Neutral Citation No. (2025:HHC:32554)

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Arb. Appeal No. 01 of 2019
Reserved on 19.08.2025
Pronounced on: 19.09.2025

Himachal Pradesh Power Corporation Ltd. .....Appellant
Vs.
M/s Orange Business Service India Technology Pvt. Ltd.
....Respondent

Coram:

The Hon'ble Mr. Justice G.S. Sandhawalia, Chief Justice.
The Hon'ble Mr. Justice Ranjan Sharma, Judge.

Whether approved for reporting?

For the Appellant : Mr. Shashi Shirshoo, Advocate.

For the respondents: Mr. Devashish Bharuka, Senior Advocate with Mr. Ravi Bharuka, Advocate (through V.C), Mr. Diwan Singh Negi and Mr. Devi Singh Verma, Advocates.

G.S. Sandhawalia, Chief Justice.

The present Civil Arbitration Appeal seeks consideration of the judgment dated 08.10.2018, passed by the learned Single Judge in Arbitration Case No. 1 of 2018, titled *Himachal Pradesh Power Corporation Ltd. vs. M/s Orange Business Service India Technology Pvt. Ltd,* whereby the Award dated 17.10.2017, passed by the learned Arbitrator in favour of the claimant/respondent herein has been affirmed.

2. A brief narration of relevant facts, necessary for the adjudication of this Appeal, may be noticed.

3. The claimant/respondent herein is a Company incorporated and registered under The Companies Act, 1956 having its registered office at DSO-601-603, 607-608, 6th floor, DLF South Court, Saket, New Delhi-110017 and is engaged in the business of rendering service in the field of Information technology infrastructure. The appellant herein, on the other hand, is an incorporated Company and is a State Government undertaking of Himachal Pradesh.

4. Apparently, claimant/ respondent herein participated in a bid invited by the appellant for Installation and commissioning of IT infrastructure, Data Centre and Disaster Recovery centre for ERP Implementation with Himachal Pradesh Power Corporation Ltd. After evaluation, the appellant, vide letter dated 19.09.2011, accepted the claimant's bid dated 28.06.2011 for execution of Installation and commissioning of aforesaid project for a consideration of Rs.19,61,52,962.00 (Nineteen crore sixty one lakh fifty two thousand nine hundred and sixty two).

5. The parties *inter se* entered into an Agreement dated 20.10.2011 and agreed to be abide by the terms and conditions of the said Agreement. The execution of the work under the Agreement was to procure equipments through

import and install the same. The project was to be completed by the claimant/ respondent within 21-90 days in terms of C1-8.2. of the said Agreement, failing which, the claimant/respondent would be liable to liquidated damages in terms of Section 8 (6) of the said Agreement.

6. The claimant/respondent was to handle all imported materials at its own expenses at the points of import in terms of Clause 21.4 subject to the employer's obligation under the GCC sub-clause-14.2. which provided that employer shall bear and promptly pay all custom & import duties. The claimant imported the equipments after paying necessary customs duty at the time of import and utilized them in the project. After making payment towards customs duties corresponding debit notes were submitted to the appellant for information and reimbursement. At the relevant time, the appellant had not raised any protest either to the import or the amount of custom duty.

7. Clause 45 of the Agreement provided for dispute resolution before the Dispute Board. Since the dispute arose between the parties, the appellant invoked Clause-45 of the agreement which provided a Three Member Dispute Board who by majority decision held the claimant entitled to reimbursement of a sum of Rs. 1,00,30,984/- (rupees one crore thirty thousand hundred eighty four only) with interest.

8. Being dissatisfied with the decision of the Dispute Board, appellant refused to pay the amount and gave a notice of dissatisfaction dated 05.04.2016 against the said decision. The claimant/respondent herein slapped a legal notice 27.04.2016 to the effect that appellant in terms of the clause 45.3 had assigned no reasons, therefore, the decision of the Dispute Board has attained finality and is binding upon the parties.

9. The appellant being aggrieved by the decision of Dispute Board, invoked the arbitration clause vide its letter dated 31.05.2016. Two of the the learned Arbitrators of the panel after considering the pleadings of the parties and documents placed on record, have passed the award in favour (whereas one of them dismissed the claim) of the claimant/respondent herein and awarded a sum of Rs.1,00,30,984/-(rupees one crore thirty thousand nine hundred and eighty four only) as reimbursement of amount paid as custom duty on the equipments and directed the respondent/appellant herein to pay the same to the claimant within a period of 90 (ninety) days from the date of award. The claimant/respondent was awarded interest @ 10% p.a, on the sum of Rs.1,00,30,984/- (rupees one crore thirty thousand nine hundred and eighty four only) for the period from three months

after the last import of equipment in January 2012 till the date of award and a sum of Rs.7,50,000/- (rupees seven lacs fifty thousand only) as costs.

Reasons which prevailed before the learned Single Judge to uphold the Award:

10. The learned Single did not deem it fit to take a different view than what the learned Arbitrator had taken and upheld the said Award of the learned Arbitrator, while placing reliance on the judgment rendered by the Apex Court in ***Sutlej Construction Ltd. vs. Union Territory of Chandigarh*** **(2018) 1 SCC 718** and ***Navodaya Mass Entertainment vs. J.M. Combines*** **(2015) 5 SCC 698.**

11. The reason which prevailed with the learned Single Judge to uphold the said majority award of the Arbitral Tribunal towards the reimbursement of the custom duty on the import rates item and not to interfere in the same though there was a minority view in favour of the corporation on account of the conjoint reading of Clauses 14.2 and 21.4 regarding the liability as such to pay custom duty and import duty and the responsibility of importing of the same and the time framed fixed for completion of the project. Resultantly, it was held that since the imported material had to be handled by the contractor though the Corporation was entitled to exemptions but the compliance had to be done within a fixed time frame.

12. A reference was made to the e-mails in question sent repeatedly in October, 2011 requesting the Corporation for requisite certificates from the Executive Head of the Project Implementing Authority which had to be counter-signed by the Principal Secretary (Finance) in the concerned State Government that the goods were required for the execution of the said project since the same had been duly approved by the Government of India for implementation by the concerned State Government. The benefit of exemption was to be granted for the projects financed by the United Nations or international organization approved by the Government of India for the whole of the duty of the custom leviable, keeping in view the notification dated 11.11.1997, bearing No. 84/97/customs, keeping in view the equipment which was being imported under the Asian Development Bank funded projects. The said exemption certificate not having been supplied at the initially time, the case of refund at the hands of the contractor had been returned on 13.11.2012, by the custom authority at Bangalore. Resultantly, it had also been noticed that vide communication dated 31.12.2013, required exemption certificate was required to be submitted at the time of import in view of Section 149 of the Customs Act, 1962 and therefore, the request at that stage could not be considered. Thus, the finding was returned that the employer was liable to

fasten with the liability to reimburse the expenses and the majority award of the Arbitral Tribunal did not suffer from any illegality and therefore, was not liable to be interfered with.

13. Reliance was placed upon the judgment by the Corporation on ***Associate Builders vs. Delhi Development Authority*** **(2015) 3 SCC 49,** wherein the Apex Court has held that there could only be interference if the said drawn up parameters had not been followed in the arbitration proceedings.

Arguments of the Counsels:

14. The Counsel for the Corporation has referred to Clause 31 of the agreement, which provided the ownership of the plant to be imported into a country to be transferred to the employer upon loading of the mode of the transport and similarly Clause 40 that the extension of time for completion of the project could have been applied for under various circumstances and that they were not liable to pay custom duty as they could have availed the exemption which was available to it and the contractor had acted hastily and imported the goods without waiting for the exemption of duties and therefore, they were not liable to pay additional financial burden due to acts of omission and commission on the part of the vendor and Clause 45.3 regarding notice of dissatisfaction

to be given in the manner provided for the entitlement of the commencement of the arbitration proceedings.

15. In contrast, learned Senior Counsel Mr. Devashish Bharuka, for the claimant/respondent has brought to our notice that a meeting was held on 02.11.2011, which was a kick-off meeting between the parties and the decision taken was that the supply in configuration of the site servers was to be done by 15.01.2012, which was the dead line fixed. He has referred to the communication dated 06.05.2013 wherein the reimbursement of the custom duty paid had been asked for by arguing that the same had been paid while importing material for the CRP data Central Project and the relevant documentation had been done. On the request to pay the same, they had been asked to claim it directly from the custom department inspite of the fact that the agreement did not provide so. However, keeping in view the spirit of the relationship, they had applied in October, 2012 and this claim had not been considered and the delay was costing them severally and therefore, they had asked for release of the payment as per the terms of the agreement. Thus, the argument is that there is denial of the right of the claimant as such for refund of custom duties paid by them as the required exemption certificate had to be submitted at the time of the import in view of the statutory provisions, was the reason for

the customs to decline the same vide letter dated 31.12.2014. It is accordingly submitted that as per the Notification No. 84/97 dated 11.11.1997, the importer at the time of clearance of the goods had to produce before the Assistant Commissioner of Customs and the Deputy Commissioner, the certificate from the Project Implementing Authority which had to be duly counter-signed and on account of the fact that the requisite certificate had not been given at the time of import of the goods in January, 2012 inspite of requests made in October, the custom duty could not be saddled upon the contractor. Thus, it was open to the Corporation to have availed the benefit of exemption by supplying necessary certificates which was done only on 14.06.2012 belatedly.

16. Reliance was placed on acceptance certificate issued by the Corporation regarding the supply installation commissioning services and the disaster center regarding supply certificate BRC Chennai to its full satisfaction on 25.06.2012 and the similar certificate issued of even date of the primary data center DC at Shimla. Similarly, it was pointed out that on 04.10.2013, the Corporation had directed the contractor to apply to the original assessing authority for reassessment of the bill of entry and claim for custom duties due and now cannot turn around and shake-off its liability and fasten it on the contractor on account of its own fault. While

also referring to the subsequent communication dated 23.11.2013 and the rejection thereafter, it was accordingly submitted that as per the communication dated 25.04.2016, since the dispute Board had conveyed its decision that the employer was not responsible for the payment which was exempted in the hands of the Corporation and paid by the contractor, there was no valid reasons given and the matter had been rightly referred to the arbitrator. The customs having declined as such to process the case and having rejected the said claim for custom duty of Rs.1.30 crores, on the basis of Clause 14.2, had been rightly granted by the Tribunal.

Reasons given by the Tribunal:

17. We have also, with the assistance of the Counsels, gone through the majority Award passed by the Tribunal and also the dissenting award of the Single Member. The reasons as such of the Award which has kept in mind the terms of general condition of the contract and given its findings would go on to show that the Tribunal came to the conclusion that the Corporation should have asked the claimant not to act on the import as they were not in a position to issue exemption certificate. The completion period being 21+19 days and no communication having been addressed regarding the exemption from certificate, it was held that Clause 14.3 was inapplicable to the custom and import duty and Clause 14.3

was only in respect of taxes specified and as per Clause 14.2 liability to pay custom and import duty was upon the respondent. The contractor having paid the duty and the corporation having not raised any objection to the import or duty paid without undue delay and Clause 21.4 of the agreement mandating that the claimant has to handle all the import material at the points of import, it was held that the goods having been imported and utilized in the project to the satisfaction of the respondent and acceptance certificate having been issued, the obligation was to pay the custom duty and reimburse the same on the undisputed amount. The fall back as such that the ownership should have been transferred, was also rejected on the ground that apparently on 14.06.2012 the exemption certificates had been signed without any condition of transfer of ownership and it had no relevance and it was only an after thought and 4 e-mails had been sent for requesting the exemption certificates. Reference can be made to Clauses 14.1 to 14.3 which read as under:

> *"14.1 Except as otherwise specifically provided in the Contract, the Contractor shall bear and pay all taxes, duties duties, levies and charges assessed on the Contractor, its Subcontractors or their employees by all municipal, state or international government authorities in connection with the Facilities in and outside of the country where the Site is located.*
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> *14.2 Notwithstanding GCC Sub-Clause 14.1 above, the Employer shall bear and promptly pay all customs and import*

duties as well as other local taxes like, e.g., a value added tax (VAT), imposed by the law of the country where the Site is located on the Plant specified in Price Schedule No. 1 and that are to be incorporated into the Facilities.

14.3 If any tax exemptions, reductions, allowances or privileges may be available to the Contractor in the country where the Site is located, the Employer shall use its best endeavors to enable the Contractor to benefit from any such tax savings to the maximum allowable extent.

14.4 to 21.3 xxxx xxxx xxxxx

"21.4 Customs Clearance.

The Contractor shall, at its own expense, handle all imported materials and Contractor's Equipment at the point(s) of import and shall handle any formalities for customs clearance, subject to the Employer's obligations under GCC Sub-Clause 14.2, provided that if applicable laws or regulations require any application or act to be made by or in the name of the Employer, the Employer shall take all necessary steps to comply with such laws or regulations. In the event of delays in customs clearance that are not the fault of the Contractor, the Contractor shall be entitled to an extension in the Time for Completion, pursuant to GCC Clause 40."

18. The imports having been made from December, 2011 to January,2012 was in the knowledge of the Corporation and the contractor being under pressure to meet the dead line and respondent not having objected to the imports, the view of the dissenting member was held not to be justified. Similarly, it was held that dissatisfaction noted on 5th April did not disclose any reason and was not in conformity with Clause 14.53. The amount was then liable to be paid as per the award. As noticed, the said majority view has been upheld, the minority view

which has been relied upon by the appellant as such that the correct procedure should have been followed and it should not have been imported without necessary exemptions certificates, is not liable to be accepted, in view of the law settled on Section 37 of the 1996 Act.

19. Thus what is to be kept in mind, while exercising powers under Section 37 is that the Apex Court has gone on to hold that the Court is not sitting in appeal as such over the award of the arbitrator or under the order passed under Section 37 is that rejecting the challenge and the jurisdiction is limited as held in ***K. Sugumar and another vs. Hindustan Petroleum Corporation Ltd and another*** **(2020) 12 SCC 539.** Similarly, reliance can be placed on ***Reliance Infrastructure Ltd. vs. State of Goa,*** **AIR 2023 SC 2280** wherein it has been that the scope of challenge while dealing with the concurrent findings of the arbitrator and the Court under Section 37 are limited and only in cases where there there is illegality which is not triable which goes to the root of the Arbitral award, it is to be interfered with. Therefore, a possible view has been taken and the award has been confirmed and under Section 34, the Court in appeal would be extremely cautious to disturb the same and the power is more circumscribed under Section 37 and there has to be patent illegality.

20. In ***Bombay Slum Redevelopment Corporation Pvt. Ltd. vs. Samir Narain Bhojwani*** **(2024) 7 SCC 218,** the matter had been remanded to be heard under Section 37 again as the learned Single Judge of the High Court had set aside the award on various grounds. The Division Bench had remanded the matter that the learned Single Judge had not considered several issues. Resultantly, it was held that the jurisdiction under Section 37 is more constrained than the hearing of a petition under Section 34 of the Act and there has to be patent illegality to interfere. Relevant paras read as under:-

> *"26.The jurisdiction of the Appellate Court dealing with an appeal under Section 37 against the judgment in a petition under Section 34 is more constrained than the jurisdiction of the Court dealing with a petition under Section 34. It is the duty of the Appellate Court to consider whether Section 34 Court has remained confined to the grounds of challenge that are available in a petition under Section 34. The ultimate function of the Appellate Court under Section 37 is to decide whether the jurisdiction under Section 34 has been exercised rightly or wrongly. While doing so, the Appellate Court can exercise the same power and jurisdiction that Section 34 Court possesses with the same constraints.*
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> *27. In the facts of the case in hand, while deciding the petition under Section 34 of the Arbitration Act, the learned Single Judge has made a very elaborate consideration of the submissions made across the Bar, the findings recorded by the Arbitral Tribunal and the issue of illegality or perversity of the award. Detailed reasons while dealing with the alleged patent illegalities associated with the directions issued under the arbitral award have been recorded. Considering the nature of*

the findings recorded by the learned Single Judge, the job of the Appellate Court was to scrutinize the said findings and to decide, one way or the other,on merits. In this case, the finding of the Appellate Bench that the impugned judgment of the learned Single Judge does not address several issues raised by the parties cannot be sustained at all."

21. In Civil Appeal arising out of **SLP © No. 27699 of 2018,** ***Punjab State Civil Supplies Corporation Ltd. And another vs.M/s Sanman Rice Mills and others***, the order passed under Section 37 was set aside while noting that the arbitrator had held that there was shortage as such in the quantity of rice recovered from the rice millers and awarded certain amount. The Additional District Judge had upheld the award dismissing the petition under Section 34 of the Act of the rice miller and in second appeal, the learned Single Judge had reversed the said award.

22. Reliance was placed on a three Judge Bench in ***Konkan Railway Corporation Ltd vs. Chenab Bridge Project Undertaking*** **(2023) 9 SCC 85,** wherein it was held that the Arbitral award should not be casually interfered with in caviler manner apart from relying upon the judgment in ***Bombay Slum Redevelopment's*** case (supra) and ***UHL Power Company Ltd. vs. State of Himachal Pradesh*** **(2022) 4 SCC 116.**

Reasons for non-interference:

23. In view of the above settled position of law, we are of the considered opinion, as put forth by the learned Senior Counsel for the respondent, that there is no illegality in the awards passed by the majority view of the Arbitral Tribunal dated 07.10.2017 and upheld by the learned Single Judge on 08.10.2018. The claim of the corporation, as noticed was on account of the fact that it had paid custom duty of Rs. 1,00,30,984/- and was liable to be reimbursed the same along with interest.

24. A perusal of the notification No. 84/97 would go on to show that the importer, at the time of clearance of the goods, had to produce necessary certificate that the goods which are intended to be used in the project financed by the World Bank, Asian Development Bank or any other International Organization. The project having been approved by the Government of India for implementation, the certificate from the Executive Head of the project implementing authority and counter-signed from the Principal Secretary (Finance) as the case may be of the concerned department, was required. The same reads as under:-

"Notification No. 84/97-Customs

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), read with sub-section (4) of section 68 of the Finance (No. 2) Act, 1996 (33 of 1996), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all the goods imported into India for execution of projects financed by the United Nations or an International Organization and approved by the Government of India, from the whole of the duty of customs leviable thereon under First Schedule to the Customs Tariff Act, 1975 (51 of 1975), the whole of the additional duty of customs leviable thereon under Section 3 of the said Customs Tariff Act and the whole of the special duty of customs leviable under Section 68 of the Finance (No. 2) Act 1996 (33 of 1996):

Provided that the importer, at the time of clearance of the goods, produces before the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, having jurisdiction, -

(i) in case the said goods are-

(a), (b), & (ii) xxxx xxx xxx

(iii)in case the said goods are intended to be used in a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any other international organization, other than those listed in the Annexure and the said project has-been-approved by the Government of India for implementation by the Government of a State or a Union Territory, a certificate from the executive head of the Project Implementing Authority and countersigned by the Principal Secretary or the Secretary (Finance), as the case may be, in the concerned State Government or the Union Territory, that the said goods are required for the execution of the said project, and that the said project has duly been approved by the Government of India for implementation by the concerned State Government."

25. The necessary e-mails having been sent asking for the said certificate on 24/25.10.2011 are already on record wherein specific reference is made to the notification in question requiring the said certificate on the format as such. It is not disputed that the requisite certificate was issued only as late on 14.06.2012 which was counter-signed by the Principal Secretary (Finance) to the Government of Himachal Pradesh along with the Managing Director of the appellant-Corporation and further signed by the Director Finance and the General Manager Electrical. For their own inefficiency as such two certificates No. 17 and 18 have been issued at the belated stage on 14.06.2012 as the goods already stood imported in January, 2012. The certificate of installation and being satisfied with the goods which had been put in place had already been granted to the contractor both at Shimla and at Chennai and acceptance certificate dated 25.06.2012 are on record. Thus, the Corporation having been satisfied with the supply installation commissioning of the project, now cannot turn around and shake-off its liability on account its own inefficiency.

26. Apparently, at the earlier stage, the Corporation itself had asked the contractor to apply to the custom department for the refund and the fact that the custom

department was denying the refund of the custom duty vide communication dated 22.05.2013. The contractor had then followed it up at his own level and even on 04.10.2013, the Corporation had written to the contractor to apply to the original assessing authority for re-assessment of the bill of entry and the claim be taken from the custom department. Accordingly, vide communication dated 17.12.2013, the company had applied to the customs and their case was rejected on 31.12.2013 in view of the statutory mandate as such of Section 149 of the Customs Act, 1962, that exemption had to be applied earlier at the time of import of the goods. On earlier occasion also, the custom as such had not agreed with the request of the contractor and returned their claim vide letter dated 13.11.2012 on the account that they were required to apply to the original assessing authority of the bill of entry and then approach for re-assessment of the bill.

27. In such circumstances, we are of the considered opinion that the Arbitral Tribunal and the learned Single Judge has rightly upheld the said award and held that the contractor cannot be saddled with the liability to pay custom duty. Even the corporation apparently had failed to produce the necessary exemption certificates when asked for in

October, 2011, as it should have been done so while stressing upon the contractor to expeditiously set up a project for which it has been done by specifically importing the goods from Singapore etc. Thus a reasonable view having been taken on the consideration of the terms of the contract and the materials placed before the Arbitrators and the conclusion drawn by the Tribunal is a reasonable and possible conclusion, which a prudent man would arrive at and therefore keeping in view the principles laid down by the Apex Court, as discussed above, we do not find any plausible reason as to interfere.

28. Resultantly, keeping in view the above stated position, we do not find any plausible reason as such to interfere in the well reasoned majority award passed by the Arbitral Tribunal and duly upheld by the learned Single Judge.

29. The present appeal is thus dismissed along with pending applications, if any.

(G.S. Sandhawalia)
Chief Justice

(Ranjan Sharma)
Judge

September 19, 2025.
(cm Thakur)