IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 822 OF 2012

Bombay Intelligence Security (India) Ltd.)
a Company registered under the)
Companies Act 1956 having it's Corporate)
Office at 101, Omega House, Hiranandani)
Gardens, Powai, Mumbai 400 076) ….. Petitioner

Versus

Oil & Natural Gas Corporation Limited,)
a Government of India Undertaking,)
having it's office at 1st Floor, Vasudhara)
Bhavan, Bandra (E), Mumbai 400 051) ….. Respondent

Mr.S.C.Naidu, a/w. Mr.Rahul Tanwani, Mr.T.R.Yadav, i/b. C.R.Naidu & Co. for the Petitioner.
Mr.V.P.Sawant, a/w. Ms.Debashree Mandpe, Mr.Pradeep Rajagopal, i/b. Ms.Rekha Rajgopal for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 1st JULY, 2015

PRONOUNCED ON : 21st AUGUST, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 19th March, 2012 passed by the learned arbitrator rejecting the claims made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings.

3. On 24th June, 1995 in response to the tender floated by the respondent, the petitioner submitted its quotation to the respondent offering to provide security services at various offices and godowns of the respondent. On 31st August, 1995 the respondent decided to award the said contract to the petitioner for providing service of receptionists etc. at various offices and godowns of the respondent.

4. On 14th November, 1995 the parties executed a formal contract recording various terms and conditions for providing services of receptionists etc. On 3rd December, 1997 by an inter-office communication addressed to the petitioner, the respondent confirmed having awarded contract for security services of 67 security personnel at the seven housing colonies listed therein to the petitioner. It is the case of the petitioner that the terms and conditions for providing security services to the colonies under the said communication dated 3rd December, 1997 were identical to the terms and conditions contained in another contract dated 14th November, 1995.

5. The petitioner provided security services at the offices, godowns, colonies of the respondent pursuant to the said contract dated 14th November, 1995 and inter-office communication dated 3rd December, 1997 read with work order dated 24th April, 1998 and raised various bills on the respondent from time to time.

CLAIM NO.1:- SERVICE TAX

6. Vide notification dated 7th October, 1998, the Central Government imposed service tax on security services for the first time under the Finance Bill 1997-98 w.e.f.16th October, 1998. By their letter dated 7th November, 1998, the petitioner intimated to the respondent about imposition of service tax on the security services w.e.f. 16th October, 1998 and that the respondent would be liable to make payment

of service tax on the security services being provided by the petitioner to the respondent and requested the respondent to approve the bill of the petitioner which would be inclusive of 5% of the bill as service tax.

7. By letter dated 16th August, 1999 the petitioner submitted statement of service tax payable by the respondent w.e.f. 16th October, 1998 to 31st October, 1999 for Rs.5,39,064/-in respect of security services rendered at the offices and godowns and Rs.1,83,459/- in respect of the security services rendered at the colonies and requested for payment thereof.

8. By letter dated 14th September, 1999 the respondent stated that since the petitioner had claimed reimbursement of service tax, the petitioner shall submit receipt showing the payment of service tax made to the Central Government.

9. On 29th May, 2001 the respondent issued an office order to ensure the smooth implementation of the MOU 2000-01 connected with the statutory obligation arising out of the payment to the workmen under the said MOU by the concerned contractors. The respondent alongwith their letter dated 31st May, 2001 forwarded a copy of the said office order to the petitioner and instructed that the statutory obligation arising out of the payment shall be completed by the petitioner for early payment of the arrears.

10. The petitioner by its letter dated 12th June, 2001 to the respondent once again informed the respondent that the petitioner was required to make payment of service tax @ 5% of the gross amount of the bill to the Central Excise Department which did not appear in the said office order issued by the respondent and requested to arrange to approve the service tax @ 5% at the gross amount of

the bill.

11. The respondent by its letter dated 26th June, 2001 to the petitioner contended that the stand taken by the petitioner in their letter dated 12th June, 2001 as a pre-condition for the payment of 5% service tax and 10% service charges on the arrears was not agreeable at the moment by the competent authority since there was no provision in the contract. It was however conveyed that the said issue would be taken up with legal and finance department which would take sometime. The respondent threatened to revoke the agreement clause 2.22 if the petitioner failed to complete the formalities within a week from the receipt of the said letter.

12. The petitioner by its letter dated 27th June, 2001 to the respondent denied that there was no provision in the contract for payment of service tax and service charges. It was contended that the respondent had agreed for the reimbursement of the tax applicable to the other contractors and the respondent was discriminating with the petitioner for the reasons best known to the respondent. The petitioner relied upon clause 2.12 of the agreement dated 14th November, 1995.

13. By letter dated 30th June, 2001, the petitioner once again reminded the respondent for payment of service tax to enable the petitioner to remit the same to the Government which amount worked out to Rs.39,38,000/- on that account. In the said letter, the petitioner also raised various other demands in respect of which separate claims were made by the petitioner before the learned arbitrator.

14. The petitioner by its letter dated 5th June, 2002 contended that during the period when the said agreement was in operation till 31st August, 1997 and later extended on monthly basis for a few months, service tax was not at all in existence

and therefore was not incorporated in agreement. Later on there was no renewal of the agreement and hence the service tax imposed w.e.f. 16th October, 1998 could not be incorporated. The petitioner contended that the service tax being a statutory obligation, respondent shall release the service tax dues to enable the petitioner to make remittance to the Government which worked out to Rs.39,27,278.28 according to the petitioner.

15. By its letter dated 23rd June, 2007 to the respondent, the petitioner informed the respondent that the Government of India had started charging service tax w.e.f. 16th October, 1998 while the agreement was entered in the year 1995 and the petitioner could not have anticipated at the time of entering into agreement that the Government was likely to take such decision in future and therefore the petitioner had not objected the incorporation of the Clause 2.28 of the agreement dated 14th November, 1995. The petitioner enclosed statement of dues on account of service tax for the period from 16th October, 1998 to 31st March, 2007 alongwith the said letter.

16. The learned arbitrator rejected the claim for reimbursement of service tax. Mr.Naidu, learned counsel appearing for the petitioner submits that the service tax was not the liability on the service provider. He submits that on the date of the agreement, service tax was not even in existence. There is no other provision in the contract which provided for payment of new tax introduced in future. He submits that the service tax was not levied on the income of the contractor or his employees. It is submitted that the liability on the service tax was on the recipient i.e. consumer and thus the respondent was liable to pay the service tax and not the petitioner. In absence of the contract to the contrary, service recipient has to pay the service tax. He submits that the respondent was liable to reimburse the

petitioner in respect of the payment of the service tax made by the petitioner.

17. It is submitted by the learned counsel that under section 66 of the Finance Act, 1994, the tax is required to be levied on the taxable service and is required to be paid by the service provider under section 68. The service provider is entitled to charge service tax on receipt of the service and is under obligation to pay the same to the government. He submits that clause 2.28 or clause 2.12 of the contract has no application to the service tax. Learned counsel submits that the learned arbitrator has totally overlooked the admission of the respondent towards payment of its liability to pay service tax in their letter dated 14th September, 1999 which was on record of the arbitral proceedings and was relied upon by the petitioner. He submits that the observation of the learned arbitrator that the service tax is on the income of the petitioner is totally erroneous and shows patent illegality and non-application of mind. He submits that since the service tax was not in existence on the service as rendered by the petitioner when the contract was entered into, the petitioner could not have intended to include the same in the consideration payable to the petitioner. The contract was entered into initially only for a period of one year on 14th November, 1995. He submits that the findings of the learned arbitrator that as per clause 2.12(a) of the contract, the service tax liability is on the petitioner is patently erroneous, perverse and contrary to the evidence on record. He submits that the reliance placed on the said provisions by the learned arbitrator in the impugned award is totally misplaced and shows patent illegality.

18. It is submitted by the learned counsel that the observation of the learned arbitrator that the component of the service tax could not be relatable to the wages and allowances to the deployed security personnel is ex-facie, perverse and

contrary to the evidence on record since the service tax was calculated on the aggregate of the wages of the security personnel and was included in the bill sent to the respondent.

19. Learned counsel for the petitioner placed reliance on judgment of Supreme Court in case of ***M/s.Alopi Prashad and Sons Ltd.vs. Union of India, AIR 1960 SC 588*** and in particular paragraphs 20, 21, 22 and 24. Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of ***All-India Federation of Tax Practitioners and others vs.Union of India and others, (2007) 7 SCC 527*** and in particular paragraphs 4 to 8, 12, 22, 24, 25, 34 and 48. He also placed reliance on the judgment of Supreme Court in case of ***Rashtriya Ispat Nigam Ltd. vs. M/s.Dewan Chand Ram Saran AIR 2012 SC 2829*** and in particular paragraphs 3 to 9, 22, 26, 29 and 30.

20. Learned counsel appearing for the petitioner submits that the learned arbitrator while rejecting this claim has erroneously relied on the judgment of this court in case of ***Hindustan Petroleum Corporation Ltd. vs. Punj Lloyd Ltd. and another 2011(2) Bom.C.R.799***. He submits that the provisions of the contract in the said matter were totally different. It is submitted that under the said contract, it was the liability of the contractor to pay service tax including the taxes introduced in future. He submits that there is no such provision in this contract.

21. My attention is invited to the cross-examination of Mr.Amarjit Singh, the witness examined by the petitioner and in particular his answers to question nos. 147 and 148. The said witness was asked whether the petitioner sought any renewal of the agreement with the incorporation of the clause with regard to the payment of service tax since the clause relating to service was not incorporated in

the agreement, the witness answered in affirmative and stated that the petitioner had approached the security department with their letters alongwith the trade notice issued by the Government of India for payment of service tax. The petitioner had always been mentioning that the extension of contract was subject to incorporation of the payment on account of service tax. He submits that the learned arbitrator has completely overlooked and ignored the oral evidence led by the petitioner.

22. Mr.Sawant, learned counsel for the respondent on the other hand submits that the impugned award rendered by the learned arbitrator is a reasoned award and the impugned award has been delivered after rendering full opportunities to both the parties and has no infirmity of any nature whatsoever. He submits that the learned arbitrator has interpreted the terms of the contract in the impugned award which interpretation of the learned arbitrator is a possible interpretation and even if the same is erroneous, it cannot be substituted by another interpretation of this Court unless the same is perverse.

23. Insofar as claim no.1 is concerned, learned counsel submits that any imposition of tax introduced after execution of the contract was on the account of the petitioner. He invited my attention to a trade notice dated 13rd October, 1998 issued by the Government imposing service tax with effect from 16th October, 1998 on the services provided by the petitioner to the respondent. Admittedly, the agreement was entered into between the parties on 14th November, 1995.

24. Learned counsel invited my attention to various correspondence exchanged between the parties which are referred to aforesaid in support of his submission that the liability to pay the service tax was on the petitioner and not the respondent.

It is submitted that though the petitioner did not pay any service tax to the Government, the petitioner had asked the respondent for reimbursement. The respondent had thus obtained an opinion of the retired Chief Justice of the Jammu & Kashmir High Court, who opined that the liability to pay service tax was not of the respondent but was of the petitioner. Reliance is also placed on the affidavit of evidence filed by the witness examined by the respondent.

25. Insofar as clause 2.9 of the agreement is concerned, it is submitted that there was no employer – employee relation between the petitioner and the respondent. Insofar as clause 2.12(a) of the agreement which was relied upon by the petitioner is concerned, learned counsel for the respondent submits that the said clause would not apply for payment of service tax by construing the term "etc." which shall be read ejusdem generes. Reliance is placed by learned counsel on clause 2.28 of the agreement and it is submitted that the said clause would not apply. Under the said clause, taxes which were liable to borne by the petitioner were inclusive of all taxes including on income.

26. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of ***Rashtriya Ispat Nigam Limited vs. M/s.Dewen Chand Ram Saran*** (supra) and more particularly paragraphs 22, 25 and 26. He also placed reliance on the definition of "assessee" under section 65(7) of the Service Tax Act and also the definition of "security agency" under section 65(94). Reliance is also placed on the definition of "taxable service and security service" under section 65(105) and under section 65(105)(w) respectively and it is submitted that even under those provisions, the petitioner was assessed for payment of service tax.

27. It is submitted by learned counsel for the respondent that with effect from 7th August, 2012, service recipient is made liable to pay service tax to the extent of 75% on the security services, whereas the security provider is liable to pay 25%. He submits that it was not the case of the petitioner that the petitioner was not liable to pay service tax from beginning and had paid the service tax and was entitled for reimbursement. Learned counsel made an attempt to distinguish the judgment of the Supreme court in the case of ***Tamil Nadu Kalyana Mandapam Assn. vs. Union of India, AIR 2004 SC 3757*** on the ground that the facts in the said matter were totally different. The Mandap keeper had challenged the validity of the provisions of Service Tax Act in view of their inclusion in the ambit of Service Tax Act. Reliance is placed on paragraphs 33 and 50 of the said judgment. Learned counsel for the respondent also made an attempt to distinguish the judgment of the Supreme Court in the case of ***All-India Federation of Tax Practitioners & Ors. vs. Union of India & Ors.*** (supra). In support of the submission that with effect from 7th August, 2012, the service recipient was liable only to pay 75% , learned counsel placed reliance on a notification dated 20th June, 2012 issued by the Government of India. He submits that in any event, even if the respondent was made liable to pay any service tax on the services provided by the petitioner, the liability of service tax would depend upon the agreement between the parties. He submits that the petitioner was liable to pay service tax levied after execution of the contract agreement and not the respondent.

28. Learned counsel for the respondent placed reliance on the judgment of this Court in the case of ***Hindustan Petroleum Corporation Limited vs. Punj Lloyd Ltd., 2011 (2) Bom.C.R. 799*** and in particular paragraphs 9 and 13 and submits that the said judgment would apply to the facts of this case and reliance placed by the learned arbitrator on the said judgment is proper. He submits that the

provisions of the agreement which were interpreted by this Court in the said judgment of ***Hindustan Petroleum Corporation Limited vs. Punj Lloyd Ltd.*** (supra) are in *pari materia* with the provisions of this contract.

29. Learned counsel for the respondent distinguished the judgment of the Supreme Court in case of ***Alopi Prasad & Sons Ltd. vs. Union of India*** (supra) on the ground that there was no material change in the situation after execution of the contract insofar as levy of service tax is concerned. He submits that the interpretation of the learned arbitrator on the issue of liability of service tax on the petitioner is logical and reasonable and is based on the plain reading of clause 8.22 of the agreement and no interference with such finding is warranted. He submits that admittedly the petitioner did not terminate the contract even though according to the petitioner, the respondent had not complied with its part of obligation in making reimbursement of the payment alleged to have been made by the petitioner and accepted the renewal of the agreement.

30. Learned counsel for the respondent also placed reliance on the judgment of the Supreme Court in case of ***Hindustan Tea Company vs. K. Shashikant, AIR 1987 SC 81*** and submits that the learned arbitrator is the final arbiter of the dispute between the parties and the arbitral award is not opened to challenge on the ground that the learned arbitrator has reached wrong conclusion or has failed to appreciate the facts.

31. Mr.Naidu, learned counsel for the petitioner in re-joinder submits that the documents which were not referred by the learned arbitrator while rendering his conclusion in the impugned award cannot be considered by this Court for the first time while hearing an application under section 34 of the Arbitration &

Conciliation Act, 1996 and cannot probe into the mind of the learned arbitrator as to how he would have come to a conclusion based on such documents. He submits that insofar as the trade notice issued by the Government of India in the year 2012 is concerned, the said trade notice would not apply to the parties to this agreement. Even the impugned award had been declared prior to the said trade notice. Learned counsel placed reliance on paragraph 9 of the judgment of the Supreme Court in case of ***Rashtriya Ispat Nigam Limited vs. M/s.Dewen Chand Ram Saran*** (supra) and would submit that under the said judgment, it is held that the obligation to pay service tax was on the service recipient and not on the service provider.

32. Learned counsel for the petitioner distinguished the judgment of this Court in case of ***Hindustan Petroleum Corporation Limited*** (supra) on the ground that in that matter, service tax was already levied prior to the date of execution of the agreement between the parties. He also placed reliance on the judgment of the Supreme Court in case of ***Alopi Prasad & Sons Ltd. vs. Union of India*** (supra) and would submit that the change in circumstances after the execution of the agreement has to be considered by a Court or an arbitrator. Learned counsel invited my attention to the cross-examination of the witness examined by the petitioner and more particularly his reply to question No.140 and would submit that the petitioner had proved by leading evidence that the petitioner had already paid service tax except what was imposed by the Government in the year 1998. The learned arbitrator did not discuss material and crucial part of the evidence in the impugned award.

33. Insofar as this claim is concerned, a perusal of the arbitral award indicates that the learned arbitrator has rejected this claim by placing reliance on the judgment of this Court in the case of ***Hindustan Petroleum Corporation Limited***

(supra) and heavily placed reliance on the opinion of the former Chief Justice of the Jammu & Kashmir High Court in the impugned award.

34. A perusal of the record clearly indicates that it was not in dispute that the service tax on the security service was levied for the first time under the Finance Bill 1997-1998 with effect from 16th October 1998 whereas, the contract was entered into between the parties on 14th November 1995. The said contract was initially for a period of one year only and was thereafter extended. The petitioner had intimated the respondent about the imposition of service tax on the security service and had demanded payment of service tax on the security service provided by the petitioner to the respondent and had also submitted the statement of service payable by the respondent from time to time.

35. The respondent by its letter dated 26th June 2001 had contended that the stand taken by the petitioner in its letter dated 12th June 2001 as a pre-condition for the payment of 5% service tax and 10% service charges on the arrears was not agreeable at the moment by the competent authority since there was no provision in the contract. The petitioner, however, was conveyed that the said issue would be taken up with legal and finance department which would take some time. In my view, the stand taken by the respondent before the learned arbitrator that the petitioner was liable to pay service tax though the same was not even attracted when the contract was entered into between the parties was contrary to its own stand taken in the letter dated 26th June 2001 and also contrary to the terms of the contract. In my view, there was no provision in the contract which provided for an obligation on the part of the petitioner to pay service tax though the same was levied much after the execution of the contract executed between the parties. It was obvious that the petitioner could not have contemplated the levy of service tax

in future when the petitioner was awarded the contract by the respondent.

36. The Supreme Court in the case of ***Rashtriya Ispat Nigam Limited (supra)*** has held that the obligation to pay service tax was only on the service recipient and not on the service provider. The learned arbitrator, however, has decided contrary to the judgment of the Supreme Court and has held that it was the liability of the petitioner to pay the service tax though the same was introduced much after the execution of the contract entered into between the parties.

37. The learned arbitrator has totally overlooked the letter dated 14th September 1999 from the respondent in which the respondent had admitted its liability to pay service tax and had contended that it would be liable to pay service tax if the petitioner produces challans of service tax paid to the Central Government. The learned arbitrator also failed to appreciate that in the oral evidence of the petitioner, the witness had deposed that the petitioner had approached the security department with its letters alongwith the trade notice issued by the Government of India for payment of service tax and had mentioned that the extension of contract was subject to incorporation of the payment on account of service tax.

38. Insofar as the judgment of this Court in the case of ***Hindustan Petroleum Corporation Ltd.*** *(supra)* relied upon by the learned arbitrator in the impugned award is concerned, a perusal of the impugned award indicates that the provisions of the contract in the said judgment were totally different. There was a provision in the said contract under which the contractor was under an obligation to pay service tax introduced in future whereas, there was no provision in this contract. Reliance placed by the learned arbitrator in the case of ***Hindustan Petroleum Corporation Ltd.*** *(supra)* was thus totally misplaced.

39. A perusal of the impugned award rendered by the learned arbitrator indicates that the service tax was on the income of the petitioner which is, in my view, shows patent illegality and shows non-application of mind on the part of the learned arbitrator. The finding of the learned arbitrator was that as per the clause 2.12(a) of the contract, service tax liability was on the petitioner is patently erroneous, perverse and contrary to the provisions of the contract. It was the stand of the respondent itself that there was no provision of payment of service tax in the contract. The award shows patent illegality on the face of the award. In my view, the service tax was to be calculated on the aggregate of wages of security personnel and thus the finding of the learned arbitrator that the component of service tax could not be relatable to the wages and allowances to the deployed security personnel is ex facie illegal, perverse and contrary to the evidence on record.

40. A perusal of the award also indicates that the learned arbitrator heavily placed reliance on the opinion of the retired Chief Justice of Jammu & Kashmir High Court in the impugned award. In my view, the opinion of the retired Chief Justice would not be binding on the parties and thus could not have been relied upon by the learned arbitrator. The award shows non application of mind on the part of the learned arbitrator.

41. Insofar as the trade notice relied upon by the learned counsel for the respondent that from 7th August 2012, the service recipient was made liable to pay service tax to the extent of 75% on the security services whereas, the security provider was liable to pay to the extent of 25% is concerned, in my view, the reliance placed on the said trade notice by the learned counsel for the respondent is totally misplaced. The said trade notice was issued much after the completion of

the contract. Be that as it may, the said trade notice was not part of the record of the arbitral proceedings and no reliance on the same thus can be placed by the learned counsel for the respondent.

42. Insofar as the judgment in the case of ***Hindustan Tea Company (supra)*** relied upon by the respondent is concerned, the said judgment is delivered by the Supreme Court under the provisions of the Arbitration Act, 1940. In my view, since the award shows perversity and patent illegality, this Court thus can interfere with the said patently illegal award and with such perverse findings. Other judgments relied upon by the learned counsel for the respondent do not assist the case of the respondent.

43. A perusal of the record indicates that the petitioner had already led oral evidence and had proved before the learned arbitrator that the petitioner had already paid the service tax and more particularly his reply to the Question No.140, except what was imposed by the Government in the year 1998. The learned arbitrator has, however, overlooked the crucial and material piece of evidence in the impugned award. The award thus shows perversity. This part of the award of the learned arbitrator goes to the root of the matter. Learned arbitrator ought to have allowed this claim. This part of the award thus deserves to be set aside and it is ordered accordingly.

CLAIM NO.2 :- REIMBURSEMENT OF PROVIDENT FUND, ADMINISTRATIVE CHARGES OF 1.61%

44. Learned counsel appearing for the petitioner states that with effect from September 1995, the provident fund contribution was increased from 12% to

13.11% i.e. 13.61% by way of administrative charges. It is submitted that though the respondent paid to the petitioner @ 0.65%, the respondent did not pay at the enhanced figure but paid to the petitioner at the old rate. Learned counsel placed reliance on para (c) of the Office Order dated 28th May, 2001 and submits that admittedly the administrative charges were @ 1.61% when the said office order was issued by the respondent and was payable as per the actuals and subject to production of the documentary proof by the contractor. He submits that the administrative charges was not mentioned anywhere in the agreement.

45. The petitioner had demanded the payment of the administrative charges of 1.61% being the difference between 13.61% and 12%. By letter dated 30th June, 2001 the petitioner had recorded that the respondent was making reimbursement of provident fund contribution @ 12% only to the petitioner whereas the petitioner was required to remit @ 13.61% to the provident fund department and the respondent was thus liable to pay the said difference of 1.61%. He submits that the said issue was discussed at the high level meeting and the respondent decided to reimburse adhoc payment of 0.5% out of the said increased contribution @ 1.61%.

46. The petitioner vide their letter dated 7th May, 2002 pointed out to the respondent that even as per the said office order, the petitioner was entitled to the reimbursement of the actual amount of difference of administrative charges of 1.61% subject to production of documentary proof by the petitioner. The petitioner enclosed to the said letter challan showing proof of payment as per the said MOU dated 29th December,2000 read with office order dated 29th May, 2001. The petitioner pointed out that the outstanding amount on accounts of administrative charges of 1.61% amounted to Rs.1,10,609/-. Copies of the challans

were enclosed with the said letter for payment.

47. The petitioner vide their letter dated 15th March, 2005 forwarded the details of the administrative charges on the provident fund for a period from 1st September, 1995 to 28th February, 2005 in respect of the offices and godowns and in respect of the housing colonies for the period 1st January, 1998 to 28th February, 2005. The petitioner also enclosed photocopies of Form No.6A (Revised) Annual statement of contributions for various years alongwith proof of submission of the yearly returns to the office of the Regional Provident Fund Commission. The petitioner demanded reimbursement of Rs.19,06,341/-. It is the case of petitioner that in the meeting held on 24th May, 2006, the respondent desired that the petitioner should forward once again to the respondent the petitioner's claim for the said amount alongwith the copies of the paid provident fund challans to enable the respondent to release the said payments to the petitioner. The petitioner alongwith their letter dated 25th May, 2006 forwarded to the respondent a copy of the claim for administrative charges alongwith paid provident fund challans.

48. By their letter dated 25th September, 2006, the petitioner pointed out that in addition to the amount of Rs.19,06,341/-, the respondent was also liable to pay further sum of Rs.4,17,102/- for the period 1st March, 2005 to 31st July, 2006. The respondent vide their reply dated 11th December, 2006 addressed to the petitioner contended that administrative charges on employees provident fund @ 1.61% was reimbursable to the extent of increased amount of liability to the petitioner due to implementation of the MOU 2000 and that no administrative charges on employees provident fund was reimbursable on the pre-revised rate of wages of the MOU-2000. The respondent requested the petitioner to re-work their claim on the basis of the increased amount of liabilities w.e.f. 1st January, 1998 on the

actuals and submit the claim with monthly statement giving all break-ups and details alongwith paid provident fund challans.

49. It is the case of the petitioner that the petitioner agreed to forgo a substantial amount reimbursable on account of administrative charges and worked out the administrative charges on differential amount. By their letter dated 8th February, 2007, the petitioner accordingly requested the respondent to pay aggregate sum of Rs.7,37,533/-. The respondent vide their letter dated 15th May, 2007 replied the said letter alleging that no documentary proofs were submitted by the petitioner and requested to submit their claim alongwith all corresponding details. The petitioner alongwith their letter dated 3rd August, 2007 submitted their total claim of Rs.7,99,160/- on account of reimbursement of administrative charges for the period January, 1998 to June, 2007.

50. The learned counsel for the petitioner submits that in the return 6A filed by the respondent, payments made by the respondent were reflected which could not be done unless the payment details were with the respondent. He submits that the administrative charges details were to be part of the return 6A. He placed reliance on paragraph 49 of the Employees Provident Fund Scheme, 1952, paragraphs 29, 32, 35,38 and 39.

51. My attention is invited to the challans annexed at Ex.C-56 and it is submitted that the learned arbitrator has not considered, the payment challans in the impugned award though were exhibited in the evidence and the learned arbitrator has rejected the claim mechanically. It is submitted by the learned counsel for the petitioner that there was no cross-examination of the witness examined by the petitioner on various letters addressed by the petitioner to the

respondent on the issue of payment of provident fund contribution @ 1.61%. Learned arbitrator also overlooked the fact that the respondent did not cross-examine the witness of the petitioner on his deposition on paragraphs 5.1, 5.2, 5.3, 5.6, 5.6A and 5.9 of the affidavit of evidence regarding administrative charges on provident fund contribution @ 1.61% and the said evidence stood uncontroverted.

52. Mr.Sawant, learned counsel for the respondent on the other hand submits that though the petitioner had produced challans before the learned arbitrator in support of this claim, no details of payment made were furnished showing the names of the employees for whom such payment was made. He submits that the respondent thus could not make out from the challan produced by the petitioner whether any payment was made by the petitioner for any particular employee of the respondent. Learned counsel placed reliance on section 17(B) of the Employees Provident Fund Act, 1952 and submits that the respondent was entitled to verify whether such contribution was made by the petitioner or not before releasing any payment to the petitioner. Reliance is also placed on paragraph 38 of the Employees Provident Fund Scheme, 1952 and it is submitted that the challans produced by the petitioner did not indicate any such payment. Learned counsel invited my attention to some of the correspondence in support of his submission that the liability, if any, of the respondent was subject to proof of actual payment, if any, made by the petitioner which the petitioner had failed to prove. He submits that the respondent had not denied its liability to pay the amount however, since the petitioner had not produced any break up and proof, the respondent could not have been asked to make such payment without any break up and proof.

53. Mr.Naidu, learned counsel for the petitioner in rejoinder submits that the administrative charges were percentage of total payment reflected in account No.I.

There was no dispute about the payment made by the petitioner in account No.I. Learned counsel placed reliance on page 893 of Vol.V and would submit that the respondent had admitted its liability. Reliance is also placed on a letter dated 15th March, 2005 from the petitioner to the respondent and it is submitted that the petitioner had submitted all requisite details and proof of submission of returns and payment. Even the details of the employees were furnished by the petitioner. My attention is invited to the written statement of the respondent in which the respondent had shown readiness and willingness to pay this claim however, had only alleged that the challans were not submitted by the petitioner. He submits that the learned arbitrator however, did not consider the evidence produced by the petitioner in the impugned award at all and the award is rendered contrary to the evidence. Reliance is placed on the statements annexed at pages 893 to 1013 and 1115 to 1118 of Vol. V.

54. A perusal of the award indicates that the learned arbitrator has not considered any of the evidence produced by the petitioner and has rejected the claim without rendering any reasons. A perusal of the record indicates that the petitioner had enclosed the photocopies of the Form No.6A (revised) 'Annual Statement of Contributions' for various years along with proof of submission of the yearly returns in the office of the Regional Provident Fund Commission. The petitioner had also forwarded a copy of the claim for administrative charges along with a copy of the paid provident fund challans. The respondent, however, returned a letter dated 8th February 2007 addressed by the petitioner demanding the payment of Rs.7,37,533/- on the ground that no documentary proof was submitted by the petitioner and requested the petitioner to submit its claim along with all corresponding details. The petitioner accordingly along with its letter dated 3rd August 2007 submitted its total claim of Rs.7,99,160/- on account of

reimbursement of administrative charges for the period from January 1998 to June 2007. The petitioner had relied upon the return 6A which was filed by the respondent in which the payments made by the respondent were reflected and which could not be made unless payment details were with the respondent. The learned counsel for the petitioner has invited my attention to the challans annexed at Exhibit 'C-56' which was exhibited in evidence by the learned arbitrator. The learned arbitrator also did not consider the crucial aspect that there was no cross-examination of the witness examined by the petitioner on the various letters addressed by the petitioner to the respondent on the issue of payment of provident fund contribution @ 1.61%.

55. I am thus not inclined to accept the statement of the learned counsel for the respondent that the petitioner had not produced the details of the employees for whom such payment was made or that the same could not be made out from the challans produced by the petitioner. The learned arbitrator has not rejected this claim on the ground that the challan produced by the petitioner did not provide any details of the employees or that the same was not sufficient to prove all the payments made by the petitioner. The learned arbitrator has mechanically decided this claim and rejected the claim by overlooking the documentary as well as oral evidence produced by the petitioner. Learned arbitrator ought to have allowed this claim. This part of the impugned award is thus set aside.

Claim No.3 :- ESIS Dues

56. The petitioner had claimed a sum of Rs.2,83,387/- against the respondent being ESI dues for the period from 1st October 2006 till February 2007 together with interest @18% p.a. thereon. It was the case of the petitioner that the Central Government vide notification dated 22nd September 2006 had

enhanced the wage ceiling coverage of the employees under the ESI Act from Rs.7,500/- to Rs.10,000/- per month w.e.f. 1st October 2006. The petitioner vide their letter dated 24th October 2006 informed the respondent about the said notification issued by the Central Government and also the resultant obligation of the respondent to pay ESI contribution on the enhanced wage ceiling coverage. It was the case of the petitioner that the petitioner had furnished the breakup of the revised rates effective from 1st October 2006 in respect of employees deployed in the offices, godowns and housing colonies. The respondent had been paying ESI contribution @4% on Rs.7,500/-.

57. It was the case of the petitioner that since the Central Government had enhanced wage ceiling coverage of the employees w.e.f.1st October 2006 from Rs.7,500/- to Rs.10,000/- per month, the respondent became liable to pay 4% on the increased component i.e. differential between Rs.7,500/- and Rs.10,000/- also at the same rate in terms of contract as contained in clause 2.18. The said enhancement of the Central Government was made effective from 1st October 2006.

58. Mr.Naidu, learned counsel for the petitioner invited my attention to some part of the oral evidence led by the witness examined by the petitioner and the documents produced by the petitioner such as letters dated 24th October 2006 and 4th March 2008 and submits that the respondent did not cross-examine the witness examined by the petitioner on his deposition in paragraphs 6.1, 6.2 and 6.3 of his affidavit of evidence dated 4th September 2009 regarding ESI payment and that part of the deposition remained uncontroverted. He submits that the reliance placed by the respondent on various letters to show that for the reasons stated in those letters, the respondent did not release ESI payment to the

petitioner was misplaced as the same were not at all relevant and had nothing to do with the claim of the petitioner for ESI payment amounting to Rs.2,83,387/-.

59. It is submitted that clause 2.27 of the contract which was entered into on 14th November 1995 had made it obligatory on the petitioner to arrange for the insurance coverage to the employees on the enhanced ESI contribution which became applicable only from 1st October 2006 and was thus not relevant. He submits that the petitioner had produced all the relevant documents/challans to prove payment of ESI contribution. My attention is invited to the document at Exhibit C-39 and also month-wise details of ESI contribution set out in Exhibit C-40. He submits that there was no cross-examination of the witness examined by the petitioner on those documents showing proof of payment of ESI contribution by the petitioner. He submits that the finding of the learned arbitrator that the petitioner had not done reconciliation of MOU-2000 arrears was ex facie perverse since the letter of the respondent dated 21st February 2003 itself proved that the reconciliation of MOU-2000 arrears was already done and the entire arrears were disbursed prior to 21st February 2003.

60. Learned counsel for the petitioner submits that though the respondent had paid the appropriate amount to the petitioner arising out of the increase in payment of contribution effected prior to the said increase i.e. from Rs.6,500/- to Rs.7,500/- per month, however, did not pay the amount in respect of the further increase from Rs.7,500/- to Rs.10,000/-.

61. Mr.Sawant, learned counsel for the respondent has placed reliance on clause 2.27 and submits that consequent to MOU-2000, the petitioner was paid an advance towards the payment of ESI and the petitioner was under an

obligation to reconcile the accounts in view of the Deed of Undertaking of the respondent. He submits that there were various complaints from ONGC, General Kamgar Sanghatana, Mumbai alleging various irregularities in payment. He submits that the petitioner did not make payment of arrears in the presence of the officer of ONGC within 3 days as stipulated. The respondent had addressed a letter dated 16th August 2001 to the petitioner with a request to confirm the total payment made to workmen by return fax. He submits that the petitioner, however, did not submit any wage sheet inspite of repeated reminders. Thus, the respondent had threatened the petitioner to levy penalty for such non-compliance. He submits that thereafter the petitioner though submitted wage sheet, the same had several irregularities such as without EPF numbers, place of posting, lack of witness by ONGC officer etc.

62. It is submitted that though the respondent had paid to the petitioner the net amount of Rs.1,77,75,134/- for disbursement to 228 persons, the petitioner had disbursed an amount of Rs.6,31,197/-. The petitioner was accordingly called upon to justify why the balance amount was not disbursed only to the remaining 6 persons. He submits that though the petitioner had submitted some of the payment sheets, he did not have proper transparency towards payment to the security personnel. He submits that the numbers of personnel eligible for the arrears were not given to the respondent. He submits that the petitioner failed to reconcile the account. The respondent could not release any more payment without reconciling the advance pending for about 7 years.

63. It is submitted that till 2008, the petitioner did not produce any proof of payment. The petitioner had only produced challans. It is submitted by the learned counsel that the petitioner had not disbursed the amount paid to the

petitioner by the respondent in *toto*. He submits that the challans produced by the petitioner did not give details of the employees. Reliance is placed on Section 44 and Form-5 of the Employee's State Insurance Corporation Act, 1948 and submits that the petitioner had not complied with those provisions.

64. In rejoinder, Mr.Naidu, learned counsel for the petitioner submits that various documents relied upon by the respondent in the present proceedings were not considered by the learned arbitrator while rejecting this claim made by the petitioner. He submits that the respondent cannot be allowed to defend such award by relying upon the evidence at this stage which was not considered by the learned arbitrator while rejecting the claim made by the petitioner. He submits that it was not the case of the respondent in the written statement that the petitioner has not given details of the persons to the respondent. The petitioner had produced the original challans before the respondent to prove that the requisite payments were made by the petitioner. He submits that it was not the case of the respondent that the petitioner was not entitled to enhancement. The contract was for payment @4% of the wages which would include the enhanced amount of wages. He submits that the petitioner had not demanded payment of 4% insofar as the claim no.3 is concerned, but demanded payment of 4% on the enhanced wages. Learned arbitrator, however, applied the principles of service tax while dealing with this claim which show non-application of mind on the part of the learned arbitrator.

65. A perusal of the award rendered by the learned arbitrator on this claim indicates that the learned arbitrator has adopted reasoning given by him with regard to service tax while dealing with this claim which is towards payment of ESI. It is held by the learned arbitrator that under the contract, the respondent

was not obliged to bear the said liability i.e. enhanced ESI contribution. In respect of this claim, the respondent has placed reliance on clause 2.27 and contended that any increase above 4% of ESI contribution was to be borne by the petitioner as a contractor and not by the respondent. Learned arbitrator has placed reliance on clause 2.18 and held that under the said provision, there was a table provided containing the rates of payment by the respondent to the petitioner and liability of the respondent towards ESI contribution was fixed @4% only.

66. A comparison of the claim made by the petitioner for service tax and reimbursement of the ESIS dues clearly indicates that both the claims were under different provisions and on different basis. The learned arbitrator has erroneously adopted the reasoning given by him while rejecting this claim with regard to the service tax which shows patent illegality on the face of the award and non application of mind.

67. A perusal of the impugned award indicates that the learned arbitrator has not dealt with the oral as well as documentary evidence led by the parties at all while dealing with this claim. There was no cross-examination of the witness examined by the petitioner on his deposition in paragraphs 6.1, 6.2 and 6.3 of the affidavit of evidence dated 4th September 2009 regarding ESIS payment and the said deposition remained uncontroverted. Though the petitioner had produced all relevant documents/challans to prove payment of ESIS contribution, the learned arbitrator has totally ignored the material and crucial part of the evidence in the impugned award. It was not urged by the respondent before the learned arbitrator that there was no reconciliation of the accounts. Various submissions advanced by the learned counsel for the respondent across the bar in the present proceedings to

justify the finding rendered by the learned arbitrator cannot be considered by this Court at this stage while hearing the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 which submissions and documents were not considered by the learned arbitrator while rejecting the claim made by the petitioner. The learned arbitrator has taken very casual approach while dealing with this claim in the impugned award by not referring to and without dealing with the submissions, pleadings and evidence led by the parties. I am thus not inclined to consider various evidence sought to be relied upon by the learned counsel for the respondent across the bar to justify the conclusion of the learned arbitrator which were not considered by the learned arbitrator. The learned arbitrator ought to have allowed this claim. The award in respect of this claim thus deserves to be set aside and it is ordered accordingly.

Claim no.4 :- For interest on gratuity amount.

68. The petitioner had claimed a sum of Rs.36,46,224/- towards amount of gratuity which was arbitrarily withheld by the respondent. According to the petitioner, the said amount was subsequently released by the respondent. The petitioner had amended their claim before the learned arbitrator and restricted their claim only towards interest. Learned counsel for the petitioner has placed reliance on Section 4 (a) of the Payment of Gratuity Act, 1972. He submits that the respondent had withheld the payment, as according to the respondent, the petitioner did not pay the gratuity amount to some of the employees.

69. During the pendency of the arbitral proceedings, the respondent had deposited the amount towards payment of gratuity to the LIC directly from 8th July 2008. He submits that the petitioner had paid interest to the LIC. It is submitted that the learned arbitrator, however, rejected this claim merely on the

ground that there was no provision in the contract for payment of interest. He submits that this part of the award is contrary to the contract. He submits that interest ought to have been awarded under section 31(7) (a) of the Arbitration Act, since there was no prohibition for making payment of interest under the contract awarded to the petitioner.

70. Mr. Sawant, learned counsel for the respondent, on the other hand, submits that the respondent had withheld the payment as the petitioner did not pay the gratuity amount to some of the employees. The said amount was subsequently released by the respondent directly to the LIC. He submits that the petitioner had not produced any record to show that the petitioner was required to pay any interest to the LIC for the delay in making any payment of gratuity by the petitioner or the respondent, as the case may be. He submits that since the respondent had not withheld the payment of gratuity unreasonably, the petitioner could not make any claim for interest. He submits that even in the notice invoking arbitration agreement annexed at Exhibit 'DDD,' the petitioner had not demanded any payment of interest.

71. Learned counsel for the respondent invited my attention to the letter of the petitioner dated 21st July 2004, Minutes of meeting dated 15th February 2001, letters of the respondent dated 25th June 2004 and 17th October 2006 and it is submitted that various payments were released by the respondent to the petitioner from time to time to enable the petitioner to pay such amount of gratuity to the LIC. He submits that the learned arbitrator has rightly rendered a finding of fact and thus no interference with such finding of fact is permissible under Section 34 of the Arbitration Act.

72. In the rejoinder, Mr.Naidu, learned counsel for the petitioner submits that the petitioner had already deposited the amount with the LIC and placed the statement showing the said payment on record of the arbitral proceedings.

73. My attention is invited to page 1417 of Volume VII in support of the submission that the payments were made by the petitioner to the LIC. He submits that it was the responsibility of the respondent to pay the said amount which was however paid by the petitioner. The respondent only had paid a sum of Rs.6 lacs to the LIC out of the sum of Rs.57 lacs. He submits that the interest has been claimed by the petitioner from January 2003 to 7th August 2008. The entire breakup of the claim for interest is furnished by the petitioner before the learned arbitrator. He submits that fund was created on behalf of the respondent. The petitioner was thus entitled to claim interest. It is submitted that the only reason rendered by the learned arbitrator for rejecting this claim is that the claim was devoid of merits and was outside the scope of the contract which according to the learned counsel shows perversity in the impugned award.

74. A perusal of the award in respect of this claim indicates that the learned arbitrator has rejected this claim only by stating in paragraph 25 of the impugned award that the claim was devoid of merits and particulars and also outside the scope of the contract and thus this claim is rejected on that ground. It is not in dispute that in view of the fact that the respondent had subsequently released the payment of the gratuity amount, the petitioner withdrew its claim of Rs.36,46,224/- towards the gratuity amount and restricted its claim only towards the interest. The case of the petitioner was that the respondents had withheld the payment due to the petitioner whereas it was the case of the respondent that since the petitioner did not pay the gratuity amount to some of the employees, the

respondent had withheld the said amount for some time and thereafter deposited the said amount directly to the LIC. It was the case of the petitioner that the petitioner had already deposited the amount with the LIC and had placed the statement showing the said payment on record of the arbitral proceedings. It was also the case of the petitioner that out of the sum of Rs.57 lacs, the respondents only had paid the sum of Rs.6 lacs to the LIC.

75. Though the petitioner had produced various documents in support of its claim for interest, the learned arbitrator has rejected this claim simplicitor on the ground that the claim was devoid of merits and particulars and also outside the scope of the contract. A perusal of the award indicates that the learned arbitrator had not dealt with the pleadings and submissions made by the petitioner at all and has rejected the claim without any reasons. Insofar as the conclusion of the learned arbitrator that the claim was outside the scope of the contract is concerned, it is not the case of the respondent that the claim for interest was prohibited under any of the provisions of the contract entered into between the parties. The award thus shows perversity on the face of record. Under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, the learned arbitrator is empowered to award 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 unless otherwise agreed by the parties. Admittedly, there was no prohibition under any of the provisions of the contract for payment of interest and thus the learned arbitrator could not have rejected the claim of the interest on the ground that the said claim is outside the scope of the contract under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 and this part of the award deserves to be set aside and it is ordered accordingly.

76. Since the learned arbitrator has rejected the claim without any reasons and contrary to Section 31(7)(a) and contrary to the terms of the contract, the other submissions made by both the parties on merits of the claim cannot be gone into by this court.

Claim No.5 :- Arrears of service charges.

77. Under this claim, the petitioner had claimed arrears of service charges on MOU arrears as per MOU-2000 in the sum of Rs.19,17,023.26 for the period upto 31st December 2000. In paragraph 2(e) of the Office Order dated 29th May 2000 issued by the respondent, it was provided that the concerned contractor shall also be paid an amount equivalent to 0.25% of the total arrears amount paid by the respondent to the contractor to meet extra establishment costs. The said payment was to be one time measure. Learned counsel for the petitioner submits that the respondent only paid 0.25% out of the arrears of service charges and the petitioner accepted the said amount under protest and without prejudice to their rights to receive balance of 9.75% of the arrears of the charges from the respondent as per MOU-2000 dated 29th December 2000.

78. Mr.Naidu, learned counsel for the petitioner invited my attention to letter dated 12th June 2001 by which the petitioner has brought to the notice of the respondent clause 2.12(a) of the Agreement dated 14th November 1995 which, according to the petitioner, provided for payment of the service charges @10%. The petitioner contended that they were not agreeable to accept 0.25% of the arrears of the service charges and the petitioner was entitled to receive service charges @10%.

79. The respondent by letter dated 26th June 2001 addressed to the petitioner

admitted that the arrears of 5% service tax and 10% service charge arising out of the MOU-2000 w.e.f. 1st January 1998 were not paid inspite of repeated reminders. The respondent stated that the issue inter alia for payment of 10% service charges would be taken up with their Legal and Finance Department and the same would take some time. Mr.Naidu, learned counsel for the petitioner submits that though the respondent had admitted their liability to pay 10% service charges, the respondent wrongfully interpreted their own Office Order dated 29th May 2000 and wrongfully withheld an amount of Rs.19,17,023.26 towards the service charges on MOU arrears @9.75% payable under the agreement dated 14th November 1995.

80. Mr.Sawant, learned counsel for the respondent, on the other hand, submits that the petitioner did not give any particulars of claim at Exhibit 'EEE' and the same was without any breakup. He submits that the respondent had already paid administrative costs @0.25% on the total arrears amount. He submits that the respondent had not agreed to pay any service charges to the petitioner. The payment @10% towards service charges was only on the payment mentioned on page 56. He submits that the service charges were not payable on the entire payment of arrears but only on the amount payable as per the Office Order. He submits that arrears were not part of the amount payable at page 56. There was no revision of the contract. He submits that reliance placed on the Office Order which provided 0.25% service charges was on payment of arrears and not on regular bills.

81. Learned counsel for the respondent placed reliance on letter dated 12th June 2001 from the petitioner to the respondent, letter dated 26th June 2001 from the respondent to the petitioner and dated 27th June 2001 from the petitioner to

the respondent and would submit that no payment as demanded by the petitioner was due and payable by the respondent under any provision of the contract. Learned counsel also placed reliance on the evidence on page nos.603 and 604 and in particular answer to question nos.176 to 179 of the witness examined by the petitioner and submits that the petitioner did not prove their entitlement of the service charges @10%.

82. It is submitted that the learned arbitrator has rightly accepted that clause 2.12 did not apply and rightly applied the reasoning rendered by the learned arbitrator while dealing with this claim for service tax. He submits that the same logic as of service tax would be applied to the claim for service charges. He submits that in any event, the interpretation of the learned arbitrator on the provision of the contract is a possible interpretation and cannot be substituted by another interpretation by this Court under Section 34 of the Arbitration Act.

83. In rejoinder, Mr.Naidu, learned counsel for the petitioner submits that the learned arbitrator has not rejected the claim of the petitioner under clause 2.12 of the contract which was relied upon by the respondent. He submits that the agreement entered into between the respondent being an employee and the Union under Section 18(3) of the Industrial Disputes Act, 1947 was binding on the respondent. He submits that the arguments advanced by the petitioner were not considered by the learned arbitrator at all. He submits that the submissions now made across the bar by the respondent were also not made before the learned arbitrator. He submits that no arguments advanced by the respondent across the bar and the reliance placed on the documents in the present proceedings were either referred to or dealt with by the learned arbitrator in the impugned award and thus can not be considered for the first time in this proceeding.

84. A perusal of the impugned award on this claim clearly indicates that the learned arbitrator has rejected this claim by adopting reasoning given by the learned arbitrator for claim no.1 which was in respect of service tax. Learned arbitrator rejected this claim also by placing reliance on the judgment in the case of ***Hindustan Petroleum Private Limited*** *(supra)*.

85. A perusal of claim no.1 made by the petitioner before the learned arbitrator clearly indicates that the said claim was based on the premise that the Central Government had imposed service tax on security service for the first time w.e.f 16th October, 1998 whereas the contract awarded to the petitioner was dated 14th November, 1995. The petitioner had applied for reimbursement of service tax on the ground that the said levy was imposed by the Central Government on security service after award of the contract. However insofar as claim no.5 is concerned, the said claim was based on the office order dated 29th May, 2000 and in particular under para 2(e) thereof on the ground that the respondent had only paid service charges on MOU arrears at 0.25% though the respondent was liable to pay the same at the rate of 10% of the MOU arrears.

86. A perusal of the pleadings filed by the parties clearly indicates that both the claims were totally different and not at all connected with each other. The judgment of this court in case of Hindustan Petroleum Ltd. relied upon by the learned arbitrator while rejecting claim no.5 is totally misplaced. The learned arbitrator has not dealt with the submission made by the petitioner at all while rejecting this claim and has simplicitor adopted the reasoning given by the learned arbitrator while deciding claim no.1 which was altogether a different claim based on different submission and evidence. The award shows total non application of

mind on the part of the arbitrator insofar as this claim is concerned. The award rejecting this claim thus deserves to be set aside. Since the claim for principle amount is rejected by the learned arbitrator which shows patent illegality claim for interest rejected by the learned arbitrator on the said claim is also set aside.

Claim Nos. 6 & 7 :- ***Security charges in respect of security service at Dharavi Complex of the respondent and service tax thereon :-***

87. Insofar as the security charges claimed by the petitioner is concerned, the petitioner had demanded a sum of Rs.16,97,923/- in respect of the security personnel alleged to have been deployed by the petitioner at Dharavi Complex of the respondent. Learned counsel for the petitioner invited my attention to the letter dated 8th December 1999 from the petitioner to the respondent, letter dated 15th February 2000 from the respondent to the security section of the respondent, letter dated 21st December 1999 from the respondent to the Sub-Engineer, Construction Division of the respondent, letter dated 16th February 2001 from the respondent to the petitioner, letter dated 17th February 2001 from the petitioner to the respondent, various paragraphs of the written statement filed by the respondent, affidavit of evidence of the respondent and the affidavit of evidence of the witnesses examined by the respondent, cross-examination of the said witnesses and more particularly reply to question nos.193 to 199.

88. Relying upon the aforesaid documents, pleadings and oral evidence, it is submitted by the learned counsel for the petitioner that the petitioner had admittedly rendered services by providing security at Dharavi Complex of the respondent on their instructions which services were accepted by the respondent and thus the respondent was liable to make payment of security charges to the

petitioner for availing such additional services. He submits that the conclusion drawn by the learned arbitrator in the impugned award is contrary to clause 2.1 of the contract. He submits that the respondent has never raised any plea that the petitioner had deployed the security at Dharavi Complex of the respondent without instructions of the respondent in writing. He submits that without instructions of the respondent in writing, the petitioner could not have deployed such security. The respondent has never raised any objection when the petitioner deployed such security at Dharavi Complex of the respondent. He submits that the learned arbitrator has decided contrary to the documents, pleadings and also the contract entered into between the parties. He submits that the learned arbitrator has totally overlooked the oral evidence led by the petitioner and the evidence of the respondent in the impugned award.

89. Learned counsel for the petitioner placed reliance on the judgment of this Court in the case of ***Jagmohan Singh Gujral Vs. Satish Ashok Sabnis & Anr.,*** reported in ***2004 (1) Bom. C.R. 307*** and would submit that since the learned arbitrator did not give any reasons based on the evidence and material on record, the impugned award deserves to be set aside. Learned counsel also placed reliance on the judgment of the Calcutta High Court in the case of ***Great Eastern Shipping Co. Ltd. Vs. Union of India,*** reported in ***AIR 1971 Calcutta 150.*** He submits that since the view of the learned arbitrator is neither plausible nor possible and is based on non-consideration of the material produced by the petitioner, the award is perverse and this Court can interfere with such perverse finding rendered by the learned arbitrator. He submits that though the judgment of this Court in the case of ***Hindustan Petroleum Private Limited*** *(supra)* was not at all relevant, the learned arbitrator has still relied upon the said judgment which shows non-application of mind on the part of the learned arbitrator.

90. Mr. Sawant, learned counsel for the respondent, on the other hand, submits that the petitioner did not produce any instructions on record issued by the respondent for deployment of security guard at Dharavi Complex. He submits that the respondent had already denied any such verbal order alleged to have been issued by the respondent in the written statement. He submits that it was not the case of the petitioner that Mr.O.P.Arya, General Manager of the respondent was authorised to place any verbal order upon the petitioner for providing additional security guard at Dharavi Complex. Learned counsel also invited my attention to letter dated 8th December 1999 from the petitioner to the respondent, letter dated 21st December 1999 from the respondent to the Sub-Engineer of the respondent, letter dated 15th February 2000 from the respondent to the Deputy General Manager, Security Section and copy of the letter dated 16th February 2001 from the respondent to the petitioner directing the petitioner to remove the person who was deployed without work order.

91. Learned counsel for the respondent submits that since the respondent had already denied their liability immediately upon the claim raised by the petitioner and still if the petitioner continued their security guard, if any, the respondent was not liable to make any payment to the petitioner under Section 70 of the Contract Act, 1872 or under any provision of the contract entered into between the parties. He submits that the learned arbitrator has also considered the oral evidence led by the parties in the impugned award and has rightly rejected the claim made by the petitioner on the ground that the same was not proved. Learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Hindustan Tea Co.Vs. K.Sashikant Co. & Anr.,*** reported in ***AIR 1987 SC 81*** and submits that the learned arbitrator having interpreted the terms of the

agreement being the final authority, his interpretation cannot be substituted by this Court.

92. In rejoinder, Mr.Naidu, learned counsel for the petitioner submits that since it was the case of the respondent that the respondent had withdrawn deployment of the security guard from Dharavi site, it pre-supposes initial deployment of such security guard by the petitioner at their site. Learned counsel invited my attention to the letter dated 15th February 2000 from the respondent to the petitioner asking the petitioner to withdraw the security guard from the said site. He submits that the said document was admitted in evidence since the witness examined by the respondent, who was an author of the said document, had admitted the said document. The said document was marked as Exhibit 'C-17.' He submits that the impugned award is contrary to the terms of the agreement and the evidence led by the petitioner. The award shows perversity on the face of the award and deserves to be set aside.

93. A perusal of the award indicates that the learned arbitrator has referred to relevant part of the evidence in the impugned award and has held that the petitioner had not proved any direction issued by the respondent to the petitioner for deployment of the security personnel. Relying on clause 2.1 of the contract, it is held that there was no merit in the said claim. Insofar as the claim no.7 is concerned, the learned arbitrator has rejected the said claim in view of the finding on claim no.6.

94. A perusal of the record indicates that it was the case of the petitioner that the petitioner had deployed additional security guards at Dharavi Complex of the respondent on the instructions of the respondent. It was also the case of the

petitioner that since the respondent themselves had instructed the petitioner to withdraw such security guards, it was clear that the petitioner had deployed such security guards at Dharavi on oral instructions of the respondent.

95. A perusal of the written statement filed by the respondent and also the letters addressed by the respondent clearly indicates that the respondent had directed the petitioner to remove the security guards deployed at Dharavi on the grounds that the said deployment was without any instructions from the respondent. The respondent had also raised this plea specifically in the written statement filed before the learned arbitrator. Though the petitioner had examined witnesses, the petitioner could not prove any such oral instructions issued by the respondent to deploy the additional security guards at Dharavi. In my view the onus was on the petitioner to prove that the respondent had issued such oral instructions to the petitioner to deploy security guards at Dharavi and the petitioner having failed to prove such alleged oral instructions, the respondent was not liable to make any payment to the petitioner even under section 70 of the Contract Act, 1872 or under any provisions of the contract entered into between the parties.

96. A perusal of the award indicates that the learned arbitrator has rendered a finding of fact that the petitioner had not proved there being any directions issued by the respondent directing the deployment of the security personam as per clause 2.1 of the contract. In my view the interpretation of clause 2.1 by the learned arbitrator while rejecting this claim is a possible interpretation and thus such interpretation cannot be substituted by another interpretation by this court under section 34 of the Arbitration Act. The findings rendered by the learned arbitrator in the impugned award insofar this claim is concerned, is based on the pleadings, after appreciation of the oral evidence led by the parties and also the submissions

advanced by both parties. Such findings of facts is not perverse and thus cannot be interfered with by this court under section 34 of the Arbitration Act. The arbitral award in respect of this claim is accordingly upheld. Judgment of this court in case of ***Jagmohan Singh*** (supra) relied upon by the petitioner thus would not assist the case of the petitioner.

97. Insofar as claim no.7 is concerned, the learned arbitrator has rejected the said claim in view of the findings of claim no.6. In my view, since the findings and conclusions of the learned arbitrator in respect of the claim no.6 is upheld, the findings and conclusions in respect of claim no.7 of the learned arbitrator also is required to be upheld. The challenge to the rejection of claim nos. 6 and 7 are accordingly rejected.

Claim for interest and costs :-

98. Learned counsel for the petitioner submits that the learned arbitrator ought to have allowed all the claims made by the petitioner with interest and arbitral costs. Learned counsel for the respondent, on the other hand, submits that the learned arbitrator has rightly rejected all the claims made by the petitioner and thus, there is no question of awarding any interest in favour of the petitioner. He submits that the learned arbitrator has directed both the parties to bear their own arbitral costs and no interference with that part of the award is warranted. In my view, the claim for interest in respect of claim nos. 1 to 5 is wrongly rejected by the learned arbitrator and similarly in respect of arbitration costs also.

Issue of Limitation.

99. Insofar as the issue of limitation is concerned, the learned arbitrator has not dealt with the issue of limitation raised by the respondent in view of the finding recorded in the impugned award on the other main issues and thus I have not heard

the learned counsel for the respondent in support of his plea that the claim made by the petitioner was even otherwise barred by law of limitation.

100. I, therefore, pass the following order:-

(a) The award in respect of the Claim Nos.6 and 7 is upheld;

(b) The award rejecting the remaining claims is set aside;

(c) The petition is disposed of in the aforesaid terms;

(d) There shall be no order as to costs.

[R.D. DHANUKA, J.]