2023:DHC:9327

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.12.2023

+ **O.M.P. (COMM) 424/2020 & IA No.3680/2020**

ONGC PETRO ADDITIONS LIMITED ..... Petitioner

Versus

TECNIMONT S.P.A & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Nakul Dewan, Sr. Adv. with Mr. K.R. Sasiprabhu, Mr. Aditya Swarup, Mr. Vishnu Sharma, Mr. Tushar Bhardwaj, Mr. Vinayak M & Mr. M. Shishodia, Advs

For the Respondents : Mr. Ritin Rai, Sr. Adv. with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. S. Niranjan & Mr. Akshay Vasishth, Advs.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

INTRODUCTION

1. ONGC Petro Additions Ltd. (hereafter '**OPaL**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an arbitral award

originally dated 06.01.2020 but subsequently corrected and re-dated on 11.02.2020 (hereafter '**the impugned award**'). The impugned award was delivered by two members (hereafter **'the Majority'**) of an arbitral tribunal comprising of three members (hereafter '**the Arbitral Tribunal**') in an international commercial arbitration with New Delhi, being the seat of the arbitration. One of the members of the Arbitral Tribunal did not concur with the material findings of the Majority and penned a separate opinion.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to two distinct, but similar agreements dated 02.09.2011 (hereafter collectively referred to as '**the Contracts**').

3. The Majority held that OPaL was liable for the delay in performance of the Contracts resulting in the respondents incurring additional expenses & costs. Accordingly, the Majority awarded an amount of ₹50,179,493/-, €5,049,443 and $4,977,199 in favour of respondent no.1 (hereafter '**TCM**') and ₹777,833,550/- in favour of respondent no.2 (hereafter '**TCMPL**'). TCM and TCMPL are hereafter collectively referred to as '**Tecnimont')**. In addition, the Arbitral Tribunal also held that the respondents (who were claimants before the Arbitral Tribunal) were entitled to interest at the rate of 2% above the current rate of interest as defined under Section 2(b) of the Interest Act, 1978 with effect from fourteen days after the date of the impugned award. The counterclaims preferred by OPaL were rejected.

FACTUAL CONTEXT

4. TCM is a company incorporated under the laws of Italy and TCMPL is a company incorporated in India. TCM & TCMPL are ultimate subsidiaries of Maire Tecnimont S.P.A., Italy. The impugned award notes that the said company is a part of a larger group of companies, which are leading engineering and construction contractors in oil, gas and petrochemicals sectors.

5. OPaL was set up by a consortium of three Indian state-owned companies – Oil and Natural Gas Corporation Limited (ONGC), Gas Authority of India Limited (GAIL) and Gujarat State Petroleum Corporation Limited (GSPCL) – for the purpose of developing a petrochemical complex (hereafter '**the Complex**') in Dahej Special Economic Zone at Dahej, District Bharuch, Gujarat under the Petroleum, Chemicals and Petrochemical Investment Regions policy of Government of India (hereafter '**the Dahej Project**'). The Complex is situated in the Petroleum, Chemicals and Petrochemical Investment Region/ Special Economic Zone (PCPIR/SEZ) at the port of Dahej and consists of various interdependent units – including a Dual Feed Cracker Unit (DFCU), which provides products as feedstock for other downstream units, that is, the Polyethylene (PE) unit and Propylene (PP) unit and other associated units – for manufacturing a range of petrochemical and allied products.

6. OPaL awarded various Lump Sum Turn-Key (hereafter '**LSTK**') contracts to several national and international contractors to erect

petrochemical plants in respect projects set up in the Complex. OPaL appointed Engineers India Limited (hereafter '**EIL**') as its Project Management Consultant (hereafter '**PMC**') for execution of the Dahej Project.

7. On 23.09.2009, OPaL issued a Letter of Intent to INEOS Europe Ltd, U.K. and INEOS USA LLC, USA (hereafter '**the Licensors**') selecting them as licensors to set up the PE and PP units respectively, through International Competitive Bidding (ICB) tendering process. Thereafter, fearing the possibility of contamination of technology with competitors, the Licensors approved a list of LSTK contractors who were pre-qualified to carry out the engineering, procurement, construction (EPC). Tenders were invited for the construction of the PE and PP units and Tecnimont were the successful bidders.

8. On 03.06.2011, two separate Notifications of Award (NoAs) were issued to Tecnimont in respect of the two units. These NOAs were identical and provided 02.10.2013 as the Scheduled Completion Date. Subsequently, on 02.09.2011, the parties entered into the Contracts for EPC and commissioning of the aforementioned two units (hereafter '**the Project**')

9. The works under the Project were divided into three stages – construction, pre-commissioning and commissioning. At the pre-commissioning stage, OPaL was required to supply Tecnimont with certain utilities in order to facilitate the pre-commissioning.

10. The performance of the Contracts was delayed. Although, the scheduled date of completion under both the Contracts was 02.10.2013, the actual completion date of the PE Unit was 14.04.2017 and the actual completion date of the PP Unit was 12.02.2017. According to Tecnimont, OPaL was responsible for the delay in performance of the Contracts as it failed to provide utilities at the pre-commissioning stage. Tecnimont claims that OPaL was obliged to provide utilities to Tecnimont immediately on it indicating its readiness in respect of the specific sub-systems but OPaL delayed the performance of its obligations. Tecnimont's principal claim, in addition to other claims, before the Arbitral tribunal was for compensation and costs incurred on account of delay in completion of the works.

11. OPaL denied Tecnimont's claims and disputed the allegation that it had breached any of its obligations under the Contracts. According to OPaL, it was not obliged to supply utilities or feedstock until Tecnimont achieved the "Mechanical Completion" as defined under Clause 1.1.38 of the General Conditions of the Contract (hereafter '**the GCC**'). OPaL claims that bulk of the delays had already occurred prior to the "Mechanical Completion" and therefore, Tecnimont was responsible for the same. OPaL not only disputed Tecnimont's entitlement to any claim but also the quantification of those claims.

12. On 18.05.2015, Tecnimont issued notices to OPaL invoking the arbitration agreements in respect of the two Contracts and appointed their nominee arbitrator. Tecnimont further claimed that the seat of

arbitration was Singapore. Although, OPaL raised certain disputes, it without prejudice to its rights and contentions, appointed its nominee arbitrator.

13. The nominated arbitrators were unable to agree on the presiding arbitrator. Consequently, Tecnimont filed applications under Section 11(6) of the A&C Act before the Supreme Court for the appointment of the presiding arbitrator. And, by an order dated 06.04.2017, the Supreme Court appointed the presiding arbitrator.

THE ARBITRAL PROCEEDINGS

14. On 08.05.2017, the Arbitral Tribunal made an order, consolidating two arbitrations and mentioned that the hearings would determine, whether or not the seat of the arbitration proceedings would be in Singapore or not and, whether or not the Arbitral Tribunal lacked the jurisdiction to arbitrate.

15. On 04.10.2017, the Arbitral Tribunal held that the notices of arbitration were valid; it had the jurisdiction to settle the disputes; and that the seat of the arbitration is New Delhi, India.

16. On 06.11.2017, Tecnimont served their Statement of Claim, stating that it was entitled to costs of utilities and feedstock, which were, in terms of the Contracts, free of costs for pre-commissioning/commissioning activities, as well as costs incurred due to delay in the project because of OPAL's failure to comply to its obligations under the Contracts. Tecnimont also claimed compensation

for payments to sub-contractors, both initially and after extension of construction, extended site supervision, running costs, head office support and overheads, extension of bank guarantees, and claims on warranty obligations amongst other claims.

17. Tecnimont claimed an aggregate amount of EUR 22,664,334 (EUR 4,736,328, ₹124,96,26,077/-, USD 1,691,015, GBP 9,670 and JPY 29,035,248) on account of damages caused due to delay in the completion of the Project, amounts withheld, and interests on delayed payments.

18. OPAL filed its Statement of Defence and also raised counter claims. The counterclaims were under five heads. These were, claims for liquidated damages due to delays caused by Tecnimont; losses arising out of the issues and defects in the PE Unit; interest cost on mobilization advance; additional insurance premium; and reimbursement on account of change orders.

19. On 01.10.2018, Tecnimont submitted its reply to the said counter- claim, which was countered by OPaL in its reply to defence of the counter claim dated 24.12.2018. Both parties submitted their rejoinders on 28.02.2019, in front of the Arbitral Tribunal. Evidentiary hearing in front of the Arbitral Tribunal took place between 07.06.2019 to 14.06.2019, and the final hearing took place from 16.09.2019 to 18.09.2019 at London.

20. On 17.01.2019, OPAL submitted an application to the Arbitral Tribunal under Section 17 of the A&C Act seeking directions to Tecnimont to continue to perform their obligations under Clauses 6.1 and 11 of the GCC and not to influence, coerce, direct, any third party/sub-contractors/ vendors to the Contract to desist from providing services to OPaL.

21. Subsequently, the Arbitral Tribunal rejected OPAL's application for specific performance on 10.02.2019. Aggrieved by the said order, OPaL filed an appeal under Section 37 of the A&C Act before this Court. The same was dismissed with liberty to file before the Arbitral Tribunal. Thereafter, on 22.08.2019, OPaL filed a second application under Section 17 of the A&C Act, which was subsequently rejected by the Arbitral Tribunal.

22. The arbitral proceedings culminated in the delivery of the impugned award by the Majority. As noted above, one of the arbitrators did not concur with the majority opinion and entered a separate opinion, which is also part of the impugned award.

23. OPaL has filed the present application under Section 34 of the A&C Act praying that the impugned award be set aside.

The Impugned Award

24. The principal claim advanced by Tecnimont was regarding delays in completion of the Contracts. Tecnimont claimed that OPaL had failed and neglected to perform its obligations to supply the utilities

and feedstock as required at the pre-commissioning stage. OPaL disputed that it was responsible for the delay on the ground that Tecnimont had not achieved the "Mechanical Completion", which according to OPaL was a stage prior to pre-commissioning. OPaL, *inter alia***,** claimed that it had no obligation to provide feedstock till the "Mechanical Completion" was achieved. It also claimed that Tecnimont had not given proper and/or sufficient notice for seeking the relevant utilities. In addition, OPaL also questioned the assessment of the damages as claimed by Tecnimont.

25. In view of the above, the Arbitral Tribunal framed the following issues for deciding Tecnimont's claim for damages on account of delay:

> "(a) ISSUE 1: On a proper construction of the Contracts, when was OPaL obliged to supply utilities and/or feedstock?
>
> (b) ISSUE 2: Did Tecnimont give proper/sufficient notice to OPaL to provide utilities?
>
> (c) ISSUE 3: Was Tecnimont ready to receive relevant utilities/feedstock?
>
> (d) ISSUE 4: Were there other /concurrent delays for which Tecnimont was responsible?
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> (e) ISSUE 5: Is the delay analysis performed by Ms. Ramey unreliable and/or flawed?
>
> (f) ISSUE 6: Is Tecnimont entitled to damages under Indian law?
>
> (g) ISSUE 7: Are Tecnimont's claims barred by Clauses 6.2.1 and/or 6.2.3 of the GCC?

(h) ISSUE 8: What is the proper assessment of Tecnimont's damages?"

26. The Majority decided the issues largely in favour of Tecnimont. The Arbitral Tribunal (Majority) did not accept OPaL's contention that it had no obligation to provide utilities for pre-commissioning of subsystems and equipment prior to the "Mechanical Completion". The Majority held that a proper construction of the Clauses 1.1.37 and 1.1.38 of the GCC did not support OPaL's contention that the pre-commissioning was to begin only after the Mechanical Completion of the entire units/system was achieved. The Majority held that Clause 1.1.37 of the GCC did not refer to the Mechanical Completion as defined in Clause 1.1.38 of the GCC. Accordingly, issue no.1 was decided in favour of Tecnimont.

27. The Arbitral Tribunal (Majority) also examined certain communications and concluded that Tecnimont had provided sufficient notice to OPaL to provide the utilities and rejected OPaL's defence that it had not. Accordingly, it decided issue no.2 in favour of Tecnimont. The Majority also held that Tecnimont was ready to receive the utilities on the dates as specified and as noted in the impugned award. Accordingly, issue no.3 was also decided in favour of Tecnimont.

28. The Majority accepted that there were substantial delays during the period of construction and held that Tecnimont was responsible for some of the delays. However, the Majority did not accept that such

delays had any impact on the delay in completion of the Project as it found that the delays attributable to OPaL's were critical.

29. The Majority accepted the delay analysis of Tecnimont's witness (Ms Ramey) and rejected OPaL's contention that the same was flawed. The evidence led by OPaL's witnesses (Mr Vaidya and Mr Mitra) was not accepted by the Majority, principally, on the ground that it was founded on the assumptions that (a) pre-commissioning could not begin until 'Mechanical Completion' was achieved; and (b) the delay had to be computed by using Critical Path Method (CPM) as adopted by OPaL's witnesses. Accordingly, issue no.5 as stated above was decided in favour of Tecnimont.

30. The Majority also accepted that Tecnimont was entitled to damages for the delay and its claims were not barred by Clauses 6.2.2 and 6.2.3 of the GCC.

31. The Majority proceeded to examine the claims made under each sub-head. Whilst the Arbitral Tribunal rejected claims under certain sub-heads, it accepted the others. A tabular statement as set out in the impugned award indicating the claims accepted by the Majority are reproduced below:

	Overall summary of Total of Claims advanced by both Claimants in respect of delay caused by OPaL's breaches of the Contracts relation to both the PE Unit and PP Unit.				Tribunal Award
<u>Head of Claim</u>	**INR**	**USD**	**EURO**	**JPY**	

Initial Compensation to Construction Subcontracts	270,000,000	-	-	-	0 (Zero)
Further Extension of Construction	102,701,980	-	-	-	TCMPL: INR 102,701,980
Extended Site Supervision	377,454,095	-	37,624	-	TCMPL: INR 250,000,000 TCM: Euros 25,000
Head Office Support	157,107,405	140	751,817	-	0 (Zero)
TCMPL Overheads	157,108,400	-	-	-	0 (Zero)
Extended Site Facilities and Running Costs	117,750,225	-	-	-	TCMPL: INR 117,750,225
Extension of Bank Guarantees	3,239,078	71,870	2,263,798	-	TCMPL: INR 3,239,078 TCM: USD 71,870 EUROS 2,263,798
Extension of Insurance	30,849,075	-	-	-	TCMPL: INR 30,849,075
Vendors Representative	690,592	-	40,992	2,331,184	0 (Zero)
Guarantees and Warranty Obligations	44,725,370	-	37,302	20,682,578	0 (Zero)

32. The Majority awarded damages in the sum of Euros 2,288,798 and USD 71,870 in favour of TCM and damages for a sum of ₹501,305,280/- in favour TCMPL.

33. In addition to the claims founded on delay in completion of the Contracts, Tecnimont had also raised claims for (a) works executed that were asserted to be beyond the scope of the Contract; (b) interests; and (c) costs. The same were seriously disputed by OPaL. OPaL had also advanced counter claims on account of certain works which were covered under the scope of the Contracts but not executed.

34. The Arbitral Tribunal rejected Tecnimont's claim for extra works executed beyond the scope of the Contracts on the ground that Tecnimont had not produced sufficient evidence. The Majority held that any claim in respect of additional work outside the contractual scope could be justified only if such claim was consistent with the procedure laid down in Clause 8.1.1 of the GCC or was subject matter of a specific agreement. The Majority accepted that Tecnimont would be entitled to the payment for additional works/change in the scope which was agreed to between the parties, subject to the agreement of price and the "change orders". However, the Majority found that Tecnimont had failed to provide sufficient evidence in support of such change orders. The Majority did not accept the calculation submitted by Tecnimont's witness (Mr Johnson) as well. According to the Arbitral Tribunal, the same was not supported by adequate documentation or other evidence for independent verification of the said calculations.

35. OPaL's counter-claims in regard to works not executed were also rejected, *inter alia*, on the ground that there was no factual or contractual basis for such claims. The Majority noted that OPaL's claims were in respect of two counts. The first being shortage in "supply of PP and PE powder", and the second being on account of "emergency purchase of Pentane for commissioning of PE Unit". The Majority noted that it was OPaL's case that Tecnimont had used less PP and PE powder in the course of commissioning than they were obliged to use. On this basis, OPaL claimed that the total amount payable by OPaL was required to be reduced. The Majority held that there was no contractual basis for such claim and accordingly, rejected the same. The second claim on account of emergency purchase was also rejected on account of lack of sufficient evidence to justify the same.

36. OPaL had raised counterclaims for liquidated damages in terms of Clause 6.3.2 of the GCC. According to OPaL, Tecnimont was obliged to pay liquidated damages if it failed to complete the entire work or certain parts before the Scheduled Completion Date. Tecnimont disputed the said claim on several grounds including on the basis that one of the officials of OPaL, Mr Kamble, had issued a joint statement, *inter alia*, accepting that the delay was for the reasons attributable to Tecnimont. In addition, Tecnimont claimed that the delay on the part of OPaL in supplying utilities and feedstock absolved Tecnimont of its obligation to complete the Contracts within the stipulated time and placed the timeline for completion at large. Additionally, Tecnimont

claimed that OPaL was required to prove actual loss in order to recover liquidated damages, which it had failed to prove.

37. The Majority held that OPaL was not precluded from advancing its claim for liquidated damages on account of a joint statement signed by Mr Kamble. The Majority declined to accept that the joint statement was ratified by OPaL and it had waived its right to pursue the claim. The Majority held that OPaL had not abandoned its claim for liquidated damages. However, it did not accept that OPaL was entitled to levy any liquidated damages for other reasons including that the delay was due to reasons attributable to OPaL.

38. OPaL had also raised counter-claims in respect of certain defects in the PE unit. It claimed that after commissioning it discovered several technical and mechanical defects, which were on account of Tecnimont's breach of contractual obligations to provide a working, operational and a safe unit. OPaL, *inter alia*, claimed that a sum of ₹2,819.82 million on account of loss of incremental profits of PE unit; ₹4,773.42 million towards impact on DFCU; and ₹111.70 million and JPY 38.14 million as additional cost to achieve Performance Guarantee Test Run (PGTR).

39. The Arbitral Tribunal had examined OPaL's claim regarding alleged defects. The Majority found that Tecnimont's obligations were in respect of engineering, procurement, construction, and commissioning of the PE unit as per the scope and specifications of the bidding documents. It observed that Tecnimont was not employed to

design the entire project from scratch but to execute the project in accordance with the specifications contained in the bidding documents. The Majority also found that there were process issues in the operation of the PE unit, which was not Tecnimont's contractual responsibility.

40. OPaL had raised a counter-claim in respect of Recycle Gas Compressor 32 (RGC 32). The PE unit had started commercial operations on 14.11.2017. However, thereafter it had to be shut down during the period from 22.05.2017 to 25.05.2017. The Recycle Gas Compressor had tripped due to high shaft vibrations in the compressor. Resultantly, the PE unit had to be shut down for a period of four months till September 2019. According to OPaL, the said defect was caused due to rust particles in the compressor which were left in the pipelines due to inadequate cleaning. OPaL had claimed that Tecnimont had not done the chemical cleaning of the system, therefore, it was liable for the loss. OPaL also relied on the evidence of its witnesses (Mr Bokde and Mr Patel) and the expert evidence of one Mr Rajan.

41. Tecnimont contested the said claims, *inter alia*, on the ground that OPaL was responsible for the same. Tecnimont claimed that in all probability, the problem was caused by a foreign material, which had remained on account of OPaL's failure to clean the suction strainers of the pipelines after the maintenance activities were carried out by OPaL and before restarting the compressor on 25.05.2017. Tecnimont also relied on its expert witness (Mr Hoar). The Majority noted that the equipment in question was working smoothly before it shut down on

22.05.2017 to 25.05.2017. The Majority reasoned that, therefore, it was probable that the problem had occurred sometime before 25.05.2017. The Majority noted that parts of the equipment in the PE unit were opened during the shut down on 22.05.2017 to 25.05.2017 to enable OPaL to perform the necessary maintenance activities. The Majority noted that OPaL's witness had confirmed that before re-starting the compressor on 25.05.2017, OPaL had not cleaned either the suction strainers or the pipelines. The Majority accepted that the same ought to have been done and failure to do so was significant. The Majority held that if the damage was caused by rust, it was likely that the same was due to failure on the part of OPaL to carry out the necessary cleaning prior to the startup. Accordingly, the Majority rejected the claim with regard to RGC 32.

42. It was OPaL's case that RGC 31 had stopped working on 12.11.2017 due to second stage vibrations and, as a consequence, Train 1 remained shut down for eighteen days till 29.11.2017. It was claimed that the cause was the lower differential pressure as a result there was a reverse flow of process gas, this in turn damaged RGC 31. The technical report indicated that there was hard powder on the surface of the carbon rings and RGC 31 had failed due to polymer deposit at the carbon rings, which was rubbed with the rotor shaft and damaged the RGC and the dry gas seal. The Majority accepted the evidence of Tecnimont's witness (Mr Hoar) that the process was unstable and had resulted in too many fines in the process gas, which could not be reduced in spite of liquid injection. Mr Hoar had testified that this had led to build-up of

fines in the restricted area and the differential pressure of 0.2 kg/cm2 was inadequate for migration of the fines. The migration of fines into the dry gas seal area had resulted in clogging of the dry gas seal. Further, it was also evident that OPaL had operated the machine with a pressure differential of 0.6kg/cm2g to 0.08kg/cm2g, which was well below vendor recommendation.

43. The Majority examined the rival contentions in some detail and, *inter alia***,** concluded that the problem was caused due to process instabilities for which Tecnimont could not be held responsible.

44. Similarly, the Tribunal examined OPaL's counter-claims in regard to defect in 31/32 GN Filter (Train 1 and Train 2); Diverter Valve Flapper (32-DV-431 and 31-DV-431); Vibrating Screens (31 GN 440A/B); First Stage Rotor Timing Gears in VRU Compressor (32 KS 480); Rotary Valves (321/32/ YF 425/430); Non-Drive Side HRSG Seal (32 PC 4098); Pellet Pre-Dewaterer (32 GN 846); BL 460 Loop (Train 1 and Train 2); Gear Pump Motor (Train 1 and Train 2) (31 PM 840 and 32 PM 840; PE Motor (32 KM 400); and Coperion Package Unit.

45. The Majority largely accepted the evidence led by Tecnimont and found that there was no fault in Tecnimont's performance of its obligations. The Majority did not accept that any of the counter- claims fell within the warranties provided by Tecnimont. Accordingly, the Majority had dismissed the counter-claims. OPaL's claims for interest cost on mobilization advance and for additional insurance premium were also rejected, principally, on the basis that it was based on OPaL's

assertion that Tecnimont was responsible for delay in not achieving the commissioning by the Scheduled Completion Date.

46. In addition, Tecnimont had also raised a claim regarding sums which were withheld by OPaL on various grounds. The Majority had considered the evidence led by Tecnimont and accepted the same.

47. Tecnimont had also claimed pre-award interest (*ante lite* and *pendente lite*). OPaL had disputed the said claim on the ground that in terms of Clause 1.3.3 of the GCC such interest was proscribed. The Majority accepted the said contention and rejected Tecnimont's claim for pre-reference and *pendente lite* interest on the sums as awarded.

48. The Tribunal held that Tecnimont being the successful party was entitled to reasonable costs. However, it also held that the said costs were subject to a small discount of 10% keeping in view that Tecnimont had also failed in certain points and objections as raised by OPaL. Notwithstanding the above, the cost relating to the fees of the Arbitral Tribunal was directed to be appropriated in accordance with Clause 1.3.3 of the GCC, which required each party to bear the cost of the Arbitrator nominated by it and share the fees of the Presiding Arbitrator in equal proportion. The costs for arbitration including costs for hearing room, reporters, hearing bundles etc. were directed to be apportioned equally between the parties bearing in mind Clause 1.1.3 of the GCC. However, since Tecnimont had spent ₹3,063,230/- more than OPaL, the Arbitral Tribunal awarded 50% of the said amount (that is,

₹1,531,615/-) in favour of Tecnimont on the principle that all such costs are to be shared equally.

49. The Majority considered the bill of costs of lawyers' fee as submitted by the parties and awarded USD150,000, Euros 2,500,000 and ₹15,000,000 as fees of lawyers. The Majority also assessed the costs payable to experts that had tendered their evidence in the arbitral proceedings and awarded further amounts of USD 600,000, GBP 450 ,000 and Euros 650,000 in favour of Tecnimont and directed that the same be split equally between TCM and TCMPL.

50. Although Tecnimont had also claimed costs for its internal employees, the Majority rejected the said claim but accepted that expenses and disbursements made to certain employees as claimed, were recoverable subject to certain deductions. A tabular statement setting out the costs awarded to TCM and TCMPL as set out in the impugned award is reproduced below:

	TCM			TCMPL
	INR	Euros	USD	INR
PART G		2,228,798	71,870	501,301,280
PART J (Sums Withheld)	444,819	1,117,109	856,686	18,671,031
	1,856,868	93,201	344,034	22,371,698
PART J (Milestones)	47,877,806	1,550,335	3,704,609	235,489,541
TOTAL	50,179,493	5,049,443	4,977,199	777,833,550

51. The operative part of the impugned award is set out below:

> "1 BY A MAJORITY, the claims advanced by the first Claimant viz Tecnimont S.p.A. (Italy) against the Respondent, ONGC Petro Additions limited (India) succeed in the following sums but no more viz INR 50,179,493, Euros 5,049,443 and USD 4,977,199.
>
> 2 BY A MAJORITY, ONGC Petro Additions limited (India) shall pay the sums referred to in paragraph 1 above to Tecnimont S.p.A. (Italy) within 14 days of the date of this Award.
>
> 3 BY A MAJORITY, the claims advanced by the second Claimant viz Tecnimont Pvt. Ltd. (India) against the Respondent, ONGC Petro Additions limited (India) succeed in the sum of INR 777,833,550 but no more.
>
> 4 BY A MAJORITY, ONGC Petro Additions limited (India) shall pay the sums referred to in paragraph 3 above to Tecnimont Pvt. Ltd. (India) within 14 days of the date of this Award.
>
> 5 BY A MAJORITY, as to the costs of the arbitration:
>
> a. Such costs are hereby assessed and fixed as set out in Part L above.
>
> b. The first Claimant i.e. Tecnimont S.p.A. (Italy) is entitled to receive and ONGC Petro Additions limited (India) shall pay to Tecnimont S.p.A. (Italy) within 14 days of the date of this Award in respect of their share of the costs of the arbitration the following amounts viz. INR 8,350,810, Euros 1,687,500, GBP 225,035, USD 375,070 and RUB 152,500.

c. The second Claimant i.e. Tecnimont Pvt. Ltd. (India) is entitled to receive and ONGC Petro Additions Limited (India) shall pay to Tecnimont Pvt. Ltd. (India) within 14 days of the date of this Award in respect of their share of the costs of the arbitration the following amounts viz. INR 10,515,810, Euros 1,587,500, GBP 225,045, USD 376,000 and MYR 3,750.

6 BY A MAJORITY, the claims by the Claimants for ante-lite (pre-reference) or pendente-lite interest are hereby rejected and dismissed. However, each of the Claimants viz. Tecnimont S.p.A. (Italy) and Tecnimont Pvt. Ltd. (India) shall be entitled to receive and ONGC Petro Additions Limited (India) shall pay to each of the said Claimants respectively interest on the sums referred to in paragraphs 1, 3 and 5 above from 14 days of the date of this Award to the date of payment at 2% above the current rate of interest as defined under Section 2(b) of the Interest Act 1978.

7 All other claims advanced by the Claimants against the Respondent and by the Respondent against the Claimants in these arbitration proceedings are hereby rejected and dismissed.

8 The award is stamped with a stamp of Rs 100 and the deficient stamp duty is required to be affixed by either the Claimants or the Respondent."

Submissions

52. Mr Nakul Dewan, learned senior counsel appearing for OPaL assailed the impugned award on, essentially, six fronts. First, he submitted that the Arbitral Tribunal's conclusion that OPaL was obliged to provide utilities prior to mechanical completion, amounted

to re-writing of the Contract and therefore, the impugned award was liable to be set aside as being in conflict with the public policy of India.

53. He referred to Clause 2.1.1 of the GCC and contended that OPaL was required to provide utilities from the pre-commissioning stage onwards. He contended that the said clause was fundamental for determining the dispute between the parties. But, the Majority had completely ignored the same. Thus, the impugned award was rendered in violation of Section 28 of the A&C Act.

54. He further contended that the Arbitral Tribunal had accepted the concept of "sustained pre-commissioning" and on the said basis concluded that OPaL was responsible for the delay in achieving the Scheduled Completion Date. He contended that the said concept was alien to the Contracts. He contended that the delays under the Contracts were required to be determined on Critical Part Method (CPM) and therefore, the Arbitral Tribunal had rendered the award in disregard of the Contracts. He contended that the introduction of the concept of sustained pre-commissioning for calculation of delay in effect amounted to re-writing the terms of the bargain between the parties. Thus, the impugned award was in conflict with the public policy of India.

55. Second, he submitted that the Majority had proceeded on an erroneous basis that OPaL was required to provide utilities even prior to Mechanical Completion of the whole unit by interpreting Clauses 1.1.37 and 1.1.38 of the GCC. The Majority held that the term

'equipments' was plural in Clause 1.1.37 of the GCC and therefore, did not refer to the mechanical completion under Clause 1.1.38 of the GCC. He submitted that this interpretation was neither canvassed by Tecnimont nor did OPaL have any opportunity to counter the said interpretation. He submitted that this effectively denied a fair opportunity to OPaL to present their case. He earnestly contended that this fell foul of Section 34(2)(a)(iii) of the A&C Act. He also referred to the decision of the Singapore High Court ***JVL Agro Industries Ltd v Agritrade International Pte Ltd (2016) SGHC 126*** in support of his contention. He contended that OPaL was taken by surprise by noticing the said interpretation in the impugned award, which was not subject matter of debate in the arbitral proceedings.

56. Third, he submitted that the Majority had accepted Tecnimont's monetary claims and had awarded ₹48.4 crores against claims that were unsupported by any documentary evidence. He contended that the petitioner had sought documents pertaining to Tecnimont's monetary claims and the same were specifically mentioned in the Redfern Schedule dated 17.04.2018. The Majority had passed an order dated 11.05.2018 directing Tecnimont to produce those documents since they were relevant for addressing the disputes. Tecnimont had not produced the documents. However, the Majority had brushed aside OPaL's objection in this regard and proceeded to accept the statement of the expert witness on the basis that the witness had reviewed the documents. He submitted that the same violated the principles of natural justice and denied a fair opportunity to OPaL to counter the said

claims. He submitted that the same offended the most basic motions of justice and was in conflict with the public policy of India.

57. Fourth, he submitted that the Majority had rejected OPaL's counter claims for liquidated damages by holding that the delays during the construction period were of no consequence. He submitted that this conclusion is *ex facie* perverse. He submitted that Tecnimont was responsible for the construction and there was no dispute that there was delay on the part of Tecnimont in performance of the obligations. Thus, in terms of Clause 6.3.2 of the GCC, OPaL was entitled to liquidated damages. However, the Majority rejected OPaL's claim on the ground that it was unable to provide utilities and feedstock much after the completion date and therefore, was disentitled to liquidated damages. He submitted that the entitlement of liquidated damages was required to be considered with reference to the contractual completion date and the subsequent events did not in any manner disentitled OPaL from recovering the liquidated damages in terms of the Contract.

58. Fifth, he submitted that the Majority had erred in rejecting the counter- claims for defective work on the basis that the burden to establish the same rested with OPaL. He contended that there were defects and the units were not performing to the guaranteed parameters. Thus, the burden to prove that Tecnimont was not responsible for the same rested on Tecnimont.

59. Sixth, he submitted that the Majority had ignored vital evidence in determining OPaL's counter claims.

60. Mr Nakul Dewan also referred to the decisions of the Supreme Court in ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***; ***Ssangyong Engineering and Construction Co. Ltd. v. N.H.A.I.: (2019) 15 SCC 131***; ***Vijay Karia & Ors. v. Prysmian Cavi E Sistemi S.R.L. and Ors.: 2020 SCC OnLine SC 177*** as well as the decision of this Court in ***Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Ltd & Ors.: 2019 SCC OnLine Del 8350,*** in support of his contention that the grounds of challenge raised by OPaL were within the scope of Section 34(2)(a)(iii) and Section 34(2)(b) of the A&C Act.

REASONS & CONCLUSION

61. At the outset, it is material to note that the impugned award was rendered in an international commercial arbitration. Therefore, a challenge to the impugned award on the ground of patent illegality on the face of the award, is not available to assail the same. In terms of Sub-section (2A) of Section 34 of the A&C Act, an arbitral award arising out of arbitrations, other than international commercial arbitration may be set aside on the ground of patent illegality. However, the challenge to an arbitral award arising out of international commercial arbitration is even narrower.

62. OPaL has thus confined its challenge to the impugned award on essentially two grounds. First, that it is in conflict with the public policy of India [Section 34(2)(b)(ii) of the A&C Act] and, Second, that OPaL

was not conferred sufficient opportunity to present its case [Section 34(2)(a)(ii) of the A&C Act].

63. According to OPaL, the impugned award offends the most basic notions of justice.

64. The first question to be examined is whether the Arbitral Tribunal (Majority) has delivered the impugned award in disregard of the contractual provisions and, in effect, by rewriting the same. According to OPaL, the reasoning of the Majority falls foul of the contractual provisions. As noticed above, the said challenge is premised on the basis that the Contracts unequivocally require that the pre-commissioning activities shall commence after the "Mechanical Completion" (a defined in Clause 1.1.38 of the GCC). It is OPaL's case that it had no obligation to provide any utilities prior to "Mechanical completion" and the Majority had completely misdirected itself by deciding to the contrary by introducing a concept of "sustained pre-commissioning". Mr. Dewan, learned senior counsel appearing for OPaL earnestly contended that the Contracts provided a linear critical path in this regard. However, the Majority had disregarded the contracts and had introduced a Concept of "sustained pre-commissioning" which was alien to the provisions of the Contracts.

65. The aforesaid contention is premised on Clause 1.1.38 of the GCC (which defines the term "Mechanical Completion"); Paragraph 2.2 of the "Guidelines for Pre-commissioning and Commissioning and

Performance Test Run", and Clause 2.22 of the "Project Execution Plan".

66. Clause 1.1.38 of the GCC, Paragraph 2.2 of the "Guidelines for Pre-commissioning and Commissioning and Performance Test Runs" and Clause 2.22 of the Project Execution Plan are set out below:

> "1.1.38 **MECHANICAL COMPLETION:** Means the status when all the civil engineering, fabrication and construction work are completed, all equipments and machineries are erected aligned and properly hooked up, all dynamic equipment have been run on no-load, all electrical and instrumentation connections made and all hydraulic / pneumatic Instruments loop testing done, pressure, vacuum & no load or any other tests required are completed and accepted by Company and the Polypropylene Unit at Dahej is / are ready for PRE-COMMISSIONING and START UP. The works shall be deemed to have been mechanically completed when all fabrlcatlon1 installation, hook up, testing and for the Works Including pipelines, mechanical, piping, electrical & instrumentation including optional works are completed except Punch List."

*** *** ***

> "2.2 Pre-commissioning activities (as detailed in Annexure-V) are defined as those activities, which are required to be performed after completion/ installation, inspection, hydrotesting etc. of an equipment/ system to make it ready for commissioning. LSTK Contractor shall raise FORMAT-III (as per format given in Annexure-IV) which certifies that all checklist points are liquidated and the plant / system/sub-system is ready for pre-commissioning. LSTK Contractor shall start precommissioning activities after acceptance of FORMAT-Ill by PMC/OWNER"

*** *** ***

"2. **BRIEF SCOPE OF WORK**

2.22 CONTRACTOR shall be responsible for their entire installation, however, initially shall achieve Mechanical completion testing of the facilities installed by them and thereafter, shall do Pre-commissioning, Commissioning and GUARANTEE TEST RUN in accordance to procedure set by LICENSOR / COMPANY/PMC and shall demonstrate the operability of the facilities installed by them."

67. Tecnimont had contested the aforesaid contention. It had relied on "Baseline Schedule" as set out in Annexure-F to the Contracts and the project key dates. It had relied on Clause 2.4.1 of the GCC which provided for the scope of work for pre-commissioning, commissioning, performance testing and operations of the plant and equipments. It also relied on Clause 2.2 of the Guidelines for pre-commissioning activities, which specify that pre-commissioning activities were defined as those activities that were required to be performed after completion, installation, inspection, hydro testing of equipments and system to make them ready for commissioning. According to Tecnimont, each sub-system and equipments required utilities for making it ready for completion. Thus, necessarily, the utilities were required to be provided prior to completion of construction and setup of all systems that substantially constitute the project.

68. Tecnimont also relied on Clause 3.3 of the GCC, which expressly provided that the plant would be divided into system and sub-system for the pre-commissioning activities so that pre-commissioning

activities of each system / sub-system can be progressively carried out along with the construction activities. The relevant extract of Clause 3.3 of the GCC is set out below:

> "**3.3 Pre-commissioning Documents**
>
> It shall be the responsibility of the LSTK Contractor to prepare detailed checklist of pre-commissioning and commissioning activities for each equipment, subsystem, system and plant as a whole. The LSTK Contractor shall submit the said format for approval to the OWNER/PMC. This checklist shall indicate the checks/test to be carried out on each equipment / system and shall also indicate the sequence and schedule of the activities.
>
> For the purpose of execution of these pre-commissioning activities, the PP plant shall be divided into system and sub-systems so that precommissioning activities of each system/sub-system can be progressively carried out along with the construction activities. The precommissioning document shall contain the following as a minimum…… "

69. The Majority found that the "Baseline Schedule" was part of Annexure-F of the Contracts and therefore, was required to be read as a part of the Contracts. The Majority had examined the rival contentions and has observed as under:

> "52. As to these submissions, the observations, analysis and conclusions of the Majority are as follow:
>
> a. As submitted by OPaL, the Majority proceed on the basis that a contract should be interpreted based on the plain meaning of its terms.
>
> b. The Majority do not accept that the effect of clauses 1.1.37 and 1.1.38 (viewed in isolation) is as submitted by OPaL. In particular, property construed, such provisions do not, in the view of

the Majority, provide, and cannot be stretched to mean, that pre-commissioning was to begin only after the Mechanical Completion of the entire PP Unit / PE Unit was achieved. In the view of the Majority, clause 1.1.37 is not referring to "Mechanical Completion" as defined in clause 1.1.38. On the contrary, it is clear that the expression "*equipments* [….] *where construction is essentially mechanically complete*" refers to individual sub-systems which have achieved "*completion / installation, inspection, hydrotesting etc.*" In the view of the Majority that is made plain by the reference to "*equipments*" in the plural.

c. Further, in ascertaining the plain meaning of the Contracts, clauses 1.1.37 and 1.1.38 must be read in light of an in conjunction with the remaining provisions of the Contracts; and, in the view of the Majority, the conclusion expressed in the previous sub-paragraph is consistent with and confirmed by the other provisions identified above and relied upon by Tecnimont viz. clause 2.4.12 GCC; clauses 2.2 and 2.3 of the Guidelines; the Baseline Schedule (Project Key Dates) at Annexure F of the Contracts; and clauses 2.6 and 8.0 of Annexure C (Project Instructions).

d. For the avoidance of doubt, the Majority do not consider that any of the other provisions relied upon by OPaL justify any different conclusion. Nor do the Majority accept the submission made by OPaL that the Baseline Schedule (Project Key Dates) set out in Annexure F does not form part of the Contracts between the parties. On the contrary, as stipulated in clause (b) of the main Agreement, all the Annexures (including Annexure F) were "*...to be taken as mutually explanatory of one another and shall be deed to* *form and be read and construed as integral parts of this Contract…*".

e. As emphasised by OPaL, the Majority accept that as stipulated in that same clause (b) "*…in case of any discrepancy, conflict, dispute ….*" the main Agreement and Annexures were to be "*…referred to in the order of priority as cited..*"; and that Annexure F appeared below Annexure A i.e. the GCC. However, the Majority do not accept that there is any *"discrepancy"*, "*conflict" or "dispute"* between the relevant clauses in the GCC and Annexure F. On the contrary, in the view of the Majority, the relevant provisions can and should all be read together harmoniously and lead to the same conclusion as stated above.

f. So far as may be relevant, the Majority also accept Tecnimont's submission that the Handover Procedure approved by EIL and prepared pursuant to Clause 3.3 of the Guidelines (in particular paragraphs 4.1.4 and 4.1.5) is consistent with the conclusion the Majority have stated above. However, in the view of the Majority, such post-contract conduct is inadmissible and / or not relevant to the proper construction of the Contracts and the Majority place no reliance on it.

g. The Majority do not accept OPaL's submission that loop testing and motor solo runs are a part of mechanical completion and that OPaL had no obligation to either provide the electricity or the water for these two activities. On the contrary, the Majority accept Tecnimont's submission (which was also confirmed by Mr Patel, OPaL's own witness) that motor solo runs and loop checking are not part of construction but form part of the pre-commissioning activities. Loop checks involve verifying whether an instrument's systems are fully connected and operational;

motor solo runs are test runs of motors without any load or onward connection in order to check their proper functioning. As submitted on behalf of Tecnimont, both activities can be performed only when the construction of the relevant sub-systems is completed; and both activities require utilities including, respectively, permanent power (as well as cooling water for larger motors) for motor solo runs, and cooling water, fire water, demineralised water, instrument air and/or plant air, depending on the subsystem, for loop checking. Motor solo runs cannot be performed using construction power from DG sets, as output is far too low. For the sake of contrary to Majority do not consider that this conclusion is in any way inconsistent with the order of priority stipulated under clause (b) of the Agreement.

53. For all these reasons, the Majority reject the case advanced by OPaL that there was no obligation on it to provide utilities and/or feedstock until after Mechanical Completion as defined in Clause 1.1.38 GCC. On the contrary, as submitted on behalf of Tecnimont, the Majority accept that on a proper construction of the Contracts, OPaL was under an obligation to provide utilities and/or feedstock if necessary prior to Mechanical Completion (as defined) as and when required for the purposes of pre-commissioning and/or commissioning."

70. It is clear from the above that the Majority has not disregarded the Contracts but has proceeded to interpret the different clauses of the Contracts harmoniously. It is well settled that construction of a Contract is clearly within the jurisdiction of an arbitrator. It is not permissible for a Court to examine whether the interpretation of an agreement is erroneous or not, in proceedings under Section 34 of the A&C Act. As

long as the interpretation of an agreement is a plausible one, no interference with the Arbitral Award is called for.

71. In ***McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.: (2006) 11 SCC 181,*** the Supreme Court had authoritatively held that "*the construction of a contract agreement is within the jurisdiction of the arbitrator having regard to the wide nature, scope and the ambit of the arbitration agreement …… Interpretation of a contract is a matter for the arbitrator to determine, even if it gives a rise to determination of a question of law".* The Supreme Court had further held that the arbitrator has jurisdiction, the Court would not interfere with it until it is found that there exists any bar. In ***M.S.K. Projects IJV Ltd. v. State of Rajasthan: (2011) 10 SCC 573***, the Supreme Court had further explained that if an arbitrator commits an error in construction of a contract, that is an error within its jurisdiction . Thus, unless the grounds as set out in Section 34(2) of the A&C Act are established, the courts will not interfere even if the arbitrator commits an error as the same is within the arbitrator's jurisdiction.

72. In terms of Sub-section (3) of Section 28 of the A&C Act, the arbitral tribunal is required to take into account the terms of the Agreement. It is material to note that Sub-section (3) of Section 28 of the A&C Act was substituted by the Arbitration and Conciliation (Amendment) Act, 2015 with retrospective effect from 23.10.2015. Prior to its substitution, Sub-section (3) of Section 28 of the A&C Act,

expressly required an arbitral tribunal to decide in accordance with the terms of the agreement.

73. In the present case, it is clear that the Majority has considered and taken into account the terms of the Contracts. The impugned award cannot be faulted on this ground. This Court is unable to accept that the Majority's interpretation of the contractual provisions is not a possible view and no reasonable person could possibly interpret the Contracts in the said manner.

74. Having stated above, it is necessary to state that the grounds as urged do not fall within the scope of Section 34(2)(b) of the A&C Act. It is apparent from the above that OPaL's case at best is that the Majority has misconstrued the provisions of the Contracts. This does not render an impugned award in conflict with the public policy of India. In given cases, where it is established that the Arbitral Tribunal has decided contrary to the express terms of the agreement; there is no other view possible; and the error goes to the root of the matter, the arbitral award may be assailed on the ground that it is vitiated by patent illegality. However, as noticed earlier, an arbitral award arising out of an international commercial arbitration cannot be assailed on this ground.

75. It was contended on behalf of OPaL that loop testing and motor solo run were a part of the Mechanical Completion and OPaL had no obligation to provide either electricity or water for such activities. This was stoutly contested by Tecnimont. The Majority had examined the

rival contentions as well as the evidence led by the parties and had concluded in favour of Tecnimont. The Majority accepted Tecnimont's contentions that OPaL was obliged to provide utilities for pre-commissioning for the sub-systems. The delay in providing the same had delayed the completion of the project. This was also supported by the evidence led by Tecnimont's witness's (Ms. Ramey's analysis). The Majority accepted the said analysis. According to the Majority, the concept of sustained pre-commissioning flowed from the terms of the Contracts. The fact that the expression "sustained pre-commissioning" was not specifically mentioned in the Contracts does not mean that the said concept was alien to the terms of the Contracts. The submission of formats at each stage does suggest a linear critical path. However, the contractual provisions also indicates that OPaL was required to provide utilities for pre-commissioning each sub-systems. The Majority has interpreted the contractual provisions and its view cannot be rejected as an impossible one.

76. The next question to be examined is whether OPaL was denied the opportunity to present its case and therefore the impugned award is liable to be set aside under Section 34(2)(a)(ii) of the A&C Act. OPaL's challenge to the impugned award on the said ground is two-fold. First, that the Arbitral Tribunal's interpretation of Clauses 1.1.37 and 1.1.38 of the GCC was neither canvassed nor debated before the Arbitral Tribunal. Second, that the Arbitral Tribunal had issued directions to produce evidence in respect of Tecnimont's monetary claims, which was not provided

77. Insofar as the first contention is concerned, the same is clearly unmerited. Clauses 1.1.37 and 1.1.38 of the GCC were the subject matter of discussions and debate before the Arbitral Tribunal. It was OPaL's case that Tecnimont was required to achieve Mechanical Completion as defined in Clause 1.1.38 of the GCC before pre-commissioning. Tecnimont had countered the said submissions and relied on various clauses of the Contracts as well as Annexure 'F' of the Contracts. As noted above, according to Tecnimont, OPaL was obliged to provide utilities for pre-commissioning of various sub-systems prior to achieving Mechanical Completion of the entire units. The Majority had examined the various clauses of the Contracts and held that the same must be construed harmoniously. The Majority had interpreted Clauses 1.1.37 and 1.1.38 of the GCC to contemplate pre-commissioning of individual sub-systems. In this context, the Majority held that the expression "equipments" as mentioned in Clause 1.1.37 of the GCC was in plural and referred to individual sub-systems. The Majority held that the aforesaid clause could not be stretched to mean pre-commissioning was to begin only after Mechanical Completion of the entire PP unit / PE unit was achieved. Merely because the Majority had highlighted the expression "equipments" in drawing an inference, which may not have been mentioned by Tecnimont, cannot possibly be the ground to claim that OPaL was not provided an opportunity to present its case. OPaL had full opportunity to present its interpretation of the Contracts and Clauses 1.1.37 and 1.1.38 of the GCC. OPaL had,

in fact, done so. The Majority has merely deliberated the clauses of the Contracts, in the context of the case set up by the parties.

78. The second contention that OPaL was denied full opportunity to present its case, rests on the assertion that OPaL was not provided the supporting documents in respect of the assessments of Tecnimont's monetary claim of ₹48.4 crores.

79. OPaL's grievance is, essentially, in regard to Tecnimont's claims for Extended Site Supervision aggregating ₹377,454,095/- and Euros 37,624. Mr Nakul Dewan had referred to paragraphs 113 and 114 of the impugned award in support of his contention that the documents sought for were not provided and the Majority had brushed aside OPaL's contentions and accepted the claims based on the said documents. The said paragraphs indicate that the claims were essentially relating to Extended Site Supervision.

80. TCMPL had claimed a sum of ₹231,785,686/- in respect of PE Unit and ₹145,668,618/- in respect of PP Unit. TCM had claimed Euros 2,24,518 in respect of PE Unit and Euros 13,106 in respect of PP Unit. Tecnimont claimed that it had deployed staff at site for a period longer than contemplated in the Contracts. It was stated that Tecnimont was thus deprived of such resources, which could be deployed in other projects. The Arbitral Tribunal (Majority) found that the claims were supported and computed by Tecnimont's witnesses (Mr. Garge and Mr. Johnson). The claims were supported by the evidence led by Tecnimont (including the testimonies of Mr. Garge and Mr. Johnson). Mr. Garge

had testified that he had examined the time sheet data and SAP extracts to quantify the actual costs. OPaL had sought to challenge the supporting data for the calculations. The Majority had considered the rival contentions and had decided in favour of Tecnimont. The relevant extract of the impugned award is set out below:

> 112. In summary, it is Tecnimont's case that they had to deploy staff on site (e.g. for supervision manpower, construction supervision, commissioning supervision or support to commissioning) longer than anticipated both from Tecnimont's Milan and Indian operations; that this meant that such staff was unavailable for use on other projects; and that this resulted in additional costs attributable to OPaL's breaches of the Contracts. The claim was supported by, in particular, the evidence of Mr Garge (which the Majority accept) and was computed by Mr Johnson in the light of that evidence and on the basis of the available records.
>
> 113. This claim was disputed by OPaL on various grounds. In particular, it was submitted on behalf of OPal that the approach followed by Mr Johnson was flawed because (i) he ignored actual historical costs; (ii) he adopted an arbitrary basis for allocating costs; and (iii) he failed to prove the "incremental" and "additional" nature of the "overheads". In addition, it was submitted on behalf of OPaL that the reluctance of Tecnimont to provide the documents requested by OPaL or the documents Mr. Johnson claims to have reviewed, cast doubts on the existence and reliability of the documents Mr. Johnson claims to have relied on to prepare his reports. Further, it was submitted that Mr Johnson's reliance on SAP extracts, timesheet data and what were said to be "relevant" cost codes was also flawed. In support of these submissions and objections, OPaL relied, in particular, on the evidence of Mr Vaidya.

114. These objections and criticisms were refuted by Mr Johnson. In particular, he confirmed that in addition to the evidence of Mr Garge, he had personally reviewed the timesheet data and SAP extracts to quantify the actual costs incurred. Despite Mr Vaidya's attack on the reliability of the timesheets, the Majority are satisfied that they provide a sufficiently sound basis for the detailed exercise carried out by Mr Johnson. Contrary to OPaL's submission, the Majority also accept that it is wrong to suggest that he (Mr Johnson) ignored actual historical costs: he pro-rated actual costs to determine the value of Tecnimont's claim.

115. The Majority recognise that the type exercise performed by Mr Johnson in relation to this claim is far from straightforward and inevitably can never be 100% perfect. However, in broad terms, the Majority are satisfied that Mr Johnson carried out the exercise in a professional manner with proper care and attention. On that basis, the Majority consider that Tecnimont has provided sufficient evidence to establish, on a balance of probability, that this claim should be allowed at least in substantial part. However, the Majority consider that it is appropriate to discount the sum claimed by approximately 30% to take account of the various points raised by way of objection by Mr Vaidya.

116. For these reasons, the Majority would allow this claim in part viz. the Majority allow TCMPL's claim in the total sum of INR 250,000,000 and TCM's claim in the total sum of Euros 25,000."

81. OPaL had, *inter alia,* sought "Timesheet data of all employees for app projects whose hours have been charged under employee man hours for Tecnimont Pvt. Ltd. PP & PE units in Section 7,8 and 9 of the CRA report". However, as pointed out on behalf of Tecnimont, the Arbitral Tribunal had not allowed OPaL's request at the relevant stage. Order dated 11.05.2018 indicates that the Arbitral Tribunal had directed

the parties to allow experts to confer to see if the said material was necessary for OPaL's expert witness can be made available on a reasonable and proportionate basis. OPaL was also permitted to apply "with the quantum experts being available for teleconference with the Chair if necessary". It is not clear whether OPaL had availed of the liberty as granted. Mr Dewan did not allude to any such teleconference or refer to the outcome of such conference.

82. Be that as it may, it is clear from the impugned award that the Majority had evaluated the evidence and had also discounted the claim by approximately 30% on account of the objections raised by OPaL's witness. This Court is unable to accept that in the overall context of the controversy, the non-production of source data, which was examined by Tecnimont's witnesses, had prevented OPaL from presenting its case. Mere denial of the documents sought for, does not establish that OPaL was denied opportunity to defend the case.

83. The Claims also included compensation for Head Office expenses and for payment made to sub-contractors including Offshore Infrastructure Limited (OIL). The claims for Head Office expenses were rejected and the Claims for compensation to OIL was supported by settlement agreements.

84. It is trite law that strict rules of evidence do not apply to arbitral proceedings. The arbitrators are required to make an award on the basis of material placed by the parties. The Arbitral Tribunal has considerable discretion in determining the extent to which the requests for discovery

of evidence and material can be acceded to. OPaL was not impeded in any manner in placing material to contradict the claims.

85. The next question to be examined is whether the Majority's decision to reject OPaL's counterclaim for liquidated damages is *ex facie* perverse.

86. OPaL had founded the said claim on clause 6.3.2 of the GCC which entitled OPaL to claim damages up to a maximum of 5% of the Contract price on account of delay. Undisputedly, there was a delay in the completion of the works. Tecnimont had resisted the claim on several fronts. First, it claimed that OPaL was prevented from claiming any liquidated damages in view of the joint statement made by one of its officials (Mr. Kamble). Second and more importantly, that the delay was for reasons attributable to OPaL. Third, OPaL was required to prove actual loss, which it had failed to do. Insofar as Tecnimont's first contention is concerned, the Majority rejected the same. The Majority held that OPaL was not precluded from raising a claim on account of a joint statement signed by Mr. Kamble. Insofar as the question whether the delay was attributable to OPaL, the Majority found in favour of Tecnimont.

87. It was OPaL's contention that Tecnimont would in any event be responsible for the delays, which had occurred prior to the scheduled date of completion. OPaL contended that in terms of Clause 6.3.2 of the GCC Tecnimont could not avoid liquidated levy of damages for the delays prior to those attributed to OPaL. This contention did not

resonate with the Majority. The Majority held that the utilities and feedstocks were not available with OPaL prior to the Scheduled Completion Date and therefore there was no possibility to complete the work within the scheduled time. The Majority reasoned that the works could have been completed after seven to eight months after uninterrupted provision of utilities or two months after uninterrupted provision of feedstocks. In this context, the Majority held that the delay on the part of Tecnimont prior to the pre-commissioning stage would have made no real difference. The Majority reasoned that even if Tecnimont had achieved the stage for pre-commissioning as per the Contract schedule which is in the eighteenth month, it could not have proceeded further for want of utilities and feedstocks. Thus, according to the Majority, the same would have only resulted in a greater idle time. The relevant extract of the impugned award in this regard is set out below:

> "185. As to these submissions advanced on behalf of OPaL, the Majority readily accept what is stated in the learned textbooks and the authorities cited by OPaL. However, the Majority do not consider that they support the specific submissions made on behalf of OPaL with regard to the proper construction of Clause 6.3.2 GCC or the conclusions to be drawn in the circumstances of the present case in light of our previous conclusions with regard to the causes of delay in completion of the Works. In the view of the Majority, Clause 6.3.2 GCC provides in effect that OPaL is entitled to claim LOs if (i) Tecnimont fails to complete the Works before the Scheduled Completion Date or the extended completion date (that is, at the end of commissioning); and (ii) such failure is due to reasons not attributable to OPaL. As the Majority have already concluded, by the Scheduled Completion Date (2

October 2013), utilities and feedstock were far from being available (utilities became available between 2014 and 2016, and feedstock became available in 2017). As submitted on behalf of Tecnimont:

a. The absence of utilities and feedstock rendered it absolutely impossible to complete the Works within the Scheduled Completion date: the earliest time at which the Works could have been completed was the later of (i) 7-8 months after uninterrupted provision of all utilities, or (ii) 2 months after uninterrupted provision of feedstock. The unavailability of utilities and, later, feedstock constituted an absolute and ongoing obstacle to the possibility of completing the Works and was entirely attributable to OPaL.

b. Any delay that Tecnimont may have incurred before pre-commissioning would have made no difference, because when Tecnimont was ready to begin precommissioning and required utilities, these were still unavailable.

c. Equally, when Tecnimont was ready to begin commissioning, feedstock was not available.

d. Therefore (irrespective of the responsibility for the delay during the construction phase, before pre-commissioning), if Tecnimont had achieved readiness of precommissioning as per the Contract Schedule (i.e., on the 18th month), it would not have been able to begin or to complete pre-commissioning any earlier than it did: it would have just incurred a greater amount of idle time. The same applies to commissioning and, therefore, to completion of the Works.

e. For all these (and other) reasons, Mr Mitra's 3rd Delay Report was fundamentally flawed.

f. Thus, the delays before pre-commissioning have not delayed completion because, even in the absence of such delays, completion would not have been achieved earlier. On the contrary, it is OPaL's delays which delayed completion because, in the absence of such delays, completion would have been achieved 22 months (PP) and 18.5 months (PE) earlier.

g. In summary, any delays attributable to Tecnimont before pre-commissioning did not cause any actual delay and therefore did not even constitute a "cause of delay": the unavailability of utilities and feedstock was the sole effective cause of (critical) delay and was attributable to OPaL not Tecnimont.

186. The Majority accept these submissions on behalf of Tecnimont. It follows that, in terms of Clause 6.3.2 GCC, the delay in completion of the Works was due to reasons attributable to OPaL. In light of our findings as stated above, the Majority do not consider that there is any basis for any apportionment."

88. In addition to the above, the Majority also accepted that OPaL did not prove the relevant actual loss.

89. Undeniably, the contention whether OPaL's claim for liquidated damages could be denied on the ground of failure on its part to provide utilities at a later stage after the Schedule Date of Completion is a contentious one. There may be some merit that OPaL's claim for liquidated damages on an admitted delay in completing the work ought not to have been denied on the ground of delays attributable to OPaL after the pre-commissioning stage was achieved. However, as noticed at the outset, the scope of examination under Section 34 of the A&C Act is limited. This Court is not required to re-adjudicate contentious issues. An arbitral tribunal is a final adjudicator of the disputes. This Court is merely to examine whether the Arbitral Tribunal (arising out

of an international commercial arbitration) offends the public policy of India. In terms of Explanation 1 to Section 34(2)(b) of the A&C Act, an award would be in conflict of the public policy of India if it is induced by fraud or corruption; is in contravention of the fundamental policy of India law; offends the most basic notions of morality and justice. In the present case, there is no allegation that the impugned award is inducted and affected by fraud or corruption. This Court is unable to accept that rejection of OPaL's claim for liquidated damages conflict with the fundamental policy of Indian law or offends the most basic notion of justice or morality.

90. In ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***, the Supreme Court had explained the principle of challenging the ground that the decision is perverse. The Supreme Court explained that the decision would be perverse, if the finding is based on no evidence; the arbitral tribunal takes into account something which is irrelevant to the decision or ignores vital evidence in arriving at its decision. The Supreme Court also referred to the earlier decisions ***Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath and Sons: 1992 Supp (2) SCC 312*** and ***Kuldeep Singh v. Commissioner of Police: (1999) 2 SCC 10*** to further explain the said principle. A decision arrived at on the basis of no evidence or on the basis of evidence, which is certainly unreliable and on which no reasonable person could act, would be amenable to challenge on the

ground that it is perverse. Paragraph 31 and 32 of the said decision is set out below:

> "31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (i) a finding is based on no evidence, or
>
> (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.
>
> 32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons:1992 Supp (2) SCC 312 , it was held:
>
> "7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."
>
> In Kuldeep Singh v. Commr. of Police: (1999) 2 SCC 10, it was held:
>
> "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

91. In a later decision in ***Ssangyong Engineering Construction Co. v. NHAI*** *(supra)*, the Supreme Court examined the amendments introduced in the A&C Act by virtue of the Arbitration and Conciliation (Amendment) Act, 2015. It was noted that the decisions, which are perverse as explained in ***Associate Builders v. Delhi Development Authority*** (*supra*), would no longer support the challenge to an arbitrator as being in conflict with the public policy of India. The relevant extract of the said decision is set out below:

> "40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders v. DDA, (2015) 3 SCC 49, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).
>
> 41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders v. DDA: (2015) 3 SCC 49, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

> 42. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."

92. This Court is unable to accept that the decision of the Majority to deny liquidated damages is a completely implausible one and is amenable to challenge on the ground that it is perverse. However, even if this Court does accept (which this Court does not) that the conclusion of the Arbitral Tribunal to deny liquidated damages is perverse and is *ex facie* erroneous, yet the same would not be amenable to challenge on the ground that it is in conflict with public policy of India. The decision would be in conflict with public policy of India, if it falls foul of the fundamental policy of Indian law or offends the most basic notions of morality and justice. The expression 'fundamental policy of Indian law' does not refer to any particular statute. It refers to the legislative policy on which Indian statutes and laws are founded. As held in ***Cruz City 1 Mauritius Holdings v. Unitech Limited 2017 SCC OnLine Del 7810*** the expression 'fundamental policy' refers to "*the basic and substratal rationale, values and principle which form the bedrock of laws in our country*". This Court is unable to accept that the impugned decision offends the most basic notions of morality or justice. In ***Associate Builders*** (*supra*), this Court had explained that an award would offend the notions of justice if it shocks the conscience of the Court. The decision to deny liquidated damages on the ground that the delay in completing the works would not be critical as OPaL was not prepared

for the next stage, clearly does not offend the most basic notions of justice or morality. It does not shock the conscience of this Court.

93. The next question to be examined is whether the Arbitral Tribunal had erred in rejecting OPaL's counterclaims on the ground that it had not discharged the burden of proof. I am unable to accept the contention that once it was pointed out that there were defects, the same discharged OPaL from any obligations to establish that the defects were covered under the Tecnimont's warranty or was for the reasons solely attributable to Tecnimont. The Majority held that Tecnimont's obligations were to prepare detailed engineering procurement construction and commissioning of the units as per the scope and specifications set out in the bidding documents. After examining the evidence, the Majority held that the issues in the operations of the PE Unit were not Tecnimont's contractual responsibility. The contention that this decision is perverse in effect invites this Court to reexamine and re-adjudicate the said issue, which as noticed above are beyond the scope of Section 34 of the A&C Act.

94. This Court finds no merit in the contention that the Arbitral Tribunal had erred in examining any of the contentions advanced on behalf of OPaL. In terms of Section 30 of the A&C Act, the Arbitral Tribunal is required to provide reasons for its conclusion. A bare perusal of the impugned award indicates that the conclusion of the Arbitral Tribunal is sufficiently informed by reasons as set out in the impugned award.

95. The petition is unmerited and is accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

DECEMBER 22, 2023
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