***IN THE HIGH COURT OF JUDICATURE AT BOMBAY***

***ORDINARY ORIGINAL CIVIL JURISDICTION***

***COMMERCIAL EXECUTION APPLICATION NO.54 OF 2016***

M/s Angerlehner Structural and
Civil Engineering Company ..Applicant

Vs.

Municipal Corporation of
Greater Bombay ..Respondent

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Mr. Firoz Andhyarujina, Senior Counsel a/w Mr. Javed Gaya, Manek Andhyarujina, Vidya Chaudhari, Mona Malvade i/b Chamber of Javed Gaya, for the Applicant.

Mr. A. Y. Sakhare, Senior Counsel a/w Jitendra Mishra, Pooja Yadav, for MCGM.

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CORAM:- **B. P. COLABAWALLA, J.**

**Reserved on :- May 4, 2022.**
**Pronounced on :- June 7, 2022.**

**P. C.:**

**1.** The above Execution Application is filed for executing the Arbitral Award dated 23rd June 2014 passed in favour of the Applicant and against the Municipal Corporation of Greater Mumbai (for short the **"MCGM"**).

**2.** The MCGM was aggrieved by the Award passed by the Arbitral Tribunal, and therefore challenged the same before this Court under Section 34 of the Arbitration and Conciliation Act, 1996 (for short **"the Arbitration Act"**). However, the said challenge was repelled by a learned single judge of this Court vide his order dated 27th February 2019. Even an Appeal filed under Section 37 of the Arbitration Act before the Division Bench of this Court was dismissed on 8th September 2021. The order of the Division Bench was thereafter challenged before the Hon'ble Supreme Court by filing an SLP which was also dismissed on 22nd November 2021. The Hon'ble Supreme Court granted time to the MCGM up to 31st March 2022, to make payment to the Applicant.

**3.** In light of the above factual position, this Execution Application was moved before me on 9th March 2022. On the said date, it was pointed out to the Court that the Applicant, being a foreign entity, does not have a bank account in India (as the contract between the Applicant and the MCGM was concluded in 2003). The Applicant, therefore, requested that payment under the Arbitral Award be made by the MCGM in the name of the Applicant's lawyer and agent who would credit the same into the Applicant's account in escrow for transfer to the Applicant in Austria. The Escrow Agreement dated 3rd February 2022

was produced before the Court on the said date along with a letter dated 29th November 2021 written by the Applicant to the MCGM requesting them to credit the monies due under the Award to their lawyer's account to be held in escrow. A copy of the said Escrow Agreement dated 3rd February 2022 as well as the copy of the letter dated 29th November 2021 addressed by the Applicant to the MCGM were also taken on record and marked **"X"** and **"X-1"** for identification. On the said date, namely, 9th March 2022, Mr. Sakhare, the learned Senior Counsel appearing on behalf of the MCGM, fairly stated before the Court that the MCGM was willing to credit the monies due under the Arbitral Award to the account of the lawyers of the Applicant. He however submitted that it should be made clear that once these monies are paid, the MCGM is relieved of their liability under the Award and the Applicant would thereafter have no claim whatsoever against the MCGM. In light of the aforesaid submissions, this Court, on 9th March 2022, directed the MCGM to pay the amounts due under the Arbitral Award (dated 23rd June 2014) by crediting Bank Account No.5020035159821 in HDFC Bank Ltd, Nariman Point, Mumbai 400 021, on or before 31st March 2022. It was made clear that once the aforesaid payment was made, the liability of the MCGM under the Award dated 23rd June 2014 would stand satisfied and the Applicant would have no claim whatsoever against the MCGM (in relation to the Arbitral Award dated 23rd June 2014). It was also directed

that the costs of Rs.1 Lakh deposited by the MCGM in this Court shall also be credited by the Prothonotary and Senior Master in the aforesaid Bank Account on or before 31st March 2022. Accordingly, the above Execution Application was placed on Board for compliance and disposal on 5th April 2022.

**4.** When the matter came up on 5th April 2022, it was pointed out to the Court that the amounts deposited in the aforesaid Bank Account was not the entire amount due and payable under the Award but after withholding an amount of Rs.67,94,965.02 allegedly towards payment of the Goods and Services Tax (**"GST"**), and which according to the MCGM, was the liability of the Applicant. It was pointed out that as per the Arbitral Award, the principal amount due was Rs.6,83,55,000/- and the interest amount due was Rs.4,45,44,770.69/-. Hence, the total amount payable under the Arbitral Award was Rs.11,28,99,770.69/-. However, the MCGM had credited only an amount of Rs.10,61,04,805.67 on 31st March 2022. The differential amount of Rs.67,94,965.02 was not deposited as the same was withheld by the MCGM towards liability of GST payable by the Applicant. This deduction was made by the MCGM because of the provisions of Section 15(2)(d) of *The Central Goods and Services Tax Act, 2017* (for short the **"CGST Act"**) read with Section 20

of *the Integrated Goods and Services Tax Act, 2017* (for short the **"IGST Act"**).

**5.** Thereafter, the matter was adjourned to 18th April 2022 when I heard the learned Senior Counsel for the parties. Being aggrieved by the action of the MCGM withholding the sum of Rs.67,94,965.02 towards the alleged GST liability of the Applicant, Mr. Firoz Andhyarujina, the learned Senior Counsel appearing on behalf of the Applicant, pointed out that the liability towards GST, if any, could not be foisted upon the Applicant, and therefore, the MCGM ought to be directed to pay the amount of Rs.67,94,965.02 to the Applicant. To substantiate this argument, the submissions made by Mr. Andhyarujina were twofold. The first submission was that there is no liability to pay any GST as the GST law/regime came into force much after the contract between the Applicant and the MCGM was concluded (i.e. in the year 2003) and even the Arbitral Award was passed long before the GST law/regime was brought into force. In this regard, Mr. Andhyarujina submitted that the Award is dated 23rd June 2014 and the GST law was brought into force sometime in the year 2017. He submitted that this being the case, the GST law had no application to the facts of the present case as it does not have any retrospective effect. The second submission canvassed by Mr. Andhyarujina was that under the CGST Act as well as

under the IGST Act, there was a Reverse Charge Mechanism (**"RCM"**) under which it was the liability of the MCGM to make payment of the GST, if any. He, therefore, submitted that in any event, the liability towards payment of GST could not be foisted on the Applicant.

**6.** On the other hand, Mr. Sakhare, the learned Senior Counsel appearing on behalf of the MCGM, contended that the Applicant's argument that the GST law is not applicable, is contrary to the provisions of the CGST Act and the IGST Act. In this regard, Mr. Sakhare submitted that the GST regime came into effect in the year 2017 and it is true that it was not in existence at the time when the Arbitral Award was passed on 23rd June 2014 (which determined the amounts due to the Applicant along with interest). However, the said Award was under challenge, and during the period of such challenge, the GST regime was introduced. In this regard, Mr. Sakhare drew my attention to Section 15 of the CGST Act read with Section 20 of the IGST Act and contended that the said provisions stipulate that the value of supply of goods or services or both, shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both, where the supplier and the recipient of the supply are not related, and the price is the sole consideration for the supply. He submitted that what is to be included in the value of supply is enumerated in sub-clauses (a) to (e) of sub-section

(2) of Section 15 of the CGST Act. He submitted that Section 15(3) provides for what would not be included in the value of supply. Mr. Sakhare submitted that for the purposes of the present dispute, Section 15(2)(d) of the CGST Act [read with Section 20 of the IGST Act] is relevant, which *inter-alia* provides that the value of supply shall include interest or late fees or penalty for delayed payment of any consideration for any supply. He, therefore, submitted that GST is payable on the interest component under the Arbitral Award as the same is awarded in favour of the Applicant because of the delay on the part of the MCGM to make payment. Mr. Sakhare submitted that considering that interest is being paid after the GST regime was brought into force, GST would be applicable on the interest component of the Arbitral Award, and which would have to be paid to the Government.

**7.** On the second contention of the Applicant, namely, that under the CGST Act as well as under the IGST Act, there was a Reverse Charge Mechanism (**"RCM"**) under which it was the liability of the MCGM to make payment of the aforesaid GST liability, Mr. Sakhare submitted that under clause 3 of the Contract between the parties, it was agreed that all taxes were to be borne by the Applicant. He, therefore, submitted that notwithstanding the Reverse Charge Mechanism (provided under the CGST Act and the IGST Act), the GST liability could

not be foisted on the MCGM and would be payable solely by the Applicant.

**8.** In support of their respective submissions, both learned Senior Counsel also tendered to the Court their written submissions/notes of arguments. I therefore heard the parties at length on 18th April 2022 and placed the matter on board on 4th May 2022 for passing orders. On 4th May 2022, I pointed out to Mr. Andhyarujina that if he is pressing the argument regarding the applicability of the GST regime/law to the present dispute (his first contention), then I would have to hear the Union of India. In answer to this, Mr. Andhyarujina, on instructions, stated that the aforesaid argument is not being pressed and I should proceed to decide the matter only on the second point canvassed by him, viz. that in any event, the Applicant is not liable to pay any GST because the Applicant is a foreign entity and by virtue of a Notification issued by the Government of India dated 28th June 2017 [under Section 5(3) of the IGST Act], it would be the liability of the MCGM to pay the GST. In other words, the argument was that by virtue of this Notification, the MCGM, being the recipient of the service, would have to bear the liability of GST under a Reverse Charge Mechanism. Since this was the stand now taken by the Applicant, I was of the opinion that there was no

need to join the Union of India and thereafter reserved judgement due to paucity of time.

**9.** In view of the statement made by Mr. Andhyarujina (recorded earlier), I am now only deciding the second point canvassed by him, namely, that under the CGST Act as well as under the IGST Act there was a Reverse Charge Mechanism (**"RCM"**) under which it was the liability of the MCGM to make payment of the GST. In support of this argument, Mr. Andhyarujina submitted that in the case of normal taxable supply, the supplier issues a tax invoice to the recipient of the goods or services and receives the amount from the recipient along with the GST and then discharges his GST liability to the Government. This is referred to be as the **"forward charge"**. In case of a **"reverse charge"** the supplier of the services or goods does not charge GST on the invoice and receives the amount from the recipient without any GST. Further, the liability to pay the GST is on the recipient of the goods or services instead of the supplier of such goods or services in respect of notified categories of supply. Mr. Andhyarujina submitted that the objective of shifting the burden of paying GST to the recipient is (i) to widen the scope of levy of tax on various unorganized sectors, (ii) to exempt specific classes of suppliers and (iii) to tax the import of services (since the supplier is based outside India). To substantiate this argument, Mr. Andhyarujina relied

upon Sections 9(3), 9(4) and 9(5) of CGST Act and Sections 5(3), 5(4) and 5(5) of the IGST Act. Mr. Andhyarujina submitted that these provisions govern the Reverse Charge Mechanism for intra-State and inter-State transactions, respectively. Mr. Andhyarujina then pointed out that in exercise of the powers conferred by sub-section (3) of Section 5 of the IGST Act, the Government has notified the categories of supply in which the specified recipient of the services is liable to pay the GST under the RCM (Reverse Charge Mechanism). In this regard, the learned Senior Counsel relied upon Notification No. 10 of 2017-Integrated Tax (Rate) issued by the Government of India, Ministry of Finance (Department of Revenue), dated 28th June 2017. The relevant portion of this Notification reads thus:-

> **GSR...(E)-In exercise of the powers conferred by sub-section (3) of section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government on the recommendations of the Council hereby notifies that on categories of supply of services mentioned in column (2) of the Table below, supplied by a person as specified in column (3) of the said Table, the whole of integrated tax leviable under section 5 of the said Integrated Goods and Services Tax Act, shall be paid on reverse charge basis by the recipient of the such services as specified in column (4) of the said Table:-**
>
> **TABLE**

| Sl. No. | Category of Supply of Services | Supplier of service | Recipient of Service |
|---|---|---|---|
| (1) | (2) | (3) | (4) |
| 1 | Any service supplied by | Any person located | Any person located in the |

| | | | |
|---|---|---|---|
| | **ANY PERSON WHO IS LOCATED IN A NON-TAXABLE TERRITORY TO ANY PERSON OTHER THAN NON-TAXABLE ONLINE RECIPIENT.** | **IN A NON-TAXABLE TERRITORY** | **TAXABLE TERRITORY OTHER THAN NON-TAXABLE ONLINE RECIPIENT.** |

**10.** Relying upon the aforesaid Notification, Mr. Andhyarujina submitted that this Notification clearly casts the liability on the MCGM to pay the GST, if applicable, as admittedly the Applicant is a person who is located in a non-taxable territory and the recipient of the service (the MCGM) was a person located in the taxable territory. This being the factual position, it is the recipient of the service (in India) who would have to pay the GST, was the submission of Mr. Andhyarujina.

**11.** Mr. Andhyarujina further submitted that under the provisions of the GST regime, the recipient of the service (in the present case MCGM) can avail of Input Tax Credit for the GST paid under the Reverse Charge Mechanism. The only condition is that the goods and services are used or will be used for business or furtherance of business. Hence, looking to the overall facts of the matter, Mr. Andhyarujina submitted that there is absolutely no justification for the MCGM to withhold the amount of Rs.67,94,965.02 towards the alleged liability of GST from the Applicant. Mr. Andhyarujina submitted that if the amount of Rs.67,94,965.02 is allowed to be retained by the MCGM (which

belongs to the Applicant) and is thereafter paid over to the Government towards the liability of GST, it would amount to unjust enrichment on the part of the MCGM because the MCGM would be entitled to Input Tax Credit (under Section 16 read with Section 49 of the Central Goods and Services Tax Act, 2017) even though the MCGM has paid the GST from the monies due to the Applicant. In other words, this would mean that the MCGM would be getting Input Tax Credit not for the amounts paid by the MCGM but for the amounts deducted from the dues payable to the Applicant. He, therefore, submitted that looking at it from any angle, the MCGM is wholly unjustified in withholding the amount of Rs.67,94,965.02 and the MCGM be directed to credit the above-mentioned Bank Account with the aforesaid amount.

**12.** On the other hand, Mr. Sakhare, the learned Senior Counsel appearing on behalf of the MCGM, submitted that there is no merit in the arguments canvassed by Mr. Andhyarujina. He submitted that it is true that under the Notification relied upon by Mr. Andhyarujina (referred to by me above), the liability to pay the GST would be on the MCGM because admittedly the Applicant is a person who is located in a non-taxable territory and is supplying services to a person in the taxable territory (other than a non-taxable online recipient). In such a situation, any person located in a non-taxable territory, and supplying services to a

person located in the taxable territory (other than a non-taxable online recipient), it is the recipient of the service that would be liable to pay the GST. He has submitted that though this is the law, the burden of tax can always be shifted by the parties by entering into a contract to the contrary. In this regard, Mr. Sakhare relied upon a decision of the Hon'ble Supreme Court in the case of **Rashtriya Ispat Nigam Ltd. V/s. Dewan Chand Ram Saran [(2012) 5 SCC 306]** and more particularly paragraphs 4 & 36 to 41 thereof. Mr. Sakhare submitted that in the present case, Clause 3 of the contract between the Applicant and the MCGM clearly stipulated that the rates and prices bid in the priced Bill of Quantities shall, except insofar as it is otherwise provided under the contract, include all constructional plant, labour, supervision, materials, erection, maintenance, insurance, profit, taxes and duties, together with all general risks, liabilities and obligations set out or implied in the Contract. He, therefore, submitted that by reading clause 3, it was clear that the Applicant had agreed that the rates and prices bid in the priced Bill of Quantities shall include taxes and duties as well. Mr. Sakhare therefore contended that in the present case, though the MCGM is the assessee under the provisions of the GST regime and was liable to pay the GST under the Reverse Charge Mechanism, since the Applicant had agreed to bear all the taxes, the MCGM was entitled and justified to deduct from the Applicant the GST payable by the MCGM. He, therefore, submitted

that the MCGM was well within its rights to withhold the amount of Rs.67,94,965.02 towards payment of the GST in view of Clause 3 of the contract between the parties.

**13.** As far as the argument of Mr. Andhyarujina regarding the Input Tax Credit is concerned, Mr. Sakhare submitted that the aforesaid argument has no merit because firstly the MCGM has not claimed any Input Tax Credit on the amount of Rs.67,94,965.02 and therefore there is no question of a double benefit or unjust enrichment on the part of the MCGM. Secondly, Mr. Sakhare submitted that in any event, MCGM's output liability towards payment of GST is miniscule as the MCGM is providing most of the services which are exempt from tax and no Input Tax Credit can be availed on exempted services. For all the aforesaid reasons, Mr. Sakhare submitted that it would be totally incorrect on the part of this Court to direct the MCGM to credit the Bank Account of the lawyer of the Applicant with the amount of Rs.67,94,965.02, which has been legitimately withheld by the MCGM towards the payment of GST.

**14.** I have heard the learned Senior Counsel for the parties at length and have perused the papers and proceedings in the above Execution Application. As mentioned earlier, both parties also tendered written submissions/notes in support of their arguments. It can hardly

be disputed that in case of a normal taxable supply, the supplier issues a tax invoice to the recipient of the goods and services and receives the amount from the recipient along with the GST and then discharges its GST liability to the Government. This, as Mr. Andhyarujina puts it, is a **"forward charge"**. Then a concept of **"Reverse Charge"** is also introduced in the GST regime. In the case of a Reverse Charge, the supplier of the services or goods does not charge GST on the invoice and receives the amount from the recipient without adding GST to his invoice. This is because under the Reverse Charge Mechanism, the liability to pay the GST is on the recipient of the goods or services instead of the supplier of such goods or services. This is however only in respect of the categories notified under Sections 9(3), 9(4) & 9(5) of the CGST Act and Sections 5(3), 5(4) and 5(5) of the IGST Act. There are similar provisions, namely, Sections 9(3), 9(4) & 9(5), even in *the Maharashtra Goods and Services Tax Act, 2017* (the State Goods and Services Tax Act). The object of shifting the burden of payment of GST to the recipient is not only to widen the scope of levy of tax on various unorganised sectors, but also to exempt specific classes of suppliers and to tax the import of services. This is apparent from Sections 9(3), 9(4) and 9(5) of the CGST Act, Sections 9(3), 9(4) and 9(5) of *the Maharashtra Goods and Services Tax Act, 2017* as well as Sections 5(3), 5(4) & 5(5) of the IGST Act. Sections 9(3), 9(4) & 9(5) of the CGST Act read as under:

**"9. Levy and collection---** (1) …….

(2) ……..

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

> Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:
>
> Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall

appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.**"**

**15.** Similarly, Sections 5(3), 5(4) and 5(5) of the IGST Act read thus:

> **"5. Levy and collection ----** (1) ……..
>
> (2) ……..
>
> (3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.
>
> (4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.
>
> (5) The Government may, on the recommendations of the Council, by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:
>
> Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce

> operator for any purpose in the taxable territory shall be liable to pay tax:
>
> Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax."

**16.** It is not in dispute that the services rendered by the Applicant to the MCGM would be governed by the IGST Act as the same are in relation to inter-State supply of services. It is also not in dispute that the Government of India, Ministry of Finance [Department of Revenue] has issued Notification No. 10 of 2017-Integrated Tax (Rate) dated 28th June 2017 under which, the Government, in exercise of powers conferred by sub-section (3) of Section 5 of the IGST Act, has notified that on categories of supply of services mentioned in column (2) of the Table appended to the said Notification and supplied by a person as specified in column (3) of the said Table, the whole of the integrated tax leviable under section 5 of the IGST Act, shall be paid on a Reverse Charge basis by the recipient of the such services as specified in column (4) of the said Table. As far as the present matter is concerned, the relevant entry of the table is at Serial No. 1 and reads as under:

| Sl. No. | Category of Supply of Services | Supplier of service | Recipient of Service |
|---|---|---|---|
| (1) | (2) | (3) | (4) |
| 1 | Any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient. | Any person located in a non-taxable territory | Any person located in the taxable territory other than non-taxable online recipient. |

**17.** From the aforesaid Notification, it is clear that any service supplied by any person, who is located in a non-taxable territory to any person located in the taxable territory [other than a non-taxable online recipient], it is the recipient of the service who would be liable to pay the GST on a Reverse Charge basis. In the present case, it is not in dispute that the Applicant was the supplier of services who is located in a non-taxable territory. The MCGM is a person located in the taxable territory and is not a non-taxable online recipient. This being the case, by virtue of the aforesaid Notification, it would be the MCGM [the recipient of the service] who would be liable to pay the GST on a Reverse Charge basis as contemplated under Section 5(3) of the IGST Act.

**18.** I must mention that this position has even been conceded by the MCGM, not only in oral arguments, but also in the written note submitted by the MCGM. In this note, it is specifically stated that though the MCGM is the assessee under the provisions of law and is liable to pay

the GST under the Reverse Charge Mechanism, since the Applicant has agreed to bear all the taxes (under the contract), the MCGM is entitled to deduct the GST (i.e. Rs.67,94,965.02) from the payment to be made to the Applicant [see paragraph No.16 of the note].

**19.** In light of this argument canvassed on behalf of the MCGM, I would now have to examine whether, in fact, the parties have agreed that the liability to pay the GST is shifted to the Applicant. If I find that the contract does provide for such a contingency then the MCGM would be correct in its submission that they are entitled to withhold the amount of Rs.67,94,965.02 towards the GST liability. I say this because the Hon'ble Supreme Court in the case of ***Rashtriya Ispat Nigam Limited [Supra]***, has clearly held that as far as indirect taxes are concerned, an assessee can enter into a contract to shift its liability on the other party. The relevant portion of the Supreme Court Judgment reads thus:

> **"4.** Clause 9.3 thereof reads as follows:
>
> *"9.3. The contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the company shall provide the contractor with required tax deduction certificate."*

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**36.** It was submitted on behalf of the respondent that Clause 9.3 and the contract must be read as a whole and one must harmonise various provisions thereof. However, in fact when that is done as above, Clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind Clause 9.3 was that the petitioner as a public sector undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor.

**37.** As far as the submission of shifting of tax liability is concerned, as observed in para 9 of *Laghu Udyog Bharati* [(1999) 6 SCC 418] , service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.

**38.** Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of sales tax, where the seller is the assessee, and is liable to pay sales tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the sales tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider.

**39.** The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between the two of them.

> There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.
>
> **40.** If this clause was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same.
>
> **41.** In *K. Mohandas case* [(2009) 5 SCC 313 : (2009) 2 SCC (L&S) 32 : (2009) 2 SCC (Civ) 524] one party viz. the bank was responsible for the formulation of the voluntary retirement scheme, and the employees had only to decide whether to opt for it or not, and the principle of *contra proferentem* was applied. Unlike the VRS scheme, in the present case we are concerned with a clause in a commercial contract which is a bilateral document mutually agreed upon, and hence this principle can have no application. Therefore, Clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligations under the contract.
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> (emphasis supplied)

**20.** It is therefore clear that the MCGM, even though being the assessee, can always contract to shift its liability to pay GST on the Applicant.

**21.** Having said this, I shall now examine the contract between the parties. According to Mr. Sakhare, the contract entered into between

the parties, clearly contemplates that it is the Applicant who would have to pay all taxes and duties together with all general risks, liabilities, and obligations set out or implied in the contract. In this regard, Mr. Sakhare relied upon Clause 3 of the contract which reads thus:

> **"3. The rates and prices bid in the priced Bill of Quantities shall, except insofar as it is otherwise provided under the Contract, include all Constructional Plant, labour, supervision, materials, erection, maintenance, insurance, profit, taxes, and duties together with all general risks, liabilities, and obligations set out or implied in the Contract."**
>
> (emphasis supplied)

**22.** What the aforesaid clause contemplates is that the rates and prices bid in the priced Bill of Quantities shall include all constructional plant, labour, supervision, materials, erection, maintenance, insurance, profit, taxes, and duties. In other words, if any taxes or duties are leviable, the same would have to be included in the rates and prices bid and would have to be borne by the Applicant. This clause does not contemplate the payment of any taxes that have arisen on account of payment of interest because of a default on the part of the MCGM to make payment in a timely manner. This is something that could have never been contemplated when the Applicant submitted its rates and prices bid in the priced Bill of Quantities under Clause 3 of the Contract. In the present case, the liability to pay GST has arisen because there were disputes between the Applicant

and the MCGM on the amounts payable by the MCGM to the Applicant. Since, the MCGM did not make those payments, the Applicant invoked Arbitration which finally culminated into an Arbitral Award dated 23rd June 2014. Since the Arbitrator found that there were monies due and payable by the MCGM to the Applicant and which were not paid, the Arbitral Tribunal awarded interest on the aforesaid amounts at the rates more particularly mentioned in the Arbitral Award. This Award was subjected to a challenge all the way upto to the Supreme Court without any success (the SLP was dismissed on 22nd November 2021). Whilst this challenge was pending, the GST law was brought into force. It is the interest granted under the Arbitral Award that is subjected to the levy of GST under the provisions of Section 15(2)(d) of the CGST Act read with Section 20 of the IGST Act. This liability of GST (taxes) was certainly not in contemplation of the parties when they entered into the contract in the year 2001. The rates and prices bid submitted by the Applicant in the priced Bill of Quantities and which were to include all taxes and duties would certainly not have taken into consideration that the MCGM would not make payment in a timely manner, raise disputes, which would then make them liable to pay interest and which would be subjected to the levy of GST. This, according to me, is also made clear from clause 4, which stipulates that the rate of price (which is to include all taxes and duties) shall be entered against each item in the priced Bill of Quantities whether

quantities are stated or not. The costs of item against which the contractor has failed to enter a rate of price shall be deemed to be covered by other rates and prices entered in the Bill of Quantities. When one reads clauses 3 & 4 of the contract in conjunction with each other, the inescapable conclusion is that the "taxes and duties" referred to in clause 3 did not in any way contemplate the liability of GST that may arise due to payment of interest for delayed payment of any consideration for the supply of the services. This, according to me, was never in contemplation of the parties when they entered into the contract. I am therefore of the opinion that clause 3 of the contract does not come to the assistance of the MCGM to deduct the GST of Rs.67,94,965.02/- from the Applicant. It is the MCGM, under Notification No.10 of 2017 – Integrated Tax (Rate) issued by the Government of India, Ministry of Finance (Department of Revenue), dated 28th June 2017, read with the provisions of Section 5(3) of the IGST Act, who would be liable to pay the GST to the Government on a Reverse Charge basis and the same cannot be deducted from the dues payable to the Applicant.

**23.** In view of the foregoing discussion, it is directed that the MCGM shall credit Bank Account No.5020035159821 in HDFC Bank Limited, Nariman Point, Mumbai – 400 021 with the sum of Rs.67,94,965.02 on or before 30th August 2022. Once this amount is

credited in the aforesaid Bank Account, the Arbitral Award dated 23rd June 2014 shall be marked as fully satisfied and the Applicant would thereafter have no claim whatsoever against the MCGM. Consequently, the above Execution Application shall also stand disposed of once the amount of Rs.67,94,965.02 is credited in the abovementioned Bank Account.

**24.** The Execution Application is disposed of in the aforesaid terms. Place the above Execution Application on board on 5th September 2022 only for the purpose of compliance.

**25.** This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

**[ B. P. COLABAWALLA, J. ]**