IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 232 OF 2024

Godrej And Boyce Manufacturing Company Limited ..PETITIONER

: VERSUS :

Remi Sales and Engineering Limited .RESPONDENT

Ms. Arti Raghavan *i/b Bachubhai Munim & Co., for Petitioner.*

Mr. Rashmin Khandekar *with Mr. Pranav Nair, Ms. Akanksha Patil, Mr. Harshil Parekh, Mr. Praharshi Saxena & Mr. Rahul Agrawal i/b Purnanand & Co., for Respondent*

CORAM : SANDEEP V. MARNE, J.

Judg. Resd On : 18 DECEMBER 2025.

Judg.Pron. On: 24 December 2025.

JUDGMENT :

1) Petitioner has filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) challenging the Award of the learned sole Arbitrator dated 8 February 2023. By the impugned Award, the learned sole Arbitrator has awarded sum of Rs. 4,25,44,680/- alongwith interest @10% p.a. in favour of the Respondent. The Petitioner has been directed to indemnify the Respondent to the extent of

applicable import duties and other levies and penalties on the import of raw material for manufacturing of goods covered by the purchase order.

2) The Petitioner is a company incorporated under the Indian Companies Act, 1913 engaged in the business *inter alia* of manufacturing of engineering and capital goods. The Respondent is engaged in the business of trading and marketing of various goods. On 24 August 2016, Petitioner issued purchase order to the Respondent for supply of 8339 numbers of Stainless Steel Seamless Tubes (**tubes**). The purchase order was revised on 7 December 2016 and the final value of the purchase order was Rs. 5,01,20,732.16. The tubes were to be in 'U' shape having length of 12 /14 meters. The total length of tubes was approximately 129 kms. The tubes were to be as per the standard ASTM (American Society Testing Material)-A213 TP 316/316L and were to be manufactured using pierced mother hollowS. The tubes were to be used in heat exchangers for an oil and gas refinery located in Oman and were supposed to withstand the regular passage of petrochemical products and steam at extremely high temperatures and pressures. As per the terms of the purchase orders, the Respondent named TUV-SUD South Asia Pvt. Ltd. as third party inspection agency **(TPIA)** for carrying out inspection of raw material as well as manufacturing and finishing of the tubes. The Respondent proposed Quality Assurance Plan **(QAP)** to the TPIA.

3) The Respondent supplied and delivered the tubes to the Petitioner in 14 consignments from 18 February 2017 to 30 March 2017. The Petitioner accepted the delivery and inserted

the tubes in the Heat Exchangers. The Petitioner addressed email to the Respondent on 13 April 2017 recording that pitting and rusting was observed in few tubes. On 14 April 2017, minutes of meetings jointly signed by representatives of the Petitioner and the Respondent recorded that pitting and rusting was observed on the inner dimension of few tubes, which was shown to the Respondent through videoscope. Thereafter further meetings took place between the parties in the month of April-2017 when the issue relating to rusting and pitting observed in respect of tubes was highlighted. Parties had different versions of outcome of the said meetings. Parties also exchanged correspondence relating to the issues observed in the tubes after their insertion in the Heat Exchangers. It appears that the Respondent suggested the solution of cleaning the tubes and 965 tubes were sent for cleaning and 157 tubes were sent for changing the radius of U bend during May 2017 to July 2017. According to the Petitioner even after cleaning, on 17 August 2017 Petitioner reported discoloration in 965 tubes cleaned by the Respondent. The Petitioner decided to reject and replace all the tubes and requested the Respondent for a plan for replacement. The Respondent demanded inspection of the tubes on 29 August 2017. It appears that the Petitioner was unable to provide inspection of all the 965 tubes which were cleaned. On 3 October 2017 the Respondent demanded payment of Rs. 4,47,58,306/-. The Petitioner disputed Respondent's demand by letter dated 18 October 2017.

4) In the above background, the Respondent invoked arbitration clause by notice dated 18 December 2017 and thereafter filed application under Section 11 of the Arbitration

Act for appointment of the Arbitrator. By order dated 12 April 2018, this Court constituted the Arbitral Tribunal. The Respondent filed Statement of Claim claiming the sum of Rs.4,47,58,306/- towards the invoice amount alongwith interest @24% p.a. from 18 March 2017. The Respondent further demanded amount of Rs.7,59,330/- towards re-bending/re-gauging 949 tubes and for further services such as inspection and transportation. The Respondent further demanded amount of Rs.1,02,33,252/- towards cost incurred due to non-disclosure of advance license against invalidation alongwith interest. The Petitioner filed Statement of Defence resisting the claim of the Respondent. Petitioner also filed counterclaim in the sum of Rs.3,10,15,779/- comprising of various items such as testing costs, costs of follow-up/ transportation costs, extra cost paid for new procurement, storage cost, loss due to delayed delivery and rework charges. Based on the pleadings, the Arbitral Tribunal framed issues. The Respondent led evidence of four witnesses. The Petitioner also led evidence of four witnesses. Parties also relied on various documents.

5) After considering the pleadings, documentary and oral evidence, the Arbitral Tribunal made Award dated 8 February 2023 allowing the claim of the Respondent in the sum of Rs.4,25,44,680/- towards invoice cost (less amount awarded towards counterclaim) together with interest @10% p.a. from 1 April 2017 till the date of the Award. The Arbitral Tribunal has also granted interest @10% from the date of the Award until realisation. The Arbitral Tribunal has directed Petitioner to indemnify and keep indemnifying the Respondent to the extent of applicable import duties and other levies and penalties as

imposed by DGFT/ Customs Authorities on the import of mother hollows/raw material for manufacturing of tubes. All the other claims of the Respondent have been rejected. The Tribunal has awarded two counterclaims in the aggregate sum of Rs. 22,13,626/- in favour of Petitioner. Parties are directed to bear their respective costs of the arbitration.

6) Aggrieved by the impugned Award dated 8 February 2023, the Petitioner has filed the present Petition. It appears that the Respondent initiated execution proceedings and one of the bank accounts of the Petitioners was forzen. By order dated 13 December 2024, this Court recorded statement made on behalf of the Petitioners that entire decreetal amount of Rs.7,53,44,878/- would be deposited in this Court. Accordingly, on 7 January 2025 the Petitioner has deposited the decreetal amount. The Respondent took out Interim Application No.627 of 2025 for withdrawal of the deposited amount. By order dated 10 July 2025, this Court permitted withdrawal of the deposited amount subject to submission of a bank guarantee.

7) With consent of the learned counsel appearing for the parties, Petition is taken up for final disposal.

8) Ms.Raghavan, the learned counsel appearing for the Petitioner would submit that the Award of the Arbitral Tribunal suffers from patent illegalities and is riddled with perverse findings. That the Award erroneously concludes that the Petitioner could not reject the tubes after putting them to use. That the Arbitral Tribunal has erroneously applied provisions of Section 42 of the Sale of Goods Act, 1930 (**Sales of Goods Act**) for

the purpose of holding that the Petitioner is deemed to have accepted the goods on account of doing of an act inconsistent with the ownership of the seller. She would submit that Section 13 of the Sale of Goods Act permits parties to agree contrary to the provisions of Section 42 of the Sale of Goods Act. That under Section 13, it is lawful for the parties to contractually agree for rejection of goods even after putting them to use. She would submit that similarly, under Section 62 of the Sale of Goods Act, it is permissible for parties to negative or vary, by way of an express agreement, the rights, duties or liability arising out of contract of sale. That in the present case, parties did agree for contractual arrangement different than provisions of Section 42 of the Sale of Goods Act. That Clause 6(b) of terms and conditions to the purchase order expressly varied the rights, duties and liability of the parties under Section 42 of the Sale of Goods Act and such contractual arrangement clearly permitted the Petitioner to reject the goods even after acceptance. That clause (b) preserved the right of the Petitioner to reject the goods even after acceptance as the acceptance was qualified and was made subject to subsequent inspection/verification or rejection of the material found defective. That second part of clause 6(b) further recognised Petitioner's right to withhold payment for non-conforming tubes regardless of whether the title had passed onto the Petitioner or not. Ms. Raghavan would further submit that there was a good reason to vary statutory provisions under Section 42 of the Sale of Goods Act by inserting clause 6(b) in the purchase order since the nature of goods were such that it was impossible to undertake comprehensive inspection of 8339 tubes at the time of delivery. Given that they were to be used for carrying out petrochemical products and steam at extremely

high temperature and pressure, it was essential that tubes were in complete conformity with the specifications. This is the reason why clause (b) preserves right to reject the goods irrespective of whether title had passed onto the Petitioner and even after completion of various mandatory tests / inspections and verifications prior to the delivery. That therefore, mere issuance of inspection/test reports did not prevent the Petitioner from subsequently rejecting the tubes which were found to be defective. Ms. Raghavan further submits that the judgment of Gujarat High Court in ***Shah Mohanlal Manilal Versus. Firm Tunning in the name and style of Dhirubhai Bavajibhai*** [1] relied upon by the Arbitral Tribunal has no application as the contract therein did not have a clause in the nature of Clause 6(b) which expressly varies the rights and liabilities of parties under Section 42 of the Sale of Goods Act.

9) Ms. Raghavan would further submit that the Award disregards Clause 12 of the Purchase Order, under which any indulgence or accommodation given by the Petitioner by not insisting upon strict observance of terms and conditions of purchase order, was not to be considered as waiver. That the learned Arbitrator erroneously held, in ignorance of Clause 12, that Petitioner's permission to clean the tubes indicated that the defects in the tubes were not material and was not considered as breach of condition by the Petitioner. That since contractual clause is ignored, the Award warrants interference. That the Arbitral Tribunal's interpretation of the contract is also not possible one and is contrary to its plain terms. She relies on judgments in ***South East Asia Marine Engineering and***

1 1961 1 SCC Online Gujarat 43

Construction Ltd. Versus Oil India Ltd.[2] and ***Konkan Railway Corporation Ltd. Versus. SRC Company Infrastructure Pvt. Ltd.***[3]. She would submit that the Arbitral Tribunal has effectively rewritten the contract between the parties, which is in breach of fundamental principles of natural justice as held in ***PSA Sical Terminals Pvt. Ltd. Versus. Board of Trustees VOCPT and Others.***[4] Relying on judgment of ***IRCTC Versus. Brandava Food Products***[5], she would submit that an arbitral Award contrary to the contractual terms is not only patently illegal, but also violates Section 28(3) of the Arbitration Act. In support of the said contention, she would rely upon judgment in ***State of Chattisgarh and Another Versus. Sal Udyog Pvt. Ltd.***[6]. Ms. Raghavan would further submit that the Award is perverse in holding Petitioner did not establish that the tubes are defective. That the Tribunal has ignored multiple categorical admissions on record as to existence of rusting in the tubes and has ignored that presence of rusting and pitting *ipso facto* established defect in the tubes. She would take me through several non-conformation reports signed by the parties to demonstrate that the factum of rusting and pitting was admitted by the senior officials of the Respondent. She would also take me through correspondence dated 1 May 2017 of Mr. Pallav Gadkari promising clearing of rusting and markings. She would also rely upon minutes of meetings between senior officials in which specific admissions are given about observance of rusting and pitting in the tubes. She would further submit that the cleaning procedure adopted by the Respondent

2 2020 5 SCC 164
3 2025 SCC Online Bom 4438
4 2023 15 SCC 781
5 2025 SCC OnLine SC 2369
6 2022 2 SCC 275

was for removal of free iron particles, thus evidencing that there was rusting on the tubes.

10) Ms. Raghavan would further submit that the arbitral Award perversely disregards the admitted presence of rusting/pitting in the tubes, by referring them as non-defective. She would submit that purchase order required tubes to be as per SA 213 TP 316/316L and that defect in the tubes has to be necessarily inferred the moment the rusting is proved. That Respondent's witness admitted that the particular grade of steel was widely used in Heat Exchangers and was not susceptible to corrosion. That the Award addresses untenable distinction between stainless steel being 'corrosion proof' and 'corrosion resistant' in absence of any evidence on record, scientific or otherwise. That in any case, both the terms mean the same. That there is no contemporaneous evidence of the Respondent adopting the position that rusting/pitting was to be expected given the grade of steel used for the tubes. That evidence points towards the Respondent recognising the problem of rusting/ pitting of the tubes. That the standard practice was relied upon by the Respondent and accepted by the Arbitral Tribunal in fact confirms that the process of passivation resorted by the Respondent confirms presence of iron/iron compound as surface contaminants in the tubes. She would submit that stainless steel used in utensil for domestic use is steel-grade 304 and despite having lower resistance to corrosion, does not show signs of corrosion for decades, whereas significantly higher grade stainless steel tubes supplied by the Respondent developed rusting immediately upon insertion in the Heat Exchangers. That the evidence bears out the importance of the tubes in the heat

exchanger, which is a critical component of a refinery and that any defect in the tubes would result in the jeopardizing the operation and safety of the refinery.

11) Ms. Raghavan would further submit that the learned Arbitrator has placed undue reliance on certain boroscopy reports for contending that there is no evidence of tubes being defective. That production of such boroscopy reports was not necessary in the light of substantial material on record and several admissions of presence of rusting and pitting. Ms. Raghavan would further submit that the Award is perverse in disregarding the evidence that establishes the deficiency/inadequacy in the test reports relied upon by the Respondent. That there are several admissions by the Respondent's witness showing non-examination/inspection of raw materials.

12) Ms. Raghavan concludes by submitting that the Award suffers from several patent illegalities and is full of perverse findings warranting interference by this Court under Section 34 of the Arbitration Act.

13) Mr. Khandekar, the learned counsel appearing for the Respondent opposes the Petition submitting that the Petitioner has failed to make out any of the enumerated grounds under Section 34 of the Arbitration Act for maintaining a valid challenge to the arbitral Award. That the main issue involved before the Arbitral Tribunal was whether the tubes supplied by the Respondent were as per the specifications and whether there was any defect in the same making Petitioner entitled to reject

the tubes. That the Arbitral Tribunal has made a detailed discussion on these issues and has recorded cogent findings for answering them in favour of the Respondent. No case of perversity in the findings or patent illegality is demonstrated by the Respondent. He would therefore submit that in narrow scope of jurisdiction under Section 34 of the Arbitration Act, it would not be open for this Court to disturb the arbitral Award. In support of his contention that the doctrine of patent illegality can be invoked only when the same goes to the root of the matter and when the Award appears to be so unfair and unreasonable that it shocks the conscience of the Court as held by the Apex Court in ***McDermott International INC. Versus. Burn Standard CO. ltd. And Another***[7]. He would submit that the learned Arbitrator has interpreted Clause-6(b) of the contract and interpretation of contractual terms is in the exclusive domain of the Arbitral Tribunal as held in ***UHL Power Company Ltd Versus. State of Himachal Pradesh,***[8] *and* ***Delhi Airport Metro Express Pvt. Ltd. Versus. Delhi Metro Rail Corporation Ltd.***[9] He would submit that the arbitral Award is in consonance with the evidence on record and it is impermissible to re-appreciate evidence while exercising powers under Section 34 of Arbitration Act as held by Apex Court in ***Reliance Infrastructure Ltd. Versus. State of Goa***[10], ***Atlanta Ltd Through its Managing Director Versus. Union Of India***[11] and by this Court in ***State of Maharashtra Versus. Bharat Constructions***[12]. He would further submit that even if this Court notices gaps in the reasoning of the Tribunal while arriving at conclusions, the Court can have regard to the documents

7 2006 11 SCC 181
8 2022 4 SCC 116
9 2022 1 SCC 131
10 2024 1 SCC 479
11 2022 3 SCC 739
12 2022 SCC Online Bom 6501

submitted by the parties and contentions raised before the Tribunal, so that Award with inadequate reasons is not set aside as held by the Apex Court in ***OPG Power Generations Pvt. Ltd. Versus. Enexio Power Cooling Solution India Pvt. Ltd. And Another***[13] *and* ***Dyna Technologies Pvt. Ltd. Versus. Crompton Greaves Limited***[14] . In support of the contention that Arbitrator is a master of evidence and is the best judge of adequacy of quality and quantity of evidence, he relies upon judgment of this Court in ***ECGC Limited Versus. Baco Metallic Industries***[15].

14) Mr. Khandekar would further submit that the Arbitral Tribunal has rightly arrived at the conclusion that the tubes supplied were as per the specifications and could not have been rejected by the Petitioner. The conclusion of the tubes being in conformity with the specifications is reached after taking into consideration several test reports produced by the Respondent and particularly the reports of TPIA appointed at the behest of the Petitioner. That six independent tests were conducted in respect of the tubes supplied by the Respondent to ensure that they were as per the specifications mentioned in the MTO read together with QAP. That the testing and inspection included (i) raw material manufacturer inspection, (ii) raw material inspection (iii) finished product inspection (iv) TPIA inspection (v) inspection conducted by the Petitioner after receipt of tubes and (vi)cleaned cut inspection in respect of the 18 cleaned tubes by TPIA.

13 2025 2 SCC 417
14 2019 20 SCC 1
15 2025 SCC Online Bom 3959

15) Mr. Khandekar would submit that the learned Arbitrator has rightly held that once the tubes were found to be as per the specifications, the burden shifted on the Petitioner to prove that the tubes were defective. That the Petitioner has failed to discharge the said burden by leading evidence to prove the defect in the tubes. Here, the Petitioner was in possession of the tubes and claims to have undertaken multiple boroscopy tests but failed to produce results thereof nor gave evidence of boroscopy tests to the Respondent. That the Petitioner itself made it impossible for the learned Arbitrator to hold that there was defect in the tubes by the brushing aside Respondent's evidence of the tubes meeting the prescribed specifications.

16) Mr. Khandekar would further submit that the Petitioner has raised erroneous contention of admissions by the Respondent about rusting and pitting of the tubes based on non-confirmation reports. That reliance by the Petitioner on minutes of meeting is also misplaced as Respondent's representative has never admitted pitting and rusting in respect of the tubes. That the learned Arbitrator has rightly appreciated that Respondent showed willingness to clean the tubes and Petitioner permitted the Respondent to do so. That the learned Arbitrator has rightly held that the tubes were meant to be corrosion resistant and not corrosion proof. That the tubes were cleaned by the Respondents and they were again put to use by the Petitioner. That there is no material on record to suggest or contend that the cleaned tubes also suffered from any defects. He would submit that the Arbitral Tribunal is right in holding that even if there was any defect in the tubes, the same could not be treated as a material defect for rejection of goods. The defect, if any, could only be covered by the

warranty clause. Mr. Khandekar would submit that the entire case canvassed by the Petitioner in relation to rusting being the reason for rejection is afterthought and was raised for the first time on 14 April 2017 i.e. after a period of about 2 months from accepting the first date of delivery of goods from 18 February 2017.

17) Mr.Khandekar would further submit that Petitioner's contention of learned Arbitrator ignoring contractual Clause-6(b) is misplaced. That under Clause-6(b), parties have not agreed anything contrary to the provisions of Section 42 of the Sale of Goods Act. That there is nothing in Clause-6(b) which permits Petitioner to reject the tubes after having used. That therefore provisions of Sections 13 and 62 of the Sale of Goods Act have no application in the present case. He would rely upon judgment of Gujarat High Court in ***Shah Mohanlal Manilal*** (supra) submitting that it is impermissible to reject the tubes having used the same. That the learned Arbitrator has considered the effect of Clause-6(b) of the Contract. That since finding of tubes not being defective is recorded, Clause-6(b) could otherwise not be enforceable.

18) Mr. Khandekar would submit that for admissions to constitute proof of waiver, admission needs to be unequivocal. In support, he would rely upon judgment of the Apex Court in ***Bhagwat Sharan Versus Purshottam and Others***[16]. In support of his contention that admissions can be always be explained, he relies upon judgment in ***OPG Power Generations Pvt. Ltd.*** (supra).

16 2020 6 SCC 387

Mr. Khandekar would accordingly pray for dismissal of the Petition.

REASONS AND ANALYSIS

19) The disputes between the parties have arisen on account of refusal on account of Petitioner-Godrej to pay the price of tubes supplied to it by the Respondent. The factum of supply of the tubes is not under dispute. Petitioner has however proceeded to reject the tubes after taking delivery on the ground that the same are found defective. The Petitioner has not just accepted delivery of the tubes, but inserted them in heat exchangers. It is Petitioner's contention that after insertion of the tubes in the heat exchangers, they developed rusting, pitting and discoloration. According to the Petitioner, since the tubes are expected to carry petrochemicals and steam at extremely high temperatures and pressures, it was essential that the tubes were in complete conformity with the specifications. Petitioner claims to have replaced the tubes and has accordingly refused to pay the amounts raised by the Respondent in the invoices in respect of the supplied tubes. In arbitral proceedings initiated at the behest of the Respondent, it claimed the invoice costs in addition to few other claims. Petitioner also raised counterclaims *inter alia* for recovery of additional cost incurred for replacement of tubes.

20) In the light of the above dispute between the parties, and based on the pleadings filed by them, the learned Arbitrator framed following issues for determination:

"1. Whether the Claimant proves that the goods/tubes supplied to the Respondent were in accordance with the specifications provided by the Respondent and did not suffer from any defects?

1A. Whether the Respondent proves that the defect in the tubes as alleged by the Respondent entitled the Respondent to reject the goods and terminate the agreement between the parties?

2) Whether the Claimant proves that the Respondent is liable to pay the Claimants an amount of Rs.4,47,58,306/- along with interest for the goods in the nature of stainless steel tubes supplied/delivered pursuant to Purchase Orders?

3) Whether the Claimant proves that the Respondent is liable to provide the Claimant with the Documents as set out in Exhibit "NN"?

4) If the issue No.3 is answered in favour of the Claimant and the Respondent fails and neglects to produce the documents mentioned Claimant the amount as per the particulars of the Claim at Exhibit "MM"?

5) Whether the Respondent proves that it is entitled to an amount of Rs.3,10,15,779/- claimed by way of its counter claim?

6) What Award and Decree?

7) Costs?"

21) Since the entire controversy revolves around Petitioner's entitlement to reject the tubes supplied by the Respondent on the ground of they not conforming to the specifications and being defective, the two principal issues, answer to which provide key to resolution of the entire controversy between the parties, are Issue Nos.1 and 1A. Issue No.1 posed burden on claimant to prove that the tubes supplied by it to the Petitioner were in accordance with the specifications and did not suffer from any defect. Though Issue No.1 was

composite putting burden on the Respondent to prove twin aspects of (i) tubes conforming to prescribed specifications and (ii) tubes not suffering from any defects, the Arbitral Tribunal also framed Issue No.1A putting the burden on the Petitioner to prove that the defects in the tubes entitled it to reject the same and terminate the agreement. Answering these two issues resolves the controversy between the parties.

22) As per the last and final purchaser order dated 7 December 2016, which ultimately determines the contractual rights and obligations between the parties, the Respondent was supposed to supply 8339 number of stainless-steel seamless tubes as per SA 213 TP 316/316L specifications. The Arbitral Tribunal has noted the exact specifications of the tubes as per the contractual arrangement between the parties in para-71.3 of the Award, which reads thus :-

> 71.3. A perusal of the purchase order dated 7th December 2016 indicates that the specifications of the goods i.e. SS Seamless Tubes were as per SA 213TP316 and 316L. The above specification is the specification of heat exchanger tubes produced from 316 or 316 grade austenitic stainless steel. The Respondent had also prescribed other specifications in Material Take-off (MTO) dated 7th November 2016. A perusal of MTO dated 7th November 2016 indicates that material was SA 213TP316 and 316L (dual certified u-tubes). Clause 2 of the notes mentioned under the MTO stipulated that material should meet the requirements of ASME Sec. II, Part-A [Ed. 2015], API 600 [Ed. 8] and NACEMR 0175 [Ed. 2009] complied. Clause 3 prescribes that tubes shall be seamless and cold drawn. Clause 4 stipulates that tubes should be supplied in solution annealed, pickled and passivated condition. Clause 5 prescribes that the product analysis shall be carried out and reported. Clause 6 prescribes tubes shall not have any circumferential weld joint. Clause 7 stipulated that the tube should be IGC (Intergranular Corrosion) tested as per ASTM A 262 Practice E. It further

states that acceptance should be based on specimen bent and inspected under magnification of 20X and the bend specification should be free from any cracks or grain etc. There are several other conditions stipulated in MTO. Clause 17 prescribed that material should be supplied with certificates to EN 10204, Type 3.2. Clause 22 stipulated that all testing of the tubes be done at the manufacturer's internal lab. It was further provided that if the testing to be carried out at the external lab, then the lab shall be certified as ILAC accredited/ISO 17025 or other prescribed accreditations

23) Respondent claimed that the tubes supplied by it were as per the contractual specifications. To prove this contention, the Respondent relied on reports of several inspections, tests and reviews. The Arbitral Tribunal considered the said material relied upon by Respondent in para-71.8 to 71.11 of the award as under:-

71.8 The learned Counsel for the Claimant drew my attention to Exhibit C-53 which stipulates composition of the raw material i.e. austenitic stainless steel. The Claimant has provided the quality certificate (Exhibit C-83) issued by the raw material manufacturer. On receipt of the raw material, the Claimant conducted inspection of the raw material as well as physical and chemical tests to ensure that the raw material was in conformity with the quality certificate issued by the manufacturer. The Mill Test Certificate (MTO) of the raw material i.e. austenitic stainless steel seamless u-tubes of different heat numbers was conducted by the Claimant either under supervision or under the guidance of TPIA as per the terms and conditions of the purchase order dated 7th December 2016. The MOTs have been produced by the Claimant which also bears the signature of the representative of TPIA. Further, the Claimant has also conducted IGC test of the raw material in the presence of TPIA and IGC test reports indicating that the raw material complied with the specifications prescribed in the purchase order dated 7th December 2016 is also issued and submitted to the Respondent.

71.9. After the Claimant manufactured the finished SS Seamless Tubes as per the specifications, the Claimant

> once again carried out tests and inspections as per the QAP. The Claimant has also produced a TPIA inspection report which certified that the SS Seamless Tubes complied with the specifications.
>
> 71.10. The parties in the contract i.e. the purchase order, MTO and QAP have agreed upon a procedure to determine whether the goods supplied and delivered by the Claimant are in compliance with the specifications or not. The material on record clearly indicates that the Claimant had fulfilled the terms of the purchase order, MTO and QAP with regard to the specifications and quality of the goods. Having considered various documents such as quality certificates, MTC, IGC certificates and certificates issued by TPIA-TUD-SUV, I have no hesitation to hold that the Claimant supplied the SS Seamless Tubes as per the specifications.
>
> 71.11. In fact, after the delivery of the SS Seamless Tubes by the Claimant to the Respondent, the Respondent also carried out inspection, tests and reviews. As confirmed by RW-2 Mr. Yatindra Shaw, the Respondent had also carried out a PMI test to determine chemical composition of the tubes. RW-2 Mr. Shaw has also confirmed that after doing PMI test, the Respondent did not find any discrepancy in the chemical composition of the SS Seamless Tubes vis-à-vis the specifications contained in the purchase order dated 7th December 2016. I also do not have any reason to doubt the correctness of the certificates issued by TUV-SUD, the third party inspection agency appointed at the behest of the Respondent which also shows that the goods in question i.e. SS Seamless Tubes were as per the specifications contained in the purchase order.

24) The Arbitral Tribunal thereafter concluded that the tubes supplied were as per the specifications and that the burden shifted on the Petitioner to prove that there was defect in the tubes. Findings in Para-71.12 of the Award reads thus:

> 71.12. The Claimant having proved that the SS Seamless Tubes supplied by the Claimant were as per the specifications mentioned in the purchase order dated 7th December 2016, the burden of proof to show that the SS Seamless Tubes were defective shifts on the Respondent.

25) Ms. Raghavan criticizes the finding of the Arbitral Tribunal of tubes conforming to the specifications by contending that there are multiple admissions of the raw material used in manufacture of tubes not meeting the requisite specifications. She has particularly relied upon admission by Respondent's witness Mr. J.C. Patil, General Manager, Quality Control that the mother hollows used for the tubes were not examined for their defects prior to their conversion into tubes. She has also relied on evidence of Inspection Engineer, Vikrant Patil in support of her contention that the key aspects of the QAP relating to inspection of raw material and manufacturing process were not complied with. She has also relied upon admission given by the Inspection Engineer that he was not present during the heat treatment test. She has also submitted that the TPIA had inspected only 10% samples and therefore its report was not conclusive. According to her, procurement of cheaper raw material from China is the reason for defective tubes. That there were several infirmities in the TPIA reports, which were highlighted by the Petitioner. Ms. Raghavan has accordingly submitted that the finding of tubes conforming to the specifications could not have been recorded by ignoring the above evidence on record.

26) Before considering the contention of Ms. Raghavan objecting to finding of the Arbitral Tribunal about tubes conforming to the specifications, it must be observed that what is conducted by the Arbitral Tribunal is a factual inquiry. Therefore, scope of interference by this Court in Tribunal's finding of fact would be in extremely narrow compass. It is only if a case of complete perversity in the findings is made out that this Court would be justified in interfering in the said finding of fact. It needs

no reiteration that the Arbitral Tribunal is the master of evidence and is the best judge of adequacy of quantity and quality of evidence. This Court cannot be called upon to enter into the realm of re-appreciation of evidence merely because another view is also possible, based on the evidence on record. In this connection, reliance by Mr. Khandekar on judgments of the Apex Court in ***Reliance Infrastructure Ltd*** (supra), ***Atlanta Ltd*** (supra), ***State of Maharashtra Versus. Bharat Constructions*** (supra) and of this Court in ***ECGC Limited Versus. Baco Metallic Industries*** (supra) is apposite. Since the principles are well settled, its is not necessary to discuss the ratio of each of them.

27) Keeping in mind the contours of powers of this Court in interfering with the finding of fact recorded by the Arbitral Tribunal, I proceed to examine whether any case of absolute perversity is made out in the finding that the supplied tubes are in accordance with the specifications. For recording that finding, the Arbitral Tribunal has taken into consideration (i) quality certificate issued by raw material manufacturer (ii) inspection report of raw material, as well as the physical and chemical tests of raw material by the Respondent (iii) mill test certificate of the raw material conducted by the Respondent in participation with TPIA (iv) report of IGC test conducted in presence of TPIA (v) inspection report of TPIA in respect of the manufactured tubes (vi) admission of conduct of inspection tests by Petitioner and rejection of tubes by the Petitioner after using them.

28) After considering the above material evidence on record, the Arbitral Tribunal has reached the conclusion that the tubes supplied by the Respondent met the requisite

specifications. Thus, the finding of fact recorded by the Tribunal is supported by evidence on record. Therefore, some stray admissions about non-examination of mother hollows prior to conversion into tubes or absence of Inspection Engineer during heat treatment test etc. cannot be highlighted before this Court for urging it to record diametrically opposite conclusion than the one recorded by the learned Arbitrator. What Petitioner wants me to do is reappreciation and reevaluation of evidence on record. It expects the Court to give more weightage to the above admissions and ignore the tests reports, etc showing conformity of supplied tubes with the specifications. I am afraid this is not the scope of powers under Section 34 of the Arbitration Act. I am not an appellate court over the award of the Tribunal. The Tribunal has taken into consideration overwhelming evidence on record for holding that the supplied tubes met the specifications. Also, it bears mention that Petitioner's case is mainly about development of defect after the tubes were put to use. Since it believed that the tubes were developing rusting and pitting when inserted in the heat exchangers, it thought of pitching the case of failure to manufacture tubes as per specifications. The defence is thus clearly afterthought.

29) Even otherwise, reliance by Petitioner on the above quoted stary material/admissions does not make its case any better. Mr. Patil's admission that the mother hollow used for the tubes were not examined for their defects prior to their conversion into tubes is to be seen in the light of other documentary evidence of inspection report of raw material, physical and chemical tests of raw material by the Respondent, mill test certificate of the raw material conducted by the

Respondent in participation with TPIA. If the tests reports were available in respect of the raw material and when some tests are conducted by Petitioner's TPIA, how the so-called admission of Mr. Patil would render the finding of Tribunal perverse is difficult to comprehend. Same applies to evidence of the Inspection Engineer-Vikrant Patil about alleged non-compliances in inspection of raw material and manufacturing process. His absence during the heat treatment test does not render the test reports nugatory. If Petitioner's TPIA chose to inspect only 10% samples, it cannot be contended that its report was not conclusive. The TPIA did so as per Petitioner's mandate. If TPIA was expected to inspect 100% tubes, Respondent cannot be held responsible for Petitioner's TPIA's actions. Having given mandate to TPIA to inspect 10% tubes, Petitioner cannot now wriggle out the test reports and contend that the tubes did not conform to specifications. Allegation of procurement of cheaper raw material from China is again baseless as Petitioner was given full idea about the manufacturer and Petitioner had approve the same. If there are any infirmities in the TPIA report, Petitioner has to blame itself as TPIA was chosen by the Petitioner. Even if it is momentarily accepted that the Tribunal ignored the above material/admissions, the same would have no effect on the ultimate conclusion recorded by it that the tubes were as per specifications.

30) In my view therefore, there is enough material on record for the Tribunal's finding of fact to pass the muster before Section 34 Court. As observed above, Petitioner's attempt to highlight some stray material cannot be a reason to set aside the finding of fact recorded by the Arbitral Tribunal that the tubes

were in conformity with the specifications. I am therefore in agreement with the finding of the Arbitral Tribunal that the tubes were in conformity with the specifications.

CLAIM OF TUBES BEING DEFECTIVE

31) Having held that the tubes supplied by the Respondent were as per the specifications, the next issue for consideration of the Arbitral Tribunal was whether there was any defect in the tubes. Determination of this sub-issue was necessary for deciding the Petitioner's defence of valid rejection of tubes due to noticing of defect.

32) Ordinarily, once the delivery of goods is accepted, the buyer becomes liable to pay for the same. Therefore, in ordinary circumstances, the enquiry before the Arbitral Tribunal ought to have ended once the issue of tube's confirmity with the specifications was proved. However, in the present case, what has happened is that the Petitioner has put the tubes to use after accepting delivery and has raised the contention that the defect in the tubes was noticed only after they were put to use. It is on account of this defence of the Petitioners that the next enquiry with regard to the defect in the tubes became necessary.

33) The Arbitral Tribunal has concluded that there was no defect in the tubes and that even if there was any defect noticed, it was not so material that the tubes could have been rejected by the Petitioner. Before examining correctness of findings recorded by the Arbitral Tribunal in respect of absence of defect in the goods, it is necessary to first consider the

objection raised on behalf of the Petitioner that it was entitled to reject the tubes even after putting them to use.

34) Ordinarily, once the goods are accepted by the buyer, he becomes liable to pay for the goods sold. Therefore, the act of acceptance of goods is an important step which needs to be proved for claiming the price of the goods sold. The concept of acceptance is dealt with in Section 42 of the Sale of Goods Act, which provides thus :-

> **42. Acceptance**
>
> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

35) Thus, Section 42 creates a deeming fiction where the goods are deemed to have been accepted when the buyer intimates to the seller that he has accepted them or when the goods have been delivered to the buyer, who acts in relation to them which is inconsistent with the ownership of the seller, or when the buyer retains the goods without issuing intimation of rejection after lapse of reasonable time. In the present case, since the Petitioner has used the tubes in the heat exchangers, such act is construed as an act which is inconsistent with the ownership of the seller. Thus, the Petitioner's act of using the tubes in heat exchangers is treated as an acceptance of the tubes.

36) Ms. Raghavan has relied on provisions of Sections 13 and 62 of the Sale of Goods Act in support of her contention that

it is impermissible for parties to agree differently than what is provided under Section 42. Section 13 of the Sale of Goods Act dealt with the treatment of condition of sale as warranty and provides thus:

> **13. When condition to be treated as warranty.-**
>
> (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
>
> (2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, **unless there is a term of the contract, express or implied, to that effect.**
>
> (3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.
>
> *(emphasis added)*

37) Under Section 13(1), when contract of sale is subject to any condition to be fulfilled by the seller, the buyer can waive the condition or elect to treat the breach of the condition as breach of warranty and not as a ground for treating the contract as repudiation. What Ms. Raghavan would place reliance on is the provisions of sub-section (2) of Section 13, which enables the party to a contract to agree otherwise than what is provided for in the Statute. Under sub-section (2), if the buyer has accepted the goods, the breach of condition to be fulfilled by the seller is required to be treated as a breach of warranty and not as a ground for rejecting the goods or for treating the contract as

repudiated. However, this provision is subject to the caveat where parties have contracted otherwise. Relying upon the expression '*unless there is a term of the contract, express or implied*' it is contended that the parties have agreed for rejection of goods instead of the treating the nonfulfillment of condition as breach of warranty.

38) Another provision relied upon by Ms. Raghavan is Section 62 of the Sale of Goods Act, which deals with exclusion of implied terms and conditions and provides thus:

> **62. Exclusion of implied terms and conditions.**
>
> Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

39) Thus, under Section 62, any right or liability arising out of contract of sale of goods can be negatived or varied by express agreement.

40) Before considering the effect of provisions of Section 13 and 62 of the Sale of Goods Act on the deeming fiction of acceptance created under Section 42, it must be observed that the contention of Clause-6(b) of the purchase order constituting contract in variance with the statutory provisions of Section 42 was never argued before the Arbitral Tribunal. It is raised for the first time before this Court. Since what is raised in point of law, I permit raising of the same for the first time before this Court on account of use of the expression 'if court finds that' in sub-sections (2)(b) and (2A) of the Arbitration Act and following the

ratio of judgment of the Apex Court in ***State of Chattisgarh Vs. Sal Udyog*** (supra).

41) For avoiding the deeming fiction created under Section 42 of the Sale of Goods Act, it must be established that the parties have contracted to the contrary. Petitioner relies on clause 6(b) of the purchase order in support of contention of contract to the contrary. However Clause-6(b) of the purchase order, in my view, does not constitute any variation from deeming provision of acceptance created under Section 42 of the Sale of Goods Act. It would be apposite to refer to clause 6(b) of Annexure-A to the purchase order, which reads thus :-

> (b) Goods received at our Stores or any other receiving departments shall be **deemed to have been accepted** by us subject to our subsequent inspection, verification or rejection and reserving our rights to reject the material found **defective** which shall be replaced by you free of cost, failing which we shall have your authority to deduct the cost of the rejected materials from your pending or future bills (including all taxes/levies, etc.)
>
> **We will have the right to withhold payment for material found not in conformity with our specifications irrespective of the fact that title therein has been passed on to us.**
>
> *(emphasis and underlining added)*

42) Thus, all that Clause 6(b) provides is that acceptance of goods by the Petitioner was subject to its subsequent inspection, verification or rejection. Petitioner also reserved the right to reject the material found defective. Ms. Raghavan has strenuously relied on second part of Clause 6(b) under which Petitioner reserved a right to withhold payment for material found not in conformity with the specifications, irrespective of

the fact that the title therein was passed on to the Petitioner. Her emphasis is on the occurrence of eventuality of '*title therein has been passed onto us*'.

43) Careful perusal of the second part of Clause 6(b) would indicate that the same created mere right to 'withhold payment' and not 'right to reject the goods'. Secondly, right to withhold payment was irrespective of 'passing of title' in favour of the Petitioner. 'Passing of title' in the goods and 'acceptance of goods' are distinct concepts. First part of clause 6(b) deals with deeming fiction of 'acceptance' and makes it subject to right of rejection of defective materials. The second part of clause 6(b) does not deal with deeming fiction of acceptance but with right of withholding the payment and here, the parameter is not 'defect in goods' but 'goods not in conformity with the specifications'. As observed above, there is difference in the concepts of detection of defect in goods and goods not manufactured in accordance with specifications. Therefore the second part of clause 6(b) would not apply to the eventuality of detection of defect after the tubes were inserted in the heat exchangers.

44) Also, Section 42 of the Sale of Goods Act deals with the concept of 'acceptance' and not with the concept of acquisition of title in the goods. Therefore, it is highly doubtful as to whether even the second part of Clause 6(b) would constitute variation to the statutory concept of 'acceptance' under Section 42. It is difficult to read the act of insertion and use of the tubes in the heat exchangers into the expression 'title therein has been passed on to us'. Once the goods are used, Section 42 deems such act as acceptance of goods thereby preventing the buyer from

rejecting the same. The statutory concept is that once the goods are dealt with by making use of the same or selling the same to third party, the buyer cannot then turn around and proceed to reject the goods. In ***Manilal Vs. Dhirubhai*** the situation before the Gujarat High Court was where the buyer had already sold the goods to sub-purchaser without examining them after delivery and after the sub-purchasers raised complaints about the quality of goods, the same were sought to be rejected. It was sought to be contended before the High Court that Section 42 comes into play only when the buyer had an opportunity to examine the goods under Section 41. Rejecting the contention, the Gujarat High Court has held that Section 42 creates a deeming fiction when the buyer consumes the goods or uses them in manufacture and that such act constitutes acceptance under Section 42. Thus, the broad statutory scheme under Section 42 is such that the moment the buyer deals with goods, the act is treated as inconsistent with seller's title.

45) There is nothing in Clause-6(b) which made the Petitioner entitled to reject the goods even after using them. The present case does not involve passing of title in Petitioner's favour. Situation here is that the title in the goods had not passed on to the Petitioner as it had not paid for the same, but it used the tubes in the heat exchangers. As observed above, Clause-6(b) does not cover the situation of consumption/use of goods. In that view of the matter, Clause-6(b) cannot be treated as a variation from statutory concept of acceptance under Section 42.

46) Ms. Raghavan contends, with some degree of vehemence, that the learned Arbitrator has not read Clause-6(b)

in the manner discussed above and has actually treated the same as constituting variance with the concept of acceptance under Section 42. She invites my attention to the following findings in Clause-71.29 of the Arbitral Award:

> 71.29. The contention of the Respondent that the Respondent under clause 6(b) had a right to withhold payment for material not found in conformity with the specification irrespective of the fact that the title of the goods had passed the Respondent or that the Respondent might have put the SS Seamless Tubes in the process of manufacture of heat exchangers is misconceived. In order to withhold the payment, the Respondent had to prove that the material i.e, SS Seamless Tubes were not in conformity with the specifications. As stated hereinabove, I am of the view that the Respondent has failed to establish the details of specifications which were not met with the SS Seamless Tubes. Thus the Respondent has failed to discharge the burden that the Claimant has committed a fundamental breach of the Purchase Order or breached the condition of the Purchase Order.

47) It is difficult to accept the contention of Ms. Raghavan that the learned Arbitrator has treated Clause-6(b) as contractual variation from provisions of Section 42 as the learned Arbitrator has specifically held provisions of Section 42 to be applicable to the present case in para-71.21 and 71.22 of the Award, which read thus :-

> 71.21. In any event, the Respondent has utilized the goods. Admittedly, the SS seamless tubes/ goods were used in the manufacture of the heat exchanger. The contention of the Respondent that as the heat exchanger was not completely manufactured, goods are not deemed to be used, in my view, is incorrect. Under Section 42 of the Sale of Goods Act, the buyer is deemed to have accepted the goods when he intimates the seller that he has accepted them or when the goods have been delivered to the buyer and the buyer does any act in relation to them which is inconsistent with the ownership of the seller or after the lapse of a reasonable time, the buyer

> retains the goods without intimating to the seller that he has rejected them. In the instant case, the general terms and conditions of the purchase order attached to the purchase order more particularly clause 6(b) stipulates that on receipt of the goods by the Respondent, the goods are deemed to be accepted by the Respondent subject to inspection, verification or rejection of the defective goods. In the instant case, admittedly, the goods were delivered to the Respondent and the Respondent conducted inspection and tests. After being satisfied that the goods were as per the specifications, the Respondent used the goods in the process of the manufacture of heat exchangers. The aforesaid facts clearly established that the Respondent having used the goods is not entitled to reject the same.
>
> 71.22. The learned Counsel for the Claimant has correctly relied on the decision of the Hon'ble Gujarat High Court in case of Manilal v/s. Dhirubhai 1961 SCC OnLine Guj. 43 AIR 1962 Guj. 56, where it is held that Section 42 of Sale of Goods Act must be treated to have come into operation notwithstanding the reasonable opportunity of examining the goods has not expired. If a buyer after taking delivery of the goods consumes them or uses them in the manufacture. The act of buyer using or consuming the goods would certainly constitute acceptance of the goods by the buyer.

48) Even if some leeway is to be granted in favour of the Petitioner on account of findings recorded in para-71.29 of the Award and even if it is construed that the learned Arbitrator has treated the second part of clause-6(b) as variation to the provisions of Section 42 of the Sale of Goods Act, the Petitioner was still required to prove that the tubes were not in conformity with the specifications, which is the condition stipulated in second part of clause 6(b). I have already upheld the findings of the Arbitral Tribunal that the tubes are in conformity with the specifications. Therefore, even if interpretation of second part of Clause-6(b) advanced by Ms. Raghavan is to be momentarily accepted, still it does not make the case of the Petitioner any

better. Once the Petitioner fails to prove that the tubes were not in conformity with the specifications, even second part of Clause-6(b) becomes inoperative. Thus, everything hinges on factual inquiry as to whether tubes were in conformity with the specifications or not. That factual inquiry has been conducted by the Arbitral Tribunal, result of which is in favour of the Respondent and against the Petitioner.

49) Thus clause 6(b) does not constitute contractual variation with deeming fiction of 'acceptance' under Section 42 of the Sale of Goods Act and even if it is held to be contractual variation, Petitioner has failed to prove that the tubes were not in accordance with specifications. In my view, therefore the provisions of Section 42 of the Sale of Goods Act have rightly been invoked by the Arbitral Tribunal. The act of the Petitioner of inserting the tubes in the heat exchangers constitutes the act of doing something which is inconsistent with the ownership of the seller. There is thus deeming fiction of acceptance of goods by the Petitioner, who cannot then turn around and reject the same.

50) Reverting to the aspect of defect in the tubes after their use in heat exchangers raised by the Petitioner, it must be observed here that once the Petitioner's right to reject the tubes after their use in the heat exchangers is negatived, even if defect is noticed in the tubes after such use, Petitioner could not have rejected the tubes. As rightly held by the Arbitral Tribunal, Petitioner's claim in such case would be towards warranty. Since the Respondent has proved that the tubes were in conformity with the specifications and once the Petitioner's act of inserting the tubes in heat exchangers is treated as deemed acceptance

under Section 42, subsequent discovery of defect in the tubes becomes irrelevant in so far as Petitioner's right of rejection is concerned. Petitioner ought to have sued the Respondent for breach of warranty if the tubes were found defective during their use. I am in full agreement with the Arbitral Tribunal's conclusion of Petitioners claim being towards warranty. Admittedly, Petitioner did not raise any Counterclaim towards warranty and in that sense, it is not even necessary to go into the aspect of existence of defect or otherwise in the goods. However, since much is argued before me and since the Arbitral Tribunal has also conducted an enquiry into the contention of defect, I proceed to deal with the aspect of defect as well.

51) The enquiry into existence or otherwise of any defect in the tubes is again a factual enquiry narrowing my scope of interference in the findings of the Arbitral Tribunal. Petitioner's claim of defect in the tubes is premised on its claim of the tubes developing rusting and pitting, after they were inserted in the heat exchangers. Ms. Raghavan has taken me through the material on record in support of her contention that observance of rusting and pitting in respect of tubes is an admitted position by the Respondent. She has taken me through the minutes of meeting dated 19 April 2017, which was attended by Mr. Gadkari, Senior Marketing Manager Mr. Patil, General Manager, Quality Control and Mr. Rishabh Saraf, Director of Respondent. The minutes record that about 30 to 35 % tubes in exchangers had developed rusting and pitting. The same was shown to above REMI personnel with the help of videoscope and the minutes record acceptance by REMI. However, there is a handwritten

mark on the said minutes by REMI stating '*actual number of tubes identified by Godrej shall be indicated by REMI'*.

52) My attention is also invited to the minutes of meeting dated 21 April 2017, which was in extension to the earlier meeting dated 19 April 2017. Those Minutes record that samples of rusting/pitting was shown to REMI. It also recorded that '*REMI informed that they are not having raw material for replacing and that they could arrange mother pipes to make tubes in next 50-60 days....*' On the basis of the above observations in the minutes of meeting, Ms. Raghavan contends that REMI admitted the factum of rusting and agreed to replace the tubes. However, in those minutes, REMI's response is separately recorded in which it is stated '*currently figures shown by the Godrej are not acceptable to REMI', we propose that so called rusting/pitting marks can easily be removed by pickling of tubes and if required process for the same can be approved by Godrej's Q.C.*'.

53) From the combined reading of minutes of meeting dated 19 April 2017 and 21 April 2017, it is difficult to hold that there is any admission on the part of the Respondent-REMI that large number of tubes suffered from rusting or pitting. What is important to note is that Godrej finally accepted the remedial measure of cleaning of the tubes and as many as 965 tubes were sent for cleaning and Respondent cleaned the same and the same were again inserted in the heat exchangers. Though it is Petitioner's contention that the even after reinsertion of cleaned 965 tubes, rusting and pitting occurred, there is absolutely no evidence on record to prove the same. While Petitioner

strenuously claims to have conducted boroscopic examination of the tubes, for some strange reason, it failed to produce on record those boroscopy reports.

54) From the material on record, what can broadly be gathered is that some rusting and pitting was observed in respect of some of the pipes, which was possibly identified as 965 in number. Respondent-REMI accepted rusting/pitting and proposed the measure of cleaning the same. Respondent shared the details of cleaning process with the Petitioner, who approved the same. This is clear from email dated 17 May 2017 sent by the Respondent to the Petitioner by which two documents viz. (i) root cause analysis report, (ii) tube cleaning procedure, were shared for approval by the Petitioner. In the root cause analysis report, Respondent stated that remedial action would be to force/pressure cleaning/washing by referring to Clause 6.2.11 of ASTM A 380. For the tube cleaning procedure, the applicable standard was proposed as 'ASTM A-380 standard procedure for pickling and passivation of 300 series of austenitic stainless steel.'

55) The said ASTM A-380 Standard Practice Manual is placed on record which prescribes procedure for undertaking exercise of cleaning of the grade of stainless steel used in manufacture of the subject tubes. Thus, the cleaning process was undertaken with approval to the procedure by the Petitioner. Also of relevance is the fact that the cleaning procedure is prescribed in the manual for SA-213 Grade 316/316L stainless steel, means that, in a given case, it is possible to develop rusting even in that grade of steel. This also belies Petitioner's

generalized contention that the grade of steel prescribed for the tubes was impossible to develop rusting.

56) In my view, the Arbitral Tribunal has rightly approached the controversy relating to defect in the tubes by considering the conduct of the Petitioner. Petitioner did not reject the tubes after observing rusting/pitting in 965 number of tubes. If it was to reject those tubes, the contention of defect in the tubes could have been considered. However, after the Respondent represented to the Petitioner that cleaning of tubes would resolve the issue of rusting, the Petitioner accepted the said suggestion and agreed to go for the procedure of cleaning. It accepted the cleaned tubes. There is nothing on record to hold that the cleaned tubes also developed rusting or pitting. It is only through email dated 14 August 2017 that the Petitioner informed the Respondent about checking of 100% tubes through boroscope and detection of defects. If the said boroscopy reports showed defects in the tubes, the Petitioner ought to have relied upon the same in the arbitral proceedings. It failed to do so. There is no material to hold that the clean tubes again developed rusting or pitting. The Arbitral Tribunal rightly concluded that the rusting/pitting/discoloration observed prior to cleaning was not a material defect since the same was cured by cleaning process with due approval of the Petitioner. It would be apposite to reproduce findings of the Arbitral Tribunal in para-71.25. The Arbitral Tribunal has held in para 71.25 as under:-

> 71.25. Another factor which militates against the case of the Respondent that the goods were defective and liable to be rejected is that the conduct of the Respondent. The Respondent claiming rusting and pitting rejected the goods for the first time on 29th April 2017. If the

> Respondent was of the view that the SS Seamless Tubes supplied by the Claimant suffered from rusting, pitting, corrosion etc., the Respondent ought to have rejected the goods and not permitted the Claimant to carry out the cleaning process. In view of the Respondent's stand that if a product suffers from rusting, pitting and corrosion, it cannot be termed as stainless steel. The Respondent ought to have rejected the goods and sought replacement of the goods. However, the Respondent permitted the Claimant to carry out cleaning and also requested the Claimant to regauge the tubes supplied by the Claimant to enable the Respondent to use the tubes in the heat exchangers. The aforesaid action of the Respondent clearly indicates that the SS Seamless Tubes did not suffer from any material defect and defects if any were of a nature that could be rectified or some quantity of SS Seamless Tubes were suffered from the defects. The fact that the Respondent permitted the Claimant to clean the tubes and also use the cleaned tubes clearly indicates that the defects in the tubes were not material and the same cannot be considered as a breach of the condition by the Claimant.

57) In my view, therefore the finding of fact recorded by the Arbitral Tribunal about the absence of defect in the tubes is well supported by the evidence on record. The findings do not suffer from the vice of perversity.

58) Ms. Raghavan's contention of rusting/pitting being expressly admitted by Respondent's senior officials does not deserve acceptance. Even if contents of minutes of meeting dated 19 April 2017 and 21 April 2017 are to be treated as some admission of observance of rusting and pitting in the tubes, the same is clearly qualified by Respondent's personnel that rusting/pitting marks could easily be removed by pickling of the tubes. Therefore, the minutes of meeting dated 19 April 2017 cannot be read in a myopic and skewed manner to infer existence of express admission of rusting/pitting in the tubes for upholding Petitioner's right of rejection of the entire lot of the supplied

tubes. The admission, if any, in the minutes of meeting dated 19 April 2017 needs to be appreciated in its proper perspective. Even if it is assumed that there is admission of rusting/pitting Respondent demanded exact number of tubes identified by the Petitioner, which latter was found to be 965. Immediately within 2 days, another meeting took place on 21 April 2017, when Respondent informed the Petitioner that the problem of rusting and pitting in the identified tubes could easily be removed by pickling if the required process is pre-approved by Godrej. Thereafter, Petitioner-Godrej agreed for cleaning and approved the process of cleaning as well. Godrej sent 965 tubes for cleaning to the Respondent; they were cleaned admittedly using the approved process and sent back to Godrej. Therefore, the so-called admission of rusting/pitting in the minutes of meeting dated 19 April 2017 needs to be appreciated in this perspective. It therefore cannot be treated as an absolute admission so as to constitute waiver of proof. Reliance by Mr. Khandekar on judgment of the Apex Court in ***Bhagwat Sharan*** in this regard is apposite. The Apex Court has held that and admission made by a party is only piece of evidence and not conclusive proof of what is stated therein. The Apex Court has considered the judgment in ***Nagubai Ammal Versus B. Shama Rao***[17] considered to be *locus classicus* on the subject of admissions in which it is held that admission is not conclusive as to the truth of the matters stated therein and that is only a piece of evidence, the weight to be attached with it must depend on the circumstances in which it is made. The admission can be shown to be erroneous or untrue so long as the person to whom it was made did not act on it to its detriment. In ***Himani Alloys Ltd. Versus. Tata Steel Ltd.***[18] the

17 AIR 1956 SC 593
18 2011 15 SCC 273

Apex Court has held that the admission should be categorical and there should be conscious and deliberate act of the party making it.

59) As a matter of fact, the judgment in ***Bhagwat Sharan*** is also instructive on the doctrine of election, acquiescence and waiver. The Apex Court has held that a party cannot be permitted to approbate and reprobate at the same time which principle is based on the doctrine of election. A party cannot blow hot and cold at the same time. Once a party elects to take a stand, it cannot turn around and take opposite stand. In the present case, Petitioner-Godrej is attempting to blow hot and cold at the same time. It ought to have remained consistent on its position of defect in the tubes on account of rusting and pitting. However, it made a conscious election to accept Respondent's readiness to clean the tubes and approved the procedure for cleaning. It sent the pipes for cleaning to the Respondent and accepted the delivery of cleaned tubes. It thereafter inserted the cleaned tubes in the heat exchangers. Having elected to do so, Petitioner cannot turn around and base its claim on the basis of its original stand of defect in the tubes on account of rusting and pitting.

60) Ms. Raghavan's contention that the Award disregards Clause 12 of the Purchase Order is misplaced. Under clause 12, any indulgence or accommodation given by the Petitioner by not insisting upon strict observance of terms and conditions of purchase order, was not to be considered as waiver. In the present case Petitioner has not granted any indulgence or accommodation to the Respondent. Its act of permitting cleaning

cannot be constructed as indulgence or accommodation. Also mere permission to clean the tubes is not held to be a ground for disallowing Petitioner's case of rejection of tubes. Petitioner failed to prove that after cleaning of tubes, they again developed rusting. It withheld the evidence of boroscopy reports. The case therefore does not involve perversity in ignoring a vital contractual clause. The Arbitral Tribunal's interpretation of the contract is possible and is not contrary to its plain terms. Therefore reliance by Ms. Raghavan on judgments in ***South East Asia Marine Engineering and Construction, Konkan Railway Corporation Ltd., State of Chattisgarh and Another Versus. Sal Udyog Pvt. Ltd.*** and ***IRCTC Versus. Brandava Food Products*** (supra) is inapposite. The Arbitral Tribunal has not rewritten the contract between the parties, nor had foisted a new commercial bargain and therefore ratio of judgment in ***PSA Sical Terminals Pvt. Ltd.*** is inapplicable to the present case.

61) The Arbitral Tribunal has rightly awarded the claim of the Respondent for invoice amount. Petitioner's act of rejection of tubes after having put them to use is clearly wrongful. Having dealt with the tubes by inserting them in the heat exchangers, Petitioner is bound to pay the price for the same. If any defect is noticed in the consumed tubes, it would be a claim for warranty and not a right to reject the tubes. Its claim of non-conformity of tubes with specifications is factually found to be incorrect. Its plea of defect in the tubes is not bonafide, especially after the Petitioner's election to allow Respondent to clean the tubes and accept the delivery of cleaned tubes. After having elected for cleaning of the tubes, it has now taken a *volte-face* by walking back on the election it made, to somehow avoid payment for the

tubes by relying the very same material on the basis of which it had made the election of cleaning measures. The Arbitral Tribunal has rightly appreciated this position while awarding the claim of the Respondent. Consequently, I do not find any reason to interfere in the impugned Award.

62) No submissions are canvassed before with regard to direction against the Petitioner for indemnity in respect on import duty and other levy on import of mother hollows/raw materials for manufacture of the tubes. So far as Petitioner's Counterclaim in the sum of Rs. 3,10,15,779/- under six heads are concerned, it appears that the major claim was towards extra costs incurred for new procurement of Rs.1,59,08,703/- which is rejected. Similarly, claim for storage of Respondent's tubes of Rs.15,00,400/- is also rejected. No submissions are raised before me challenging rejection of the said two counterclaims. The Arbitral Tribunal has awarded Petitioner's counterclaim in the sum of Rs.18,38,626/- being the costs incurred by the Petitioner for testing of the tubes. Similarly, the Arbitral Tribunal has also awarded claim in the sum of Rs.3,75,000/- out of the claimed sum of Rs.8,25,000/- towards rework charges and spending extra man-days due to delay in manufacture of heat exchangers in view of problems in the tubes. This is how the Arbitral Tribunal has awarded Counterclaim of Rs.18,38,626/- plus Rs.3,75,000/- = Rs.22,13,626/- and after deducting the said amount from total invoice amount of Rs.4,47,58,307/- has directed payment of balance amount of Rs.4,25,44,680/- by the Petitioner. Respondent has not challenged award of counterclaims in the sum of Rs. 22,13,626/- in favour of Petitioner.

63) In my view therefore there is no warrant for interference in the impugned Award.

64) The disputes between the parties arise out of a commercial transaction and ordinarily imposition of costs should follow as a natural consequence of rejection of Arbitration Petition. Petitioner is lucky that the Arbitral Tribunal did not impose costs on the Petitioner though it is a losing party before the Tribunal. Since the Arbitral Tribunal has awarded 10% interest to the Respondent on the awarded sum and has not awarded any costs in favour of the Respondent, I deem it appropriate not to impose any further costs on the Petitioner while rejecting the present Petition.

65) The Arbitration Petition is accordingly dismissed. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]

66) After the judgment is pronounced, Ms. Raghavan would pray for continuation of bank guarantee submitted by the Respondent. The request is opposed by the learned counsel appearing for the Respondent. Considering the facts and circumstances of the case, Respondent is directed to continue the bank guarantee for a period of 6 weeks. The Respondent is also permitted to withdraw the balance amount lying deposited in this Court after 6 weeks.

[SANDEEP V. MARNE, J.]