engineers & Contractors Private Limited vs. Som Datt Builders Limited, reported in (2009) 7 SCC 696, which decision has been extensively referred by the another learned Single Judge in Arbitration Petition No. 509 of 2011 decided on 20t July, 2016 (supra), it is evident that a reference does not become bad or the invocation per se is not illegal if the contract work, though assigned, that assignment has not been accepted by the employer. Thus, the contractor's arrangements inter se were not, according to the MCGM, to their knowledge, much less had their consent. The principle that there is no provision in the contracts that even if the contracts were assigned in favour of a third party by any of the party to the said contracts, the same could be of the entire contract excluding the arbitration agreement is inapplicable, then all the more, the conclusion reached by the learned Single Judge cannot be faulted. This is not a case where the learned Single Judge proceeded on the assignment only. He agreed with the learned arbitral Tribunal and in the Majority Award that if the MCGM disowns the assignment, then, its questioning the locus of M/s. Walter Bau is on the footing that it is not a legal successor to the original contractor. Having found the position to be quite contrary on facts, the finding was recorded that M/s. Walter Bau was the legal successor. In the facts and circumstances of the present case, when there was continued correspondence, then, Walter Bau stepping in was not found to be of such nature as would vitiate the invocation from the inception. This is again a finding of fact and imminently possible from the materials produced before the Tribunal and the learned Single Judge. We do not see any perversity in the same.
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> (Emphasis supplied)

Learned counsel for the Respondent further submitted that the Petitioner-Corporation had not challenged the aforesaid decision dated 26th August 2022 of this Court and, therefore, could not seek to reopen the issue in the present proceedings.

21. With regard to the issue of limitation, learned counsel for the Respondent submitted that the learned Arbitral Tribunal had considered the issue in detail and had returned a reasoned finding that the present arbitral proceedings were

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instituted within the prescribed period of limitation. It was contended that the learned Arbitral Tribunal had rightly relied upon the order dated 31st October 2017 passed by the learned Single Judge of this Court, which was subsequently affirmed by the Division Bench by its order dated 22nd December 2017. He therefore submitted that the issue of limitation stood concluded in favour of the Respondent in view of the aforesaid judicial determinations. Relevant paragraphs of the impugned arbitral award dated 6th March 2018 as modified by the corrected impugned arbitral award dated 11th September 2018 on the issue of limitation are reproduced below:-

> 23. That takes us to the 2nd point mentioned in paragraph 13 above i.e. the Arbitration proceedings are barred by limitation and therefore liable to be dismissed on that ground alone. It should be noted that after a denial of time of extension by the Engineer the Claimant went in for arbitration. The arbitration award has come and it has held that the denial of extension of time was illegal and therefore extension was fully granted. The real contention is the Bank Guarantee was invoked in the year 2006 and the dispute is commenced in the year 2014, when the Claim was lodged. At the time when the claim was lodged in the year 2014, Award dated 21st April 2011was passed and the contention of the Claimant that it was entitled to extension of time was fortified by the Tribunal and therefore dispute filed immediately thereafter is not barred by limitation. The claim of the Claimant till the award of Shrikhande Tribunal was inchoate claim during the pendency of arbitration before the Shrikhande Tribunal and it has become contractual right of the Claimant on passing of the award. Any lodgement of claim in this regard prior to crystallising the rights would be premature and initiation of arbitration proceedings immediately after the encashment of the Bank Guarantee would have probably defeated the claim of the Claimant. This aspect also needs no more consideration because the Hon'ble Bombay High Court by the above stated judgment have held that the dispute was within limitation and therefore we are fortified in our view that the limitation bar does not arise in the present case.

22. Learned counsel for the Respondent further submitted that as on 25th August 2006, when the Bank Guarantee was invoked by the Petitioner-Corporation, there had been no final determination of the disputes between the parties concerning the change in the method of construction or the claim for EOT. It was contended that, at that stage, no liability towards liquidated damages or any

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other amount had crystallized or become payable by the Respondent. Accordingly, the Respondent's right to seek relief against the wrongful invocation of the Bank Guarantee remained inchoate owing to the pendency of the disputes before the Shrikhande Tribunal, which was adjudicating the aforesaid issues.

23. He further submitted that the impugned arbitral award dated 6th March 2018 was supported by adequate reasons on all material issues, as was evident from a plain reading thereof. In support of this contention, reliance was placed on the decision of the Supreme Court in **Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.**[2], wherein the Court discussed the requirements of a reasoned arbitral award. He submitted that in assessing whether an arbitral award contains adequate reasons, the Court must examine whether the reasoning is proper, intelligible, and adequate. He therefore contended that the impugned arbitral award dated 6th March 2018 could not be set aside on the grounds of patent illegality or perversity, as the Petitioner-Corporation had failed to establish any such defect in the findings or reasoning of the learned Arbitral Tribunal. He submitted that the impugned arbitral award dated 6th March 2018 was not of such a nature as to be unreasonable or to shock the conscience of this Court. He contended that, on a plain reading, the impugned arbitral award contained adequate reasons in support of the findings recorded by the learned Arbitral Tribunal. Accordingly, it was submitted that the Petitioner-Corporation had failed to make out any ground for setting aside the impugned arbitral award under Section 34 of the Act.

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2 (2019) 20 SCC 1

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24. With regard to the grant of interest at the rate of 12% per annum from the date of invocation of the Bank Guarantee, learned counsel on behalf of the Respondent submitted that the corrected impugned arbitral award was consistent with the relief sought in the Respondent's Statement of Claims in the arbitral proceedings. It was contended that the Respondent had claimed interest on the amount of Rs. 5,50,00,000/- from 25th August 2006, being the date on which the Bank Guarantee was encashed, until the date of payment. He submitted that, however, the Respondent had sought interest at the rate of 10% per annum, whereas the learned Arbitral Tribunal awarded interest at the rate of 12% per annum.

25. It was further submitted that in the impugned arbitral award dated 6th March 2018, the learned Arbitral Tribunal had inadvertently recorded 6th August 2013 as the date from which interest was payable. It was contended that the said date was a typographical error, which was subsequently corrected by the learned Arbitral Tribunal upon allowing the Respondent's application under Section 33 of the Act. Learned counsel on behalf of the Respondent submitted that it was only after the Respondent's application under Section 33 of the Act had been allowed and the aforesaid date was corrected that the Petitioner-Corporation filed a separate application under Section 33, contending that interest ought to have been awarded from the date of filing of the Statement of Claim, i.e., 14th April 2015. He further submitted that the Petitioner-Corporation's application under Section 33 of the Act was rejected by a majority of the learned Arbitral Tribunal after considering the respective submissions of the parties and by recording detailed reasons in the

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majority order. It was therefore contended that the Petitioner-Corporation's challenge to the correction of the impugned arbitral award dated 6th March 2018 was without merit.

26. Learned counsel for the Respondent further submitted that the Petitioner-Corporation had failed to file its application under Section 33 of the Act within the prescribed period of 30 days from the date of the impugned arbitral award dated 6th March 2018, i.e., by 6th April 2018. Instead, the Petitioner-Corporation filed the said application belatedly on 5th October 2018, after the learned Arbitral Tribunal had passed the corrected impugned arbitral award dated 11th September 2018 correcting the typographical error in the impugned arbitral award dated 6th March 2018. It was further contended that the Petitioner-Corporation had neither filed a response, nor raised any objection to the corrections sought by the Respondent before the order dated 11th September 2018 was passed. It was submitted that only after the Respondent's application for correction had been allowed did the Petitioner-Corporation seek to introduce a different date, namely, 14th April 2015, being the date of filing of the Statement of Claims in the arbitral proceedings, as the date from which interest ought to have been awarded. It was therefore submitted that the aforesaid conduct of the Petitioner-Corporation demonstrated their failure to comply with the requirements of Section 33 of the Act. Hence, it was contended that the impugned majority order dated 12th April 2019, rejecting the Petitioner-Corporation's application under Section 33 of the Act was justified and warranted no interference by this Court.

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27. Learned counsel for the Respondent further submitted that the interest awarded for the period during the pendency of the arbitral proceedings could not be modified by this Court while exercising its jurisdiction under Section 34 of the Act. In support of this submission, reliance was placed on the decision of the Supreme Court in Gayatri Balasamy v. ISG Novasoft Technologies Ltd.[3]. It was contended that the rate of interest awarded by the learned Arbitral Tribunal fell within its discretion and that, in the absence of an agreement between the parties permitting otherwise, the corrected impugned arbitral award would either have to be sustained or set aside in its entirety, rather than being modified by substituting a different rate or period of interest.

28. Learned counsel for the Respondent further submitted that the Petitioner's submissions that they were a contractor for a project concerning public infrastructure, and that the project was undertaken by the Petitioner as a public duty, is irrelevant, as the project was a commercial contract. It was further submitted that even on the grounds of equity, wrongful invocation of a bank guarantee creates severe financial and legal inequity to the party who issues the bank guarantee. The moment a guarantee is invoked, the bank deducts funds directly from the guarantor's account which instantly paralyzes business' operational liquidity, and hence, this warrants compensation and payment of interest.

29. Learned counsel on behalf of the Respondent also sought to distinguish the judgments relied upon by the Petitioner-Corporation, and the same shall be

3 (2025) 7 SCC 1

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considered later in this judgment. Learned counsel on behalf of the Respondent therefore submitted that in the facts of the present case no interference was warranted under the provisions Section 34 of the Act in respect of the impugned arbitral awards.

ANALYSIS & FINDINGS

30. I have heard learned counsel appearing on behalf of the parties at length and, with their assistance, perused the pleadings, the documents on record, and the proceedings, including the impugned arbitral awards.

31. At the outset, it is necessary to observe that the scope of interference with an arbitral award under Section 34 of the Act is limited. The statutory provisions, as interpreted by various decisions of the Supreme Court and this Court, permit interference with an arbitral award only in the circumstances contemplated under Section 34 of the Act. It is within these limited parameters that I proceed to examine the rival submissions advanced by the Petitioner-Corporation and the Respondent.

32. The principal grounds on which the Petitioner-Corporation has challenged the impugned arbitral awards may be summarised as follows:-

i) The Respondent's claim for refund of the amount realised under the Bank Guarantee was barred by limitation.

ii) The impugned arbitral award dated 6th March 2018 is not a reasoned award and, therefore, is contrary to the requirements of Section 31(3) of the Act.

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iii) The corrected impugned arbitral award dated 11th September 2018 travels beyond the scope of Section 33 of the Act, inasmuch as the correction made by the learned Arbitral Tribunal amounts to a substantive modification of the impugned arbitral award dated 6th March 2018 rather than the correction of a clerical or typographical error.

iv) The rate of post-award interest awarded at 12% per annum is excessive and ought to be reduced to a rate between 6% and 8% per annum.

33. I am of the view that the first objection raised by the Petitioner-Corporation, namely, that the impugned arbitral award dated 6th March 2018 fails to properly consider the issue of limitation, does not warrant interference. The learned Arbitral Tribunal has rightly relied upon the orders passed by this Court in other arbitration proceedings between the Petitioner-Corporation and the Respondent. In particular, the issue of limitation had been considered by this Court in Arbitration Petition No. 433 of 2017, and the same was affirmed by a Division Bench of this Court in the Commercial Appeal (L) No. 92 of 2017 by the order dated 22nd December 2017.

34. It is on the basis of the aforesaid judicial decisions, and having regard to the fact that the dispute concerning the Respondent's claim for EOT was pending adjudication before the Shrikhande Tribunal, that the learned Arbitral Tribunal concluded that the Respondent's claim remained inchoate until the arbitral award dated 21st April 2011 was passed by the Shrikhande Tribunal. The learned Arbitral Tribunal, upon an appreciation of the facts and circumstances, rightly concluded that when the Bank Guarantee was invoked by the Petitioner-Corporation, no

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liability towards liquidated damages had crystallised in its favour. In these circumstances, the learned Arbitral Tribunal rightly held that the initiation of separate arbitration proceedings concerning the encashment of the Bank Guarantee during the pendency of the proceedings before the Shrikhande Tribunal could have prejudiced the Respondent's claim. The finding of the learned Arbitral Tribunal on the issue of limitation is, therefore, consistent with the aforesaid judicial determinations and does not warrant interference under Section 34 of the Act.

35. I am, therefore, unable to accept the submission advanced on behalf of the Petitioner-Corporation that since the Shrikhande Tribunal rejected the Respondent's application under Section 17 of the Act on 8th July 2010 seeking to restrain the Petitioner-Corporation from encashing the Bank Guarantee or to secure its restoration by permitting an extension of its validity, the Respondent ought to have challenged the said order or initiated separate arbitration proceedings at that stage. The rejection of the interim application did not, by itself, require the Respondent to commence separate arbitral proceedings concerning the refund of the encashed Bank Guarantee while the underlying dispute regarding EOT remained pending adjudication. This in view of the fact that this Court in the other arbitration proceedings, which have been relied upon by the learned Arbitral Tribunal to come to the conclusion that the present Arbitration proceedings were filed well within time, is a finding which need not be disturbed.

36. In any event, this Court is of the view that the proceedings under Section 34 of the Act are not proceedings which require re-appreciation of the facts

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and evidence, and the learned Arbitral tribunal, being the master of facts before it, is entitled to come to a possible conclusion, which conclusion need not be substituted by the view of this Court, unless the finding thereon is shown to be arbitrary or perverse. In the facts of the present case, it is not in dispute that the proceedings concerning the Respondent's claim for EOT for completion of the civil works were pending adjudication before the Shrikhande Tribunal. In these circumstances, the invocation and encashment of the Bank Guarantee by the Petitioner-Corporation on 25th August 2006 did not, by itself, give rise to a crystallised claim in favour of the Respondent, particularly when the underlying dispute concerning the EOT had not yet been adjudicated. The Respondent's entitlement to seek a refund of the amount encashed under the Bank Guarantee was dependent upon the determination of the said dispute.

37. I am, therefore, not inclined to interfere with the finding returned by the learned Arbitral Tribunal on the issue of limitation, and the said objection raised by the Petitioner-Corporation is accordingly rejected.

38. The relevant paragraphs of the decision of the learned Single Judge in Arbitration Petition No. 433 of 2017, the decision of the Division Bench in Commercial Appeal (L) No. 92 of 2017, dealing with the aforesaid issue are reproduced hereinbelow:-

> Order dated 31st October 2017 in Arbitration Petition No. 433 of 2017
>
> 8. Coming now to the issue of limitation, the majority arbitrators' reasoning for holding in favour of the contractor may be outlined thus: (a) Sub-clauses 60.9 to 60.14 of the contract, which bear on the subject, imply that the agreement between the parties was to keep open all rights and obligations under the contract till a stage was reached where all disputes were resolved and settled; the documents produced before the tribunal showed that that stage was never reached; (b) it was clear from the evidence on record that both parties to the contract consented to the waiver of

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the requirement of clause 60.10 of the contract for submission of the statement at completion within the meaning of clause 60.10 within the originally stipulated period; the statement submitted under clause 60.11, calling it a draft final bill, on 22 July, 2003, was, thus, in order; (c) the procedure to be followed upon submission of a statement under clause 60.11, namely, consultation between the contractor and the Engineer so as to reach the stage of an agreement on the sums to be paid to the contractor and the sums on which there was a dispute, was not completed till March 2006; it was only in March 2006 that the contractor and the Engineer could be said to have reached an agreement upon the sums claimed by the contractor under the draft final bill, though there still were two outstanding issues, which came in the way of submission of a final statement, namely, (i) appointment of its employee as 'Engineer' by the Petitioner and (ii) three pending disputes before the earlier arbitral tribunal concerning interim payments. These disputes were resolved only when awards were delivered by the earlier arbitral tribunal on the three disputes; and accordingly, the final statement submitted on 24 October, 2009 and invocation of the reference on 2 February, 2010 were both within time.

9. The arbitrators' reasoning and conclusion on this issue represent a fair and reasonable view on the subject. The scheme of clauses 60.10 to 60.14 of the contract envisages submission of a statement at completion (Cl.60.10) not later than 84 days after the issue of the Taking-over Certificate. This statement is to contain the final value of all work done upto the date stated in the Taking-over Certificate. The Engineer is thereupon expected to certify payment. The next stage is of a draft final statement to be submitted under Cl.60.11 not later than 56 days after the issue of Defects Liability Certificate. After following the procedure in Cl. 60.11, a final statement is prepared. This statement is on the basis of the agreement/disagreement between the Engineer and the Contractor after following the procedure under Cl.60.11. The final statement in the present case (termed as 'draft final statement) was submitted on 24 October, 2009. No document submitted earlier could be termed as the final statement. [It is pertinent to note that this statement is in fact considered as the draft statement within the meaning of Clause 60.11 by the Petitioner (see para 55 of the petition).] The crucial question is, whether the submission of this statement on 24 October 2009 is in order and in accordance with the contract between the parties. If this statement is in order and within time, the invocation of the arbitration agreement on 2 February, 2010 is clearly within time. It is important to remember in this behalf that the contract work was taken over by the Petitioner with effect from 30 March, 2001. (Even the extended Defects Liability Period expired with effect from 27 May, 2003 under the certificate issued on 13 June, 2003.) And yet the statement at completion referred to in clause 60.10 of the contract was not issued within 84 days of the issue of the Taking-over Certificate. So also, no final statement was issued within 56 days of issue of the Defect Liability Certificate. What was issued at that time was a running account bill, being R.A. Bill No.67. The Petitioner not only accepted this interim bill, but the same was even certified by the Engineer by way of an interim payment certificate, namely, IPC 69A and 69B. If that is so, it is clearly reasonable to hold that both parties mutually did away with the requirement of clause 60.10 and waived the same. The claimant, thereafter, submitted what it termed as draft final bill on 22 July, 2003. Even if one were to treat this as a draft final statement under clause 60.11 of the contract, what the contract contemplates is that after this submission, the Engineer and the Contractor would consult each other, during which consultation, further information or changes in the draft, as may be required by the Engineer, would be made by the Contractor, and finally, the parties would reach a stage where there is an agreement between them on the sums to be paid to the Contractor or they arrive at sums, which they agree and other sums, about which there is a dispute. If there is any dispute, the Engineer is required to submit an interim payment certificate for

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those parts of the draft final statement, which are not in dispute. It is only then that the disputes are required to be settled in accordance with clause 67 of the contract, that is to say, by arbitration. As noted by the arbitrators, the consultation stage itself clearly lasted till about March 2006. The stage of agreement on those parts of the draft final statement, which were not in dispute, could be said to have been arrived at when the Engineer's decision reached the contractor. Even at that stage, however, there were outstanding issues, which prevented the stage of final statement, as noted by the arbitrators. These issues pertained to the appointment by the Petitioner of its own officer as the 'Engineer', which was contested by the Respondent and the interim bills which were in dispute before the earlier arbitral tribunal. The awards on these bills were finally delivered on 10 July, 2008 and 14 November 2008 by the arbitral tribunal. There was no case for submission of any final statement till then. The final statement submitted on 24 October, 2009 can, thus, be said to be within the terms of the contract between the parties. It was submitted by the Respondent to the Engineer, after the consultative process referred to in clause 60.11 was gone through and the issue concerning those parts of the draft final statement, which were not in dispute, was resolved through the process of arbitration concerning interim certificates. Since no final certificate was issued to the Contractor, or no payment was made in response to the final statement, the Contractor duly issued a notice of arbitration invoking the arbitration agreement.

10. As held by a Division Bench of Calcutta High Court in the case of Mc. Nally Bharat Engineering Ltd. vs. Benoy Krishna Bose, and as noted by the arbitral tribunal, limitation is to be computed not from the date on which the bill was submitted, but from the date on which the employer refused to pay the bill. The dispute could be said to have arisen on and from the date of such refusal or non-payment. By all accounts, in the present case, a bill in the form of a final statement was submitted on 24 October, 2009. The Petitioner failed and neglected to pay this bill and, as a result, the Contractor invoked the arbitration clause by nominating its arbitrator on 2 February, 2010. The Petitioner reiterated its refusal to pay by its communication dated 10 February 2010, in reply to the arbitration notice of 2 February, 2010. In the premises, the event of terminus a quo, which is by invocation of the arbitration agreement, was within limitation.

Order dated 22nd December 2017 in Commercial Appeal (L) No. 92 of 2017

22. The arbitrators found that if Sub-clause 60.11 has to work, firstly, there has to be an Engineer. Secondly, the mechanism provided by that Sub-clause would require the contractor submitting a draft and the consultation on the draft and discussions between the Engineer and the contractor. Thirdly, pursuant to such discussions and consultations, if any changes are proposed, then, those changes have to be incorporated. Nextly, when these changes are brought, the Engineer has to take requisite steps. It is therefore, clear that for this Sub-clause to work, the requirements stipulated therein have to be satisfied. It was not workable if the Engineer was not in picture. The arbitral Tribunal, taking an overall view of the same, did not hold that the bar of limitation is saved by the communication of 27" October, 2009. On the other hand, the arbitral Tribunal, in dealing with the rival contentions on this point, came to the conclusion that the Running Account Bill 67 was submitted for the work done till 31st March, 2003. That was certified by the Engineer. Thus, all the parties agreed that Statement at Completion would not be submitted upon taking over of the works. However, the MCGM could not show any evidence that any complaint was made either by the Engineer or the MCGM complaining to the contractor that Sub-clause 60.10 was not followed. Hence, by the implied consent and clearly waiving the requirement of Sub-clause 60.10, the contractor submitted

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under Sub-clause 60.11, a Draft Final Bill. That was submitted on 22nd July, 2003. Thus, the finding in para 17.3 of the Majority Award relies upon the admitted documents. Then, in para 17.4, the Tribunal analyzes that when statement under Sub-clause 60.11 is submitted, there is a procedure prescribed. That procedure with reference to the said Clause is then set out and it is stated that the document showed that not till 4th March, 2006, the stage contemplated by Sub-clause 60.11 was reached. In the sense, it was only in March, 2006 that the contractor and the Engineer could be said to have reached an agreement on the sums claimed by the contractor under the Draft Final Bill. Mr. Setalvad contended in the alternate that the invocation on 2nd February, 2010 is clearly time barred if we reckon this date, namely of 4th March, 2006. Thus, within a period of three years from this date at least, the arbitral reference could have been made. The claim was therefore, barred by time once the date of 24th October, 2009 is reckoned. We do not think that there is any substance in this contention.

23. The arbitral Tribunal, in the impugned Majority Award, makes reference to the contents of this letter of 24th October, 2009, but it having been brought to our notice, we cannot omit the same from consideration. If this document, namely this letter is read as a whole, it would be evident that there was an Engineer but post 22nd July, 2003 its services were terminated. At that time, namely from July 2003 till October 2004, the Engineer was reaching its final views on the quantification of the appellant's claims. He was also busy in rendering a decision on Extension of Time of 45 days. He was considering the claims raised during such extended period. While the claimant communicated its agreement with the Engineer's decision, the MCGM by its letter dated 24th May, 2006 communicated its disagreement. It announced that it will be taking further action as per the contract provisions at its earliest, but did not allow that Clause to operate further or work it out otherwise, as stated. Thus, the Engineer's services were terminated before he could complete the process of consultation and equally, the MCGM did not take any steps in terms of Clause 60.11. It is in these circumstances that when the MCGM relies upon its communication dated 4th March, 2006, it is equally imperative that we take note of the stand of the claimant- respondent. The claimant-respondent has brought to the notice of not only the Tribunal, but the MGM itself, its letter of 4th March, 2006, treating the recommendations of the Engineer as decisions of the Engineer and its disagreement therewith. It is in these circumstances that when Sub-clause 60.11 was not being worked out and that makes in the later part a reference to the Interim Payment Certificate, that the Tribunal, in para 17.4 made reference to the same. These outstanding issues came in the way of submitting final statement withing the meaning of Sub-clause 60.11, is the conclusion reached. That is how the plea of bar of limitation and raised by the MCGM was not accepted by the Tribunal. We do not think that the Tribunal traveled beyond any contractual terms or the terms of the reference and somehow or the other saved the bar of limitation. Once the Tribunal has emphasized that the two outstanding issues prevented or came in the way of submitting the draft final statement, then the reasoning is not perverse at all. We are not in agreement with Mr. Setalvad that the learned Single Judge merely reinforced these findings without any application of mind. We think that the learned Single Judge noted the admitted dates and events, the contention on the plea of limitation in paragraph 3 and gave his independent reasoning. The discussion by the learned Single Judge from paragraph 6 refers to the admitted dates and events. The learned Single Judge, in paragraph 8, made extensive reference to Clause 60.11, broke it up and dealt with it independent of what the arbitral Tribunal's construction. The learned Single Judge reached a correct finding in paragraph 9 that the final statement in the case termed as 'draft final statement' was submitted on 24th October, 2009, and no document submitted earlier answered this description. We do not think that the learned Single Judge has failed in his duty in considering the

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> challenge to the arbitral award on the ground that it violates public policy, in the sense that it allows patently time barred claims. The arbitral Tribunal does nothing of this kind, but accepts an interpretation of the contractual term by the respondent and which is reasonable as well. The interpretation cannot be said to be perverse or such that no reasonable person placed in the position of an adjudicator or as an arbitral Tribunal would not arrive at it. We therefore do not think that the learned Single Judge's judgment can be said to be erroneous or illegal or suffering from such a serious legal infirmity warranting interference in our appellate jurisdiction.
>
> (Emphasis supplied)

39. The relevant finding in the impugned arbitral award dated 6th March 2018 and the corrected impugned arbitral award dated 11th September 2018 on this issue have been reproduced in paragraph no. 21 above. In so far as the next contention on which the Petitioner-Corporation has sought to challenge the impugned arbitral award dated 6th March 2018 is concerned, I am of the view that provisions of Section 31 of the Act are to be considered, and particularly, the provisions of Section 31(3) ought to be considered first. It would be beneficial to reproduce the provisions of Section 31 of the Act, which read as follows:-

> **31. Form and contents of arbitral award.**-(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.
>
> (2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.
>
> **(3) The arbitral award shall state the reasons upon which it is based, unless-**
>
> **(a) the parties have agreed that no reasons are to be given, or**
>
> **(b) the award is an arbitral award on agreed terms under section 30.**
>
> (4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.
>
> (5) After the arbitral award is made, a signed copy shall be delivered to each party.
>
> (6) The arbitral tribunal may, at any time during the arbitral proceedings, make an. interim arbitral award on any matter with respect to which it may make a final arbitral award.

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> (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
>
> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.
>
> Explanation. -The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).
>
> (8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.
>
> **(Emphasis supplied)**

On a plain reading of Section 31, and particularly Section 31(3) of the Act, it is evident that an arbitral award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30 of the Act.

40. In the facts of the present case, the Petitioner-Corporation has failed to make out any ground to assail the impugned arbitral award dated 6th March 2018 on the basis that it does not contain reasons or findings on the issues raised before the learned Arbitral Tribunal. On the contrary, the learned Arbitral Tribunal has relied upon the orders passed by this Court concerning the limitation of the claim of the Respondents' and the Respondent's *locus standi* to invoke arbitration, and has thereafter arrived at a reasoned conclusion that the Respondent was entitled to initiate the arbitral proceedings, and that the claim was within the prescribed period of limitation

41. Further, the Petitioner-Corporation has miserably failed to point out or even aver on what basis they seek to assail the impugned arbitral award dated 6th

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March 2018 as being an unreasoned or an unintelligible award. The learned Arbitral Tribunal has, in fact, correctly held that till the dispute in respect of EOT was pending before the Shrikhande Tribunal, the claim of the Respondent was inchoate, and hence, once a finding to that effect was made by the learned Arbitral Tribunal, then the encashment of the bank guarantee in August 2006 by the Petitioner-Corporation being illegal was a logical corollary which the learned Arbitral Tribunal had rightly decided in favour of the Respondent. I am therefore, of the view that the reliance by learned counsel on behalf of the Respondent on the case of **Dyna Technologies** (supra) would be apposite to the facts of the present case, inasmuch as in the aforesaid case it has been held that when the fulfilment of the requirements of a reasoned order had to be taken into consideration, three characteristics of a reasoned order can be fathomed, i.e., the same has to be proper, intelligible, and adequate.

42. In the facts of the present case, I am of the view that the impugned arbitral award dated 6th March 2018 does not suffer from any infirmity on the ground that its reasoning is improper, unintelligible, or inadequate. It sets out the basis for the conclusions reached at by the learned Arbitral Tribunal and does not warrant interference on the ground that it is an unreasoned award. Relevant paragraphs of the impugned arbitral award dated 6th March 2018 setting out the reasons for the findings enumerated therein are reproduced below:-

> 24. That takes us to the 3rd point as mentioned in paragraph 13 above. According to the Corporation there is no merit in the claim because certain extension of time was granted by the Engineer and rest denied extension period was pending in dispute before the Shrikhande Tribunal. We need not direct much on this. No merit issue for the reason that Shrikhande Tribunal awarded the claim of the Claimant completely and the matter was challenged before the Hon'ble Bombay High Court as mentioned above in Arbitration Petition No.433 of 2017. There the

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> Tribunal held that the denial of extension period claimed by the Claimant was wrong and entire extension time claimed by the Claimant was granted by the Tribunal and this fact is confirmed by the Hon'ble Bombay High Court by dismissing the petition challenging the award made by Shrikhande Tribunal. In our opinion we are bound by the view taken by the Hon'ble Bombay High Court and the contention raised by the Respondent that there is no merit in the claim is liable to be rejected in toto. It should also be noted that the fact of encashment of the Bank Guarantee by the Respondent is not even disputed, on the contrary the Respondent has justified the encashment. We have therefore no hesitation in holding that the Claimant has proved that the encashment of Bank Guarantee was unwarranted, unjustified and therefore illegal. Consequently, the Claimant has proved that the encashment of Bank Guarantee by the Respondent was wholly illegal.
>
> (Emphasis supplied)

43. I am further of the view that interference under Section 34 of the Act on the ground of patent illegality is permissible only where the illegality goes to the root of the matter and is of such a nature that the arbitral award is manifestly arbitrary or unreasonable. The threshold for interference is not met merely because another view of the facts or the law may be possible. In this regard, the reliance placed by learned counsel for the Respondent on the decisions of the Supreme Court in Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India[4] and Union of India v. Recon, Mumbai[5] is apposite to the facts of the present case. Applying the principles laid down therein, I find that the impugned arbitral award dated 6th March 2018 cannot be set aside merely on the allegation that it lacks reasons or fails to record a finding on material documents or a contentious issue raised by the parties. The Petitioner-Corporation has not established any such deficiency in the impugned arbitral award dated 6th March 2018 which would justify interference under Section 34 of the Act.

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4 (2019) 15 SCC 131

5 2020(6) Mh.L.J.

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44. The principles laid down in **Associate Builders v. Delhi Development Authority**[6] have also been considered in **Ssangyong Engineering** (supra), wherein the Supreme Court explained the circumstances in which an arbitral award may be interfered with on the ground of patent illegality, including circumstances where the arbitral award fails to provide reasons when reasons are required by law. In the present case, as discussed hereinabove, the impugned arbitral award dated 6th March 2018 does not suffer from the vice of being unreasoned, and no ground for interference is made out on this count.

45. The third ground of challenge concerns the award of interest from 25th August 2006 until the date of payment. The Petitioner-Corporation has vehemently contended that, by allowing the Respondent's application under Section 33 of the Act the learned Arbitral Tribunal travelled beyond the scope of its jurisdiction under the said provision. This objection must be examined in light of the statutory limits governing the correction and interpretation of arbitral awards under Section 33 of the Act. It would, therefore, be appropriate to reproduce Section 33 of the Act, which reads as follows:-

> **33. Correction and interpretation of award; additional award.-**(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties-
>
> (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
>
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
>
> (2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

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6 (2015) 3 SCC 49

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> (3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.
>
> (4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
>
> (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).
>
> (7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

46. On a plain reading of Section 33 of the Act, it is evident that a party may, within thirty days of receipt of the arbitral award, request the Arbitral Tribunal to correct any computational, clerical, or typographical error, or any error of a similar nature occurring in the arbitral award, unless another period has been agreed upon by the parties. The scope of Section 33 is therefore confined to the corrections contemplated therein and does not extend to a substantive review or reconsideration of the arbitral award on its merits.

47. In the facts of the present case, upon receipt of the impugned arbitral award dated 6th March 2018, the Respondent filed an application under Section 33 of the Act seeking correction of an alleged typographical error in paragraph 25(c). The date mentioned therein as 6th August 2013 was sought to be corrected to 25th August 2006. The learned Arbitral Tribunal, after hearing both parties, allowed the application and made the aforesaid correction. It is pertinent to note that during the hearing of the Respondent's application under Section 33 of the Act, the Petitioner-Corporation did not raise any objection to the correction sought by the

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Respondent. The same is recorded in the corrected impugned arbitral award dated 11th September 2018 passed by the learned Arbitral Tribunal, whereby the correction was allowed.

48. In these circumstances, I am of the view that the Petitioner-Corporation's contention that the aforesaid order was passed beyond the scope of Section 33 of the Act cannot be accepted merely on the ground that the date of commencement of interest was altered. The correction was sought by the Respondent as a typographical correction, and the Petitioner-Corporation, having raised no objection to the same during the hearing of the application cannot be disregarded. The question, however, remains that whether the correction was in fact within the limited scope of Section 33, which must be determined by examining the nature and effect of the error corrected.

49. I am of the view that the learned Arbitral Tribunal acted within the scope of its powers under Section 33 of the Act in correcting the aforesaid error, as the same was treated as a typographical, clerical, or other error of a similar nature occurring in the impugned arbitral award. The correction was, therefore, within the category of errors contemplated under Section 33(1)(a) of the Act. The contention advanced by learned counsel for the Petitioner-Corporation that the learned Arbitral Tribunal failed to record reasons for allowing the correction does not warrant acceptance. Section 33(1)(a) of the Act does not expressly prescribe a separate requirement to record reasons for every correction of a clerical, computational, or typographical error falling within its scope. Accordingly, the absence of elaborate reasons in the order allowing such a correction does not, by

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itself, render the corrected impugned arbitral award invalid. The decisive question is whether the correction was of a nature permissible under Section 33 of the Act.

50. The correction in question was treated by the learned Arbitral Tribunal as relating to an error apparent on the face of the impugned arbitral award, falling within the categories of errors contemplated under Section 33(1)(a) of the Act. The contention advanced by learned counsel for the Petitioner-Corporation, relying on Section 31(7) of the Act to submit that reasons were required even for the aforesaid correction, cannot be accepted. Section 31 deals with the form and contents of an arbitral award, whereas Section 33 specifically provides for the correction of computational, clerical, and typographical errors, and errors of a similar nature. The absence of elaborate reasons for a correction falling within Section 33 does not, by itself, invalidate the corrected impugned arbitral award.

51. I am further of the view that the Petitioner-Corporation did not object to the correction sought by the Respondent during the hearing of the application under Section 33 of the Act. The validity of the correction must ultimately be determined by reference to the nature of the error and the scope of the power conferred upon the Arbitral Tribunal under Section 33 of the Act. In these circumstances, I am of the considered view that the correction made by the learned Arbitral Tribunal, whereby the date of 6th August 2013 was replaced with 25th August 2006 as the date from which interest was payable under paragraph 25(c) of the impugned arbitral award dated 6th March 2018, did not constitute a substantive modification of the arbitral award, but was rather a correction of a typographical error within the scope of Section 33 of the Act.

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52. I am, therefore, unable to accept the submission advanced by learned counsel for the Petitioner-Corporation that the aforesaid correction was impermissible, or that the learned Arbitral Tribunal exceeded its jurisdiction in making the same. In fact, the Respondent, in their Statement of Claim had specifically sought interest on the amount of Rs. 5,50,00,000/- from 25th August 2006 until the date of payment, at the rate of 10% per annum, compounded annually. The relevant prayer appears at Page No. 26 of the Compilation of Documents tendered by the Petitioner. This supports the Respondent's contention that interest was claimed from 25th August 2006, and that the reference to 6th August 2013 in the impugned arbitral award dated 6th March 2018 was an inadvertent error which the learned Arbitral Tribunal subsequently corrected in exercise of its powers under Section 33 of the Act. The objection raised by the Petitioner-Corporation on this ground is accordingly rejected.

53. I further find that it was only after the aforesaid correction was made by the learned Arbitral Tribunal by its order dated 11th September 2018 that the Petitioner-Corporation filed its application under Section 33 of the Act, seeking to modify the commencement date for the payment of interest to 14th April 2015, being the date of filing of the Statement of Claim by the Respondent before the learned Arbitral Tribunal, instead of 25th August 2006. The Petitioner-Corporation's application was filed beyond the prescribed period of limitation under Section 33 of the Act. The learned Arbitral Tribunal, after considering the submissions advanced by the Petitioner-Corporation, rejected the application by a reasoned majority decision.

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54. In my view, the aforesaid decision does not warrant interference under Section 34 of the Act. The learned Arbitral Tribunal acted within the scope of its jurisdiction in considering and deciding the applications for correction, and this Court cannot undertake a fresh appraisal of the factual issues merely because the Petitioner-Corporation seeks a different conclusion. Such an exercise would be inconsistent with the limited scope of judicial review under Section 34 of the Act. I am, therefore, of the view that no interference is warranted with the aforesaid findings of the learned Arbitral Tribunal. To grant the relief sought by the Petitioner-Corporation would, in the circumstances of the present case, amount to rewriting the terms of the impugned arbitral awards, which is impermissible in the exercise of jurisdiction under Section 34 of the Act.

55. Insofar as the final ground of challenge concerning the reduction of post-award interest, is concerned, it is necessary to distinguish between interest awarded for the period during which the arbitral proceedings were pending and interest awarded after the passing of the arbitral award. The grant of interest for the period during which the arbitral proceedings are pending (pendente lite interest) falls within the discretionary powers of the Arbitral Tribunal, subject to the provisions of the Act and any agreement between the parties excluding or restricting the award of interest. In the present case, there is no contractual prohibition on the grant of interest that would preclude the exercise of such discretion.

56. Section 31(7)(a) of the Act empowers the Arbitral Tribunal, unless otherwise agreed by the parties, to award interest at such rate as it considers reasonable on the whole or any part of the money awarded, for the whole or any

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part of the period between the date on which the cause of action arose and the date on which the arbitral award is made. In the facts of the present case, I am of the view that the learned Arbitral Tribunal exercised its discretion in awarding interest in accordance with the aforesaid provision, and no ground has been made out for interference with the award of pendente lite interest.

57. In respect of post-award interest, the decision of the Supreme Court in the leading case of **Gayatri Balasamy** (supra) has held that post-award interest granted by the Arbitral Tribunal can be modified by the Court. The relevant paragraphs of the aforesaid decision on the severability of arbitral awards and the modification of post-award interest by the Court are reproduced below:-

> 32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of kompetenz-kompetenz, that is, the arbitrators' competence to determine their own jurisdiction. Secondly, it enables the Court to sever and preserve the "valid" parts) of the award while setting aside the "invalid" ones.- Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.
>
> 33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.
>
> 34. To this extent, the doctrine of omne majus continet in se minus-the greater power includes the lesser-applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.
>
> 35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the "valid" and "invalid" portions are legally and practically inseparable. In simpler words, the

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"valid" and "invalid" portions must not be interdependent or intrinsically intertwined. If they are, the award cannot be set aside in part.

…

40. A core principium of arbitration, an alternative dispute resolution (hereinafter referred to as "ADR") mechanism, is to provide a quicker and cost-effective alternative to courtroom litigation. While this suggests minimal judicial interference, the role of domestic courts remains crucial, as they function in a supportive capacity to facilitate and expedite the resolution of disputes. Therefore, it follows that judicial intervention is legitimate and necessary when it furthers the ends of justice, including the resolution of disputes.

41. To deny courts the authority to modify an award—particularly when such a denial would impose significant hardships, escalate costs, and lead to unnecessary delays—would defeat the raison d'être of arbitration. This concern is particularly pronounced in India, where applications under Section 34 and appeals under Section 37 often take years to resolve.

42. Given this background, if we were to decide that courts can only set aside and not modify awards, then the parties would be compelled to undergo an extra round of arbitration, adding to the previous four stages: the initial arbitration, Section 34 (setting aside proceedings), Section 37 (appeal proceedings), and Article 136 (SLP proceedings). In effect, this interpretation would force the parties into a new arbitration process merely to affirm a decision that could easily be arrived at by the Court. This would render the arbitration process more cumbersome than even traditional litigation.

43. Equally, Section 34 limits recourse to courts to an application for setting aside the award. However, Section 34 does not restrict the range of reliefs that the Court can grant, while remaining within the contours of the statute. A different relief can be fashioned as long as it does not violate the guardrails of the power provided under Section 34. In other words, the power cannot contradict the essence or language of Section 34. The Court would not exercise appellate power, as envisaged by Order 41 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

44. We are of the opinion that modification represents a more limited, nuanced power in comparison to the annulment of an award, as the latter entails a more severe consequence of the award being voided in toto. Read in this manner, the limited and restricted power of severing an award implies a power of the Court to vary or modify the award. It will be wrong to argue that silence in the 1996 Act, as projected, should be read as a complete prohibition.

45. We are thus of the opinion that the Section 34 Court can apply the doctrine of severability and modify a portion of the award while retaining the rest. This is subject to parts of the award being separable, legally and practically, as stipulated in Part II of our Analysis.

46. Mustill and Boyd have observed that an order varying an award is not equivalent to an appellate process.30 The authors suggest that a modification order would only be appropriate where the modification, including any adjustment of costs, follows inevitably from the tribunal's determination of a question of law. This approach would be beneficial, as it would reduce costs and delays. The courts need not engage in any fact-finding exercise. By acknowledging the Court's power to modify awards, the judiciary is not rewriting the statute. We hold that the power of judicial review

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under Section 34, and the setting aside of an award, should be read as inherently including a limited power to modify the award within the confines of Section 34.

...

73. The next question that arises is: Do courts possess the power to declare or modify interest, especially post-award interest? In respect of pendente lite interest, Section 31(7)(a) (Annexure A), states that unless otherwise agreed by the parties, the Arbitral Tribunal may include in its sum for the award, interest, at such rate it deems reasonable on whole or part of the money for whole or part of the period on which the cause of action arose and the date on which the award is made. In respect of post-award interest, Section 31(7)(b) (Annexure A) states that unless an award provides for interest on a sum directed to be paid by it, the sum will carry an interest at a 2% higher rate than the current rate of interest prevalent on the date of the award, from the date of the award till the date of payment. The Explanation defines the expression "current rate of interest".

74. There can be instances of violation of Section 31(7)(a), and the pendente lite interest awarded may be contrary to the contractual provision. We are of the opinion that, in such cases, the Court while examining objections under Section 34 of the 1996 Act will have two options. First is to set aside the rate of interest or second, recourse may be had to the powers of remand under Section

75. For the post-award interest in terms of Section 31(7)(b), the courts will retain the power to modify the interest where the facts justify such modification. This is why the standard rate stipulated in clause (b) applies when the award itself does not specify the applicable post-award interest. There can be a situation where the party to be paid money is at fault and is guilty of delay which may require a modification in the rate of interest. In the absence of grant of post-award interest in the award, the Court also possesses the power to grant post-award interest. Clearly, as per the legislative mandate, it is not the sole prerogative of the arbitrator.

76. Compare Section 31 of the 1996 Act with Section 31 of the Model Law. While both sections are titled similarly-"Form and Contents of Award"-only the 1996 Act addresses interest in Section 31(7). The Model Law does not provide standards governing the determination of interest rates. Thus, Section 31(7) is a unique creation of the Indian legislature. It was not borrowed from the Model Law. Specifically, under Section 31(7)(b), the legislature has established a standard rate of interest to guide the arbitrator's discretion when it comes to determining the post-award interest rate. While the arbitrator retains his flexibility based on facts and circumstances of the case, the standard set by the legislature must weigh in on their consideration. Further, as there is a standard prescribed by the legislature, the post-award interest awarded can be scrutinised by courts against the standards prescribed.

77. Our reasoning is bolstered when considering the practical aspects. Ine Arbitral Tribunals, when determining post-award interest, cannot foresee future issues that may arise. Post-award interest is inherently future-oriented and depends on facts and circumstances that unfold after the award is issued. Since the future is unpredictable and unknown to the arbitrator at the time of the award, it would be unreasonable to suggest that the arbitrator, as a soothsayer, could have anticipated or predicted future events with certainty. Therefore, it is appropriate for the Section 34 Court to have the authority to intervene and modify the post-award interest if the facts and circumstances justify such a change.

78. Inherent in the discussion above, is the Court's power to both increase or decrease the post-award interest rate. It would be incorrect to state that the Court's

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power to interfere with this interest rate is limited solely to decreasing the interest rate. Situations may arise where the rate should be increased due to delays or obstructions in the execution of the award. Interest rates may also fluctuate over time.

79. However, the Court, while exercising this power, must be cautious and mindful not to overstep its role by altering the interest rate unless there are compelling and well-founded reasons to do so. In exercising this power, the Court is not acting in an appellate capacity, but rather under limited authority. For instance, the 1996 Act stipulates a standard post-award interest rate. When the statute itself benchmarks a standard, unless there are special and specific reasons, the rate of interest stipulated by the statute should be applied.

80. Nevertheless, this limited power is significant, as it can help avoid further rounds of litigation. Without it, the Court may be forced to set aside the entire award or order a fresh round of arbitration because of an erroneous interest rate rather than simply adjusting this rate.

…

87. Accordingly, the questions of law referred to by Gayatri Balasamy- are answered by stating that the Court has a limited power under Sections 34 and 37 of the 1996 Act to modify the arbitral award. This limited power may be exercised under the following circumstances:

87.1. When the award is severable, by severing the "invalid" portion from the "valid" portion of the award, as held in Part II of our Analysis;

87.2. By correcting any clerical, computational or typographical errors which appear erroneous on the face of the record, as held in Parts IV and V of our Analysis;

87.3. Post-award interest may be modified in some circumstances as held in Part IX of our Analysis; and/or

87.4. Article 142 of the Constitution applies, albeit, the power must be exercised with great care and caution and within the limits of the constitutional power as outlined in Part XII of our Analysis.

(Emphasis supplied)

58. In view of the aforesaid findings in the case of Gayatri Balasamy (supra), where Courts have been empowered to modify post-award interest, it would be relevant to examine the provisions governing post-award interest under the Act. The same are reproduced below:-

Section 31(7)(b) of the Act prior to its substitution by Act 3 of 2016

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

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Section 31(7)(b) of the Act post amendment by Act 3 of 2016

> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.
>
> Explanation- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).

On a reading of the amended and the unamended provisions, it is clear that prior to amendment, the arbitrator could direct future interest at the rate of 18% per annum from the date of the arbitral award to the date of payment. However, the amended section carries interest at a rate 2% higher than the current rate of interest prevalent from the date of the arbitral award till the date of payment. In the facts of the present case, the learned Arbitral Tribunal has correctly awarded post-award interest as per the mandate of Section 31(7)(b) of the Act, however, to my mind, it has mistakenly applied the rate of 12% per annum. In the facts of the present case, the date of the award is 6th March 2018, and the same will therefore be governed by the amended provisions of Section 31(7)(b) of the Act, and hence in my view the rate of interest would be 10% per annum, considering that the date of award is 6th March 2018 and the rate of interest prevalent on the date of award was roughly 8.35%, and Section 31(7)(b) allows the Arbitral Tribunal to charge interest at a rate 2% higher than the prevalent rate of interest. Hence, to that extent, the impugned arbitral award is modified, and instead of an interest rate of 12% per annum from the date of the impugned arbitral award till the payment and realization of the awarded amount, an interest rate of 10% per annum would be charged.

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59. Further, the decisions as relied upon by learned counsel on behalf of the Petitioner-Corporation are also not apposite to the facts of the case, as they have been rendered in a different fact pattern. The same are discussed in the subsequent paragraphs.

60. The decision of the Delhi High Court in the case of **Emmson Gulf DMCC v. National Coop. Consumer Federation of India Ltd.**[7] is not apposite to the facts of the present case, as the same has been rendered in a different fact pattern. In the aforesaid case, the Arbitral Tribunal had rejected the claim of the Petitioner therein for pendente lite interest but had failed to record reasons for the same in the arbitral award as per the requirements of Section 31(3) of the Act. The Court had therefore held that Section 31(3) of the Act casts an obligation on the Arbitral Tribunal to state the reasons upon which the arbitral award is based, unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30 of the Act, and that since the exceptions to the giving of reasons by the Arbitral Tribunal were not attracted, the Arbitral Tribunal was under an obligation to give reasons for rejecting the claim of grant of interest. However, in the facts of the present case, the impugned arbitral award dated 6th March 2018 is a well-reasoned award as held by me above. Further, the learned Arbitral Tribunal, in the corrected impugned arbitral award dated 11th September 2018 while adjudicating upon the application under Section 33 of the Act was not required to state reasons for changing the date from which interest was to be awarded from 6th August 2013 to 25th August 2006, as the same was a

7 2023 SCC OnLine Del 920

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typographical error sought to be corrected under Section 33 and therefore did not fall within the ambit of Section 31(3) of the Act.

61. Further, I am not in agreement with the reliance placed by learned counsel on behalf of the Petitioner-Corporation on the decision of the Supreme Court in **Gyan Prakash Arya v. Titan Industries Ltd.**[8]. The arbitrator in the aforesaid case had passed an arbitral award in favour of the Respondent therein, directing the Appellant to return 3648.80 grams of pure gold to the Respondent or in the alternative pay the market value of the same, calculating the value of gold at Rs. 740/- per gram. The Respondent had thereafter filed an application under Section 33 of the Act before the arbitrator seeking modification of the value at which the market value of the gold was calculated from Rs. 740/- per gram to Rs. 20,747/- per 10 grams, which was allowed by the Arbitrator. Thereafter, the Appellant therein had filed an application to set aside the arbitral award before the City Civil Court, which was dismissed, and upon the same being challenged before the High Court of Karnataka under Section 37 of the Act, the High Court also dismissed the appeal. The Supreme Court however held that the original award was passed considering the claim made by the Respondent as per its original claim, and therefore, subsequently allowing the application under Section 33 of the Act to modify the original award in exercise of powers under Section 33 of the 1996 Act was not sustainable. The Court held that only in a case of arithmetical and/or clerical error, the award can be modified, and such errors only can be corrected, and that it could not be said that there was any arithmetical and/or clerical error in the

8 (2023) 1 SCC 153

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original award passed by the arbitrator. Therefore, in the aforesaid case, the correction made in the original arbitral award amounted to a substantial modification, changing the computation of the value of gold from Rs. 740/- per gram to Rs. 20,747/- per 10 grams, with the latter value not being a part of the Statement of Claims filed by the Respondent before the arbitrator. This modification was therefore not in respect of a typographical error under section 33 of the Act. In the facts of the present case, the date from which interest was to be awarded was changed to 25th August 2006, and the Respondent in their Statement of Claims before the learned Arbitral Tribunal had sought interest from the same date. Therefore, it is correct to infer that same amounted to the correction of a typographical error, and therefore the decision in **Gyan Prakash Arya v. Titan Industries Ltd.** (supra) is distinguishable from the facts of the present case.

62. The decision of the Supreme Court in **Gujarat Water Supply & Sewerage Board v. Saryu Plastics (P) Ltd.**[9] is also not apposite to the facts of the present case. In the aforementioned case the Arbitral Tribunal had passed an arbitral award partly allowing the claims made by the Respondent therein and awarded simple interest on the awarded amount at the rate of 21.675%. The Appellant-Board had thereafter filed an application under Section 34 of the Act before the Commercial Court, and thereafter the Respondent had filed an application under Section 33 of the Act before the Arbitrator seeking substitution of the words "simple interest" in the arbitral award to "compound interest", upon which the arbitrator had held that since proceedings under Section 34 had been

9 2026 SCC OnLine SC 944

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initiated and were pending, the same ought to be filed before the Commercial Court. The Commercial Court thereafter dismissed the application filed by the Respondent, who then filed a Review Application for restoration of its application. The Commercial Court had then modified the arbitral award and granted compound interest instead of simple interest and also rejected the application under Section 34 filed by the Appellant-Board. The Appellant-Board thereafter challenged the modification of the arbitral award and the dismissal of its application before the Gujarat High Court, which was also dismissed. Upon appeal, the Supreme Court had held that the substitution of "simple interest" with "compound interest" for the pendente lite period was not, by any stretch of legal reasoning, a correction of a computational, clerical, or typographical error. It held that the characterisation of the mode of interest - whether simple or compound, went to the very root of the arbitrator's assessment of the equities of the case and reflected a substantive determination on the merits, and that it was neither a slip of the pen, nor an inadvertent arithmetical mistake, nor a clerical oversight that could be remedied under Section 33(1)(a). However, in the facts of the present case the correction through the corrected impugned arbitral award dated 11th September 2019 was only in respect of a typographical error, and the correction granted was in accordance with the Statement of Claims filed by the Respondent before the learned Arbitral Tribunal.

63. Further, the reliance placed by learned counsel on behalf of the Petitioner on the decision of the Delhi High Court in Virender Khanna & Associates v.

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Airport Authority of India[10] to contend that the cause of action in a dispute arises when the right to sue first accrues is distinguishable from the facts of the present case, inasmuch as the same has been rendered in a fact pattern that is distinct from the facts of the present case. In the aforesaid case, the Petitioner-Contractor had challenged the arbitral award on the ground that the Arbitral Tribunal had failed to grant the Petitioner-Contractor's claim regarding encashment of bank guarantee and that the Arbitral Tribunal had granted interest from the date of reference of the dispute to arbitration rather than from the date on which the cause of action arose. The Delhi High Court in the aforesaid case had held that that cause of action had arisen when the Petitioner-Contractor had submitted their final bid and demanded the amounts due to them. This reasoning would however, in the facts of the present case, not aid the Petitioner in their contention that the claims of the Respondent were barred by limitation, as the same is no longer *res integra*, and as held by me above, has been adjudicated upon in finality in Arbitration Petition No. 433 of 2017, with the same being affirmed by a Division Bench of this Court in the Commercial Appeal (L) No. 92 of 2017 by the order dated 22nd December 2017.

64. I am further not inclined to accept the reliance placed by learned counsel on behalf of the Petitioner on the decision of the Supreme Court in Kamlesh Verma v. Mayawati[11], wherein it has been held that the review of a dispute is maintainable only on the grounds of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of

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10 2018 SCC OnLine Del 8677

11 (2013) 8 SCC 320

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the Petitioner or could not be produced by him, a mistake or error apparent on the face of the record, or any other sufficient reason. The Court further held that the phrase "any other sufficient reason" meant "a reason sufficient on grounds at least analogous to those specified in the rule". However, the aforesaid decision has been rendered in a different fact pattern, and the rationale adopted by the Court would not be applicable in the facts of the present case, inasmuch as there has been no review of the dispute in the facts of the present case, and the application filed by the Respondent under Section 33 of the Act, along with the subsequent corrected impugned arbitral award dated 11th September 2018 were only in respect of a typographical error.

65. Further, the decision of this Court in **TJSB Sahakari Bank Ltd. v. Amritlal P Shah**[12] is not apposite to the facts of the present case, inasmuch as in the aforesaid case the Court had held that the entire arbitral award need not be set aside merely because the rate at which interest had been awarded was erroneous. In the facts of the present case however, as held by me above, pendente lite interest has been awarded at a correct rate, as per discretion of the Arbitral Tribunal warranting no interreference in that regard. Insofar as post-award interest, as held by me in paragraph No. 58 above, the same is modified by applying the principles in the case of **Gayatri Balasamy** (supra).

66. Having regard to the facts and circumstances of the present case, the detailed findings recorded in the impugned arbitral award dated 6th March 2018, and the subsequent corrections made thereto by way of impugned arbitral awards

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12 Commercial Arbitration Petition No. 370 of 2024

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dated 6th March 2018 and 11th September 2018 in accordance with Section 33 of the Act, I am of the view that the learned Arbitral Tribunal has adopted a plausible view of the matter. The Petitioner-Corporation has failed to establish any ground warranting interference with the impugned arbitral award within the limited scope of Section 34 of the Act, except in respect of post-award interest.

67. Accordingly, the impugned arbitral award dated 6th March 2018 and the corrected impugned arbitral award dated 11th September 2018 are modified to the extent as provided for in paragraph No. 58 above in respect of post-award interest. The remaining findings and portions of the award do not warrant interference under Section 34 of the Act and are therefore not set aside or modified. Therefore, the Petition is disposed of in the aforesaid terms.

68. All pending Interim Applications, if any, stand disposed of accordingly.

69. Any amount deposited in this Court shall be released in accordance with law within **one month** from the date on which this Judgment is uploaded on the official website of this Court.

70. The Arbitration Petition stands disposed of in the aforesaid terms. No costs.

(AARTI SATHE, J.)

71. After pronouncing the Judgment, learned counsel for the Petitioner has requested for stay of the Judgment, to approach higher Court. The request is opposed by the learned counsel for the Respondent. The effect of operation of the Judgment is stayed for a period of **four weeks** from today.

(AARTI SATHE, J.)

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