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

COMMERCIAL ARBITRATION PETITION NO.394 OF 2023

Thermax Limited …Petitioner

Versus

Rashtriya Chemicals & Fertilizers Ltd., …Respondent

WITH

INTERIM APPLICATION (L) NO. 23263 OF 2023
IN
COMMERCIAL ARBITRATION PETITION NO.394 OF 2023

Mr. Janak Dwarkadas, Senior Counsel a/w Mr. Mustafa Doctor, Senior Counsel a/w Mr. Aditya Thakkar, Mr. R. Sudhinder, Mr. Ranjit Shetty, Mr. Rahul Dev & Ms. Monika Vyas i/b Argus Partner for the Petitioner.

Mr. Shyam Mehta, Senior Counsel a/w Mr. Aditya Bapat, Mr. Mac. C. Bodhanwala, Mr. Sheraj M. Bodhanwalla, Ms. Sayali Puri, Mr. Akash Singh and Mr. Shreyas Thakur i/b M.S. Bodhanwala & Co., for the Respondent.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 30th JUNE 2025.

PRONOUNCED ON : 9th DECEMBER 2025.

JUDGMENT:

1. By this Commercial Arbitration Petition, the Petitioner has challenged the Award dated 5th June, 2023 ("**the said/subject Award**") passed by the learned Sole Arbitrator, under Section 34 of the Arbitration & Conciliation Act, 1996 ("**the Arbitration Act**").

2. The relevant facts are stated under:

(i) The Petitioner – Thermax Limited (referred to as "**Thermax**") is an Indian industrial company offering engineering, procurement and commissioning services and sustainable solutions in Energy and Environment domain. The Respondent - Rashtriya Chemicals & Fertilizers Limited (referred to as "**RCF**") is a commercial public sector undertaking engaged in the manufacturing and marketing of nitrogenous, phosphatic and potassic fertilizers as well as a variety of industrial chemical products. For the aforesaid manufacturing of fertilizers, among others, electricity is one of the utility costs of RCF.

(ii) RCF issued a Notice Inviting Tender ("**NIT**") on 19th January, 2015 which invited eligible bidders to submit bids for setting up of a 2X25 MW Gas Turbine Generators ("**GTGs**") and 2X100 PH HRSG along with all Balance of Plant, at RCF's factory at Thal, Maharashtra as per detailed scope laid down in the NIT on a Lump Sum Turnkey basis. Under the NIT, Siemens was one of four approved vendors (the other approved GT manufacturers being BHEL, GE Power, Hitachi) specified by RCF. Thermax decided to participate in the bid with Siemen's manufactured GTGs.

(iii) Thermax was the successful bidder for the same and RCF accordingly issued a Letter of Intent ("**LOI**") on 12th February and 25th February, 2016 in favour of Thermax for award of contract for the said scope of work.

(iv) A Statement of Agreed Variation was executed between the parties on 26th February, 2016 whereby

it was agreed that RCF would operate the plant only after successful completion of the Performance Guarantee Test ("**PG Test**").

(v) The Contract was executed between Thermax and RCF on 3rd March, 2016 for a total Contract price of Rs.3,53,08,99,313/- (Rupees three hundred and fifty three crores eight lakhs ninety nine thousand three hundred and thirteen only) out of which the Contract price for supply of GTGs was approximately Rs.106 Crores. The contract which was executed between the parties stipulated *inter alia* that RCF upon compliance of several conditions by Thermax would issue a Preliminary Acceptance Certificate ("**PAC"**) *(Clause 3(50) of GCC)*; 'Taking over' shall mean RCF taking possession and use of the Plant following issuance of PAC *(Clause 3(63) of GCC)*; PAC would be followed by a Defect Liability Period of one year *(Clause 17 of SCC)* and post the Defect Liability Period a Final Acceptance Certificate would then be issued by RCF *(Clause 19.1 of SCC)*

and Payments by RCF and Warranties by Thermax were linked to these periods under the Contract.

(vi) As per the baseline schedule, it was RCF's obligation to complete the Main steam line by 31st August, 2017 and Thermax had to complete the PG Tests by 02nd December, 2017. It is pertinent to note that RCF could not complete the main steam line by the original timeline of 31st August, 2017, which, in turn, delayed the PG Tests.

(vii) Thermax imported the GTGs from Siemens and supplied the same to RCF. The executives of Siemens were also directly involved in the erection, installation and commissioning of the Plant.

(viii) On 28th February 2018 and 27th March 2018 the sustained load throw off tests in respect of both GTGs were conducted. It is pertinent to note that from March 2018 onwards, the primary source of power for the manufacturing activity at RCF's plant were the 2 GTGs.

(ix) RCF deducted Mutually Agreed Damages ("**MAD**") amounting to Rs.19,56,85,716/- vide its Debit Note No. LD130080123 on 30th March, 2018.

(x) The PG Tests were successfully completed for GTG-1 and GTG-2 on 24th April, 2018 and 10th May, 2018 respectively. RCF vide its email dated 10th May, 2018 congratulated Thermax for successful completion of the PG Test in respect of GTG-2.

(xi) Thermax informed RCF that it will de-mobilize its manpower at the site after 11th May 2018 vide Email dated 10th May, 2018.

(xii) After the successful completion of PG Tests in respect of GTG-2 and all guarantees being met, on 14th May, 2018 to 23rd May, 2018, RCF demanded that the PG Test be re-conducted. Though according to Thermax there was no requirement to conduct another PG Test on the basis of the issues raised by RCF, Thermax ultimately agreed to do a re-test.

(xiii) It is Thermax's case that from the correspondences available on record i.e. from May to September 2018, the GTGs were under unilateral control of RCF.

(xiv) Thermax though maintaining that no fresh PG Test was required for GTG 2, successfully conducted the re-test for GTG 2 in October, 2018.

(xv) During the period 22nd February, 2019 to 8th March, 2019 there were multiple alarms in the control systems of both GTGs which had been ignored by RCF. It is Thermax's case that RCF did not inform either Thermax or Siemens about the same.

(xvi) Since RCF was complaining about the efficiency of GTGs having dropped, Siemens i.e. Original Equipment Manufacturer ("**OEM**") was contacted and Siemens advised RCF to immediately stop the units and carry out internal washing of the compressor since major amount of dirt had entered the compressor and accumulated on the blades.

(xvii) In view of RCF not immediately carrying out Siemens instructions, Siemens sent an official letter under cover of email dated 22nd February, 2019 calling upon RCF to shutdown GTGs immediately and carryout immediate internal washing of the compressor and also after inspecting the filters to share pictures of the same with Siemens.

(xviii) Siemens, by its e-mail dated 11th March 2019, enquired with Thermax whether any air intake filters had been changed by RCF.

(xix) RCF vide email dated 12th March, 2019 conveyed to Siemens that they had not changed any air intake filters till date.

(xx) The PAC was issued by RCF on 15th March, 2019 with effect from 7th March, 2019.

(xxi) After being operational for 11 months, GTG-2 broke down on 20th March, 2019.

(xxii) Siemens vide email dated 21st March, 2019 at 13:27

hours informed Thermax and RCF to stop the unit (GTG 1) immediately and internally wash the compressor of GTG-1. It is an admitted position that RCF did not comply with these directions of Siemens. After being operational for 11 months, GTG - 1 broke down on 22nd March, 2019.

(xxiii) It is the contention of RCF that the breakdown had occurred on account of the GTGs being defective and that since the PAC had been issued only on 15th March, 2019, in terms of the contract, Thermax was liable to repair the machines. RCF sought to invoke the 'defect liability' clause under the Contract claiming that failure of GTGs was covered by supplier's warranty undertaking. Thermax disputed that it was responsible for the breakdown of GTGs, *inter alia* since RCF had been commercially operating the GTGs since March 2018. This was recorded in the emails dated 13th May, 2019 and 18th May, 2019 exchanged between RCF and Thermax.

(xxiv) Between May and June 2019 discussions ensued between the Parties to determine the exact quantum and value of repair and the time period required for the repair and restoration. Thermax vide email dated 24th May, 2019 submitted a proposal to Siemens setting a way forward for repair and restoration of the GTGs under which liability for cost of repairs was contemplated to be apportioned between the parties based upon the findings of the Final Root Cause Analysis Report which was to be conducted by Siemens.

(xxv) Siemens submitted the Final Root Cause Analysis Report ("**Final RCA**") on 24th June, 2019 *inter alia* stating that the root cause of the compressor damage was the fouling of the compressors *i.e.* dirt was accumulated on the blades of the compressor. As per Final RCA, the filters let a significant amount of dirt enter the compressors causing the compressor to become significantly dirty. The reason was that the filters were not replaced on time. It

was also observed that if a compressor wash had been performed, it was likely that the compressor damage would have never occurred.

(xxvi) An agreement titled 'Notice to Proceed' was entered into between Thermax and RCF on 2nd July, 2019. This Agreement specified, *inter alia*, the manner in which the repairs would be conducted and also provided that the Notice to Proceed was the final expression and a complete understanding between the parties with respect to the warranty claim of repair and restoration of GTGs.

(xxvii) RCF ordered a new Gas Generator (GG) from Siemens directly on 6th July, 2019, in order to restart GTG-2. The GTG-2 was thus made operational from August 2019.

(xxviii) RCF invoked arbitration on 5th November, 2019 claiming *inter alia*, that - the GTGs that had been supplied were defective and hence, Thermax was liable to repair the machines at its cost. RCF has

claimed damages under several heads including a claim of Rs.173.72 Crores for loss allegedly suffered on account of additional expenditure on power for the period 1st April 2019 to 30th November 2020 on account of non-availability of the GTGs. This was on the premise that since the PAC was issued on 15th March, 2019 with effect from 7th March 2019, all defaults prior thereto would be at the sole responsibility of Thermax.

(xxix) In the arbitration proceedings, Thermax preferred a Counter Claim for refund of MAD deducted by RCF to the tune of Rs.19,56,85,716/-; for charges on delayed release of bank guarantee (bank charges amounting to Rs.7,06,000/-) furnished by Thermax; for compensation and additional costs amounting to Rs.2.15 crores incurred for the period during which RCF was operating the plant without "Taking Over" the plant as per the Contract; for refund of 2% retention money withheld by RCF which was payable at the time of final bill; and for release of

fresh bank guarantee furnished by Thermax amounting to 5% of the contract value.

(xxx) The learned Arbitrator framed a total of 16 issues. The challenge to the impugned Award is on Issue Nos. 1, 2 and 3 which deal with the issue of defect in the GTGs supplied and who is responsible for repairs and rectification of GTGs after breakdown; Issue No.4 which deals with the issue of additional expenditure on power awarded as damages; and Issue No.10 which deals with the refund of MAD.

3. Mr. Janak Dwarkadas, learned Senior Counsel appearing for the Petitioner has submitted that there was no defect in the GTGs which had been supplied by Thermax to RCF. He has submitted that the reason for breakdown of the GTGs was on account of faulty handling of the GTGs by RCF. He has submitted that Thermax has placed on record several correspondence exchanged between Siemens, Thermax and RCF between February 2019 till the ultimate breakdown of the GTGs i.e. 20th March 2019 and 22nd March 2019 respectively.

4. Mr. Dwarkadas has submitted that the Final RCA Report prepared by Siemens has opined that the cause for the breakdown of GTGs was faulty operation and failure on the part of RCF to comply with the O&M Manual, *inter alia* as it had ignored the air intake filter alarms which numbered 269 for GTG 1 and 52 for GTG-2. The Final RCA Report has also found that there was a failure on the part of RCF to inspect air intake for combustion air on a monthly basis, failed to evaluate the performance of the compressor on a weekly basis, failed to adhere to the express instructions of Siemens etc.

5. Mr. Dwarkadas has submitted that RCF in its Reply to Thermax's Counter Claim had for the first time referred to the Report dated 1st September 2019 of Shakti (as an expert) to contend that the cause for breakdown of the GTGs was the Rubbing Theory. As per Rubbing Theory, there were heavy rubs on the compressor metal blades and casings which would have induced high fatigue in the metal blades thereby causing cracks in some of the blades. Over a period, these cracks propagated causing the metal blades to fail and break. The Shakti Report has sought to rely upon a Report of Metallurgical Report namely TCR Advanced Engineering

Private Limited, Vadodara considering that this was metal blades. He has submitted that though the author of the Shakti Report was produced for cross examination, RCF failed to produce the author of the Metallurgical Report for cross examination. He has submitted that in view thereof, the Shakti Report is based on hearsay evidence and remained 'not proved'. He has submitted that this being the only evidence that RCF produced in order to discharge the burden of proving Issue No. 1 viz. Whether the GTGs supplied to the Claimant were defective in nature, which evidence could not be tested by cross examination, it becomes entirely worthless.

6. Mr. Dwarkadas has submitted that Thermax at the stage of oral as well as written submissions, objected to the evidence of one Mr. Sudhakar Jammula (**CW-3**), Director of Shakti, who was a co-author of Shakti Report being taken into consideration on the ground that the Report is based almost entirely on a Metallurgical Report prepared by some other agency, the author of which never entered the box for cross examination. He has submitted that on this objection being raised in the course of oral arguments, the Counsel on behalf of RCF abandoned relying upon the Shakti Report. He has placed reliance upon Paragraphs 5.8 to 5.12 of Synopsis of Written

Submission filed on behalf of Thermax.

7. Mr. Dwarkadas has submitted that the learned Arbitrator has not rendered any finding on whether the Shakti Report has been proved by RCF. He has submitted that it is trite law that principles of the Evidence Act apply to arbitral proceedings. Further, it is a trite law that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. The learned Arbitrator, without giving any ruling/finding on the proof and veracity of Shakti Report has proceeded on a completely alternate basis by observing in Paragraph 49 that "*Even if we proceed entirely on the basis of the RCAs of Siemens and RINA report, there were defects in GTGs installed by the Respondent and supplied by Siemens…"*

8. Mr. Dwarkadas has submitted that the learned Arbitrator in so finding failed to take into account the contrary evidence led in by Thermax in the form of Final RCA and RINA Report wherein the experts had categorically stated there is no evidence in support of the conclusion that rubbing between the blades and the

casing caused initiation of cracks.

9. Mr. Dwarkadas has referred to the evidence of Michael Wood (**RW-3**) who has commented on the Shakti Report and disputed its contents and opined it as unreliable. He has submitted that RW–3 was extensively cross examined by RCF with regard to aforesaid conclusion reached by him and this conclusion remains unshaken.

10. Mr. Dwarkadas has submitted that Issue No.1 ought to have been decided against RCF, as it had failed to prove the Expert's Report and / or abandoned the same. He has submitted that if Issue No. 1 were to be decided against RCF, Issue Nos. 2 and 3 would also have to be decided in the negative. Issue No.2 being *"Whether the breakdown of the GTGs is covered under the defect liability and warranty clauses of the contract?"* and Issue No.3 "*Whether the Claimant is entitled to a declaration that the entire cost of repair and rectification of the GTGs is to be borne by the Respondent?".*

11. Mr. Dwarkadas has submitted that the learned Arbitrator has relied upon an admission in the Final RCA by Siemens that the Compressor Malfunction Alarm was 'configured incorrectly' and therefore it did not raise the required alarm. The learned

Arbitrator has further held that in view of the incorrect configuration of the Compressor Malfunction Alarm, the recommendation made in the Final RCA for more frequent washing of the dirt from the compressor blades to prevent the breakdown of GTGs could not be accepted.

12. Mr. Dwarkadas has submitted that the learned Arbitrator has in rendering the above findings, overlooked and not considered the most material admitted facts and evidence available on the record. He has submitted that the admitted/uncontroverted evidence on record was that air intake filters were the first line of defence to protect the compressor from any dirt; the function or purpose of the filters was to prevent the dirt to pass through and settle on the compressor blades; the Filter Operation and Maintenance manual (**O&M**) requires a periodic checking of the filters; there were separate and independent alarms system called the 'Deviation Air Intake Filter Differential Pressure' and 'DP Air Intake Filter' ("**Filter Alarms**"); and the O&M manual provided for a fault procedure for the actions to be taken *inter alia* in the event of the Filter Alarms going off, which has also been extracted in the Final RCA.

13. Mr. Dwarkadas has submitted that admittedly, between 20th February, 2019 to 22nd March, 2019, when the GTGs broke down, there were 269 Filter Alarms triggered for GTG -1 and 52 Filter Alarms triggered for GTG 2. He has placed reliance upon Appendix 1 and 2 of Siemens Final RCA in this context. He has submitted that the correspondence shows that though Siemens had specifically requested RCF to inspect the filters and send photos of the same, RCF never provided any pictures to Thermax/Siemens.

14. Mr. Dwarkadas has submitted that RCF had admitted that they had not changed any air intake filters till date. Despite numerous repeated warnings from the Filter Alarms which were admittedly noticed by RCF, RCF did not either report this to Thermax/Siemens nor took any action as per the O&M manual to change the filters and merely gave a perfunctory explanation for not changing the filters as per the O&M manual.

15. Mr. Dwarkadas has submitted that it is evident from the Final RCA that real cause for accumulation of dirt on blades of compressor was that the filters were not changed in time. The conclusion from the Final RCA is that breakdown could have been

avoided by washing the dirt on the compressor blades in time.

16. Mr. Dwarkadas has submitted that the finding of the learned Arbitrator, in Paragraph 39 of the Impugned Award, to the effect that the compressor malfunction alarm being configured incorrectly did not put RCF to notice of the accumulation of the dirt on the compressor blades is only a secondary fact in as much as it completely fails to consider and overlooks the fact that air intake filter alarms are the primary alert mechanism to indicate the problem in filtration and the condition of the filters. These alarms admittedly were triggered on multiple occasions.

17. Mr. Dwarkadas has placed reliance upon the evidence of Roger Ahlin (**RW–2**), Product Owner of SGT-700 at Siemens Energy AB, Sweden who had the overall responsibility for the GTGs during their entire lifecycle. He was also a member of the review team for the RCA which finally approved the Final RCA.

18. Mr. Dwarkadas has submitted that the evidence of Roger Ahlin (RW-2) remains unimpeached/unchallenged. The learned Arbitrator has not even adverted to the said evidence, although, it has been the case of Thermax, that the Filter Alarms being the primary

alert mechanism to indicate the problem in filtration and the condition of the filters, RCF had not taken requisite steps, either for preventive maintenance or remedial action.

19. Mr. Dwarkadas has submitted that RW-2 has given evidence that under the O&M manual, RCF was required to periodically inspect the filters as well as monitor the compressor efficiency. According to RW-2, the reason for the breakdown of the GTGs was the failure on part of RCF to abide by the requirements of O&M manual.

20. Mr. Dwarkadas has submitted that it is apparent from the evidence on record that RCF's case is that the frequency with which the air intake filter alarms went off were for short durations and was activated only for a few seconds after which it got normalized, no action was warranted. This is evident from the extract of the Evidence Affidavit of R.P. Jawale (CW-1). Accordingly, the learned Arbitrator was required to evaluate the evidence led by witnesses of RCF as well as Thermax and come to a conclusion that which of the two was believable/acceptable with reasons thereof. He has submitted that what the learned Arbitrator has done instead is to

jettison the evidence led by RCF's witness as well as evidence led by the expert witness of Thermax and arrive at a perverse conclusion that on a reading of Clause 14.1 of the Contract, it was the duty of Thermax to have inspected the atmospheric conditions at the site prior to supply of GTGs.

21. Mr. Dwarkadas has submitted that it was incumbent upon the learned Arbitrator to have examined/evaluated the evidence on the Filter Alarms and the conduct of RCF and give a finding thereon before deciding on the aspect of Compressor Malfunction Alarm.

22. Mr. Dwarkadas has submitted that although Thermax had placed the above facts in its Written Submissions (filed prior to final hearing) as well as Synopsis of Submissions (filed after final hearing) before the learned Arbitrator, the Learned Arbitrator has not considered the submissions and rendered no finding in respect thereof.

23. Mr. Dwarkadas has submitted that the findings of the learned Arbitrator on (i) filters of requisite capacity were not installed – which defect had a direct connection with breakdown of the

compressor and, (ii) compressor malfunction alarm was configured incorrectly and hence, RCF cannot be blamed for not washing the compressor; are perverse and patently illegal.

24. Mr. Dwarkadas has submitted that instead of holding that the evidence on record could lead to one and only one conclusion namely, that the breakdown occurred on account of RCF's failure to maintain and operate the GTGs as required by the O&M manual, the learned Arbitrator has held Thermax liable for the breakdown on a simplistic finding based on a provision in the contract, i.e. definition of 'Taking over' under Clause 3(63) of General Conditions of Contract ("**GCC**") by holding that since the PAC was issued on 15th March, 2019 w.e.f 7th March 2019, Thermax was responsible for all acts prior thereto. He has submitted that the entire record before the learned Arbitrator has been ignored/overlooked.

25. Mr. Dwarkadas has submitted that Thermax, relying on the evidence on record, had contended before the learned Arbitrator that the Contract as understood and as performed by parties led to only one interpretation viz. RCF had taken over the plant and was responsible for the breakdown. It was submitted before the learned

Arbitrator that RCF by its conduct did not wait for PAC for taking over the Plant and rendered the provision qua issuance of a PAC completely irrelevant, otiose and redundant. He has relied upon Paragraph 4.10 to 4.16 of the Synopsis of Submissions in this context.

26. Mr. Dwarkadas has submitted that the learned Arbitrator without considering the effect of these contentions/arguments and the incontrovertible evidence on record, negates their relevance by merely relying on the Contract and holding in Paragraph 34 of the Award that "*it is not necessary to go into the details of the emails exchanged between the parties when the terms of the contract are clear and responsibility of the Respondent continues till the issuance of PAC (Preliminary Acceptance Certificate) …*".

27. Mr. Dwarkadas has submitted that this finding of the learned Arbitrator is completely circuitous, perverse and patently illegal in as much as the learned Arbitrator had completely disregarded the entire evidence on record regarding the actual facts and commercial realities in the performance of the Contract.

28. Mr. Dwarkadas has placed reliance upon the relevant clauses of the GCC. He has relied upon Clause 8 of the GCC which provides that commercial use shall mean that use of the Plant, which the contract contemplates or of which it is commercially capable. He has placed reliance upon Clause 21 of the GCC which provides that such matter shall not be a defect if it is caused by *inter alia* a failure by the Purchaser to operate and maintain the Plant in accordance with any operating and maintenance manuals provided by the Contractor and/or with good engineering practice. He has placed reliance upon Clause 22 of the GCC which is Defect Liability Period and which shall mean a period of 12 months commencing from the date of Preliminary Acceptance. He has placed reliance upon "Preliminary Acceptance" and "Preliminary Acceptance Certificate" under Clause 50 and 51 of the GCC. He has also relied upon Clause 63 of the GCC which is 'Take Over' 'Taking Over' and 'Taken Over' which shall mean owner taking possession of and use of the Plant following issue of the PAC.

29. Mr. Dwarkadas has also placed reliance upon Clause 17 of the Special Conditions of Contract ("**SCC**") which provides for Liability for Defects.

30. Mr. Dwarkadas has submitted that since RCF had started operating the Plant and was commercially using the GTGs, the issue of inadequate maintenance leading to breakdown would be the responsibility of RCF. He has submitted that in light of the factual position including the admitted and uncontroverted fact that RCF had put the GTGs to commercial use for over a year, the Contract would have to be interpreted in a manner so as to make the Contract commercially efficacious. To put it differently, a party who had used and operated the GTGs as its primary source of power and gained commercial benefit therefrom could not be allowed to take advantage of its own wrong in not issuing a PAC and thereby contend that responsibility until PAC is with Thermax. He has submitted that alternatively, RCF wrongly delayed the issuance of PAC. The fact that RCF took over operational control of the Plant post commissioning and started using it for commercial purposes from March/April 2018 makes the requirement of issuing PAC under the Contract as redundant/otiose.

31. Mr. Dwarkadas has submitted that the admitted documents and correspondence between the parties establish that RCF was in full control and operating the GTGs (atleast) from April

2018 onwards. He has placed reliance upon the e-mails exchanged between parties from 12th April, 2018 till 24th February, 2019 in this context.

32. Mr. Dwarkadas has submitted that the correspondence shows that RCF had made a warranty claim in December, 2018 indicating that it had taken over the GTGs. By Letters dated 30th November 2018, 15th February, 2019 and 7th March 2019, Thermax repeatedly called upon RCF to issue PAC. He has also placed reliance upon the pre-arbitration correspondence between the parties including the letter dated 18th May, 2019 of RCF stating that they had followed instructions of Siemens and the Operating and Maintenance manual thereby admitting that RCF was solely operating the GTGs in the month of February 2019, i.e. prior to issuance of PAC. Thermax in its Letter dated 18th May, 2019 informed RCF that the GTGs were in commercial operation since February/March 2018 and had clocked 7644 and 7827 operating hours prior to breakdown during which the units were solely operated by RCF. Further, in its annual report for the financial year 2018-19, RCF had made a categorical statement that the GTGs have been commissioned and had resulted in energy savings to RCF. RCF had also claimed depreciation in respect of GTGs

for the financial year 2018-19 commencing on 1st April 2018.

33. Mr. Dwarkadas has submitted that for the first time in the Reply to Counter Claim, RCF contended that till the issuance of PAC, the GTGs were under the control and supervision of Thermax. He has submitted that however, in the Rejoinder Note of Written Submission, RCF admitted that "***it was not disputing the position that it had put the plant to commercial use with effect from March/April 2018***". He has submitted that RCF, at the stage of Rejoinder arguments changed its tune and abandoned its case that it was not using the plant for commercial operations from March/April 2018 and suddenly purported to contend that ***"...the question whether and when RCF took over the plant from Thermax will have to be determined on the basis of the terms and conditions of the contract..."***

34. Mr. Dwarkadas has submitted that Thermax in its Statement of Defence ("**SoD**") and the Evidence in Chief established the fact that RCF was in physical control of the Plant since March/April 2018. RCF had in the Statement of Claim at Paragraphs 34 and 39 of SoC, positively asserted that the machines were operated

by trained personnel of RCF after taking thorough training from Siemens in accordance with the operation and maintenance ("**O&M**") manual provided by Thermax and also in line with good engineering practice.

35. Mr. Dwarkadas has submitted that the learned Arbitrator has disregarded the evidence led by Thermax i.e. of Mr. Sunil Raina (RW-1), Head - Strategic Business Unit (Power Division) to establish that RCF, in fact, had taken over operations of the GTGs in March/April 2018 by deploying their own O&M crew and was thereafter using the same for its commercial operations. RW-1 has deposed that even after using the GTGs for more than 7000 hours, RCF grossly delayed in issuance of PAC by raising minor punch points which were irrelevant to the issuance of PAC.

36. Mr. Dwarkadas has submitted that upon reading of the cross examination of RW-1, it would be apparent that RCF has been unable to establish that operations and control of the plant was with Thermax till issuance of PAC. He has in this context relied upon Q&A Nos.1, 2, 42, 46, 50, 76, 108.

37. Mr. Dwarkadas has submitted that it is an admitted fact that commissioning of GTG 1 was completed on 28th February 2018 and commissioning of GTG 2 was completed 27th March 2018. RCF had put the plant to commercial use immediately after commissioning with effect from March/April 2018. Under the Statement of Agreed Variations of Contract, RCF was not allowed to start commercially operating the GTGs prior to PG Test, however, RCF admittedly did start using the GTGs immediately post commissioning of plant. Manufacturing activity of the plant for the period March 2018 to March 2019 was primarily done from the power generated by the two GTGs. Both GTGs were operated for more than 7000 hours till the date of breakdown and generated a total 3,27,152 MWH of power i.e. 90% of the power requirement.

38. Mr. Dwarkadas has submitted that on its own showing, RCF derived huge commercial benefit by the use of the GTGs in terms of cost of power saving from use of GTGs and Urea Policy incentive received from the Government of India, as is evident on a simple calculation from the documents produced by RCF itself.

39. Mr. Dwarkadas has submitted that RCF by its actions in taking over and using the Plant prior to issue of the PAC has clearly chosen to give a go by to the Clause 3(63) read with Clause 3(50) of GCC relating to 'Take Over' and 'PAC' and they became completely irrelevant, redundant and otiose. He has submitted that RCF cannot take advantage of its own wrong by breaching terms of the Contract at the first place by using the Plant for its commercial purposes and then hold Thermax strictly to the contractual provisions.

40. Mr. Dwarkadas has submitted that RCF had claimed a loss aggregating to an amount of Rs.173.72 Crores on account of additional expenditure incurred towards the cost of power due to non – availability of GTGs for the period 1st April, 2019 to 30th November, 2020. It is claimed by RCF that total cost of the power incurred during the said period, i.e. by (i) importing power through the State MSEB grid; (ii) generation of power from Turbo Generators and (iii) cost of power generated from one of the GTGs (which became operational on or about 12th August, 2019) after RCF directly purchased a Gas Generator from Siemens. From this aggregate amount, RCF has reduced the notional cost of power that it would have incurred on the basis that the GTGs continued to remain operational and supplied

100% of RCF's power requirements for its plant at Thal for the period 1st April, 2019 to 30th November, 2020.

41. Mr. Dwarkadas has submitted that the impugned Award, has awarded damages amounting to Rs.173.72 Crores in relation to alleged additional expenditure incurred by RCF by importing power from MSEB and from Turbo Generator for the period 1st April, 2019 to 30th November, 2020.

42. Mr. Dwarkadas has submitted that the claim for damages could not have been granted as the claim was beyond the contract and contrary to the contractual bargain; the claim was beyond the scope of agreement titled as "Notice to Proceed" dated 2nd July, 2019 entered into between Thermax and RCF in relation to repairs and reinstatement of GTGs; and RCF failed to lead adequate evidence to prove the claim for damages.

43. Mr. Dwarkadas has submitted that RCF's claim for damages is a claim for consequential loss. Being a claim for consequential loss – award of damages to that extent is patently illegal. He has relied upon Clause 32 of the GCC and in particular Clause 32.2 thereof which provides ***"Notwithstanding anything***

contained elsewhere in CONTRACT or implied to the contrary:

(a) CONTRACTOR shall, in no circumstances, be liable in respect of any indirect or consequential loss or loss of profit suffered by OWNER in connection with or arising out of performance of WORK under CONTRACT.

(b) OWNER shall, in no circumstances, be liable in respect of any indirect or consequential loss or loss of profit suffered by CONTRACTOR in connection with or arising out of performance of WORK by CONTRACTOR under the CONTRACT."

44. Mr. Dwarkadas has submitted that the contract specifically excludes any liability for consequential loss and Clause 32.0 states that the Contractor shall not be liable for any indirect loss or loss of profits suffered by the Owner. He has placed reliance upon Thermax's contention in Paragraph 84(a)(iv) of its Statement of Defence to this effect.

45. Mr. Dwarkadas has submitted that it is RCF's

contention that the claims are direct losses arising from the breaches committed by Thermax of the terms of said contract and therefore the provisions of Clause 32(a) does not apply to these losses suffered by the RCF. This is evident from Paragraph 6 of Reply to Statement of Defence / Counter Claim.

46. Mr. Dwarkadas has submitted that it was the submission of Thermax in its Written Submissions before the learned Arbitrator that from the provision of Clause 32(2)(a), it was clear that the claims in question being barred by the terms of the contract would fall outside and beyond the scope of the jurisdiction of the Hon'ble Tribunal and therefore are ex-facie liable to be rejected. He has submitted that RCF did not deal with the aforesaid submission made by Thermax in its written submissions. However, during the course of arguments, it was argued that the claim for damages was on account of a direct loss incurred by RCF and hence, beyond the scope of exclusion under Clause 32.2(a) of the GCC.

47. Mr. Dwarkadas has referred to Paragraphs 64, 65, 70 and 75 (last four lines) and 76 of the impugned Award. He has submitted that the learned Arbitrator has accepted the claim of the

Claimant for loss amounting to Rs.173.72 Crores by holding that the loss is neither indirect nor consequential but a direct loss and hence, Clause 32.2(a) has no application.

48. Mr. Dwarkadas has submitted that the learned Arbitrator in considering whether the claim for consequential loss made by RCF came within the exclusion clause set out in Clause 32.2(a) of the GCC was required to apply her mind firstly to the provisions of Section 73 of the Contract Act; secondly to what is excluded from being claimed as compensation for loss or damage claimed from the provisions of Section 73 of the Contract Act; and thirdly, in the light of the interpretation of Section 73 of the Contract Act consider the width and ambit of the exclusionary Clause 32.2(a) of the GCC. He has submitted that from the plain reading of Section 73 of the Contract Act, what is apparent is - that when a contract is broken, a party who suffers by the breach is entitled to receive "*compensation for any loss or damage caused to him, which naturally arose during the usual course of things from such breach, or which the parties knew, when they made the contract, was likely to result from the breach of it.*" Section 73 of the Contract Act, however, provides that compensation cannot be given for any remote or

indirect loss or damage sustained by reason of the breach.

49. Mr. Dwarkadas has submitted that the learned Arbitrator had not reached the conclusion that the exclusion Clause 32.2(a) of GCC falls within the realm of 'remoteness' and 'indirect loss' or 'damage' provided for by second part of Section 73 of the Contract Act. In other words, the learned Arbitrator has not held the exclusion clause to be void or as being unenforceable being contrary to the second part of Section 73 of the Contract Act. This was also not the case of RCF.

50. Mr. Dwarkadas has submitted that the learned Arbitrator therefore proceeded on the assumption that Clause 32.2(a) of GCC is a valid and enforceable exclusion clause. He has submitted that the question therefore immediately arises is and which ought to have been answered by the learned Arbitrator is what is it that the parties agreed to exclude by virtue of Clause 32.2(a) of GCC.

51. Mr. Dwarkadas has submitted that the word "damage" is defined in the Collins New English Dictionary to mean: "*any injury or harm to person, property or reputation….legal compensation paid to injured party*". He has submitted that the word "loss" is defined in

Collins New English Dictionary to mean: "*the act of losing*". By definition, the words 'loss' and 'damage' are not synonyms and/or do not have the same meaning. It is for this reason that Section 73 of the Contract Act provides for right of a party who suffers by breach from party who has broken the contract "*compensation for loss or damage*" caused.

52. Mr. Dwarkadas has submitted that Section 73 permits for claims for compensation which could fall either within the normal measure of damages as also from consequential losses so long as it is established that they normally arise in the usual course of things or which parties knew was likely result from breach of it.

53. Mr. Dwarkadas has submitted that Clause 32.2(a) of GCC when it provides that the Contractor (Thermax) shall, in no circumstances, be liable in respect of any 'indirect' or 'consequential loss' or 'loss of profit' was meant to exclude the claim for consequential loss, which would otherwise be claimable under Section 73 of the Contract Act. The word 'indirect' appearing in Clause 32.2(a) does not mean the same as 'remote' and 'indirect' appearing in the latter part of Section 73 of the Contract Act. In any

event, the word 'indirect' appearing in Clause 32.2(a) of GCC is distinct from the words 'consequential loss' appearing in Clause 32.2(a).

54. Mr. Dwarkadas has submitted that it is trite law that Indian Courts have repeatedly enforced exclusion clauses under a contract. He has placed reliance upon following Judgments:

(i) *Seth Thawardas Pherumal v. Union of India, AIR 1955 SC 468*
(ii) *Oil and Natural Gas Corporation v. WIG Brothers Builders and Engineers Private Limited (2010) 13 SCC 377 at Paragraphs 6 and 7*
(iii) *Ramnath International Construction (P) Ltd. v. Union of India (2007) 2 SCC 453*
(iv) *Steel Authority of India v. J.C. Budharaja Government and Mining Company (1999) 8 SCC 122*

55. Mr. Dwarkadas has also placed reliance upon the Judgment of the Supreme Court in ***Superintendent Company of India v. Krishan Murgai*** [1] at Paragraphs 25 and 26. He has submitted that the question therefore which the learned Arbitrator was required to

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1 ***(1981) 2 SCC 246***

decide was the question as to what the normal measure of damages is as contrasted with any indirect or consequential loss or loss of profits suffered by RCF.

56. Mr. Dwarkadas has submitted that it is too well settled a proposition of law is what can be claimed under the heading normal measure is either the diminution in the value of the goods or the reasonable cost of repair which may arise on account of any breach. He has placed reliance upon Pages 1143-1144 of Mcgregor on Law of Damages (21st Edition). He has also submitted that the expression consequential loss has been judicially interpreted to mean and include expenses which may be incurred by a claimant as a result of a breach which will constitute a recoverable loss. He has referred Pages 1143-1144 of Mcgregor on Law of Damages (21st Edition). He has submitted that given this distinction which exists in the eyes of law, the parties consciously incorporated Clause 32.2(a) in the Contract by which RCF clearly waived its right to hold Thermax liable in respect of any 'indirect' or 'consequential loss' suffered by RCF in connection with or arising out of performance of work under the contract.

57. Mr. Dwarkadas has submitted that the reliance placed by the learned Arbitrator on ***Saint Line Limited v. Richordson Westgarth & Co. Ltd.***[2] is completely misplaced in as much as this decision deals with different set of facts and in any event cannot be applied in the context of statutory provisions contained in Section 73 of the Contract Act. This Judgment is a Judgment under the heading loss of user profits which comes under the topic of consequential loss and not under the normal measure of damages. The ratio of the decision is that what the clause sought to exclude in that case was something which by the provisions of Section 73 of the Contract Act already stands excluded under the Indian law.

58. Mr. Dwarkadas has submitted that the claim for damages was beyond the scope of agreement titled as "Notice to Proceed" dated 2nd July, 2019 ("**NTP**") entered into between the parties. The NTP was prior to the repairs of the GTGs being undertaken and prior to an investigation by Siemens with respect to the cause of the breakdown of the GTGs.

59. Mr. Dwarkadas has submitted that the learned Arbitrator has in the teeth of Clause 5 of the NTP which provides that

2 *[1940] 2 K.B. 99*

it is intended to be a complete understanding of the parties with respect to the warranty claim and repair and restoration of GTGs, has held that NTP has no connection with claims not connected with repairs and recommissioning of the GTGs which RCF may have for breach of any terms of the original contract. The learned Arbitrator rejected Thermax's claim that RCF's claim for damages was therefore barred by the terms of NTP. He has submitted that it is clear from the findings in this regard in the impugned Award that the same are *ex facie* contrary to the plain language of NTP and are based on an impossible interpretation thereof. He has in this context referred to the relevant findings in the Award on this aspect at Paragraphs 59 to 63 of the impugned Award.

60. Mr. Dwarkadas has submitted that the learned Arbitrator has failed to consider the implications of Force Majeure event (COVID 19) from March 2020 and two Force Majeure Letters dated 23rd March, 2020 and 11th July, 2020 and wrongfully granted damages for the period April 2019 to November 2020. The learned Arbitrator has not even referred to let alone give any findings on the impact of the force majeure event on the ability of Thermax to carry out the repairs of the GTGs within the period prescribed under the

NTP. He has submitted that given the fact that the parties had agreed upon a reasonable period for completing the repairs and given the facts and circumstances in which the delay occurred on account of Force Majeure events, Thermax could not have been made liable for any damages in this regard. The learned Arbitrator has completely failed to deal with this submission in its entirety.

61. Mr. Dwarkadas has submitted that RCF has failed to lead adequate evidence to prove the claim for damages. RCF has relied upon Chartered Accountant's Certificate dated 20th February, 2020 in support of its claim which is annexed at Annexure-23 to its original (unamended) Statement of Claim. This Chartered Accountant's Certificate was not produced on the evidence by RCF.

62. Mr. Dwarkadas has submitted that though the original claim for loss aggregated to an amount of Rs.113.70 Crores upto 31st December 2019, this was revised cumulatively to Rs.173.72 crores to claim loss towards additional expenditure of power for additional period from 1st January, 2020 to 30th November, 2020. In the amended Statement of Claim, RCF has relied upon the Certificate dated 28th February, 2020 of the Chartered Accountant Parekh Sule &

Associates for the dues sought by the Claimant as on 31st December, 2019 set towards the additional expenditure on power and for loss of income on account of lower energy savings and which is set out in the particulars of claim.

63. Mr. Dwarkadas has submitted that alongwith the amended Statement of Claim, RCF produced a table of particulars of claim as Annexure 25 and which table *inter alia* contained unproved figures relating to loss caused due to additional expenditure incurred on power for the period (i) 1st April 2019 to 31st December 2019 (ii) 1st January 2020 to 31st March 2020 and (iii) 1st April 2020 to 30th November 2020.

64. Mr. Dwarkadas has relied upon the Statement of Defence of Thermax dated March 2021 and in particular Paragraph 84(a) and (f) thereof. Thermax has expressly disagreed with the computation of the extra cost as alleged by the RCF as the Chartered Accountant's Certificate dated 20th February, 2020 is extremely restrictive and only based on limited records.

65. Mr. Dwarkadas has submitted that RCF in support of its claim for damages of Rs.173.72 Crores has led the evidence of Mr.

Shivkumar Subramaniam (CW-2) the Deputy General Manager - Corporate Finance of RCF. Mr. Shivkumar Subramaniam (CW-2) has filed three Affidavits in lieu of Examination in Chief dated 29th March, 2021, 30th June, 2021 and 20th July, 2021. He has submitted that RCF alongwith the Evidence Affidavit dated 29th March 2021 of CW – 2, for the first time produced two new CA Certificates both dated 11th January, 2020 authored by the same Chartered Accountants who had certified the earlier Certificate annexed as Annexure 23 of the Statement of Claim. Thermax has by its letter dated 12th July, 2021 to Advocates of RCF expressly denied the existence and contents of the CA Certificates.

66. Mr. Dwarkadas has submitted that CW-2 during the course of his examination-in-chief, firstly - abandoned and/or not even relied upon Annexure 23 which was produced alongwith the Statement of Claim; and secondly - abandoned and/or not relied on the table of Particulars of Claim produced as Annexure 25 of the Statement of Claim. Instead, CW – 2 attempted to rely upon the two new CA Certificates, the existence and contents of which were expressly denied by Thermax. These two new CA Certificates were nevertheless marked as Exhibit CW-2/C-1(Colly).

67. Mr. Dwarkadas has submitted that even though the two purported CA Certificates were marked in evidence, the author of the documents viz. the Chartered Accountant was never examined to prove the existence and correctness of the contents of the said purported Certificates. He has submitted that the unproved Certificates were themselves premised on alleged underlying documents allegedly seen by the Chartered Accountants, which documents were never produced nor proved.

68. Mr. Dwarkadas has referred to the two Affidavits in lieu of Examination-in-Chief of CW-2. He has submitted that there are no underlying documents whatsoever which were produced other than the CA Certificates dated 11th January 2020 through CW-2.

69. Mr. Dwarkadas has submitted that in Paragraph 4 of the Evidence Affidavit dated 20th July, 2021, CW-2 has stated that all information is derived from SAP Enterprise Resource Planning (ERP) System, the primary document would be the print out or an electronically retrieved data from such SAP ERP System. He has submitted that this has not been produced. The reason for non-production is apparent. This is because such electronic records can

only be proved and could be regarded as admissible only if it is proved in accordance with Section 65-B of the Evidence Act, 1872. This has admittedly not even been attempted in the present case.

70. Mr. Dwarkadas has submitted that the only manner in which the contents of the purported data stored on the SAP ERP System could have been proved was by way of producing the primary document i.e. the data retrieved directly from SAP ERP System with the underlying documents thereof.

71. Mr. Dwarkadas has relied upon Paragraphs 5.6 to 5.14 of the Written Submissions of Thermax prior to final hearing of the arbitration, where Thermax dealt with the issue of alleged loss caused to RCF on account of additional expenditure of power. It has been expressly submitted that Thermax was deprived of the opportunity of questioning the Chartered Accountant as to the Methodology used by him and/or in preparing the statement and / or the underlying based on which the Chartered Accountant prepared the same. In this view of the matter, RCF is not entitled to rely upon the Chartered Accountant's statement and the same must be rejected in toto by the Hon'ble Tribunal. Thermax has also relied upon

authorities in this context.

72. Mr. Dwarkadas has submitted that the learned Arbitrator in Paragraphs 70 to 75 of the Award, dealt with Issue No. 4 in relation to the alleged loss caused to RCF due to additional expenditure incurred on power on account of breakdown of GTGs. The finding in Paragraph 75 is that "*the Respondent has contended that in his affidavits Mr. Shivakumar has relied upon certificate of Chartered Accountant but evidence of chartered accountant has not been led. Hence, his evidence should not be accepted. This contention cannot be accepted because Mr. Shivakumar who has deposed to these figures has done so on his personal knowledge as also on the basis of the records of the Claimant company as maintained in the ordinary course of business. His evidence is not shaken in cross- examination*."

73. Mr. Dwarkadas has submitted that RCF has failed to discharge its burden of proving its claim for damages. It has been overlooked by the learned Arbitrator that RCF, without producing the best evidence and primary evidence and in violation of the mandate of Sections 59 and 65 of the Evidence Act, 1872 led parole/secondary

evidence of Mr. Shivkumar Subramaniam (CW-2) on the alleged contents of the documents which would have shown the alleged expenses incurred, if any. He has submitted that failure to produce the primary evidence and the best evidence ought to have invited adverse inference to the effect that had these documents been produced they would not have borne out the allegations of RCF. Thus, CW –2 has failed to discharge its burden of proof by producing the best evidence and primary evidence being the documents themselves in his examination in chief.

74. Mr. Dwarkadas has submitted that finding of the learned Arbitrator that the evidence of Mr. Shivkumar Subramaniam (CW-2) is not shaken in cross examination, is entirely unreasoned. He has relied upon the Questions and Answers (Q&A), in cross examination of CW-2 where 25 questions relating to the computations made in his evidence with respect to the claim made by RCF of Rs.173.72 Crores were asked. It became apparent during the cross examination of CW – 2 that he had merely relied on the CA Certificates for computation of the claim.

75. Mr. Dwarkadas has submitted that the CA Certificates

were not produced by leading evidence of the Authors thereof being the Chartered Accountants themselves and the said unproved Certificates were premised on alleged documents, which documents were never produced nor proved.

76. Mr. Dwarkadas has submitted that the learned Arbitrator rendered a completely unreasoned, perverse and patently illegal finding in Paragraph 75 of the Award. He has submitted that the conclusions reached by the learned Arbitrator that the CW – 2 had deposed to the figures "*on his personal knowledge*" and also on the basis of the records of RCF as maintained "*in the usual course of business*" are patently illegal and perverse. He has submitted that this is because CW – 2, during the course of his cross examination, admitted that the information contained in the records was maintained by a separate department namely the accounts department and officials working in that department. Additionally, the CW-2 has stated that since the information contained in the records was certified by Chartered Accountant, he had relied on the said Certificates issued by the Chartered Accountant. Therefore, CW-2 could never be said to have any personal knowledge of the information contained either in the records or in the Certificates of

the Chartered Accountant. At best, his evidence could be considered as hearsay which is clearly not admissible in law.

77. Mr. Dwarkadas has submitted that the claim for damages remained not proved and ought to have been rejected. The learned Arbitrator rendered no reasons and finding *qua* the quantification of the claim for additional expenditure and more particularly the proof thereof. This is in contravention to Section 31(3) of the Arbitration Act. He has submitted that the award for claim of damages to the tune of Rs.173.72 Crores is unreasoned, perverse, patently illegal and against the most basic notions of justice and is accordingly liable to be set aside.

78. Mr. Dwarkadas has submitted that one of the conditions of Thermax was that the claim for damages due to additional expenditure incurred on account of sourcing power from other sources was either an indirect or consequential claim expressly waived by the parties and hence, the learned Arbitrator, being a creature of contract, was barred from awarding the same in terms of the contract between the parties. However, the learned Arbitrator has held that the damages claimed are a *"direct loss"*. He has referred to

Paragraphs 70 and 75 of the Award in the context.

79. Mr. Dwarkadas has submitted that the issue which the learned Arbitrator was thus called upon to determine considering the contractual bar on grant of *"indirect loss"* or "*consequential loss"* was to determine firstly, what would be the normal measure of damages in a case like the present case and secondly, if something was beyond the normal measure of damages then would the same not be "indirect" or "consequential" and hence, contractually barred.

80. Mr. Dwarkadas has placed reliance upon the Judgment of the Delhi High Court in ***Shwetadri Speciality Papers Pvt. Ltd. v. National Research Development Corp.***[3] at Paragraph 19. He has also placed reliance upon Judgment of the Supreme Court in ***Trojan and Company vs R.M. Nagappa Chettiar***[4] at Paragraph 22. He has placed reliance upon Judgment of this Court in ***Chief Commercial Superintendent of Railways vs. Anand Kumar***[5]. These Judgments have considered Section 73(1) of the Contract Act in the context of the loss or damages being "indirect" or "consequential" as against

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3 *2019 SCC OnLine Del 9345*

4 *(1953) 1 SCC 456*

5 *1996 SCC OnLine Bom 412*

direct approximate damages.

81. Mr. Dwarkadas has submitted that the learned Arbitrator has in Paragraph 68 of the Award has observed, *inter alia,* that the claim for loss of income on account of allegedly being unable to obtain government subsidies is barred by Clause 32.2(a). This finding shows that the Arbitrator found the claim for loss of income as not being within the notional Section 73(1) i.e. not being proximate nor direct but being indirect and remote. The learned Arbitrator then holds that the claim for indirect and remote loss is barred by Clause 32.2(a) thereby rendering Clause 32.2(a) a dead letter, since it is held to exclude indirect and remote loss which is already excluded by the statute itself.

82. Mr. Dwarkadas has submitted that the normal measure of damages is what it would have cost the party to get out of the situation. Applying the said principle, the only damages which could be said to be the normal measure of damages would have been the cost of repairs. The claim for additional expenditure on account of power sourced from other sources cannot and would not fall within the normal measure of damages nor has there been any consideration

nor finding on this aspect by the learned Arbitrator.

83. Mr. Dwarkadas has submitted that applying the said principles laid down by the Supreme Court and followed by the Division Bench of this Court, the claim for additional expenditure incurred on account of power sourced from other sources is only an "indirect" or "consequential" loss and hence, expressly barred by the Contract and beyond the jurisdiction of the learned Arbitrator. Accordingly, the impugned Award in so far as it grants a claim for Rs.173.72 crores towards additional expenditure allegedly incurred by RCF is perverse and a patent illegality.

84. Mr. Dwarkadas has submitted that Thermax had preferred a Counter Claim, *inter alia,* for refund of MAD which had been unilaterally deducted by RCF ostensibly under Clause 3(73) read with Clause 31.0 and Clause 31.1.3 of the GCC to the tune of Rs.19,56,85,716/-.

85. Mr. Dwarkadas has submitted that it was Thermax's contention that while as per the "Baseline Schedule" the RCF was required to provide the main steam line by 30th August 2017, the same was not made available by RCF till 8th February 2018. Thus,

there was a delay of approximately 162 days on the part of RCF in providing the said main steam line which led to consequential delays in project completion. It was Thermax's case that the non-availability of steam line had an overriding effect on project completion. He has referred to Paragraph 20(s) and 23 of Counter Claim of Thermax in this context.

86. Mr. Dwarkadas has submitted that RCF in its Reply to Counter Claim, alleged that PAC was issued on 7th March 2019 after a delay of 444 days and RCF had incurred huge losses due to delayed performance of contract by Thermax. He has relied upon the emails exchanged between the parties which show that RCF itself admitted that the communication *qua* the main steam line being ready was made only in February, 2018. As per the Baseline Schedule, RCF was required to provide the main steam line by 30th August 2017, however, as is evident, the same was made available by RCF only in February, 2018. Thus, there was a delay of approximately 162 days on the part of RCF in providing the said main steam line.

87. Mr. Dwarkadas has submitted that Thermax placed reliance upon the evidence of Mr. Sunil Raina (RW-1) in support of

its Counter Claim. Thermax in particular placed reliance upon the Affidavit of Evidence of RW-1 dated 10th June 2021 at Paragraphs 21, 25 to 27 and 30. In contrast, RCF led the evidence of Mr. R.P. Jawale (CW–1). He has submitted that in the evidence led by CW-1 there is neither any deposition nor documentary material produced to even allege, let alone establish that RCF incurred or suffered any loss on account of the alleged delay by Thermax.

88. Mr. Dwarkadas has submitted that Thermax during the course of oral arguments and in its written submissions, *inter alia,* contended that the levy of MAD was illegal, in as much as, it was RCF which delayed the handing over of steam line and that RCF had not suffered any loss on account of the purported delays.

89. Mr. Dwarkadas has submitted that the learned Arbitrator in Paragraph 81 to 92 of the said Award held that RCF was entitled to levy MAD, as defined under the contract, for the delay which comes to 444 days.

90. Mr. Dwarkadas has submitted that it is trite law as held by the Supreme Court in the case of ***Kailash Nath v Delhi***

Development Authority[6] at Paragraph 43.3 that even in case of levy of liquidated damages, proof of actual loss or damage is a *sine qua non*. He has submitted that there is no averment *qua* actual loss or damage nor evidence led but the record shows to the contrary that the admitted commercial use of RCF from March/April, 2018 was to its immense benefit. The learned Arbitrator has not even considered nor addressed the aspect of loss or damage suffered whilst permitting RCF to deduct monies as liquidated damages despite there being no established loss nor damage. He has submitted that the impugned Award is thus, perverse and patently illegal in as much as it upholds the levy of liquidated damages completely contrary to the express provisions of Section 74 of the Indian Contract Act and the law laid down by the Supreme Court in several decisions regarding the requirement to prove actual loss or damage before any liquidated damages can be imposed.

91. Mr. Dwarkadas has submitted that the learned Arbitrator has not even addressed the aforementioned lack of proof and the settled law.

92. Mr. Dwarkadas has submitted that the learned

6 ***(2015) 4 SCC 136***

Arbitrator has failed to appreciate and address the submission of Thermax in so far as the levy of MAD by RCF for the alleged delay is concerned. He has submitted that since RCF was in breach of its contractual obligations and delayed the completion of main steam line by 162 days, it cannot complain of any delay by Thermax. RCF cannot take advantage of its own wrong. He has accordingly submitted that the counter claim of Thermax ought not to have been rejected by the learned Arbitrator.

93. Mr. Dwarkadas has relied upon Judgments which can be broadly classified as under:

(i) On Principles of Evidence Act applying to arbitral proceedings, he has placed reliance upon ***Pradyuman Kumar Sharma V. Jaysagar M. Sancheti*** [7] at Paragraph 18 and 33.

(ii) On mere production and marking of documents not amounting to proof of its contents, he has placed reliance upon ***Bareilly Electricity Supply Co.Ltd. Vs.***

7 ***(2013) 5 MhLJ 86***

The Workmen & Ors.,[8] at Paragraph 14 & ***Sudhir Engg. Company Vs. Nitco Roadways Limited*** [9] at Paragraph 6 and 8.

(iii) On failure to produce party for cross examination leads to a presumption that case set up is not correct, he has placed reliance upon ***Vidhyadhar V. Manikrao***[10] at Paragraph 17; ***Maharashtra State Board of Secondary and Higher Education Vs. K.S. Ganshu & Ors.,***[11] at Paragraph 11; ***Man Kaur (Dead) by Irs. V. Hartar Singh Sangha***[12] at Paragraph 14 & 17; and ***Seethakathi Trust Madras Vs. Krisnaveni*** [13] at Paragraph 12.

(iv) On allowing claims for damages without any evidence is liable to be set aside under Section 34 he has relied upon ***Essar Procurement Vs.***

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8 ***(1971) 2 SCC 617***

9 ***1995 (34) DRJ 86***

10 ***(1999) 3 SCC 573***

11 ***(1991) 2 SCC 716***

12 ***(2010) 10 SCC 512***

13 ***(2022) 3 SCC 150***

Paramount Constructions[14] at Paragraph 100 to 114; ***Unibros Vs. All India Radio***[15] at Paragraph 19-20; ***Jaiprakash Hyundai Consortium Satluj Jal Vidyut Nigam Ltd.***[16] at Paragraphs 10, 14, 20-24, 38-49.

(v) On Arbitrator requiring to give reasons for rejecting the submissions of a party; finding based on no evidence is liable to be set aside and grounds for setting aside under Section 34, he has relied upon ***Bhanumati Jaisukhbhai Bhuta Vs. Ivory Properties & Hotels Private Limited***[17] at Paragraphs 172, 173 and 175 & 176; ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India (NHAI)***[18] at Paragraphs 37, 39, 41; ***Associate Builders Vs. Delhi Development Authority***[19] at Paragraphs 29, 31, 32, 42.2, 43.

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14 *2016 SCC Online Bom 9697*

15 *2023 SCC Online SC 1366*

16 *2024 SCC Online Del 1237*

17 *2020 SCC Online Bom 157*

18 *(2019) 15 SCC 131*

19 *(2015) 3 SCC 49*

(vi) On rule of best evidence, he has relied upon ***J. Yashoda Vs. K. Shobha Rani***[20] at Paragraphs 7-10; ***Neeraj Dutta Vs. State (NCT of Delhi)***[21] at Paragraph 60; ***Vijay Vs. Union of India***[22] at Paragraph 34.

(vii) On admissions are best proof of facts, he has relied upon ***Nagindas Ramdas Vs. Dalpatram Iccharam & Ors.***[23] at Paragraph 27.

94. Mr. Dwarkadas has accordingly submitted that the impugned Award requires to be set aside on ground of it being bereft of reasons, overlooking material evidence, being perverse and suffering from patent illegality.

95. Mr. Shyam Mehta, the learned Senior Counsel appearing for the Respondent-RCF has submitted that it is the RCF's case before the Arbitral Tribunal that the Plant was under the control and supervision of Thermax and that the same was being operated by Thermax with support of RCF and further that till issuance of the

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20 ***(2007) 5 SCC 730***

21 ***(2023) 4 SCC 731***

22 ***2023 SCC Online SC 1585***

23 ***AIR 1974 SC 471***

PAC, Thermax was responsible for the plant.

96. Mr. Mehta has submitted that Thermax's contention that RCF had not pleaded that it was operating the plant under the supervision of Thermax is totally incorrect. He has submitted that it is clear that both Thermax and RCF agreed that till the issuance of the PAC, Thermax was responsible for the plant and that the same was being operated at the risk and cost of Thermax.

97. Mr. Mehta has referred to the contractual provisions, viz. Clauses 1.1.1, 1.1.2, 1.2.19.1, 1.2.19.2, 4, 6, 30.1 and 30.2 in support of his submission that these contractual provisions establish beyond a shadow of doubt that Thermax was in charge and control of the plant until the issuance of the PAC. Thermax also remained liable and responsible for the plant in all respects until the issuance of the PAC. He has submitted that this has also been admitted by Thermax in its Counterclaim. It was the obligation of Thermax to handover the fully operational plant to RCF inasmuch as the contract was a Lump Sum Turnkey Contract.

98. Mr. Mehta has submitted that it is Thermax's contention that the provisions of the Contract relating to PAC viz.

Clauses 3(50) and 3(63) were irrelevant, redundant and otiose and had been given a go-by to by RCF. It is not their case that any of the aforementioned provisions of the contract viz. Clauses 1.1.1, 1.1.2, 1.2.19.1, 1.2.19.2, 4, 6 and 30.1 and 30.2 were irrelevant, redundant and otiose and had been given a go-by to by RCF. He has submitted that Thermax has accepted that these provisions were always binding and applied in full force to the parties at all times. He has submitted that this being so, it is absolutely clear that Thermax was in charge and control of the plant and liable and responsible for the same until the issuance of the PAC.

99. Mr. Mehta has submitted that as regards the contention that Clauses 3(50) and 3(63) were irrelevant, redundant and otiose and had been given a go-by to by RCF, no such contention was raised by Thermax in its pleadings. He has submitted that in the absence of a plea to this effect, Thermax was not entitled to raise the contention in the course of arguments. He has submitted that since there was no such pleadings raised by Thermax, there was no occasion for RCF to deal with the same. Further no issue was framed by the Arbitral Tribunal in that regard. He has submitted that there was also no evidence whatsoever led by Thermax to prove the said contractual

provisions were irrelevant, redundant and otiose and given a go-by to by RCF.

100. Mr. Mehta has referred to the pleadings of Thermax viz. Statement of Defence at paragraphs 34 and 35 where Thermax had relied upon Clause 6 of the SCC; at paragraph 37 where Thermax has referred to Clause 3(63) of the GCC; and at paragraphs 40 and 41 where Thermax has relied upon Clause 3(50) of the GCC. He has also referred to paragraph 39 of the Counterclaim where Thermax has relied upon Clauses 30.1 and 30.2 of the GCC as well as Clause 3(63) of the GCC. These provisions have been relied upon by Thermax in support of their case. Whilst relying upon the aforementioned contractual provisions, Thermax has not averred that the same were being relied upon without prejudice to its rights and contention that they were irrelevant, redundant and otiose and given a go-by to by RCF.

101. Mr. Mehta has submitted that it is well settled that an Arbitrator is a creature of contract and is bound by terms and if the Arbitrator travels beyond or outside the contract, the Award is liable to be set aside. He has placed reliance upon Section 28(3) of the

Arbitration Act and the judgment of the Supreme Court in **Union of India Vs. Bharat Enterprise**[24] in this context.

102. Mr. Mehta has submitted that as regards the contention of Thermax that RCF wrongly delayed the issuance of the PAC, it is important to note that in the course of arguments before the Arbitral Tribunal, Thermax accepted the position that both GTGs had failed during the defect liability period. Thermax did not question the correctness of the PAC being issued w.e.f. 7th March 2019. There were no arguments advanced by Thermax on this aspect.

103. Mr. Mehta has submitted that in view of above, it must be accepted as an undisputed position that the PAC was rightly issued w.e.f. 7th March 2019 and the defect liability period commenced from 7th March 2019.

104. Mr. Mehta has submitted that though Thermax has argued to the contrary before this Court in these proceedings, by denying that the PAC had been rightly issued with effect from 7th March 2019 and which stand is also taken in Note 4 of the Written Submission filed before this Court, the proven facts establish beyond

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doubt that the RCF had rightly issued the PAC with effect from 7th March 2019.

105. Mr. Mehta has submitted that in the proposal submitted by Thermax to RCF on 2nd July 2019 for the purpose of issuing the Notice to Proceed, Thermax expressly admitted that the effective date of the PAC was 7th March 2019 and the defect liability period started from this date.

106. Mr. Mehta has submitted that the PAC was liable to be issued only upon Thermax fulfilling all the conditions stipulated in Clause 3(50) of the GCC. From Thermax's letter dated 7th March 2019, requesting RCF to issue the PAC, itself it is absolutely clear that even as on 7th March 2019, Thermax had not fulfilled all the conditions stipulated in the said Clause 3(50). Thermax stated that it was working on these pending issues and sought time till 30th June 2019 to complete the same. Thermax even suggested withholding Rs. 20 lakhs until the pending works were completed. It was pursuant to this letter that RCF issued the PAC dated 15th March 2019 with effect from 7th March 2019. He has submitted that thus, it is clear that Thermax was not entitled to the PAC prior to 7th March 2019.

107. Mr. Mehta has submitted that as per Clause 3(50), 12 milestones had to be achieved by Thermax before it was entitled to the PAC. He has relied upon the evidence on record which shows that all 12 milestones were not achievable by the stipulated dates, and were achievable only by 27th September 2019. He has submitted that this is not being disputed by Thermax before the Arbitral Tribunal, because in fact, no arguments were advanced by Thermax in this regard.

108. Mr. Mehta has submitted that though it is the case of Thermax that the GTGs were put to commercial use in March / April 2018, it meant that RCF had taken over the plant and was in charge of the same notwithstanding that the PAC was not issued with effect from March / April 2018, Thermax had at no stage objected to RCF using the plant for commercial production and/or asked RCF to stop doing it. It was only when Thermax applied for the PAC vide its letter dated 30th November 2018 that Thermax sought the PAC with effect from 27th March 2018 on the basis that commercial production for both GTGs had commenced by this date. However, subsequently, after correspondence and meetings in this regard with RCF, in its letter dated 7th March 2019 seeking the PAC, Thermax did not request for the PAC to be issued with effect from 27th March 2018. It is therefore,

clear that Thermax had itself given up its contentions regarding commercial use / production with reference to the issuance of the PAC and had accepted the fact that it had to fulfill the conditions stipulated in the contract for the purpose of securing the PAC from RCF.

109. Mr. Mehta has submitted that both RCF and Thermax are bound by the Contract and consequently, take over can be effected only in accordance with the Contract and not otherwise. Under the contract commissioning is a stage prior to production (Clause 3(7) of the GCC). Since commercial production started sometime in March / April 2018, commissioning occurred sometime before that. Accordingly, it was stated in the Annual Report that the plant was commissioned in April 2018. Thermax in its submissions has sought equating commissioning with the take over of the plant after issuance of PAC. He has submitted that it is clear from the contract that commissioning and take over are two different and distinct stages during the manufacture and installation of the plant and the two cannot be equated.

110. Mr. Mehta has submitted that though Thermax has relied upon Annual Report for FY 2018-19 where RCF had made a

categorical statement that the GTGs were commissioned and had resulted in energy savings for RCF and had claimed depreciation in favour of the GTGs during FY 2018-19, neither of these two acts of RCF show that RCF had taken over the plant under the Contract or otherwise.

111. Mr. Mehta has submitted that depreciation was claimed in accordance with law and has no bearing on the takeover of the plaint by RCF under the Contract and does not and cannot even remotely suggest that RCF had taken over the plant. In any event, RCF did take over the plant in FY 2018-19 and as such its claim for depreciation was consistent with the take over of the plant in FY 2018-19.

112. Mr. Mehta has submitted that though it was contended that RCF derived a commercial benefit of Rs. 500 crores by using the GTGs from March / April 2018, no such contention was raised before the Arbitral Tribunal. The computation of Rs. 500 crores has been arrived at by Thermax in Annexure A to Note 2 submitted before this Court. He has submitted that this computation cannot be and ought not to be considered at this stage. It is a factual issue and a matter of

evidence and was required to be pleaded and proved before the Arbitral Tribunal. He has submitted that even on the face of it, it is speculative and based on assumptions and surmises.

113. Mr. Mehta has submitted that it is the contention of Thermax that the Arbitral Tribunal did not consider extensive evidence, which purportedly shows that RCF had taken over the plant in March / April 2018. He has submitted that the Arbitral Tribunal considered the relevant and material facts while arriving at its conclusion that Thermax was in charge and control of the plant until 7th March 2019. The Arbitral Tribunal has considered the contractual provisions, the counterclaim of Thermax, Thermax's submissions with regard to the statements made by RCF in its Annual Report, RCF's claim for depreciation and various other relevant facts while arriving at its conclusion and the same cannot be faulted.

114. Mr. Mehta has submitted that it is the case of RCF in its pleadings on the issue of the defective nature of the GTGs that the filters installed by Thermax/Siemens were not as per the specifications provided in the contract. They did not have the minimum operating life of two years and on the contrary had an operating life of only six

months and were required to be replaced every six months. It was also the case of RCF in its pleadings that Thermax/Siemens were required to inform themselves of the local conditions before supplying and installing the plant, which they failed to do. Thermax/Siemens had not configured the Compressor Malfunctioning Alarm in the control system of the GTGs.

115. Mr. Mehta has referred to the evidence led by RCF in the first additional Affidavit dated 31st March 2021 of CW-1, Mr. Jawale, where he has deposed regarding the defective filters and the non-configuration of the Compressor Malfunctioning Alarm. He has in particular relied upon paragraphs 23 and 25 of the Affidavit of Evidence of CW-1 in this context. He has submitted that it is clear that both in the pleadings and in its evidence that RCF had consistently made out a case of defective filters and the failure on the part of Thermax/Siemens to configure the Compressor Malfunctioning Alarm.

116. Mr. Mehta has submitted that the Arbitral Tribunal in the impugned Award although has not accepted RCF's case based on the rubbing theory, accepted its case with regard to the defective filters and non-configuration of the Compressor Malfunctioning Alarm.

117. Mr. Mehta has submitted that as regards the alleged non-compliance by RCF with the O & M Manual, the Arbitral Tribunal accepted the case of RCF that Thermax was in charge and responsible and liable for the plant in all respects until the issuance of the PAC and consequently until then, if there was any non-compliance with the O & M Manual, the fault lay at the door of Thermax and RCF could not be blamed for the same.

118. Mr. Mehta has submitted that Thermax's case regarding the 269 air intake filter alarms for GTG 1 and 52 air intake filter alarms for GTG 2 observed in their respective control systems during the period from 22nd February 2019 to 8th March 2019 and the allegation that RCF being aware of these alarms did not bring the same to the notice or attention of Thermax/Siemens, was not a case which was sought to be made out before the Arbitral Tribunal at any time. This factual contention had been raised for the first time in the course of arguments in this Petition, which is clearly impermissible.

119. Mr. Mehta has submitted that Thermax / Siemens were fully aware and apprised of the situation at the site and the issues being faced in the GTGs. He has submitted that in not a single email

have either Thermax or Siemens raised any grievance with regard to the non-availability of the data relating to the alarms and that they were not aware of the same and alleged that RCF had not provided the same. This is because their engineers were at the site and therefore aware of all the alarms and signals observed in the control systems of the GTGs.

120. Mr. Mehta has submitted that the 269 air intake filter alarms and 52 air intake filter alarms observed in GTG 1 and GTG 2 respectively, were all the FP915 signal / alarm. In the Fault Procedure forming part of the O & M Manual, the action suggested when this alarm is observed is to "*Check the trend curve. Change filter stage No. 1 and or stage 2 depending on the trend curve.*". He has submitted that it is pertinent to note that the data regarding the trend curves was always available with Thermax / Siemens and the same even finds place in the Siemens RCA. This has also been admitted by Mr. Roger Ahlin (RW-2) during his cross-examination that the trend curve data was available with Siemens at the time of making the Siemens RCA. He has submitted that neither in its pleadings nor in the evidence has Thermax sought to make out a case that the trend curves observed with regard to the filters pursuant to the FP915 signals / alarms, were

of such a nature that they indicated that the filters required to be changed.

121. Mr. Mehta has submitted that the FP915 signal / alarm did not relate to the compressor and did not suggest any fault in the compressor or action to be taken with regard to the compressor. The only signal / alarm relating to the compressor was the FQ910 Compressor Malfunctioning Alarm. The action suggested when this signal / alarm was observed, was to shut down the GTG and wash the compressor. He has submitted that admittedly, this signal / alarm was never observed in the control system of either of the GTGs. He has submitted that in the absence of the Compressor Malfunctioning Alarm being observed in the control system, it was safe for parties to assume that there was nothing wrong in the compressor, including that the compressor was not severely fouled.

122. Mr. Mehta has submitted that the contention of Thermax that the primary alert mechanism were the air intake filter alarms is completely misconceived and baseless. He has submitted that it is only the Compressor Malfunctioning Alarm which indicates a problem in the compressor. This alarm is therefore the primary alert

mechanism in relation to the compressor. He has submitted that the failure on the part of Thermax / Siemens to configure this alarm was therefore a very serious defect in the GTGs and this led to the breakdown of the GTGs inasmuch as there was no indication at any point of time that there was any problem or issue with the compressors or that they were severely fouled.

123. Mr. Mehta has referred to Siemens RCA in support of his submission that this establishes that the GTGs were defective. He has submitted that in view of high saline or salt content in the air at the site of the plant, the Siemens RCF recommended the adjustment of the replacement interval of the filters based on time. It was also recommended to evaluate whether the existing maintenance plan for the air intake filters required to be modified. It is further stated in the Siemens RCA that if F9 filters had been installed instead of F8 filters, the events that had occurred would have occurred at a slightly later stage, meaning thereby that the GTGs would not have failed in March 2019. It was further found that the Compressor Malfunctioning Alarm of both GTGs was incorrectly programmed in the control system as a result of which this alarm did not appear in February and March 2019, when it should have appeared in the control system. The RCA

recommended that this alarm be rectified in both GTGs.

124. Mr. Mehta has submitted that the Siemens RCA does not arrive at any conclusive finding with regard to the cause of the failure of the GTGs, but merely provides "likely" and "possible" causes for the failure. He has submitted that therefore, it is evident that Siemens is not clear about the cause of the failure of the GTGs. In any event, it is not possible to blame RCF for the failure of the GTGs on the basis of such a speculative RCA.

125. Mr. Mehta has submitted that the testimony of Mr. Roger Ahlin (RW-2) and Mr. Michael Wood (RW-3), inter alia, also corroborates the findings of the Siemens RCA on the above aspects. He has referred to their evidence in this context.

126. Mr. Mehta has submitted that it is clear from the Siemens RCA itself that GTGs were defective and that if in fact any party had failed to follow the O & M Manual or the instructions of Siemens, it was Thermax and not RCF.

127. Mr. Mehta has submitted that though the material on record shows that the normal operating life of the filters was a

minimum of two years, the filter lifetime did not even last a year. He has relied upon the documentary evidence on record, which includes O & M Manual, which provides that the filter expiry date is required to be checked after two years of operation, suggesting that the filter operating life is at least two years.

128. Mr. Mehta has submitted that the plant was inherently defective and neither designed nor installed properly by Thermax / Siemens and which is apparent from the fact that at the very beginning, the plant was displaying all kinds of defects. Repeatedly signals/alarms/trips as provided in the Fault Procedure were observed. On 27th February 2019, an abnormal sound was heard in GTG-1 and the air compressor suction duct clamps of GTG-2 had become detached from their original position and that there was a gap between the suction duct, lower and upper halves, from where air was being released. Although this was to be brought to the attention of Thermax, in view of plant being under control and supervision of Thermax, these issues ought to have been investigated thoroughly by Thermax / Siemens, possibly by opening the compressor and examining it.

129. Mr. Mehta has submitted that on 28th February 2019, there was an increase in vibrations in GTG-1, thereafter the vibrations remained more or less constant at the increased level. He has submitted that Mr. Wood has considered this aspect in paragraph 6.4.1 of the RINA Report. Mr. Wood states that sudden changes in vibrations normally indicated that there has been a mechanical change in the compressor or turbine. He has referred to the cross-examination of Mr. Michael Wood (RW-3) (Q&A 52 and 53) where he was asked what is meant by mechanical change in the compressor or turbine. Mr. Michael Wood (RW-3) stated that if there were changes in the vibration behaviour, then one of the possible reasons was that pieces of the rotating equipment had broken away e.g. a piece of the blade. He has admitted that vibrations in GTG-1 had continued to remain at the higher level after 28th February 2019 until its failure i.e. changed permanently.

130. Mr. Mehta has submitted that in view of RINA Report and the deposition of Mr. Michael Wood (RW-3), it is clear that on 28th February 2019 itself, one or more pieces of the rotor blades of GTG-1 had broken away which resulted in the permanent increase in vibrations.

131. Mr. Mehta has submitted that Mr. Roger Ahlin (RW-2) was cross-examined (Q&A 78 – 80) with regard to the abnormal sound heard on 27th February 2019. He has virtually admitted that no independent investigation was carried out and that Siemens therefore did not know the cause of the sound.

132. Mr. Mehta has submitted that it is clear from Mr. Roger Ahlin's answers that Thermax / Siemens did not investigate the matter further with a view to determine the reason for the sound. They ought to have opened the compressor and examined it. Instead, all that they did and recommended was to keep washing the compressor.

133. Mr. Mehta has submitted that though it is alleged by Thermax that RCF did not shut down GTG-1 immediately on receiving instructions from Siemens on 21st March 2019 at 13:27 p.m. to do so, RCF did immediately commence the process of shutting down GTG-1. He has submitted that in a similar situation in February 2019, when instructed by Siemens to urgently shut down and wash the compressor, Thermax/RCF had not done so within 24 to 48 hours after receiving the instructions and Siemens had not found any fault with the same. He has submitted that moreover, the Compressor

Malfunctioning Alarm was not seen in the control system and hence, there was no cause for RCF to be concerned about the compressor being damaged. He has submitted that RCF cannot be blamed for not instantaneously shutting down GTG-1 by risking its downstream plant but instead taking all the proper steps to shut down GTG-1 after taking precautions to safeguard the downstream plant and GTG-1 in the same manner as it had done in the past, e.g. February 2019, under the supervision of Thermax.

134. Mr. Mehta has relied upon the findings of the Arbitral Tribunal on the above aspects i.e. paragraphs 19, 35 to 54, 63, 85 to 87 and 95 of the impugned Award. He has submitted that these findings clearly show that there was no confusion whatsoever in the mind of the Tribunal nor is there any confusion in the findings rendered in the impugned Award.

135. Mr. Mehta has submitted that out of the claims of RCF for damages / compensation from Thermax, the Arbitral Tribunal has only awarded claim of Rs. 173.72 Crores towards loss suffered by RCF due to additional expenditure on power. All the other claims of RCF were rejected by the Arbitral Tribunal. He has referred to the findings

of the Arbitral Tribunal where the claim of Rs. 173.72 Crores has been dealt with i.e. paragraphs 56 to 62, 64 to 76 and 96 of the impugned Award.

136. Mr. Mehta has submitted that RCF's claim for damages / compensation of Rs. 173.72 Crores was based on the loss caused to it on account of the increased expenditure incurred by RCF to secure power from other sources due to the breakdown of the 2 GTGs. After the GTGs broke down, RCF was required to secure power from the State Grid i.e. MSEB as well as to generate power from steam turbo generators. The cost of procuring power through these sources was higher than the cost of power procured through the GTGs. The increased cost of power procured by RCF during the period from 1st April 2019 to 30th November 2020 was Rs. 173.72 Crores.

137. Mr. Mehta has submitted that the said loss suffered by RCF naturally arose in the usual course of things and parties obviously knew that such a loss would arise in the event of the breakdown of the GTGs. The immediate effect of the breakdown of the GTGs would be the procuring of power from other sources and this was the natural consequence of the breakdown of the GTGs. Such a loss was obviously

in clear contemplation of the Parties. There is no question of such a loss being remote or indirect. This loss is therefore covered by the first paragraph of Section 73.

138. Mr. Mehta has submitted that Thermax has accepted the position that such a loss on account of the increased expenditure arose out of the breakdown of the GTGs is covered by the first paragraph of Section 73. However, it seems to be the case of Thermax that this loss is a "consequential loss", which though covered by the first paragraph of Section 73, is excluded by virtue of Clause 32.2(a) of the GCC. It is Thermax's case that the consequential loss is not the same as remote or indirect loss. Thus, it fell for consideration before Arbitral Tribunal, as to what is the meaning of consequential loss.

139. Mr. Mehta has submitted that the consequential loss is the same as indirect loss and is not a loss naturally arising in the usual course of things or which parties knew would arise. It is therefore, a loss covered by the second paragraph of Section 73 and not the first paragraph. He has placed reliance upon **Saint Line Limited Vs. Richardsons, Westgarth & Co., Limited** (supra); **McDermott International Inc. Vs. Burn Standard Co. Ltd. and others**[25], Black's

25 **(2006) 11 SCC 181 at paras 116 to 120**

Law Dictionary and P. Ramanatha Aiyar Dictionary.

140. Mr. Mehta has submitted that in the decision relied upon by Thermax on the issue of consequential loss, namely **Seth Thawardas Pherumal** (supra), the parties had contemplated the remote loss and expressly excluded it contractually. This was not a decision on consequential loss. Further, the decision of **Shwetadri Speciality Papers Pvt. Ltd.** (supra) **and Trojan And Company** (supra) relied upon by Thermax are not cases of consequential damages. They are cases relating to the sale of shares (i.e. goods) and, as such, the principle relied upon therein by Thermax is not applicable in the present case, in as much as the present case is not a case of sale of goods. He has submitted that **Chief Commercial Superintendent of Rail ways, Secunderabad Vs. Anand Kumar** (supra) relied upon by Thermax was a case where the claim in question was held to be remote and hence, barred under Section 78(d) of the Indian Railways Act, 1890. He has referred to Section 78(d), which treats indirect and consequential damages as being of the same kind i.e. remote. He has submitted that even the Legislature has treated consequential damages as damages which do not naturally arise in the usual course of things from a breach of contract.

141. Mr. Mehta has submitted that the extracts from McGregor on Law of Damages relied upon by Thermax relate to damages under the law of torts and that too, on damage to goods. It is inapplicable in the present case. He has submitted that it is well settled that the plant and machinery fixed to the ground are not goods, but are immovable property. The GTGs manufactured and installed by Thermax constitute plant and machinery and are fixed to the ground and hence, are not goods. Consequently, the principles applicable to goods will not apply to the GTGs.

142. Mr. Mehta has submitted that Section 73 is based on the principles of English Law as enunciated in the classic case of **Hadley Vs. Baxendale**. This being so, there is no question of Thermax contending that English Law ought not to be considered while deciding what is consequential loss in the context of Section 73.

143. Mr. Mehta has submitted that the consequential loss is also an indirect or remote loss and is not a loss that arises naturally in the usual course of things from a breach of contract. Accordingly, Clause 32.2(a) did not exclude losses naturally arising from the usual course of things from a breach of contract. He has submitted that

RCF's claim for damages/compensation of Rs. 173.72 Crores is not excluded by Clause 32.2(a) of the GCC.

144. Mr. Mehta has dealt with the contention of Thermax viz. that the claim of RCF to damages / compensation was beyond the scope of Agreement titled as "Notice to proceed" dated 2nd July 2019 entered into between Thermax and RCF in relation to repairs and reinstatement from GTGS. He has submitted that this contention is misconceived. Notice to Proceed is a clear and unambiguous document and therefore, required to be construed on the basis of the terms contained therein. He has submitted that it is clear from the terms of the Notice To Proceed that it was only concerned with the repairs and restoration of the GTGs and was issued by RCF in view of the provisions of Clause 17 of the SCC and pursuant to an arrangement agreed to between RCF and Thermax with regard to the repairs and restoration of the GTGs. The Notice To Proceed had no bearing on the right of RCF to claim damages from Thermax for the loss suffered by RCF on account of the failure of the GTGs.

145. Mr. Mehta has submitted that the contention of Thermax with regard to force majeure, i.e. Covid-19 pandemic, which broke out

in March, 2020 being a *force majeure* event due to which RCF's claim for damages of Rs. 173.72 Crores is liable to be rejected is misconceived. He has submitted that there is no question of the Covid-19 pandemic being a *force majeure* event for a claim commencing from 1st April 2019, when there was no such pandemic in existence. Moreover, the two GTGs were required to be repaired and restored within 33 and 35 weeks respectively, which period was virtually over by March, 2020. He has submitted that it is obvious that Thermax was merely using the Covid-19 pandemic as an excuse for the delay on its part in repairing and restoring the GTGs.

146. Mr. Mehta has submitted that Thermax neither produced any material whatsoever in terms of Clause 35 of the GCC nor evidence was led to show how the Covid-19 pandemic prevented or delayed the completion of the repairs and restoration of the GTGs. The damaged GTGs had already shipped to Sweden much before the Covid-19 pandemic. Thermax has neither explained nor proved what prevented or delayed the carrying out of the repairs and restoration of the GTGs in Sweden, when they were already at the factory of Siemens prior to the outbreak of the Covid-19 pandemic.

147. Mr. Mehta has submitted regarding the contention of Thermax that the issue of *force majeure* due to the Covid-19 pandemic was not considered by the Arbitral Tribunal, the admitted facts established beyond a shadow of doubt that there is no substance whatsoever in this contention and that the Arbitral Tribunal was not required to consider every such frivolous and trivial issue raised by Thermax.

148. Mr. Mehta has submitted that insofar as the contention of Thermax that the Chartered Accountant, who had prepared the Certificates which have been relied upon in the Affidavit of Evidence of Mr. Shivkumar Subramanian (CW-2), the Deputy General Manager-Corporate Finance of RCF, at the relevant time, having neither been examined nor produced for cross-examination, made it impossible for Thermax to ascertain the basis on which, the said Certificates were prepared or the details of the relevant records relied upon, nor was it possible the controvert the said Certificates, is misconceived. He has submitted that the claim of Rs. 173.72 Crores was proven by the evidence of Mr. Shivkumar Subramanian (CW-2), who had personal knowledge of the facts and figures deposed in the Affidavit of Evidence. He has referred to the Affidavit of Evidence dated 29th

March 2021 as well as cross-examination of CW-2 in this context. He has submitted that CW-2 has in support of the computation of damages i.e. additional expenditure incurred by RCF towards the cost of power, submitted two financial statements, one for the period from 1st April 2019 to 31st March, 2020 and the second for the period from 1st April 2020 to 30th November 2020, which have been annexed to the Affidavit of Evidence. Thus, the Financial Claim Statements were part of the Certificates of the Chartered Accountants dated 11th January 2020, which were produced by CW-2. These Financial Statements contained the break up and particulars of the various expenses incurred by RCF for the purpose of generating power from the GTGs, Turbo generators and MSEB.

149. Mr. Mehta has also referred to the further Affidavit of Evidence dated 20th July 2021, in which the CW-2 has deposed to the correctness of the amounts and figures in the Financial Claim Statements. He has also relied upon the readings in the SAP ERP System as regards the cost of power secured through the turbo generators and GTGs. CW-2 has deposed that he has personally verified the figures and data in the SAP ERP System and that the computation of the expenditure incurred towards the consumption of

power as provided by CW-2 in his Affidavit of Evidence dated 29th March 2021, which was based on these figures and data and was correct.

150. Mr. Mehta has submitted that the CW-2 in his cross-examination when asked as to who had prepared these Financial Claim Statements, CW-2 answered that the same were prepared by his costing team under his supervision. He has submitted that both the Certificates of the Chartered Accountant state the Financial Claim Statements annexed thereto were prepared by the Management of RCF and that the contents thereof had been verified by the Chartered Accountants from the Books of Accounts and from the other relevant records of RCF. He has submitted that CW-2 being part of the Management of RCF as the Deputy General Manager, Corporate Finance was having personal knowledge of the matter and was in the best position to prove the claim. In fact, CW-2 was in a better position than the Chartered Accountants. Consequently, the evidence of Mr. Shivkumar Subramanian (CW-2) was the best evidence and there was no requirement to lead the evidence of the Chartered Accountants.

151. Mr. Mehta has submitted that the contention of

Thermax that the alleged underlying documents were not produced is based *inter alia* on the incorrect assumption that the data and figures relied upon by Mr. Shivkumar Subramanian (CW-2) can be derived only from underlying documents.

152. Mr. Mehta has submitted that the contention of Thermax that RCF ought to have produced a printout of the SAP-ERP System to prove its claim and that in the absence thereof, the evidence of Mr. Shivkumar Subramanian (CW-2) was secondary evidence is also misconceived. He has submitted that as explained by CW-2, the SAP-ERP System is a system in which entries are made. It is not a document in the sense of an email, contract etc. CW-2's deposition was that he verified the various inputs and figures available in the SAP-ERP System with his own records and the records of RCF. In these circumstances, the evidence of CW-2 was not secondary evidence, but primary evidence adduced on the basis of his records and records of RCF and his personal knowledge.

153. Mr. Mehta has submitted that it is well settled that while considering an application under Section 34 of the Arbitration Act, the Court does not act as a Court of Appeal and errors of fact

cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his award. Once it is found that the Arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. He has placed reliance on the decision of the Supreme Court in **Associate Builders Vs. Delhi Development Authority** (supra) in this context.

154. Mr. Mehta has submitted that the counterclaim of Thermax with regard to MAD by which Thermax sought an Award against RCF for the amount of Rs. 23,09,09,100/- recovered by RCF as MAD has been rightly rejected by the Arbitral Tribunal.

155. Mr. Mehta has submitted that Clause 3(73) and Clause 31.1.3 of the GCC provided for MAD. He has submitted that it is clear from the above provisions of the GCC that the time for completion of the works was the essence of the Contract and of utmost importance and in the event of Thermax failing to achieve the Preliminary Acceptance within the contractual completion period from the effective date, then Thermax was liable to pay to RCF, MAD at the rate of 0.77% of the total contract price for every week or part thereof,

subject to a maximum of 5% of the contract price. He has submitted that the Preliminary Acceptance was to be achieved within 22 months from effective date i.e. by 11th December 2017. Thermax achieved Preliminary Acceptance only on 7th March 2019 after a delay of 444 days. Consequently, RCF was entitled to recover MAD from Thermax for the period of delay. RCF recovered only 5% of the contract price as MAD in view of the ceiling of 5% stipulated by Clause 31.1.3 of the GCC.

156. Mr. Mehta has submitted that it is well settled that if the terms of a contract stipulate the liquidated damages to be recovered in the case of breach of contract, the same can be recovered from the party who has committed the breach of contract unless it is established by such party that the said liquidated damages / compensation was unreasonable or by way of a penalty. He has placed reliance on the decision of the Supreme Court in **Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes**[26]. He has submitted that it is not the case of Thermax in its Counterclaim that the liquidated damages stipulated by Clause 31.1.3 were either unreasonable or in the nature of a penalty. It is the case of Thermax in its pleadings that RCF had

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not shown that the delay in achieving Preliminary Acceptance was on account of Thermax. He has submitted that the question whether the stipulation of liquidated damages was unreasonable or in the nature of a penalty cannot be raised unless it is pleaded. Accordingly, it must be assumed that the liquidated damages agreed by parties vide Clause 31.1.3 were a reasonable estimate of the loss that would be caused to RCF on account of the delay on the part of Thermax in achieving Preliminary Acceptance and there was no necessity for RCF to prove any loss.

157. Mr. Mehta has submitted that the contention of Thermax that RCF did not establish that the delay in achieving Preliminary Acceptance was on account of Thermax is misconceived. The Arbitral Tribunal after considering all the evidence and material on record has rejected the contention of Thermax. RCF had produced voluminous documents in answer to Thermax's contentions and proved that Thermax alone was guilty of the delay in achieving Preliminary Acceptance. This was accepted by the Arbitral Tribunal. He has placed reliance upon the evidence of RCF's witness, Mr. Ravindra Jawale, CW-1, who has deposed regarding delay on the part of Thermax in paragraph 4 of further Affidavit of Evidence dated

31st March 2021. Thermax's Witness, Mr. Sunil Raina, RW-1 was also cross-examined in detail on this aspect. The Arbitral Tribunal, after considering and appreciating the evidence led by both sides, dealt with the various issues raised by Thermax in detail in paragraph 91 of the impugned Award. He has submitted that these are all findings of fact and they cannot be interfered with through proceedings under Section 34 of the Arbitration Act.

158. Mr. Mehta has submitted that the learned Arbitrator has considered the submissions of Thermax as well as the evidence on record while arriving the findings on the matters relating to PAC. He has relied upon the various findings on the submissions of Thermax.

159. Mr. Mehta has submitted that Thermax has contended that the impugned Award is liable to be set aside, if it falls within the three categories enunciated in the decision of the Supreme Court in the case of **OPG Power Generation Pvt. Ltd. Vs. Enexio Power Cooling Solutions India Pvt. Ltd. & Anr.**[27]. He has submitted that according to Thermax, the impugned Award is devoid of reasons or in any event, the reasons furnished are inadequate. He has submitted that in fact the learned Arbitrator has given reasons in support of her findings and

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which have been relied upon. He has submitted that Thermax has completely misconstrued the judgment of the Supreme Court in **OPG Power Generation Pvt. Ltd.** (supra). In paragraph 80, the Supreme Court in the first sentence itself expressed its absolute agreement with the view taken by the Supreme Court in paragraphs 34 and 35 of its decision in the case of **Dyna Technologies** (supra). The ratio of the Supreme Court in **Dyna Technologies** (supra) has thus been reaffirmed by the Supreme Court in **OPG Power Generation Pvt. Ltd.** (supra). The Supreme Court has merely added that in appropriate cases, the documents referred to in the award may also be examined to decide whether the reasons in the award are unintelligible or inadequate. Accordingly, it is open for the Court considering an application under Section 34 to examine documents produced before the Arbitral Tribunal for the purpose of deciding whether the reasons in the award are adequate and intelligible. He has submitted that the contention of Thermax that RCF has sought to cover up the absence of reasons by relying upon the documents and material not referred to in the Award is misconceived.

160. Mr. Mehta has submitted that the reasons in the impugned Award are in fact intelligible and adequate. The learned

Arbitrator may not have referred to every email or correspondence in the impugned Award. He has submitted that all relevant facts and materials have duly been considered by the learned Arbitrator. It is well settled that an Arbitrator is not required to consider or deal with each and every submission and piece of evidence while adjudicating upon the various issues and it is sufficient for the Arbitrator to consider the relevant submissions and material on record, which in the instant case, the learned Arbitrator has done.

161. Mr. Mehta has submitted that RCF has not attempted to call upon this Court to reappreciate the entire evidence or to reinterpret the terms of the Contract as contended by Thermax. On the contrary, this is exactly what Thermax has invited this Court to do so.

162. Mr. Mehta has accordingly, submitted that there is no valid ground raised by the Petitioner under Section 34 of the Arbitration Act and the above Commercial Arbitration Petition requires to be dismissed.

163. Having considered the submissions, from a reading of the impugned Award, it is evident that the findings arrived at by the learned Arbitrator are *inter alia* based on no evidence at all or by

disregarding vital evidence. It is well settled law that a Court under Section 34 of the Arbitration Act can only look beyond and outside the Award for the limited purpose of considering whether the evidence on record has been ignored and/or disregarded by the Arbitral Tribunal. Further several findings of the learned Arbitrator in the impugned Award are bereft of reasons.

164. The Supreme Court in its recent decision in **OPG Power Generation Pvt. Ltd.** (supra) has laid down three categories for setting aside an Arbitral Award in paragraph 80, which read thus :-

> *"80. We find ourselves in agreement with the view taken in Dyna Technologies (supra), as extracted above. Therefore, in our view, for the purposes of addressing an application to set aside an arbitral award on the ground of improper or inadequate reasons, or lack of reasons, awards can broadly be placed in three categories:*
>
> *(1) where no reasons are recorded, or the reasons recorded are unintelligible;*

(2) where reasons are improper, that is, they reveal a flaw in the decision- making process; and

(3) where reasons appear inadequate."

165. After setting out the three categories, the Supreme Court has in paragraphs 81 to 83 held as under:

"*81. Awards falling in category (1) are vulnerable as they would be in conflict with the provisions of Section 31(3) of the 1996 Act. Therefore, such awards are liable to be set aside under Section 34, 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.*

82. Awards falling in category (2) are amenable to a challenge on ground of impropriety or perversity, strictly in accordance with the grounds set out in Section 34 of the 1996 Act.

83. Awards falling in category (3) require to be dealt with care. In a challenge to such award, before

taking a decision the Court must take into consideration the nature of the issues arising between the parties in the arbitral proceedings and the degree of reasoning required to address them. The Court must thereafter carefully peruse the award, and the documents referred to therein. If reasons are intelligible and adequate on a fair-reading of the award and, in appropriate cases, implicit ***in the documents referred to therein****, the award is not to be set aside for inadequacy of reasons. However, if gaps are such that they render the reasoning in support of the award unintelligible, or lacking, the Court exercising power under Section 34 may set aside the award."*

(emphasis supplied)

166. Having perused the impugned Award, it falls within all the three categories as enunciated by the Supreme Court in **OPG Power Generation Pvt. Ltd.** (supra), which render the impugned Award liable to be set aside.

167. The learned Arbitrator has side-stepped one of the principal issues that arose for consideration, viz. the fact that RCF had taken over the plant from Thermax and was using the plant for commercial purposes for approximately eleven months from April 2018 to March 2019 prior to issuing the PAC. It was the contention of Thermax that RCF had benefited by the use of the plant by substantially saving on energy costs as well as other benefits. Thermax had led extensive evidence before the learned Arbitrator to show that RCF was in complete control of the plant from April 2018 onwards, i.e. well before it issued the PAC and was using the plant for its commercial production. In the impugned Award, this entire evidence has been completely disregarded.

168. The learned Arbitrator has omitted to consider the documents on record as well as the evidence which established that RCF was using the GTGs as its primary source of power from April 2018 by using the same i.e. for 7644 hours for GTG-1 and 7827 hours for GTG-2 and generating a total of 3,27,152 MWH of power between April 2018 and March 2019. The material on record which includes correspondence between Siemens and RCF relied upon by Thermax before the learned Arbitrator in relation to the operation of the GTGs,

shows that it was RCF who had sent emails to Siemens on the difficulties faced by it while commercially operating / running the plant. It is the established fact that RCF was independently operating the plant (without any supervision) long before the PAC was issued by them. The learned Arbitrator has completely failed to consider and/or deal with this aspect of the matter in the Award.

169. The learned Arbitrator has solely based her findings on the aforementioned fundamental issue by taking shelter behind a contractual provisions of PAC and the term "Taking over". This is apparent from paragraph 34 of the impugned Award. This approach by the learned Arbitrator is *ex facie* perverse. There is not even a smattering of reason given by the learned Arbitrator for ignoring the extensive evidence produced by Thermax in this regard.

170. In view of aforementioned issue being a fundamental issue it was required to be determined not only on the contractual provisions, but also on the evidence as well as the material documents placed on record. The learned Arbitrator could not simply ignore and/or disregard the same. It is evident from the material on record that RCF had taken possession of and started using the plant as far back

as April 2018 prior to the issuance of PAC on 15th March 2019. There is merit in the submission of Thermax that Clauses 3(63) read with 3(50) of GCC relating to 'take over', 'taking over' and 'taken over' and defining 'Preliminary Acceptance' were rendered completely irrelevant and otiose. RCF having chosen to take over the plant and start using the same for commercial purposes prior to the issuance of a PAC was no longer entitled to contend that the date of taking over was the date of the PAC. RCF had admittedly claimed depreciation on the plant for the entire year, which makes it evident that RCF had itself chosen to take over the plant without issuing a PAC as contemplated under the Contract.

171. I do not find any merit in the submission of RCF that Thermax had not raised the argument before the learned Arbitrator that Clauses 3(63) read with 3(50) of GCC had been rendered completely irrelevant and otiose. This is contrary to material on record as well as evidence placed by Thermax before the learned Arbitrator in support of this contention of Thermax.

172. RCF has with an attempt to support the impugned Award called upon this Court to re-appreciate the evidence without

dealing with the submissions made by Thermax in relation to deficiencies in the Award.

173. It is Thermax's case that the reason for breakdown of the GTGs was on account of faulty handling of the GTGs by RCF and failure to comply with the O & M Manual. RCF had ignored several numerous repeated warnings from the air intake filter alarms, i.e. 269 Filter Alarms in GTG-1 and 52 Filter Alarms in GTG-2, though admittedly noticed by RCF and this was neither reported to Thermax / Siemens nor did RCF take any action as per O & M Manual to change the filters. The Final RCA opines that the real cause for accumulation of dirt on blades of compressor was that the filters were not changed on time. The Final RCA in its conclusion stated that breakdown could have been avoided by washing the dirt on the compressor blades in time. The learned Arbitrator inspite of the material on record, has failed to consider and overlooked the fact that air intake filter alarms was the primary alert mechanism to indicate the problem in filtration and the condition of the filters. The learned Arbitrator has in side-stepping the issue, placed reliance on the fact that the compressor malfunction alarm had been incorrectly configured.

174. The learned Arbitrator by failing to deal with and/or disregarding the evidence of Thermax in particular, the testimony of RW-2 regarding the repeated warnings from air intake filter alarms, makes the impugned Award vulnerable to being set aside under Section 34 of the Arbitration Act on this ground.

175. RCF had not answered Thermax's arguments on failure of RCF to take appropriate action upon noticing these filter alarms. RCF has attempted to justify the same on the ground that this issue had not been raised before the learned Arbitrator and was being raised before this Court for the first time.

176. The material on record also establishes that at the relevant time of breakdown of GTG-1, this could have been avoided, if the plant had been shutdown immediately by RCF on instructions of Siemens. It has been admitted by RCF's witness (CW-1) during his cross-examination that it is possible to shutdown the plant within half an hour. The only reason given by RCF for failure to immediately shut down GTG-1, which would have prevented its breakdown, was that on previous occasions also RCF had taken 24 - 48 hours to shutdown the plant. This overlooks the fact that Siemens by its email

on 21st March 2019 at 13:27 hours, had categorically instructed RCF to *"stop the unit immediately and wash it"* . The argument that RCF had stopped the plant within 24-48 hours of the Instructions of Siemens on prior occasions could not be applied to a situation where RCF was categorically informed to stop the unit *"immediately"* to *"prevent same events as that of GTG-2"*. The learned Arbitrator has not considered this aspect of the matter in the Award.

177. The learned Arbitrator has in the impugned Award selectively relied upon the findings in the Final RCA to hold that the GTGs were defective in nature. This overlooks the conclusion of the Final RCA, viz. that dirt and most likely liquids entered into the compressor causing the compressor to become so dirty that the blades cracked due to high cycle fatigue causing the debris to damage other parts of the compressor. The dirt on the blades was caused on account of the filters not filtering the dirt and allowing dirt and salts to wash through the filters and settle on the blades. Had the filters been inspected and maintained periodically and replaced in time, the breakdown of the GTGs could have been prevented.

178. The case of RCF before the Arbitral Tribunal was that

the GTGs supplied to them were inherently defective in nature. RCF in order to prove this defect, had produced the Shakti Report and had led evidence of Mr. Jamula Sudhakar (CW-3), Director of Shakti, who was co-Author of the Shakti Report. This was in order to establish that the defect in the GTGs was on account of rubbing theory. However, RCF abandoned and/or failed to prove the Shakti Report. In view thereof, the learned Arbitrator should have held that RCF had failed to establish that the GTGs supplied to them were inherently defective.

179. The learned Arbitrator has mixed up the issues of defect in GTGs with the breakdown in the GTGs. It was for the learned Arbitrator to consider that RCF had by taking over the plant from Thermax and putting it to use for commercial purpose for approximately eleven months from April 2018 to March 2019 i.e. prior to the issuance of the PAC, was incharge in control of the plant and by its neglect in taking action on the filter alarms as per O & M Manual, the breakdown of the GTGs is to their account.

180. The RCF has sought to supplement the inadequacy of reasons of the learned Arbitrator. RCF has contended that Thermax had

not investigated into the ambient air conditions at Thal site. This by relying upon Clauses 14.4 and 14.5 of the Instructions to Bidders and Clauses 4.1 and 6.1.2 of Technical Specifications. The Award makes no mention and/or reference to these Clauses and/or considers the same. Further, RCF has relied upon events that purportedly transpired on 27th February 2019, 28th February 2019 and 1st March 2019 and the evidence of Mr. Michael Wood (RW-3) to contend that Thermax/Siemens had not responded to RCF in respect of certain problems faced by it while operating the plant. It is pertinent to note that the Award does not make any reference to these dates/events and thus, RCF is relying on material/evidence which does not form part of the Award.

181. RCF also sought to refute the contention of Thermax that Thermax had moved out from RCF's plant on 11th May 2018 barring one site engineer by referring to the Counterclaim of Thermax for overstay of personnel at site. The learned Arbitrator in the Award has not arrived at any findings on this issue. There is no discussions / findings in the Award on the issue of costs incurred by Thermax for extended stay of manpower. This submission of RCF clearly travels beyond the Award.

182. The learned Arbitrator has not dealt with the *'Statement of Agreed Variation'* under which RCF was not allowed to start commercial operation of the GTGs prior to the PG Test. The learned Arbitrator has thus ignored vital evidence in the form of *'Statement of Agreed Variation'* .

183. RCF has sought to justify the categorical statement made in their Annual Report for FY 2018-19 that GTGs were commissioned in April 2018 and depreciation had been claimed for FY 2018-19 by claiming that commissioning of the GTGs was at the stage prior to commercial production and hence, the Annual Report for FY 2018-19 correctly mentioned that GTGs were commissioned in April 2018. This justification / reasoning is conspicuously absent from the Award.

184. This Court under Section 34 of the Arbitration Act cannot re-appreaciate the evidence placed before the learned Arbitrator by a party. Under the provisions of Section 34 of the Arbitration Act while deciding whether or not to set aside an award, the Court is only concerned with the question with respect to whether the Arbitral Tribunal has considered all relevant evidence, dealt with the same by providing reasons in the award and/or whether the Arbitral Tribunal

has disregarded/ignored certain vital evidence resulting in perversity in the Award which amounts to a patent illegality. It is clear from a reading of the impugned Award that the learned Arbitrator has completely ignored and/or disregarded the submissions, and oral and documentary vital evidence in support of these submissions. This results in perversity in the Award which amounts to patent illegality. The impugned Award is accordingly, liable to be set aside on this ground.

185. The learned Arbitrator has granted RCF damages to the tune of Rs. 173.72 Crores. The learned Arbitrator has in paragraph 75 of the said Award given a finding to the effect that Mr. Shivkumar Subramanian ('Shivkumar') / CW-2 had personal knowledge of the figures that he had deposed. Shivkumar / CW-2 has relied upon the CA Certificates to establish the claim regarding the cost of power, which formed the basis of RCF's claim for damages. However, the evidence of the Chartered Accountant was neither led nor the Chartered Accountant produced for cross-examination.

186. RCF during the arguments before this Court purported to contend that it did not rely upon the CA Certificates at all to prove its claim. The learned Arbitrator has not recorded any such submission on

the part of the RCF and the only finding recorded by the learned Arbitrator as aforementioned is in paragraph 75 of the impugned Award. The finding being that Shivkumar / CW-2 had deposed to these figures on his personal knowledge as also on the basis of records of the Claimant Company as maintained in the ordinary course of business and his evidence is not shaken in cross-examination.

187. The learned Arbitrator has overlooked the fact that Shivkumar / CW-2 has himself at multiple places in his evidence, and even during the course of his cross - examination relied upon the CA Certificates. RCF's entire case relating to adequacy of evidence to support its claim for damages is now based on its contention that Shivkumar / CW-2 had personal knowledge, which was adequate to prove RCF's claim of Rs. 173.73 Crores. However, the claim made by RCF and evidence led by its witness Shivkumar / CW-2 is on the fundamental premise that the actual power requirement during 1st April 2019 to 31st March 2020 was 3,50,669.64 MWH and that the actual power requirement during 1st April 2020 to 30th November 2020 was 2,25,418.88 MWH. Except for the bare word of the witness Shivkumar / CW-2, there is no evidence to corroborate these figures.

188. Shivkumar / CW-2 claims that the figures have been extrapolated from the SAP/ERP System maintained by RCF with which he is "familiar". However, no supporting data from the SAP/ERP System is produced to justify these claims. The learned Arbitrator was thus expected to decide this claim only on the bare statement of Shivkumar / CW-2 to the effect that the SAP/ERP System contains the data that the witness claims to have seen. Further, Shivkumar / CW-2 has relied upon what he calls *"a certified copy of Financial Claim Statement"*. The alleged certification of these financial claim statements is based on the two Chartered Accountant Certificates annexed to the Affidavit of Evidence dated 29th March 2021, of which RCF has now claimed that it does not wish to rely upon.

189. In view of the submission now made by RCF that it does not wish to rely on the CA Certificates, the references to the CA Certificates in evidence is required to be disregarded. If this exercise is undertaken, it will become all the more apparent that Shivkumar / CW-2 had no personal knowledge that he claims to have and that his evidence is completely insufficient to prove his claim. There is a failure to provide the underlying documents evidencing the claim and this

cannot be cured by leading the oral evidence of Shivkumar / CW-2. Section 34 of the Evidence Act provides that entries in Books of Accounts including those maintained in electronic form are not sufficient to charge any person with liability. In this case the entries have also not been produced.

190. The finding of the learned Arbitrator in paragraph 75 of the impugned Award that Shivkumar's evidence "*is not shaken in cross–examination*" is rendered without any supporting reasons and is contrary to the answers given by Shivkumar / CW-2 during his cross examination, which ex-facie shows that he has admitted his lack of knowledge in relation to the claim. Thus, the learned Arbitrator by accepting the evidence of Shivkumar / CW-2, has acted in an arbitrary or perverse manner.

191. It is Thermax's contention that the claim for damages on account of additional expenditure incurred on account of sourcing power from alternate sources was either an *"indirect"* or a *"consequential"* claim, which was expressly waived by the parties and hence, the learned Arbitrator, being a creature of contract, was barred from awarding the same. There is merit in this submission, considering

Clause 32.2(a) of the GCC, which provides that a *"Contractor shall, in no circumstances, be liable in respect of any indirect or consequential loss or loss of profit suffered by owner in connection with or arising out of performance of Work under Contract."*.

192. The cost incurred for purchasing of power in the absence of power from the GTGs is consequential to the failure of the GTGs. Under normal circumstances, applying Section 73 of Contract Act, RCF could have claimed the said cost. Section 73 of the Contract Act, 1872 reads as under :-

> *"73. Compensation for loss or damage caused by breach of contract.-*
>
> *1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby,*
>
> *(a) which naturally arose in the usual course of things from such breach, or*

(b) which the parties knew, when they made the contract, to be likely to result from the breach of it.

2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

193. Thermax and RCF had under Clause 32.2(a) of the GCC expressly agreed for exclusion of certain categories of loss/damages, from the ambit of Section 73(1). The *"indirect loss"* or *"consequential loss"* in Clause 32.2(a) have been judicially interpreted to mean other than and distinct/ different from *"remote and indirect losses or damages"* , which are in any event, statutorily excluded under the Indian codified law. The learned Arbitrator was called upon to determine whether the contractual bar under Clause 32(2)(a) to grant *"indirect loss"* or *"consequential loss"* was attracted. The learned Arbitrator would firstly have to determine what would be the normal measure of damages in a case like the present case; and secondly, whether the claim for damages of RCF was beyond the normal measure of damages and would therefore constitute an *"indirect loss"*

or *"consequential loss"*. The learned Arbitrator without determining these issues, came to the conclusion that the claim of RCF fell within Section 73(1) without examining the effect of parties excluding "*consequential*" losses within the ambit of Section 73(1) by incorporating Clause 32.2(a). I find much merit in the submission of Thermax that Clause 32(2)(a) could never have been intended to exclude what was anyways statutorily barred under Section 73(2).

194. The RCF by relying upon the decision of the King's Bench Division in **Saint Line Limited** (supra) in support of their contention that if the loss is direct, then it is not indirect or consequential, has overlooked that whereas the law in India is codified in Section 73 of the Indian Contract Act, 1872, the law being considered in the **Saint Line Limited** (supra) case was based on English common law dealing with a claim for damages.

195. Further, RCF's reliance on **McDermott** (supra) is also misplaced since the Supreme Court did not consider the effect of an exclusion clause, which excludes certain damages, which would otherwise fall within Section 73(1). This judgment relied upon by RCF is clearly distinguishable on facts.

196. It has been held by the Supreme Court in **Trojan** (supra), relied upon by Thermax, that damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Damages can only be the difference between the price which he paid and the price which he would have received, if he had resold the goods in the market forthwith after the purchase, provided of course that there was a fair market then. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation i.e. how much worse off was his estate owing to the bargain in which he entered into.

197. The learned Arbitrator ought to have applied the principle as laid down in **Trojan** (supra) that a party is entitled to receive the normal measure of damages and which could have only been the cost of repairs. The claim for additional expenditure on account of power sourced from other sources cannot and would not fall within the normal measure of damages. There has neither been any consideration nor finding on this aspect by the learned Arbitrator.

198. The attempt made by RCF to distinguish this judgment is misconceived. The impugned Award insofar as it awards the claim for Rs. 173.72 towards the additional expenditure allegedly incurred by RCF, although falling within the exclusion clause is perverse and patently illegal.

199. The Counterclaim of Thermax for refund of MAD, which had unilaterally been deducted by RCF ostensibly under Clause 3(73) read with Clause 31.1.3 of the GCC has been rejected by the learned Arbitrator.

200. The findings of the learned Arbitrator overlooks the emails and correspondence, wherein RCF itself had admitted that the main steam line was made available only in February, 2018. As per the baseline schedule, RCF was required to be provide the main steam line by 31st August 2017. Thus, there was a delay of approximately 162 days on the part of RCF providing the main steam line.

201. The learned Arbitrator has failed to appreciate and address the submissions of Thermax insofar as levy of MAD by RCF for the alleged delay. It was Thermax's case that there was no delay on the part of Thermax in completing the PG Test and MAD was

accordingly, not leviable. These submissions and material documents relied upon by Thermax in support thereof have not even been dealt with by the learned Arbitrator. Given the fact that there was delay on the part of RCF in provision of the main steam line, RCF cannot take advantage of its own wrong and complain of delay by Thermax. Accordingly, the finding of the learned Arbitrator that there was delay of 444 days on the part of Thermax is perverse.

202. Thermax has accordingly, raised valid grounds of challenge to the impugned Award under Section 34 of the Arbitration Act. The failure on the part of the Arbitrator to give reasons for rejecting the submissions of Thermax; the findings of the learned Arbitrator based on no evidence; are all grounds for which the impugned order is liable to be set aside. This is as per the settled law laid down by this Court in **Bhanumati Jaisukhbhai Bhuta** (supra); the Supreme Court in **Ssangyong Engineering and Construction Company Limited** (supra) and **Associate Builders** (supra).

203. In view thereof, the Commercial Arbitration Petition is allowed and the impugned Award dated 5th June 2023 is set aside.

204. RCF is directed to comply with the order of stay dated

4th October 2023, in particular paragraph 7 of the said order and refund the entire amount of Rs. 218,45,88,493/- deposited by the Petitioner along with interest at the rate of 6% per annum within a period of ten days from uploading of this Judgment and Order.

205. Commercial Arbitration Petition is accordingly, disposed of. There shall be no order as to costs.

206. In view of disposal of the Commercial Arbitration Petition, Interim Application (L) No. 23263 of 2023 does not survive and is disposed of.

[R.I. CHAGLA, J.]

207. After this judgment and order has been pronounced, the learned Counsel for the Respondent-RCF has sought for a stay of the judgment and order in order for them to avail of their appellate remedy.

208. Considering the application of Respondent-RCF, for a period of four weeks, the undertaking given by RCF recorded in the order of stay dated 4th October 2023 will not be given effect to.

[R.I. CHAGLA, J.]