

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on 29.11.2021

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O.M.P. (COMM) 535/2020

L AND T MHPS BOILERS PRIVATE LTD. Petitioner

Versus

NTPC LTD. Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Dayan Krishnan, Senior Advocate with
Mr. Dharendra Negi, Ms. Tanya Tiwari & Mr.
Sukrit Seth, Advocates.

For the Respondent : Mr. Aman Lekhi, ASG with Mr. Adarsh
Tripathi, Mr. Vikram S Baid, Mr. Ritwiz
Rishabh & Mr. Ajitesh Garg, Advocates.

AND

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O.M.P. (COMM) 567/2020

NTPC LTD. Petitioner

versus

LARSEN & TOUBRO LIMITED Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Aman Lekhi, ASG with Mr. Adarsh
Tripathi, Mr. Vikram S Baid, Mr. Ritwiz
Rishabh & Mr. Ajitesh Garg, Advocates.

For the Respondent : Mr. Dayan Krishnan, Senior Advocate with
Mr. Dharendra Negi, Ms. Tanya Tiwari &
Mr. Sukrit Seth, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The parties have filed these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 25.06.2020 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal constituted of three members, Justice PK Balasubramanyam (Retd.), Justice M.Y. Eqbal (Retd.) and Justice Dr Mukundakam Sharma (Retd.) as the Presiding Arbitrator (hereafter 'the Arbitral Tribunal').

2. The impugned award was delivered by the majority with Justice (Retd.) M.Y. Eqbal rendering a partially dissenting opinion.

3. The controversy in the present case arises in the following context:

3.1 Tenders were invited by National Thermal Power Corporation Limited (hereafter 'NTPC') for setting up of Steam Generator, Tanda Thermal Power Project Stage-II (2x660 MW) located at Vidyut Nagar, District Ambedkar Nagar, Uttar Pradesh on EPC basis (hereinafter 'the Project'). The work was divided into three packages as under:

Contract Package 1 : CIF Supply (Indian Port of Entry)
Contract Package 2 : Ex-works (India) Supply

Contract Package 3: *Inland Transportation including Port Clearance, Port Charges and Inland Insurance Charges for Plant and Equipment and Mandatory Spares covered under first and second contract, and Installation Services for the Project.*

3.2 Larsen and Toubro Limited (hereafter 'L&T') had participated in the bidding process pursuant to the aforesaid Notice Inviting Tenders. L&T's bid for the contracts was accepted by NTPC and on 11.09.2014, NTPC issued three Notifications of Awards in favor of L&T.

3.3 Thereafter, contracts for all the aforesaid packages were signed by the parties on 07.10.2014.

3.4 The impugned award was rendered in the context of the disputes that have arisen between the parties in connection with the contract for the third contract package (hereafter 'the Contract Agreement') for 'Inland Transportation including Port Clearance, Port Charges and Inland Insurance Charges for Plant and Equipment and Mandatory Spares covered under first and second contract, and Installation Services for the Project' awarded by NTPC to L&T on 11.09.2014.

3.5 The dispute between the parties relates to L&T's claim for payment of additional amounts as compensation for the increase in costs on account of increase in the basic minimum wage rates notified in

terms of notification no. S.O.188 (E) dated 19.01.2017 (hereafter ‘the Notification’) issued under the Minimum Wages Act, 1948.

3.6 By its various communications addressed to NTPC, L&T claimed that the increase in minimum wages of construction workers had severely affected the labor cost portion in executing the contracts and requested NTPC to consider reimbursement of additional costs in terms of Clause 26 of the Special Conditions of Contract (hereinafter ‘SCC’), which provided for reimbursement of increased expenses, *inter alia*, resulting from any change in law.

3.7 NTPC rejected L&T’s claim stating that price adjustment for compensation for any increase in the minimum wages was covered in Appendix-2 of the Contract Agreement.

3.8 L&T did not accept NTPC’s stand and by its letter requested NTPC to appoint an adjudicator for settlement of the disputes. By the award passed by the adjudicator on 10.10.2018 (modified by an order dated 15.10.2018), NTPC was directed to reimburse L&T in terms of Clause 26 of the SCC.

3.9 Aggrieved by the award passed by the adjudicator, NTPC invoked Clause 6.2 of the General Conditions of Contract (hereafter ‘GCC’) read with Clause 3 of the SCC and referred the matter to arbitration for adjudication of the disputes.

4. The claims made by L&T before the Arbitral Tribunal are set out below:

CLAIM	PARTICULARS	AMOUNT
Claim no.1 and 2	Impact due to revision in minimum wages due to the Notification dated 19.01.2017 along with interest @14% per annum on monthly payments due from 20.04.2017 till 29.04.2019	₹38,23,63,428.06/-
Claim no.3	To pay increased costs on account of the Notification dated 19.01.2017 from 1 st May 2019 onwards along with 14% interest per annum till payment	
Claim no.4	Costs of arbitration	₹95,31,911/-

5. By the impugned award, the Arbitral Tribunal partially allowed L&T's claim in respect of reimbursement of increase in costs resulting from the Notification [to the extent of ₹7.104 crores along with interest at the rate of 10% per annum] till the date of payment. L&T, has also

been allowed further six weeks' time to prove that it had incurred expenditure in excess of the said amount. NTPC and L&T were directed to jointly examine the said details and NTPC was directed to pay the amount so verified along with interest at the rate of 10% per annum from the date of Statement of Claims till the date of payment. The Arbitral Tribunal further directed that in the event the parties were unable to agree on the amount payable, they would take the assistance of a Chartered Accountant, who would examine the documents furnished by L&T; determine the amount payable; and issue a certificate certifying the amount payable by NTPC to L&T. NTPC has been directed to pay that amount along with interest at the rate of 10% per annum from the date of Statement of Claims till the date of payment. In addition, L&T was also awarded costs of ₹50,00,000/- for the arbitration to be paid within a period of six weeks.

6. Aggrieved by the impugned award, the parties have filed the present petitions.

7. L&T claims that the impugned award is patently illegal to the extent that it requires L&T to prove payment of increased costs. It is contended on L&T's behalf that the Arbitral Tribunal had erred in ignoring expert evidence, which established that the payments of increased costs were required to be paid on the basis of the increase in minimum rates of wages and the agreed labour component of each work and not on the basis of actual payment vouchers.

8. NTPC contends that the impugned award is contrary to the terms of the Contract Agreement, which expressly provides the manner in which increase/decrease in cost of labour has to be factored in the Contract Price. It further contends that the impugned award is vitiated by patent illegality as after having concluded that L&T had not proved its claim, the Arbitral Tribunal had issued directions enabling L&T to once again prove its claims after the impugned award.

Reasons and Conclusion

9. The principal dispute between the parties relates to L&T's claim for additional payment on account of increase in the cost of labour resulting from increase in the minimum rates of wages payable to various categories of labour in terms of the Notification issued under the Minimum Wages Act, 1948. According to L&T, the said Notification constituted a change in the law resulting in L&T incurring additional costs, which was required to be reimbursed in terms of Clause 26 of the SCC as applicable to the Contract Agreement. Clause 26 of the SCC is set out below:-

“26. Change in Laws and Regulations

If, after the date seven (7) days prior to the last date of Bid submission, in the country where the Site is located, any law, regulation, ordinance, order or bylaw having the force of law is enacted, promulgated, abrogated or changed (which shall be deemed to include any change in interpretation or application by the competent authorities) that subsequently affects the costs and expenses of the Contractor and/or the Time for Completion, the Contract

Price shall be correspondingly increased or decreased, and/or the Time for Completion shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract. However, these adjustments would be restricted to direct transactions between the Employer and the Contractor/ Assignee of Foreign Contractor (if applicable). These adjustments shall not be applicable on procurement of raw materials, intermediary components etc. by the Contractor/Assignee of Foreign Contractor and shall also not be applicable on bought out items despatched directly from sub vendor works to site. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with Appendix 2 to the Contract Agreement.

Notwithstanding aforesaid, in the event of withdrawal of Deemed Export Benefits as per the extant Foreign Trade Policy of Govt of India, the impact of differential duty/tax liability shall be adjusted in Contract Price subject to documentary evidence. The adjustment in tax liability shall however be restricted to the value of CJF component declared in the Attachment-9 end ex-works value of Bought out item's declaration given in Attachment-13.

Further in the event of introduction of GST or any other tax in lieu of existing Excise Duty/ Service Tax and VAT / Sales Tax, etc., the impact of differential Tax liability, if any on the total Contract price including Bought Out Items (to be dispatched directly from sub-vendor's works to site) will also be adjusted in Contract Price subject to documentary evidence. The total differential Tax liability will be limited to the applicable increase/ decrease in Tax rate on the Contract price including sub-vendor items specified in the Bid in Attachment-13.

In case Attachment-13 duly filled is not submitted along with bid or is left blank or statement/ any declaration like 'later', 'to be furnished later', 'NA' etc. are indicated, in such cases contractor will not be eligible for. any adjustment in the event of withdrawal of Deemed export benefits & /or introduction of GST and no claim in this regard shall be entertained by the Employer.

The above adjustment however shall be restricted to schedule I date of dispatch or actual whichever is less."

10. NTPC disputes that L&T was liable to be paid any amount on account of increased labour wages pursuant to the Notification in terms of Clause 26 of the SCC. It is NTPC's case that the price variation on account of increase in labour costs is specifically provided for in Appendix-2 of the Contract Agreement and Clause 26 of the SCC is inapplicable as it applies only in cases where the increase in expenditure is not factored in the price adjustment provisions. According to NTPC, Appendix-2 to the Contract Agreement contains an exhaustive mechanism to compensate L&T for any changes in the cost of labour and material component during the execution of the contracts.

11. Appendix-2 to the Contract Agreement contained a formula for revision in the price component for civil works, structural works, installation, testing and commissioning. The said formula for the Indian Rupee portion for the Installation Services is set out below:-

“For Installation Price Component (excluding Civil Works and Site Fabricated Structural Works component) of the contract:

- i) It is understood that the price component for erection portion of Installation Services comprises a fixed portion and variable portion linked with the index of labour (description and co-efficient as enumerated).
- ii) The monthly price adjustment amount for the erection portion of Installation Services component will be computed as per the formula given below:

a) Indian Rupee Portion of the Installation Services

$$ER = ER1 - ER_0$$

ER1 will be computed as follows:

$$ER1 = ER_0 (0.15 + 0.85 F1)$$

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Where :

ER = Adjustment to Erection portion of Installation Services component of contract price expressed in Indian Rupees payable to the contractor for each billing.

ER1 = Adjustment amount of Erection portion of Installation Services component of contract price expressed in Indian Rupees payable to the Contractor.

ER0 = Value of the Erection work done in the billing period, which shall be calculated as under:

For the purpose of computing ERO, each Erection bill (which is excluding initial Advance and amount payable on completion bill (which is excluding initial Advance and amount payable on completion of the Facilities and on successful completion of Guarantee test) during the Erection period upto the 'Completion of the Facilities' shall be divided by a factor as indicated below:

Erection portion of Installation – Services component of the Contract Price	– [Initial Advance amount + Erection Portion of Installation Services component of the Contract Price payable on completion of the Facilities + Erection Portion of Installation Services component of the Contract Price payable on successful completion of Guarantee test]
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12. The Arbitral Tribunal considered the aforesaid dispute and found in favour of L&T. It held that L&T is entitled for reimbursement of additional expenditure on account of the increase in the basic minimum rates of wages for various categories of labour. The Arbitral Tribunal observed that the Notification of the minimum wages for labour are in two parts. The first being the basic minimum wage rate and the second being a Variable Dearness Allowance (VDA). The second component of VDA had been revised from time to time to commensurate with the

price in the cost of living. The Arbitral Tribunal found that insofar as the VDA is concerned, the same was factored in the formula for the variation in the Contract Price, as stipulated in Appendix-2 of the Contract Agreement. This was apparent as in the terms of the formula, the price for labour component was linked to the “*All India Consumer Price Index for Industrial Workers*” as published by Labour Bureau. Thus, the Arbitral Tribunal was persuaded to accept that Appendix-2 only factored in the variable cost of living allowance as published by the Labour Commissioner periodically and did not factor in any rise in the basic minimum rate of wages.

13. The Arbitral Tribunal also referred to Section 4 of the Minimum Wages Act, 1948 and the same is set out below:-

“4. Minimum rate of wages.- (1) Any minimum rate of wages fixed or revised by the appropriate Government in respect of scheduled employments under sec. 3 may consist of-

- (i) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers (hereinafter referred to as the “cost of living allowance”); or
- (ii) a basic rate of wages with or without the cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates, where so authorised; or

- (iii) an all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.

(2) The cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates shall be computed by the competent authority at such intervals and in accordance with such directions as may be specified or given by the appropriate Government.”

14. The Arbitral Tribunal noted that the minimum rate of wages had two components – the basic rate of wage, and a cost of living allowance, which was required to be computed by the Competent Authority at such intervals as may be specified.

15. Accordingly, the Tribunal held that insofar as the increase in the basic rate of wages is concerned, the same was not factored in Appendix-2 to the Contract Agreement and consequently, was required to be compensated in terms of Clause 26 of the SCC.

16. Mr Lekhi, learned ASG contended that the said conclusion was contrary to the plain language of the contract. He submitted that Clause 26 of the SCC could not be interpreted in the manner as done by the Arbitral Tribunal. Clause 26 of the SCC expressly excluded any increase, which is compensated by other provisions of the Contract Agreement and Clause (i) of Appendix-2 expressly provided for computation of adjustment in the Contract Price to reflect the changes in cost of labour.

17. Clause (1) of Appendix-2 to the Contract Agreement reads as under:-

“The Contract price shall be subject to price adjustment during performance of the Contract to reflect changes in the cost of labour and material components etc. in accordance with the provisions described below :”

18. Mr. Lekhi submitted that the aforesaid clause made it amply clear that Appendix-2 catered to reflect all changes in the cost of labour, which would also include the basic minimum rate of wages. He submitted that merely because the formula for calculating the variation in Contract Price did not fully reimburse any variation in the basic minimum rate of wages, it did not follow that the same was required to be separately reimbursed. Thus, the impugned award is contrary to the terms of the Contract Agreement.

19. Next, Mr. Lekhi contended that even if it is assumed that L&T was entitled to reimbursement of additional expenditure on account of increase in the minimum rate of wages as notified under the Notification, L&T was nonetheless required to prove the additional expenditure incurred by it for sustaining any claim for reimbursement. In the present case, L&T had failed to establish the same and although the Arbitral Tribunal returned a finding to the aforesaid effect, it still awarded a sum of ₹7.104 crores to L&T on the ground that the same was admitted by NTPC in its written submissions. He referred to the written submissions and submitted that there was no unequivocal admission on the part of NTPC that it owed the aforesaid amount to

L&T. Thus, the Arbitral Tribunal's award of ₹7.104 crores in favour of L&T is vitiated by patent illegality.

20. Lastly, he submitted that the directions issued by the Arbitral Tribunal permitting L&T to further adduce evidence in support of its claim and a direction to NTPC to verify and pay the same was wholly without jurisdiction. The Arbitral Tribunal was required to finally adjudicate the disputes between the parties and, directions to the aforesaid effect enabled L&T to, once again, agitate its claims that were required to be finally adjudicated.

21. This Court is unable to accept that the impugned award is *ex-facie* contrary to the term of the Contract Agreement and therefore, is vitiated by patent illegality. The Arbitral Tribunal has interpreted the provisions of Clause 26 of the SCC along with Appendix-2 to the Contract Agreement. The decision of an arbitral tribunal in respect of construction of a contract is final and the court cannot supplant its view in place of that of the Arbitral Tribunal. Concededly, the scope of interference with an impugned award under Section 34 of the A&C Act is limited. Unless the court finds that the impugned award is patently illegal on the face of the award or falls foul of the fundamental policy of Indian Law, the impugned award cannot be set aside. In the present case, the Arbitral Tribunal's interpretation as to the construction of Clause 26 of the SCC is a plausible one. This Court is unable to accept that such an interpretation is *ex-facie* erroneous and contrary to the plain language of the Contract Agreement.

22. The Arbitral Tribunal had awarded a sum of ₹7.104 crores in favour of L&T on the basis of material submitted by NTPC. It is apparent from a plain reading of the impugned award that the Arbitral Tribunal had not only relied on the submissions made in the written submissions but on the affidavit filed by NTPC's witness viz. Mr. R.K. Singh, AGM-ME, NTPC Ltd., Tanda Thermal Power Station. The relevant extract of the said affidavit is set out below:

- “17. I say that in any case, even if it is accepted for the sake of argument, but without admitting the same, that the Claimant is entitled to some reimbursement due to its incurring additional cost / expenditure due to increase in minimum wage than also the reimbursement has to be only of the actual expenditure and not on the basis of any theoretical percentage cost in each work price component.
18. I say that for claiming such reimbursement the Claimant should have placed the actual cost incurred by it due to the increased minimum wage rate. I say that every month the Claimant submits the record of payment received by each of its workmen, including the workmen employed by its sub-contractors, to the Respondent as required by the contract between the parties. I say that thus, the number of workers employed by the Claimant (directly or indirectly), the number of days worked by each of the workmen and the rate at which he is paid by the Claimant or its sub-contractors is mentioned in the proof of payments submitted to the Respondent by the Claimant.
19. I say that as a sample, the details submitted by the Claimant regarding the payments made by it or its sub-contractors to their respective workmen / labour in each category for the months of Jan 2017 to

March 19 along with the details submitted in regard to atleast one sub-contractor for each month are being annexed hereto and marked as **Exhibit R/1 (Collectively)**.

20. I say that the said data has been collated by me personally from the records of the data submitted every month by L&T MHPS. I further say that based on the said collated data I have placed on record charts which is being annexed hereto and marked as **Exhibit R/2 (Collectively)** reflecting the actual quantity of man days in relation to increase in minimum wages has to be considered.
21. I say that as per the said calculations it is clear that even if it is accepted without admitting that the total increase in additional expenditure incurred by the Claimant would be far less than what is now claimed by the Claimant.”
23. It is apparent from the above that NTPC’s witness had affirmed that he had collated the records and data submitted by L&T and had produced the results of the same. The said affidavit clearly established that L&T had submitted documents and returns to NTPC indicating the number of man days in relation to which the increase in minimum wages was required to be considered. Undeniably, the tabular statements produced by NTPC did constitute material, which could be considered by the Arbitral Tribunal. The Indian Evidence Act, 1872 does not apply *stricto sensu* to arbitral proceedings. Thus, the decision of the Arbitral Tribunal to rely on material placed before it and draw an inference cannot be faulted. This Court is unable to accept that the impugned award is based on no evidence / material at all. Thus, this

Court is also unable to accept that the impugned award is liable to be interfered with.

24. Insofar as Mr. Lekhi's contentions that the directions issued by Arbitral Tribunal for L&T to once again furnish proof of incurring additional expenditure and further directing NTPC to pay the same is unsustainable. L&T had made a claim for a quantified amount and on the basis of pleadings, the Arbitral Tribunal had inter framed the following issues:

- “(1) Whether the increase in the rate of minimum wages brought into effect by the Government of India by issuing a Notification in 2017 effective from 19.01.2017 constitute a change in law within the meaning of Clause 26 of the SCC and thereby effecting costs and expenses of the Claimant, and if so, its effect?
- (2) Whether the Price Adjustment formula contained in Appendix 2 to the Contract compensates the Claimant for increase in the rate of back wages, if so, its effect?
- (3) Whether or not the Claimant is entitled to claim any amount in terms of the invoices raised and claims made and if so, to what amount?
- (4) If the aforesaid issue is answered in favour of the Claimant, would the Claimant be also entitled to claim interest at the rate of 14% or at any other rate from 19.01.2017 till payment?
- (5) Whether the Claimant would also be entitled to claim increased cost on the amounts due on account of Notification dated 19.01.2017 every month from 01.05.2019 onwards within 45 days of

the receipt of the invoice till the completion of the contract works, and if so, to what amount and if the aforesaid issue is answered in favour of the Claimant, would the Claimant be also entitled to claim, if case of delay in payment, interest at the rate of 14% per annum or at any other rate on the amounts due every month till the date of payment?

- (6) Whether the Claimant is also entitled to claim cost of the arbitration proceedings, and if so, for what amount?"

25. The first issue struck by the Arbitral Tribunal required the Arbitral Tribunal to determine whether any amount was payable to L&T on account of increase in the rate of minimum wages in terms of the claims made in the Statement of Claims and if so, the amount and the period for which it would be payable. The Arbitral Tribunal had concluded that L&T had failed to establish the amount payable to it on account of its claim for increased expenditure. Thus, L&T's claim for a sum of ₹38,23,63,428.06 was rejected. Having held so, the first issue struck by the Arbitral Tribunal was required to be decided in the aforesaid terms. Issue no.3 was also required to be rejected.

26. However, the Arbitral Tribunal not only issued directions for L&T to further submit proof and evidence for claiming reimbursement but also directed NTPC to pay the same along with interest.

27. Having stated above, it is also material to note that L&T had succeeded in its claim that it was entitled to reimbursement of additional expenditure incurred on account of increase in the basic minimum wage rate. However, it had failed in its contention that the said amount was

required to be determined on a notional basis. In the given facts, it may have been possible for L&T to otherwise claim additional expenditure on the basis of the findings that it is entitled to reimbursement of additional expenditure. This claim could be considered by NTPC as and when the same was quantified. NTPC would also be entitled to oppose the claim on such grounds as may be available in law. But that would be a separate dispute required to be addressed as and when the same matured. The decision of the Arbitral Tribunal to issue a blanket award directing NTPC to pay the amount as verified with interest from the date of the Statement of Claims and in the event of dispute, to pay the amount as certified by the Chartered Accountant along with interest, amounts to making an award in respect of a possible dispute that was not before the Arbitral Tribunal.

28. This Court is also unable to accept that any interest could be awarded on the amount that may be determined in future from the date of the Statement of Claims. L&T had founded its claim on the interpretation of Clause 26 of the SCC, which the Arbitral Tribunal found was illegal, unacceptable and baseless. Clearly, in this view, the award of interest from the date of Statement of Claims is patently erroneous and unsustainable.

29. L&T had also assailed the impugned award. According to L&T, the impugned award is patently illegal as the Arbitral Tribunal has ignored the expert opinion. The expert witness examined by L&T had deposed that in contracts of similar nature, increase in wages is compensated by notional formulas and not on the basis of actual

reimbursement as a contractor could execute the works by various methods. The contractor has the option to deploy a higher work force and use mechanical means to a lesser degree. Alternatively, he may deploy higher number of machines and use a lean labour force. Thus, the compensation is required to be made for increase in costs.

30. The Arbitral Tribunal had considered and rejected the aforesaid contentions. The Arbitral Tribunal had examined the language of Clause 26 of the SCC and found that the said clause had implied the use of the word 'reimbursement'. The Arbitral Tribunal reasoned that for the petitioner to establish the claim on the basis of reimbursement, it was required to establish that it had incurred additional expenditure and the same was on account of increase in labour wages as notified under the Notification. The scope of examination under Section 34 is limited. The decision of the Arbitral Tribunal regarding consideration and interpretation of the Contract is final and this Court cannot supplant its opinion over that and cannot interfere with the impugned award unless, it finds that the same is patently illegal. This Court is unable to accept that the Arbitral Tribunal's view with regard to interpretation of Clause 26 of SCC is patently illegal and no reasonable person could have accepted the same. The said view is clearly a plausible one.

31. In *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: 2021 SCC OnLine SC 695*, the Supreme Court had once again explained the scope of the ground of patent illegality as under:

“24. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited grounds available to courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression ‘patent illegality’. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression ‘patent illegality’. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-

mindful or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

26. Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice. In *Ssangyong* (supra), this Court held that the meaning of the expression 'fundamental policy of Indian law' would be in accordance with the understanding of this Court in *Renusagar Power Co. Ltd. v. General Electric Co.* In *Renusagar* (supra), this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the 'national economic interest', and disregarding the superior courts in India would be antithetical to the fundamental policy of Indian law. Contravention of a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be

brought within the confines of ‘patent illegality’ as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day.

27. In light of the principles elucidated herein for interference with an arbitral award by a court in exercise of its jurisdiction under Section 34 of the 1996 Act, we proceed to consider the questions that arise in these Appeals as to whether the Division Bench of the High Court was right in setting aside the award of the Arbitral Tribunal dated 11.05.2017.”

32. L&T’s contention that the impugned award is patently illegal does not fall within the scope of concept of patent illegality as explained by the Supreme Court in the aforecited decision.

33. The Arbitral Tribunal had rendered an arbitral award in similar term [Arbitral Award dated 12.06.2020] in respect of a similar dispute raised in connection with the contract for supply and erection including civil works of EPC Package, Khargone Super Thermal Power Project. NTPC and L&T had challenged the said award by filing petitions under Section 34 of the Act being OMP(COMM) No.560/2020 captioned ***NTPC Ltd. v. Larsen and Toubro Ltd.*** and OMP(COMM) No.524/2020 captioned ***Larsen and Toubro Ltd. v. NTPC Ltd.*** The said

petitions were heard along with the present petitions and the same have been disposed of by a judgment rendered on 26.11.2021. The reasons stated in the said decision may also be read as part and parcel of the present petitions.

34. In view of the above, the impugned award to the extent it directs NTPC to examine L&T's claim once again and pay the same along with interest at the rate of 10% per annum or pay the amount as certified by the Chartered Accountant along with interest at the rate of 10% per annum, is set aside.

35. Accordingly, NTPC's petition [O.M.P. (COMM) 567/2020] is partly allowed to the aforesaid extent and L&T's petition [O.M.P. (COMM) 535/2020] is dismissed. All the pending applications are also disposed of.

VIBHU BAKHRU, J

NOVEMBER 29, 2021

'gsr'