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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 30th April, 2024

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O.M.P. (COMM) 509/2018, I.A. 17233/2018, 1781/2020, 1782/2020 & 2080/2020**STEEL AUTHORITY OF INDIA LTD**

..... Petitioner

Through: Mr. Arun Kathpalia, Senior Advocate with Ms. Raveena Rai, Ms. Apeksha Dhanvijay and Mr. Aditya, Advocates.

versus

JSC CRYOGENMASH

..... Respondent

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Jafar Alam, Ms. Shivani Khandekar, Mr. Akshay Bhatia, Ms. Sheniza Farid and Mr. Sumer Seth, Advocates.

CORAM:**HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. This petition has been filed on behalf of the Petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') impugning the Arbitral Award dated 20.07.2018 in ICC Case No.18801/CYK/TO, whereby learned Arbitral Tribunal (hereinafter referred to as the 'Tribunal') has awarded a sum of USD 8,492,592.31 in favour of the Respondent including costs of USD 957,889.38 and interest @ 12% per annum.

2. Factual matrix as set out in the petition is that Petitioner is a Public Sector Undertaking owned and controlled by the Central Government and is engaged in business of manufacturing steel. Respondent is a company



incorporated under the laws of Russia and engaged in business of setting up Air Separation Unit ('ASU') plants largely in Russia.

3. On 25.11.2006, Bhilai Steel Plant ('BSP') of the Petitioner issued an Invitation for Bids for 'Installation of 650 TPD ASU-IV, including Air Turbo Compressor, Nitrogen Turbo Compressor, LIN/LAR tanks along with civil foundations (Package-I) as per Technical Specification No. MEC.VC22.02.06.U.000.8001, R-1 November, 2006' to be executed on divisible turnkey basis. Apart from the price, bidders were required to specify the power consumption, which would factor into award of the tender. Notice Inviting Tender ('NIT') specifically provided that offers were invited in accordance with the Technical Specifications ('TS'), which contained details of the specifications of the equipments as well as the list of preferred vendors for the same. Relevant provisions of the TS accompanying the NIT read as follows:-

"03. Special Instructions to Tenderer

03.01 All equipments and components shall be supplied strictly in accordance with this Technical Specification. Deviation, if any shall be clearly spelt out in the offer to the purchaser along with specific advantage.

03.02 In case of any contradiction and/or difficulty in interpretation of the specification and drawings the Tenderer will bring it to the notice of purchaser prior to submission of his offer.

03.03 The Tenderer will study the specification and the drawings and satisfy himself thoroughly regarding workability of the plant and equipment.

03.04 The Tenderer may offer any alternative scheme or modification to the plant and equipment that he may think necessary for better performance of the plant. So far as that does not affect the overall description and specification of the unit. However, prior approval for all such alteration and modification shall have to be obtained from the Purchaser. Price alteration, if any, for such alternate proposal will be indicated separately."

4. In view of the NIT conditions, bidder was to satisfy itself with respect to the required TS and workability thereof at the time of submitting



the tender. In the event any deviation from the TS was required, the same had to be specified in the offer itself along with the price proposal. Petitioner being a PSU is bound by Central Vigilance Commission ('CVC') Guidelines, which do not permit any relaxation, amendment or modification in contractual terms, having financial implications, after conclusion of the contract, unless absolutely essential because this deprives the bidders of a level playing field at the time of bid submission and in view of this, Petitioner incorporated Clause 03.01 in the TS providing that tenderers were required to propose deviations, if any, with the offer itself.

5. Respondent submitted its bid in compliance with the TS and offered a Pre-Purification Unit ('PPU') with 8 hours of adsorption and 7 hours of reactivation. It also offered Synchronous Motors, structured packing with columns and Valves for the Cold Box. On 24-25.02.2007, a meeting was convened between the parties to discuss the techno-commercial aspects of the tender. The Minutes of Meeting ('MoM') recorded Respondent's confirmation that no deviations were proposed with respect to the TS and its agreement to withdraw all commercial deviations and conditions and to strictly comply with the TS.

6. On 19.04.2007, after scrutiny of the techno-commercial offers, including deviations proposed, Petitioner requested all bidders to submit their revised price bids, which were submitted by the bidders on 28.04.2007. Respondent quoted a low price and power consumption figure and in response to Petitioner's letter seeking confirmation, Respondent vide letter dated 01.06.2007 re-confirmed that it was capable of giving power consumption of 12350 KW and the difference in power consumption of nearly 3000 KW, with its nearest competitor would enable the Petitioner to recover its investment in the unit, over the course of 15 years, due to



savings in the electricity payments. Respondent was L-1 in the price bid and based on its offer and subsequent negotiations, Contract Agreement was executed between the parties on 31.07.2007 for installation of 700 TPD ASU with the contract price of USD 26,912,000 and INR 17,39,48,320/-.

7. Article 5 of the Contract provided a period of 24 months for completion of work under the contract and Appendix-2 thereto contained the time schedule. As per Clause 1.2, the time schedule indicated in Clause 1.1 of Appendix-2 was binding on the Respondent and therefore, parties clearly understood that time was of the essence of the contract. Appendix-3 incorporated the terms of payment. Article 10 of the contract read with Clause 6 of the General Conditions of Contract ('GCC') provided for Arbitration as per the Rules of Arbitration of International Chamber of Commerce, 2012 (hereinafter referred to as the 'ICC Rules') in New Delhi, where the contractor was a foreign party and the contract value was more than Rs.20 crores. Metallurgical and Engineering Consultants (India) Limited ('MECON') was appointed as the technical consultant under the contract, responsible for approving the drawings and data sheets of the equipment.

8. On 02.08.2007, a meeting was held between the parties for implementation of the contract and from this date itself, i.e. within 2 days of signing the contract, Respondent started proposing various deviations from the contract. Respondent wanted itself to be the approved vendor for certain items but had never suggested this deviation at the offer stage and therefore, it was clear that Respondent was not prepared to execute the contract as per its terms, from the very beginning. In the kick-off meeting dated 29.08.2007 held between the parties, it was agreed that Basic



Engineering Drawings ('BEDs') would be progressively submitted upto 15.12.2007 and approvals thereof will be completed by 29.12.2007. Respondent agreed to submit the list of drawings, name plate and numbering system, which were part of BEDs, by September, 2007. In its letter dated 01.10.2007, Petitioner expressed its concern for slow progress in the project despite passage of 2 months and non-providing of the list of drawings. Eventually, the list of drawings, name plate and numbering system were submitted by the Respondent on 17.10.2007, as recorded in Minutes of Meetings held between 10.10.2007 to 17.10.2007. Thereafter, there was correspondence between the parties with respect to certain deficiencies in the drawings. Revised name plate and numbering system were provided to MECON for approval on 23.11.2007, on which comments were furnished by MECON on 28.11.2007. This was followed by the Respondent submitting the data sheets for compressors on 04.12.2007.

9. Petitioner avers that several letters were sent to the Respondent pointing out slow progress of work including a detailed letter dated 13.12.2007. Petitioner suggested that all drawings be submitted by 15.12.2007 in advance of its meeting on 22.12.2007. However, instead of submitting the drawings in advance, Respondent vide letter dated 14.12.2007 insisted that drawings would be submitted only during its visit from 17.12.2007 to 22.12.2007. Eventually, Respondent submitted the drawings for approval on 17.12.2007, instead of submitting them progressively. Respondent submitted the Process Flow diagram vide letter dated 08.12.2007 and on 18.12.2007, MECON provided the Respondent its comments on the same.

10. As the drawings were submitted by the Respondent at one-go, it was not possible to review them in a short period of 14 days and consequently,



MECON furnished its comments on 26.12.2007 and thereafter promptly and progressively from 29.12.2007. It was found that many drawings/data sheets had been submitted without incorporating previous comments, were incomplete and contrary to the contract. Petitioner sent a letter dated 03.01.2008 to the Respondent pointing out lack of progress despite lapse of 5 months as well as other deficiencies, however, Respondent vide letter dated 10.01.2008, instead of submitting revised BEDs, started blaming Petitioner/MECON for delay in approval.

11. Petitioner sent a letter dated 17.01.2008 to the Respondent stating that none of the milestones agreed between the parties in the kick-off meeting had been achieved and the deviations sought as far as possible had been agreed but it was not possible to agree to further deviations. Petitioner also sought revised drawings, as a number of drawings submitted did not pertain to the project in question. 18 revised BEDs were submitted by the Respondent on 31.01.2008 but the same were again not to the satisfaction of the Petitioner.

12. Correspondence continued between the parties on various issues from time to time with each one blaming the other for non-performance of the contractual obligations. Realising that as per Clause 1.1 of the Time Schedule in Appendix-2 of the Contract, supply and delivery of different items was to commence from month 7-9 (February to April, 2008) and was to be completed by month 17/18 and as per the bar chart, ordering of technical equipments was to commence from month 02 and completed by month 13 and supply of technological equipments was to commence from month 07 and completed by month 17 and also that Long Delivery Items ('LDIs') such as compressors, motors, etc. would take 13-14 months to manufacture and supply after placement of Purchase Orders and that work



was not progressing as per schedule, on 29.08.2007 a kick-off meeting was again held between the parties and Petitioner advised the Respondent to expedite submission of specifications of the compressors and other LDIs to facilitate timely ordering and supply of equipment. Respondent agreed to provide a detailed list of equipments with ordering schedule by November, 2007.

13. Petitioner states and avers that as late as on 19.09.2007 and 26.09.2007, Respondent was still procuring proposals from Cameron and Siemens for a Centrifugal Compressor Package and Unit Control Panel, respectively. This indicated that Respondent was in no position to place orders for LDIs to comply with the time schedule.

14. In the meetings held between 10.10.2007 to 17.10.2007, submission of list of LDIs along with the ordering schedule had to be postponed from 30.09.2007 to 16.11.2007 i.e. by 1½ months, due to delays by the Respondent. In its letter dated 26.12.2007, Respondent claimed that design and ordering of main equipment could not be done without approval of BEDs and insisted that the deviations proposed be allowed and in a subsequent letter dated 16.01.2008, insisted that it could not order any equipment unless BEDs and alternate vendors were approved. Petitioner did not agree to this offer and on 25.01.2008, wrote to the Respondent *inter alia* stating that Respondent had previously never stated that LDIs could not be ordered without approval of BEDs and TS of the LDIs being part of the contract, they could have been ordered immediately after signing of the contract. It now became apparent to the Petitioner that Respondent was unable to ensure the supply of the equipment within the contractual timelines.



15. Respondent allegedly placed Purchase Orders dated 06.02.2008, 07.02.2008 and 18.02.2008 on Fives Cryogenics for Heat Exchanger, Cameron for Centrifugal Compressor Package and Siemens for the Main Air Compressor ('MAC'). However, copies of unpriced Purchase Orders were not provided to the Petitioner and Petitioner disputes the placing of these orders. Thereafter, contrary to the terms of the contract, Respondent kept on proposing major deviations for PPUs, etc.

16. In the TS accompanying the NIT, no adsorption time/cycle for the PPU was stipulated, however, in its technical offer, Respondent offered PPU with 8 hours adsorption time and 7 hours re-activation/regeneration time. Further, in the MoM dated 24/25.02.2007, Respondent confirmed this position and Clause 06.02.03 was amended to read "*Adsorber: Radial bed type with 8 hrs duty cycle with design margin of 51-90 min in case of delayed changeover*". In its letter dated 18.12.2007, MECON re-affirmed the cycle duration. In response dated 19.12.2007, the Respondent instead of complying with the TS proposed a major deviation of a PPU with 4 hours cycle of adsorption, claiming that it was a standard solution and sought approval of the Petitioner. In the meeting held on 20-21.12.2007, the deviation proposed was rejected. Despite this, Respondent again sent a letter dated 25.12.2007 offering PPU with a deviation, which was again rejected and communicated to the Respondent vide Fax message dated 31.12.2007.

17. The deviation in the PPU was discussed subsequently in various communications exchanged between the parties as well as the meetings held from time to time but no fruitful result was achieved and Respondent clearly breached Clause 01.01 of Appendix-2 and Clause 06.02.03 of TS. Simultaneously, issues arose with respect to the synchronous motors for the



compressors. Respondent in its offer as well as MoM dated 24-25.02.2007 *inter alia* agreed that motors for MAC, Booster Air Compressor ('BAC') and Nitrogen Turbo Compressor ('NTC') shall be synchronous. The understanding was incorporated in the Contract TS in Clause 06.02.01 for MAC, Clause 06.02.03 for BAC, Clause 06.02.09 for NTC. Further, Clause 06.04.02 provided that motors for MAC, BAC and NTC will be synchronous. Vide letter dated 13.12.2007, MECON categorically stated that induction motors were unacceptable and the compressor motors were required to be synchronous as per the contractual terms and this position was reaffirmed by letter dated 18.12.2007. Over 4½ months after signing the contract, on 19.12.2007, Respondent sent a letter claiming that compressor suppliers including Atlas Copco had no standard solutions for synchronous motors less than 5 MW and that Privod, a Russian manufacturer of synchronous motors was ready to work out a solution but could not guarantee the workability of the system, as it had no experience in such projects. It was thus proposed that Petitioner should either approve asynchronous motors for compressors or approve Privod as a vendor. This proposal was a delay tactic and breach of Clause 03.03 which required the Respondent to satisfy itself of the workability of the specifications at the start.

18. In the meeting dated 20-21.12.2007, Respondent agreed to ensure the compatibility of Privod synchronous motors with Cameron make BACs and NTCs and assured that technical specifications of the motors would be in accordance with the contract. Petitioner agreed to approve Privod as a vendor. On 26.12.2007, Respondent again sent a letter insisting that asynchronous motors should be used and vide letters dated 27.12.2007 and 31.12.2007, MECON and the Petitioner accepted Privod as a vendor for



synchronous motors, provided motors were compatible with the compressors and technical specifications. In response, vide letter dated 10.01.2008, Respondent claimed that compatibility would be achieved during execution of the project but confirmation of compatibility was never received from the Respondent.

19. Later, on the insistence of the Respondent, Petitioner accepted Respondent as a vendor for cold valves as well as Russian make warm valves and FEMA (Italy) make safety valves in the meetings held on 25.02.2008 to 07.03.2008. Various issues arose with respect to the columns, PERT Network, etc. constraining the Petitioner to send letters to the Respondent pointing out delays in performance of the contract and breaches etc. On 09.04.2008, Petitioner sent a detailed letter pointing out various problems faced in the execution of the contract, due to which it had lost confidence that Respondent would be able to meet the contractual timelines. Petitioner asked the Respondent to send a time schedule for implementation within 14 days, failing which risk purchase action as per Clause 37 of GCC would be taken. This was followed by a reminder letter dated 12.04.2008. In response, vide letter dated 14.04.2008, Respondent blamed the Petitioner for delay in resolving the matters, in particular, for not approving the BEDs on time, without which Respondent could not move ahead. Given the lack of progress in 10 months, Petitioner sent a final risk purchase notice dated 07.06.2008 and finding the response dated 19.06.2008 from the Respondent, unsatisfactory, Petitioner terminated the contract under Clause 44.2 of GCC for Respondent's default vide letter dated 01.07.2008, spelling out 9 reasons to do so.

20. Respondent replied to the termination notice vide letter dated 09.07.2008 pointing out that contract could not be terminated under Clause



44.2. On 12.07.2008, Petitioner invoked the Performance Bank Guarantee ('PBG'). On 15.07.2008, Petitioner paid LC charges of Rs.1,61,916/- for the period 27.05.2008 to 27.08.2008 and on 23.07.2008 wrote to the Bank that contract had been terminated and the LC be closed and directed the Bank not to release any payment against the LC. On 25.02.2009, Petitioner awarded the contract to Air Liquide for completion of the project. By a letter dated 22.10.2010, Respondent sought settlement of disputes and responding thereto on 19.04.2011, Petitioner informed the Respondent that it would be claiming a sum of Rs.67.68 crores from the Respondent on account of the additional burden incurred by it due to risk purchase contract. On 04.07.2012, Respondent filed a Request for Arbitration with the International Chamber of Commerce ('ICC') Secretariat and the request was received by the Petitioner on 08.08.2012. Arbitration was kept in abeyance from 12.09.2012 with the consent of the parties. On 29.08.2013, Petitioner sent a notice of dispute to the Respondent claiming Rs.67.68 crores on account of: (a) differential price of contract; (b) differential cost of power consumption; and (c) LC charges for 8 quarters, reduced by the amount of PBG encashed by the Petitioner and sought payment within 30 days, failing which it would invoke Clause 6 of GCC.

21. Respondent filed amended Statement of Claim on 09.12.2016 seeking: (a) USD 1,543,269 for wrongful encashment of PBG; (b) USD 1,489,250 for BEDs and DEDs; (c) USD 2,190,756 towards advance payments made to Vendors; (d) USD 151,016 towards expenses incurred in execution of the project; (e) USD 11,241,713 towards loss of profit and goodwill; (f) Interest @ 18% p.a.; and (g) Costs.

22. On 07.01.2007, Petitioner filed amended Statement of Defence and counter-claim seeking: (a) Rs. 6,24,24,000/- towards the differential



contract price; (b) Rs. 67,88,72,880/- towards differential cost of power consumption; (c) Rs. 91,08,62,684/- towards differential cost of Oxygen procured from the market; (d) Rs. 12,32,607/- towards LC charges for 8 quarters; (e) interest @ 18% p.a.; and (f) Costs.

23. The learned Tribunal, by the impugned award dated 20.07.2018 dismissed the counter-claim of the Petitioner and allowed the claims of the Respondent as follows:

- (a) USD 1,551,456 for wrongful encashment of PBGs;
- (b) USD 2,190,756 towards advance payments made by the Respondent to its vendors;
- (c) USD 151,016 towards expenses incurred towards performance of the Contract;
- (d) USD 919,209.93 towards loss of profit;
- (e) USD 2,722,265 for work done in preparation of BEDs and DEDs;
- (f) USD 957,889.38 towards costs; and
- (g) Interest @ 12% p.a. for varying periods on different amounts.

24. At this stage, it is pertinent to mention that Respondent has raised a preliminary objection that the present petition under Section 34 of the 1996 Act is time barred and deserves to be dismissed on this ground alone. Arguments canvassed by the Senior counsels on the preliminary objection can be captured as follows:-

Contentions on behalf of the Respondent:

- (A) Section 34(3) of the 1996 Act provides a period of 03 months for filing an application for setting aside an arbitral award. Proviso to Section 34(3) of the 1996 Act provides that if the Court is satisfied that applicant was prevented by sufficient cause from making the application within 03 months, it may entertain the application within a further period of 30 days, but not thereafter. In the present case, petition was filed after the prescribed period of 3 months and 30 days



and cannot be entertained. Time for filing the petition commenced on 27.07.2018, when an e-mail dated 27.07.2018, sent by ICC Secretariat, was received by all the four persons designated by SAIL to receive such communication as per Articles 3, 23(1)(b) and 34 of the ICC Rules and whose names are also recorded in the Terms of Reference as per Article 23(1)(a). These persons were SAIL's top-most legal officers including the present Chief General Manager (Legal) Mr. S.B. Mathur, who is also one of the authorised signatories in the present petition. By this e-mail, Petitioner was informed that the draft award was approved by International Court of Arbitration on 28.06.2018 and ink signed copy of the Award was attached to the e-mail. Complete petition, valid in all respects, was filed on 07.12.2018 and was thus beyond a period of 03 months and 30 days calculated from 27.07.2018, the date of receipt of the Award by the Petitioner. In these circumstances, this Court has no power to condone the delay even under Proviso to Section 34(3) of the 1996 Act, which stipulates that if sufficient cause is made out for not filing the objections within 3 months, delay can be condoned upto 30 days, but not thereafter.

(B) Petitioner did not disclose that the Award was received by e-mail on 27.07.2018 in the petition. It was falsely claimed that the Award was received on 06.08.2018 and importantly, no proof in support of this plea also was filed. Objection with regard to the petition being time barred was promptly raised by the Respondent as a part of its preliminary objections in the reply dated 18.03.2019 and no rejoinder was filed by the Petitioner, controverting the averments in the reply.

In Ministry of Youth Affairs and Sports, Dept. of Ports, Govt. of



India v. Ernst and Young Pvt. Ltd. (now known as Ernst and Young LLP) and Another, 2023 SCC OnLine Del 5182, this Court held that when service by e-mail is an accepted mode of service, then sending scanned signed copy of the Award of the Arbitral Tribunal to the parties would be a valid delivery as envisaged under Section 31(5) of the 1996 Act.

(C) Section 3 of the 1996 Act contemplates that parties can agree to the manner of receipt of written communications and in consonance with this provision, Petitioner had agreed to be notified of the Arbitral Award by e-mail. This is evident from Clause 6 of GCC, which reads as follows:-

“6. Settlement of Disputes: Conciliation & Arbitration

In case of disputes, the matter shall be referred for conciliation before arbitration. ...

Arbitration with foreign contractor or in consortium contracts (including foreign contractor) where the contract value is more than Rs. 20 crores, shall be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. The venue of the arbitral proceedings shall be New Delhi. During the pendency of the conciliation or arbitration proceedings, the Employer and the Contractor shall continue to perform their contractual obligations.”

(D) ICC Rules contemplate notification of the Award by e-mail, which is substantiated by a bare reading of Articles 3 and 34 of the said Rules, which read as follows:-

“Article 3: Written Notifications or Communications; Time Limits

...

2) All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.

3) A notification or communication shall be deemed to have been made on the day it was received by the party itself or by Its



representative or would have been received if made in accordance with Article 3(2)."

"Article 34: Notification, Deposit and Enforceability of the Award

1) Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.

...

3) By virtue of the notification made in accordance with Article 34(1), the parties waive any other form of notification or deposit on the part of the arbitral tribunal."

(E) The 1996 Act does not stipulate any specified method or mode of delivery or receipt of an Arbitral Award and does not mandate or require receipt of an ink-signed original award in physical form from the Arbitrators. These observations come from the judgment of this Court in *Delhi Urban Shelter Improvement Board v. Lakhvinder Singh, 2017 SCC OnLine Del 9810* and of the Calcutta High Court in *National Agricultural Cooperative Marketing Federation of Indian Ltd. v. M/s. R. Piyarelall Import & Export Ltd., 2015 SCC OnLine Cal 7198* and therefore, date of receipt of the copy of the Award by e-mail on 27.07.2018 will be the date of commencement of limitation period of 3 months under Section 34(3) of the 1996 Act. Petitioner's contention that by virtue of paragraph 141 of 'Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration' (hereinafter referred to as the 'ICC Note'), courtesy copy of the Award received via e-mail will not trigger time limits under Section 34(3) of 1996 Act, is a misreading of the statutory provisions. Time limits under ICC Rules do not apply to time limits postulated under the 1996 Act and in any case the ICC Rules only govern the conduct of arbitration till the passing of the Award. [Ref. *Imax Corporation v. E-City Entertainment*



(India) Private Limited, (2017) 5 SCC 331]. Paragraph 141 of the ICC Note reads as under:-

“141. A courtesy copy of the PDF signed original of the Awards, addenda and decisions will be sent to the parties by email. The sending of a courtesy copy by email does not trigger any of the time limits under the ICC Rules of Arbitration.”

(F) The Award was received by the Petitioner on 27.07.2018 and the 3 months period prescribed under Section 34(3) of the 1996 Act expired on 27.10.2018 and further period of 30 days expired on 26.11.2018. Petition was filed on 12.11.2018 for the first time after 3 months and 16 days starting from 27.07.2018 and without any application for condonation of delay. On this ground alone, the petition deserves to be dismissed. Assuming that the date of receipt of the Award is taken as 06.08.2018 and the filing on 12.11.2018 is within 3 months, the filing being *non-est* would not stop limitation in the present case. The nature of defects pointed out by the Registry while marking objections, reflect that the defects were fatal inasmuch as petition was filed without the copy of the Award and the Power of Attorney authorizing Petitioner's signatory to file the petition; blanks were visible in the Statement of Truth; verification was done with respect to paragraphs 1-214 and 216 of the petition, which was different from the verification in the petition ultimately filed on 07.12.2018 wherein contents of paragraphs 1-211 and 213-214 were verified; 300 pages were filed in total without bookmarking and pagination while the index reflected 1901 pages and the petition filed on 07.12.2018 had over 2000 pages; Statement of Truth was not filed as per the Commercial Courts Act, 2015; caveat report was not taken; Court fees was short/missing; and



affidavits were incomplete. It is thus obvious that the petition was filed on 12.11.2018 only to stop limitation and this act is an abuse of process of the law. The defect of non-filing of the Award goes to the root of the matter and this becomes important since Petitioner had admittedly received the Award before 12.11.2018 but has offered no explanation for not filing the same at the time of initial filing. Petitioner admits that multiple conferences were held post the filing of the petition on 12.11.2018 amongst the officers of SAIL and the counsels to understand the documents, which reflects that the petition filed on 12.11.2018 was not intended to be final. Since the petition, complete in all respects, was filed only on 07.12.2018, which was beyond 03 months and 30 days from date of receipt of the Award, delay cannot be condoned. Without prejudice, even if date of 06.12.2018 is taken as the date when complete petition was validly filed, Petitioner has failed to make out a sufficient cause that prevented it from filing the petition within 3 months. Reliance was placed on the following judgments in support of the plea of *non-est* filing:-

(a) ***Delhi Development Authority v. Durga Construction Co., ILR (2014) 1 Del 153***

Defects: Award to be re-typed on legal size paper.

Observations:

- *The Court has jurisdiction to condone the delay in refiling of the objections beyond the statutory period prescribed, however, this is not to be exercised liberally, in view of the object of the Act to ensure that proceedings are concluded expeditiously. The delay in refiling cannot be permitted to frustrate the object of the Act and defeat the purpose of specifying an inelastic time period [para 25].*
- *To condone the delay, the party must satisfy the court that the matter was pursued diligently, and delay is beyond his control and unavoidable [para 25].*



(b) *Sravanthi Infratech Private Limited v. Greens Power Equipment (China) Co. Ltd., 2016 SCC OnLine Del 5645*

Defects: No document filed, no vakalatnama, no resolution/authority, no application for condonation of delay, no affidavit, no signature of party on the petition.

Observations:

- When the defects were cured and the petition was re-filed, the date of the supporting affidavit and the signing of the petition were ante-dated. This is prima facie an attempt to falsify the record [para 18].
- The court is not expected to mechanically condone the delay in filing the petition in terms of the proviso to Section 34(3) of the Act. It can only be upon the petitioner satisfying that the delay was for bona fide reasons can the court proceed to condone the delay [para 19].
- By filing a petition with just 66 pages to start with (which later on - re-filing grew to 859 pages) with no signature of the petitioner, without affidavit, without vakalatnama, the petitioner sought to defeat the whole object of section 34(3) of the Act. This Court is statutorily mandated to take a strict view of the outer limit within which petitions under section 34 of the Act have to be filed [para 20].

(c) *SKS Power Generation (Chhattisgarh) Ltd. v. ISC Projects Private Limited, 2019 SCC OnLine Del 8006*

Defects: The petition contained only 29 pages, without any affidavit, vakalatnama and impugned award.

Observations:

- In view of the above defects, the filing was merely a “bunch of papers” to stop the period of limitation from running [para 11].
- While courts have the jurisdiction to condone the delay in re-filing a petition, the approach of the court cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch [para 13].
- Distinguishes *Uday Shankar Triyar vs. Ram Kalwar & Anr, (2006) 1 SCC 75*. The non-filing was clearly deliberate and mischievous as it was intended only to stop the period of limitation from running and thereafter the petitioner took no steps to have the petition re-filed expeditiously [para 16].

(d) *Director Cum Secretary, Department of Social Welfare v. Sarvesh Security Services Pvt. Ltd., 2019 SCC OnLine Del 11593*

Defects: Petition did not bear the signatures, it was not accompanied with an affidavit, the statement of truth was not filed, and the advocate did not have a vakalatnama on record.

**Observations:**

- The above defects indicate that only a sheaf of papers bunched together were filed and the original petition was a sheer paper formality undertaken by to save the period of limitation. [paras 13 and 14].

(e) ***Union of India v. Bharat Biotech International Ltd., 2020 SCC OnLine Del 483, (upheld by the Division Bench in appeal being FAO(OS)(COMM) 82/2020 filed by Union of India, decided on 19.12.2023)***

Defects: No copy of award, original application only contained 83 pages, no signatures on each page, documents not annexed, no court fees, blanks in the statement of truth, re-filed with drastic alterations running into 430 pages, then again re-filed with 441 pages.

Observations:

- At the time of re-filing, not only were documents spanning over 350 pages added to the petition, but even the framework of the petition was changed, yet the last page of the re-filed petition continued to reflect the date of filing as 31.05.2019; which is patently untrue, in the light of the petitioner's admission that it had made changes in the body of the petition at the time of re-filing. This is an entirely unacceptable practice [para 18].

- A petition seeking to assail an award without even annexing a copy thereof cannot be claimed to be a valid filing and that too without even moving an application seeking exemption from filing a copy of the impugned award [para 18].

- Failure to file the impugned award along with the petition at the time cannot be underplayed as a 'trivial' defect but is a defect of such gravity that it would render the original filing as a dummy filing [para 19].

- The original petition, only running into 83 pages was a careless and deliberate attempt on the petitioner's part to somehow stop the clock on limitation amounting to a clever manoeuvre to buy time. In fact, even after the original petition was received by the petitioner's counsel with defects being pointed by the registry, the petitioner did not take any steps to file a copy of the impugned award while re-filing the petition within the extended period of limitation of 3 months and 30 days [para 19].

(f) ***Oil and Natural Gas Corporation Ltd. v. Planetcast Technologies Ltd., 2020 SCC OnLine Del 2083 (Upheld by the Division Bench in Oil and Natural Gas Corporation Limited v. Planetcast Technologies Ltd., 2023 SCC OnLine Del 8490)***

Defects: Non-filing of award and statement of truth.

Observations:

- The holistic picture that emerges is that to be termed as a 'proper' petition, it must be accompanied at least by a statement of truth,



vakalatnama and the Award impugned therein, in the absence of all these vital documents, the filing constitutes a 'bunch of papers' [para 27].

- *Permitting a party, aggrieved by an award, to file inadequate petitions to stop limitation and then argue that the defects are curable will also put the intent of the Legislature, to provide a strict and inelastic limitation period, to a naught [para 34].*

(g) *Oriental Insurance Co. Ltd. v. Air India Ltd.*, 2021 SCC OnLine Del 5139

Defects: *Non-filing of award, vakalatnama, signed & attested statement of truth and affidavits in support of the application.*

Observations:

- *If the party concerned exhibits careless attitude even after the first filing and causes delay which is disproportionately large to the period of limitation prescribed under Section 34 of the Act, the delay in filing and refiling may be fatal. However, where they party - after the initial delay in filing (which is within the 30 days period of the expiry of the 3 month period of limitation), exhibits a sense of urgency in refiling(s), then a more favourable view should be taken by the Court to condone the delay [paras 12 and 14].*
- *A filing can be considered as non-est, if it is filed without any signatures of either the party or its authorised and appointed counsel [para 11].*

(h) *Ircon International Ltd. v. Reacon Engineers (India) Pvt. Ltd.*, 2022 SCC OnLine Del 1860

Defects: *Non-filing of award, vakalatnama, no statement of truth, initial filing was only 73 pages, while the final filing spanned over 1325 pages.*

Observations:

- *An increase in the number of pages from 73 to 1325 indicates that the entire framework of the petition was changed at the time of re-filing [para 14].*
- *The absence of the Award and vakalatnama indicates that the filing was not valid and is nonest [para 15].*

(i) *Oil and Natural Gas Corporation Ltd. v. Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & M/s Megha Engineering & Infrastructure Limited (MEIL)*, 2023 SCC OnLine Del 63

Defects: *Affidavits were not attested.*

Observations:

- *It is necessary that the application be accompanied by a copy of the Award as without a copy of the Award, which is challenged, it would be impossible to appreciate the grounds to set aside the Award [paras 32 and 41].*



- *In given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as non-est. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is non-est [para 41].*

- *In order to consider the question whether a filing is non-est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award; and the contents set out the material particulars including the names of the parties and the grounds for impugning the Award [para 41].*

(j) *Brahmaputra Cracker and Polymer Ltd. v. Rajshekhar Construction Pvt. Ltd., 2023 SCC OnLine Del 516*

Defects: *Non-filing of impugned award, statement of truth, and vakalatnama*

Observations:

- *Non-filing of award alone amounts to a fundamental defect which renders the filing to be non-est [para 15].*

- *The filing of a petition or an attempted filing of a petition under section 34 of the Act unaccompanied with a statement of truth or the Award should not be lightly countenanced especially where the same may be merely presented in order to stall the limitation period prescribed in section 34 of the Act from commencing [para 16].*

(k) *Ambrosia Corner House Private Limited v. Hangro S Foods, 2023 SCC OnLine Del 517*

Defects: *Not filing the documents in a separate folder as prescribed in the Delhi High Court (Original Side) Rules, 2018 [para 19].*

Observations:

- *The court must assess the facts of each case while determining the issue of the filing being considered as 'non-est' [para 18].*

- *The conduct of the petitioner clearly evidences its endeavour to file a proper petition under Section 34 of the Act on the date of re-opening of the court for the purposes of limitation in terms of Section 4 of the Limitation Act, 1963 [para 20].*

(l) *National Highways Authority of India v. Patel-KNR (JV), OMP (COMM) 516/2018, decided on 23.02.2023*

Defects: *Non-filing of the Award, blanks in affidavit and statement of truth, and non-attested affidavit.*

Observations:

- *A wholistic view of the filing as done is to be taken to determine whether in spite of the petition carrying the signatures of the party or its counsel it can still be termed as a non-est filing [paras 16 – 18].*



(m) ***Steel Strips Wheels Limited v. Tata Aig General Insurance Company Limited, FAO(OS) (COMM) 178/2020, decided on 06.02.2023.***

Defects: *Blanks in Statement of Truth, no verification, vakalatnama not properly executed (without welfare stamp), no enrolment numbers, dates on memo of parties, urgent application, notice motion etc. all different from each other.*

Observations:

- *Vakalatnama did not contain the alleged blanks and the requisite information was filled; the only defect that remained was the blank in para 6 of the statement of truth; therefore, the filing cannot be termed as non-est. However, delay was caused due to carelessness of the petitioner, therefore, costs imposed and delay in re-filing condoned [paras 8.1-11].*

(n) ***Viceroy Engineering v. Smiths Detection Veecon Systems Private Limited, OMP (COMM) 302 of 2019, decided on 04.12.2023***

Defects:

- *Wrong format of the petition was filed at first. Later, 174 pages were filed without bookmarking and incomplete pagination.*
- *Affidavit and statement of truth were not attested.*
- *Subsequently, there was an increase in number of pages, which the petitioner explained was on account of filing of true-typed copies of documents such as TDS certificates.*

(G) It was emphasized that non-filing of the Award is not a curable defect and on this ground alone, filing has to be treated as *non-est* on 12.11.2018. In this context, reliance was placed on the judgment of the Supreme Court in ***Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1***, where the Supreme Court held that a party intending to object to an Award, is required to file an application under Section 34(1) indicating the objections along with the copy of an Award and such complete petition indicating the grounds of challenge is required to be filed within the time prescribed under Section 34(3) of the 1996 Act. Reference was also made to the judgments of two Division Benches of this Court in ***Union of India v. Panacea Biotec Limited, 2023 SCC OnLine Del 8491*** and ***Planetcast Technologies Ltd. (supra)***.



(H) Petitioner's contention that the judgments relied on by the Respondent are *per incuriam* as the earlier judgment by the Division Bench of this Court in *Oriental Insurance (supra)*, was not considered, is misconceived. In the said judgment, this Court found that filing was delayed as the minority Award was passed later and therefore, Petitioner therein was under an impression that limitation period had not commenced but when advised correctly, he approached the Court and filed the petition diligently, as soon as possible. Moreover, the filing was not beyond the statutory period of 03 months 30 days. Petitioner is also wrong in contending that the observations of the Supreme Court in *Vidya Drolia (supra)*, would not apply to the present case as they were rendered in a different factual scenario and/or the judgment was in the context of 'non-arbitrable dispute'. It is settled law that even the *obiter dicta* of the Supreme Court is binding on lower Courts. For this proposition, judgment of this Court in this context in *Larsen & Toubro Limited v. Experion Developers Pvt. Ltd. and Others, 2019 SCC OnLine Del 11549*, was cited. Judgment in *Ambrosia Corner (supra)* cannot aid the Petitioner inasmuch as in the said case, the Court found as a matter of fact that Petitioner had filed the requisite documents including copy of the impugned Award but inadvertently in the same folder, which was against the Delhi High Court (Original Side) Rules, 2018, which require documents to be filed in a separate folder.

Contentions on behalf of the Petitioner in response to Preliminary Objection:

(A) It is wrong to contend that limitation of 3 months prescribed under Section 34(3) of the 1996 Act for filing objections to an Arbitral



Award commenced on 27.07.2018 and is consequently, time barred. On 27.07.2018, a 'courtesy copy' of the Award dated 20.07.2018 was sent by the ICC. The e-mail stated that receipt of the courtesy copy would not trigger the time limits under the ICC Rules. Notification of the Award was under ICC Notes 140 and 141 read with Article 34 of the ICC Rules. Note 141 clearly states that "*A courtesy copy of the PDF signed original of the Awards, Addenda and decisions will be sent to the parties by e-mail. The sending of a courtesy copy by e-mail does not trigger any of the time limits under the ICC Rules of Arbitration.*" If the contention of the Respondent is accepted, it would render Notes 140/141 otiose. Reliance by Respondent on Articles 3 and 23 of the ICC Rules, to contend that Arbitral Award was received by the Petitioner on the date on which the e-mail was sent by the Tribunal with the courtesy copy, is equally misplaced. These Articles deal with pleadings and ordinary communications and not with the delivery of the Award and notification of the Award is covered under Notes 140 and 141. Article 34(1) is also incorrectly relied upon as the same prescribes notification of the 'text' of the Award and does not deal with the mode of delivery of the Arbitral Award. It provides that '*once an award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal, provided always that the costs of arbitration have been fully paid to the ICC by the parties or one of them*'. The language demonstrates that parties are only made aware of the text and not the final award so as to propose corrections, modifications and alterations to the text. Section 3 of the 1996 Act does not aid the Respondent as the provisions are subject to the



agreement between the parties and secondly, the it deals with ordinary communications, while delivery of Award is governed by Section 31(5) of the 1996 Act, which stipulates that after the Award is made, a signed copy shall be delivered to each party. Conjoint reading of Sections 3 and 31(5) of the 1996 Act shows that the agreement between the parties with respect to what would constitute delivery of the Award would have an overriding effect and therefore, once ICC Rules envisage and provide that courtesy copy will not trigger time limits, it means and connotes that delivery of the Award under Section 31(5) would have to be understood as delivery of original signed copy and not courtesy copy. Section 31(5) itself cannot be interpreted to mean that any kind of copy of the Award served on the party to the Award will be treated as service. In ***State of Maharashtra and Others v. Ark Builders Private Limited, (2011) 4 SCC 616***, the Supreme Court held that the petition under Section 34 of the 1996 Act was within limitation even though photocopy of the Award was available with the Petitioner a year earlier.

- (B) The argument of the Respondent, if accepted, would lead to a precarious position in law. From a reading of ICC Rules, it is evident that a courtesy copy would not trigger the timeline to apply to the Arbitral Tribunal for correction of errors etc. in the Award under the ICC Rules or under Section 33 of the 1996 Act and this position is uncontroverted. In this scenario, it is inconceivable that receipt of courtesy copy would trigger commencement of limitation for filing objections against the Award under Section 34 of the 1996 Act while the party will wait to receive the original to apply for correction of the Award, if any, in a given case. As per the scheme of the 1996



Act, timelines under Sections 33 and 34 commence simultaneously only after receipt of original signed copy of the Award under Section 31(5) as held by the Division Bench of this Court in **DUSIB** (*supra*) and relevant observations are ‘.....Based on deliberations on this premise, the Commission did not adopt the proposal. The same approach was adopted in Section 31(5) of the Act where the arbitral award becomes binding when the party receives a signed copy of the Award and the same receipt becomes relevant for purposes of Section 33(1), (4) and 34(3).....’ ”

(C) Respondent is not right in its contention that once an Award was signed, Rules of the Institution conducting the arbitration, ICC Rules in the present case, shall cease to apply and provisions of the 1996 Act will take over. The 1996 Act itself contemplates that after the Award has been made, signed copy shall be delivered to each party under Section 31(5). Section 32 deals with termination of proceedings and comes into play when the entire procedure under Section 31 is complete. In **Union of India v. Tecco Trichy Engineers & Contractors**, (2005) 4 SCC 239, the Supreme Court held that delivery of an Arbitral Award under Section 31(5) is not a mere formality. Even Section 32(1) is subject to Section 32(3) and therefore, mere signing of the Award does not terminate the arbitral proceedings. In the present case, parties had categorically agreed that arbitration shall be governed by ICC Rules and the same would continue to govern all related aspects, including delivery of award, until termination of arbitration under Section 32, which stage would come later. There is no inconsistency between ICC Rules and provisions of the 1996 Act on the question involved in this case i.e



whether courtesy copy of the Award triggered commencement of limitation period under Section 34(3) of the 1996 Act. Hence the limitation period to file the present petition did not commence on 27.07.2018.

(D) Party autonomy is the overarching principle of arbitration and is crystalized in Section 2(6) of the 1996 Act. The provision allows parties to determine the relevant law and procedure that will govern the arbitration. In the present case, parties had agreed that arbitration shall be governed by ICC Rules till proceedings are terminated under Section 32. In *Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*, 2022 SCC OnLine SC 1122, the Supreme Court restated that party autonomy is a cardinal principle underlying arbitration.

(E) Even otherwise, service of award by e-mail would not amount to compliance with Section 31(5) of the 1996 Act. If the Legislature envisaged that sending a scanned/photocopy/e-mail copy, then the expression 'signed copy' would not have been used and merely the word 'copy' would have found place in Section 31(5). Illustratively, scanned copy of a signed cheque is not a signed cheque. Unamended Section 7(4) provided for execution of an arbitration agreement in the following manner:-

“7(4). An arbitration agreement is in writing if it is contained in –
(a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.”

The Legislature amended Section 7(4) in the year 2015, which now reads as under:-

“7(4). An arbitration agreement is in writing if it is contained in –
(a) a document signed by the parties; (b) an exchange of letters, telex,



telegrams or other means of telecommunication (including communication through electronic means) which provide a record of the agreement.”

As per the amendment, ‘communication through electronic means’ would now constitute an arbitration agreement and if the Legislature intended that delivery of the Award could be made through electronic means, Section 31(5) would have been amended, which was not done. Law so far does not recognize communication by electronic means as an accepted mode of delivery of signed copy of the Award. [Ref. *G. Narayanaswami v. G. Pannerselvam and Others, (1972) 3 SCC 717*]. It is not open to this Court to accept delivery of the Award by electronic mode as a legally acceptable mode as that would amount to amending Section 31(5), which the Legislature chose not to.

(F) Reliance by the Respondent on the judgment in *Imax Corporation (supra)* is misplaced, as in the said case, the Supreme Court held that since the seat of arbitration was London, objections to the Award could not be filed in India. Judgment is inapplicable to the proposition that ICC Rules will cease to apply after signing of the Award. Judgment in *Hindustan Petroleum Corporation Ltd. v. Delhi Transport Corporation, 2021 SCC OnLine Del 3189*, is of no assistance to the Respondent because it is not under the ICC Rules; does not lay down any legal principle that sending an award by e-mail is sufficient compliance of Section 31(5); and it was a case of gross laches where Section 34 petition was filed six months after the signed copy was couriered and 9 months after the e-mail copy was sent. Judgment in *National Agricultural Cooperative Marketing Federation of Indian Ltd. (supra)*, is against the Respondent. The



said case was dealing with arbitration under ICA Rules, 1968 which provided that after the Award was made, Registrar shall furnish a true copy of the Award to the parties by registered post. Accordingly, ICA sent a certified copy of the Award under a covering letter signed by Registrar, ICA. Petitioner had acted on this copy and filed petition under Section 34 almost after 7 months from the date of receipt. Similarly, the case under **DUSIB (supra)** was not under the ICC Rules. The hard copy of the Award was sent by the Arbitrator, which bore his stamp on every page with the Arbitrator's name and covering letter was signed in original by the Arbitrator. Having received this award in March, 2016, DUSIB falsely pleaded ignorance of the Award and filed a petition 5 months later on 23.08.2016.

(G) Original copy of the Award was first received by counsel for the Petitioner on 02.08.2018 but this cannot be treated as delivery of the Award under Section 31(5) of the 1996 Act so as to trigger commencement of limitation period prescribed under Section 34(3) of the 1996 Act. In **Benarsi Krishna Committee and Others v. Karmyogi Shelters Private Limited, (2012) 9 SCC 496**, the Supreme Court observed that receipt of an Award by the counsel is not proper compliance and signed Award must be served on the party to the arbitration agreement. Party would mean a party which executed the contract and was a party to the arbitration agreement. In **Benarsi Krishna (supra)**, the Supreme Court held as follows:-

“15.The expression “party”, as defined in Section 2(1)(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and not his or her agent, or advocate



empowered to act on the basis of a vakalatnama. In such circumstances, proper compliance with Section 31(5) would mean delivery of a signed copy of the arbitral award on the party himself and not on his advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.”

In ***Tecco Trichy (supra)***, the Supreme Court, in the context of one of the parties i.e. Southern Railways, held that the term ‘party’ as defined in Section 2(h) of the 1996 Act would mean ‘a party to an arbitration agreement’ and service of award on General Manager would not constitute starting point of limitation as it was the Chief Engineer who had executed the contract and was a party to the agreement. Present matter involves SAIL, which has steel plants throughout the country, one of which is BSP. BSP is the employer and party to the contract dated 31.07.2007 and the arbitration clause/agreement contained in the contract as well as a signatory thereto. Plant is headed by the CEO, who had the power to decide whether the Award was to be challenged or accepted. The agreement was signed by the Executive Director (Projects) of BSP, who was under the CEO. As per Section 2(h), BSP through its Executive Director and CEO was a party to the arbitration agreement and therefore, on a conjoint reading of Sections 31(5), 34(3) and 2(h) along with the observations of the Supreme Court in ***Tecco Trichy (supra)*** and ***Benarsi Krishna (supra)***, only when the original signed copy of the Award was received by the ED/CEO of BSP, limitation for challenging the Award under Section 34 commenced. Signed copy of the Award in the present case was received by the counsel on 02.08.2018 and was thereafter sent to the Legal Department of the Petitioner at its Corporate office in Delhi, where it was received on 06.08.2018. Legal Department called upon the counsel handling the



arbitration to give an opinion, which was received on 17.08.2018. After studying the opinion to challenge the Award, the original award along with the opinion was sent to BSP in 4th week of August, 2018. All documents were put in a note-sheet for consideration of ED, BSP on 01.09.2018 and before CEO, BSP, the Competent Authority on 05.09.2018 to take a final decision and therefore, the limitation will start either on 01.09.2018 or 05.09.2018. Period of 3 months would thus expire on 02.12.2018 or 05.12.2018 and since the present petition was filed on 12.11.2018, it was within limitation.

(H) Without prejudice, even if receipt of the Award by the Legal Department on 06.08.2018 is considered as starting point of limitation, petition was filed within 3 months. The period of 3 months expired on 06.11.2018 but the High Court was closed on account of Diwali break from 04.11.2018 to 11.11.2018 and the petition was filed on the date of re-opening i.e. 12.11.2018. Period from 04.11.2018 to 11.12.2018, when the Court was closed, is to be excluded as per Section 4 of the Limitation Act, 1963.

(I) Argument of the Respondent that the initial filing of the petition on 12.11.2018 was *non-est* cannot be accepted for more than one reason. Respondent, for the first time, after one and a half years from receiving notice and when the opening arguments on merits were concluded by the Petitioner, raised the issue of *non-est* filing, though not pleaded in reply to the petition. Therefore, Respondent cannot be allowed to raise this argument. [*Ref. Thonikkudam Bhagwati Mills v. Reena Ravindra Khona & Ors., 2007 SCC OnLine Bom 448*]. This is more so when the Registry of this Court did not point out this objection.



(J) The filing on 12.11.2018 was valid and all the defects marked by the Registry were curable. Petition filed on 12.11.2018 was a detailed petition with exhaustive grounds signed by the Authorised Representative of the Petitioner on every page of the pleading. Petition contained verification and was also signed by the counsel and was accompanied by Statement of Truth and *vakalatnama* duly authorising the counsel to file the petition and was signed by the party. All essential requirements of *vakalatnama* were fulfilled and only the welfare stamp was missing. The same does not make the authorisation given to the counsel defective. [Ref. ***Delhi High Court (Original Side) Rules, 2018, Chapter V, Rules 1 and 3***]. The alleged defect in the Statement of Truth was curable. Requirement of filing the Statement of Truth was introduced through the Commercial Courts Act, 2015 whereby certain provisions of CPC were amended in its applicability to commercial suits. Section 16 of the said Act makes CPC as amended by the Schedule to the said Act applicable only to suits in respect of a commercial disputes of a specified value and a petition under Section 34 is not a suit. [Ref. ***M/s Dwivedi and Sons v. Bharat Petroleum Corporation and Ors., Civil Writ Jurisdiction Case No. 11279 of 2019 High Court of Judicature at Patna para 20; M/s Janaki Spinning Mills Ltd. v. K. Ganeshan, 2018 SCC OnLine Mad 3420 para 13; and Lilawati Gupta v. Union of India, MANU/GH/0070/2004 para 14-16***]. Even assuming that filing of a Statement of Truth with a petition under Section 34 is a mandate, the defects pointed out were merely procedural and curable. The Division Bench of this Court in ***Oriental Insurance (supra)***, held that even where impugned award, Statement of Truth,



vakalatnama and Court fees were not filed with a petition, the same would not render the petition *non-est*. The same view was taken by another Division Bench of this Court in *Steel Stripes Wheels Ltd. (supra)*. The Court held that as long as the ownership of the documents/petition can be established, filing cannot be termed as *non-est* and rest of the defects were curable. Filing will be *non-est* only when it is without signatures of either party or appointed counsels. In the present case, pleadings were duly signed by both the counsels and the Authorized Representative of the Petitioner and ownership was clearly identifiable and filing was valid.

(K) The Supreme Court in *Vidyawati Gupta and Others v. Bhakti Hari Nayak and Others*, (2006) 2 SCC 777, held that requirements of Orders VI and VII CPC are directory and not mandatory and are procedural in nature. Therefore, any omission in respect of affidavit, verification etc. would not render the plaint invalid as these are curable defects. [Ref. *Alka Kasana v. Indian Institute of Technology*, 2015 SCC OnLine Del 11455]. The Supreme Court in *Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Another*, (2006) 1 SCC 75, observed that appeal filed without signature is not a defect which can lead to consequences of dismissal of the appeal, unless the Rules say so. Recently, this Court has reiterated that in case the defects in the initial filing were procedural, a mere increase in the number of pages would not render the filing *non-est* and therefore, even this argument of the Respondent that the number of pages increased from the date of filing to the final petition is no consequence. [Ref. *Viceroy Engineering (supra)*].

(L) If the Court comes to a finding that the filing on 12.11.2018 was



non-est and re-filing was done on 06.12.2018, which was proper in all respects, then there is a delay of 1-4 days, if counted from 01.09.2018/05.09.2018 or of 23-29 days, if counted from 06.08.2018. In both the scenarios, delay is condonable as it falls within the 30 days condonable period under Proviso to Section 34(3) of the 1996 Act. Supreme Court has interpreted and held that the period of 3 months stipulated in Section 34(3) is 3 months and not 90 days. [Ref. *State of Himachal Pradesh and Another v. Himachal Techno Engineers and Another*, (2010) 12 SCC 210]. Petitioner has filed a detailed affidavit setting out sufficient cause for condonation of delay in filing the petition within 3 months and the delay deserves to be condoned. Signed copy of the Award received by the Legal Department at Delhi on 06.08.2018 was sent for legal opinion, which was received on 17.08.2018 and after carefully studying the Award and the documents etc., matter was placed before the ED on 01.09.2018 and before CEO on 05.09.2018. The CEO approved the proposal to challenge the Award on the same day. Thereafter, counsels were engaged and after completion of formalities, the case was entrusted to the counsels in the first week of October, 2018. The files were voluminous with thousands of pages of documents and the new counsel took time to understand the case and go through them. Multiple trips had to be made by the concerned officers of BSP to Delhi to have conferences with the counsels for preparing the petition, as the subject matter was highly technical in nature.

Contention on behalf of the Petitioner on merits of the Award:

- (a) The impugned award is in conflict with public policy of India, being contrary to the contractual terms agreed upon between the parties,



containing findings based on unintelligible reasons and ‘no evidence’ and importantly, Tribunal has re-written the contract between the parties. The impugned award, whereby exorbitant damages, heavy costs and high rate of interest has been awarded in favour of the Respondent, deserves to be set aside on all scores.

- (b) Pursuant to amendment in the 1996 Act by the Amendment Act of 2015, admittedly, ground of ‘patent illegality’ is no longer available for challenging the present award, passed in an International Commercial Arbitration, but an arbitral award is not wholly insulated from challenge. The Supreme Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)***, (2019) 15 SCC 131, while dealing with an International Commercial Arbitral Award, where the Appellant was registered in Korea, has laid down the contours and confines of examining and adjudicating objections in relation to contravention of public policy and upon examination of the provisions of Section 34(2) of the 1996 Act, held as follows:-

“76. However, when it comes to the public policy of India, argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said



unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

- (c) Following the law propounded by the Supreme Court, if an objector is able to demonstrate that the Arbitral Tribunal has travelled beyond the contract and imported terms creating a new contract, the Award can be set aside as this would constitute a breach of most basic notions of justice that run contrary to public policy of India. The observations in *Ssangyong (supra)* were affirmed by the Supreme Court in *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others*, 2021 SCC OnLine SC 508 and *Indian Oil Corporation Limited through its Senior Manager v. Shree Ganesh Petroleum Rajgurunagar through its Proprietor Laxman Dagdu Thite*, (2022) 4 SCC 463. Applying these principles, this Court in *Geoenpro Petroleum Ltd. v. Geophysical Institute of Israel*, 2020 SCC OnLine Del 2500, set aside the arbitral award passed in an International Commercial Arbitration, where the Arbitral Tribunal had effectively re-written the contract. In *Dyna Technologies Private Limited v. Crompton Greaves Limited*, (2019) 20 SCC 1, the Supreme Court held that an award which is based on unintelligible reasoning, is contrary to



public policy. In a nutshell, an impugned award is in conflict with public policy, if the Arbitral Tribunal creates a new contract between the parties; fundamental principles of justice are breached; if any unilateral addition or alteration of a contract is foisted upon an unwilling party; if a party to the agreement is made liable to perform a bargain not entered into with the other party; if it shocks the conscience of the Court; if it is against basic notions of justice and Arbitrator travels beyond his jurisdiction; and it is based on unintelligible reasoning. In the present case, the impugned award suffers from most of these anomalies and deserves to be set aside.

- (d) Tribunal has virtually re-written the terms of the contract between the parties. The contract was for “Installation of 650 TPD ASU-4, including Air Turbo Compressor, Nitrogen Turbo Compressor, LIN/LAR tanks along with civil foundations (package-I) as per Technical Specification No. MEC.VC22.02.06.U.000.8001, R-1 November, 2006” to be executed on divisible turnkey basis. NIT was issued, inviting offers in accordance with TS. CVC Guidelines bind the Petitioner being a PSU and do not permit relaxation/amendment in contractual terms, which have financial implications on the contract after its execution, as it deprives bidders of a level-playing field. Accordingly, bidders were requested to propose deviation(s), if any, along with their offers and this was clearly stipulated in Clause 03.01. Respondent had confirmed that it was not seeking deviations from technical specifications and had also confirmed that Petitioner was a strategic customer for it and possibly for this reason, Respondent had quoted an extremely low price and power consumption figure.



- (e) Clause 3.7 of GCC provided that no amendment or variation of the Contract was effective unless it was in writing and signed by the authorized representative of each party. Article 13 of the Contract provided that no modification of the Contract shall be valid unless parties agreed to it in writing and an amendment to the Contract was issued. Article 1.2 of the Contract provided that the contract would include contract agreement, appendices, SCC, GCC, Contract Technical Specifications, General Technical Specifications and Safety in contract works. As per Clause 03.01 of the TS under the Contract, Respondent was required to supply all equipment and components strictly in accordance with the TS and as per Clause 03.03, Respondent was expected to have studied the specifications and satisfied itself regarding the workability of the plant and the equipment. Respondent is in the business of setting up ASUs and hence was well aware of the standard solutions available in the market, the vendors from which it could procure the equipment as also the price implications. Therefore, Respondent was bound to raise the issues of deviations at the earliest and propose them in the offer, particularly, deviations to include Respondent as a vendor.
- (f) Respondent cannot rely on Clause 03.04 of the TS to suggest modifications, which it could have suggested at the time of the offer as per Clause 03.01. Clause 03.04 of TS, on which the Respondent and the Tribunal have heavily relied, permitted the Respondent to contract an alternative scheme/plant/equipment, however, the same was subject to the conditions that such modifications were necessary for better performance of the plant and overall description and



specification of the unit were not affected. Moreover, prior approval of the Petitioner was required to be taken in this regard.

- (g) Non-application of mind by the Tribunal is writ large from the fact that it has not considered the correct Clause 03.04, and the Clause extracted in paragraph 10.32 of the impugned award is the Clause in the NIT, which was subsequently modified in the TS, accompanying the final contract with several differences, the most important one being the words '*The Tenderer may offer any alternative....*' were replaced with '*The Contractor may Contract any alternative ...*'. Therefore, after execution of the contract, any alternative proposed by the Respondent and approved by the Petitioner would have to be made part of the contract, which did not happen in the present case as no approval was granted to any modification sought. Similarly, Clause 06.02.07 relied upon by the Tribunal is of the NIT and not of the Contract.
- (h) Tribunal has held that there was an obligation on the Petitioner to approve the modification/deviation proposed by the Respondent, which is contrary to the plain language of Clause 03.04. By rendering this finding, Tribunal has re-written the contract between the parties and therefore, the Award is in conflict with public policy of India and thus vulnerable to interference under Section 34(2)(b)(ii) of the 1996 Act, as held by the Supreme Court in *Ssangyong (supra)*. Clause 03.04 does not oblige the Petitioner to accept any alternative scheme or modification proposed by the Respondent and instead vested a right in the Petitioner to approve or disapprove the proposals, which is evident from the language of the Clause which mandated the Respondent to seek prior approval. It is a



settled law that a contract must be read to give it a plain meaning and the Tribunal has erroneously interpreted Clause 03.04 to defeat the whole intent and purpose of the Clause. *[Ref. Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another, (2018) 11 SCC 508 and Steel Authority of India Ltd. v. Noble Chartering Inc., 2019 SCC OnLine Del 7412].*

- (i) Tribunal has noted in paragraph 14.43 of the Award that the list maintained under Clause 06.02.07 could be modified on the basis of Clause 03.04. This finding is in ignorance of the contractual terms. Under Clause 06.02.07 of TS in the NIT, it was mentioned that tenderer shall clarify any deviation required in the offer, however, Respondent did not clarify any such deviation in its offer in the commercial meeting held on 25.02.2007. Article 7 of the Contract Agreement and Clause 19.1 of GCC apply only to sub-contractors/vendors specified in Appendix 6 of the Contract and not to those specified in Clause 06.02.07 of the TS and therefore, after finalization of the contract, Respondent had a right to propose additions to the vendors in Appendix 6 only and not to those under Clause 06.02.07 i.e. for HT Motors and Turbo Expanders. The additions proposed were further subject to approval by the Petitioner and therefore, Respondent had no right to add whichever vendor it chose and nor was the Petitioner obliged to approve such additions. One of the requirements for suggesting such an addition under Article 7 and Clause 19.1 was that the proposal be made well in advance so as not to impede the progress of work on the facilities. However, additional vendors were proposed by the Respondent as late as on 19.12.2008 i.e. 4½ months after entering into the contract,



which was a huge delay considering that the term of the contract was 24 months. Article 7 has also been ignored by the Tribunal.

- (j) Tribunal has rendered an erroneous finding with respect to the compressor motors, which the Respondent was required to provide and for which TS were unambiguously provided in Clauses 06.02.02, 06.02.03, 06.02.09 and 06.04.02. The specifications, in no uncertain terms, provided that the compressor motors shall be synchronous. Under Clause 03.01 of TS, Respondent was required to supply all equipment and components strictly in accordance with the specifications and as per Clause 03.03, Respondent was expected to have studied the drawings and other specifications and any alternate proposal as per Clause 03.04 was required to indicate the price alteration with the offer. In 2007, Respondent submitted its bid and offered to provide synchronous motors. Meeting was convened on 24/25.02.2007, to discuss techno-commercial aspects of the tender, wherein Respondent's confirmation that no deviations were proposed and its agreement that motors for the MAC, BAC and NTC shall be synchronous, was recorded. Since these compressor motors were LDIs, the same were to be ordered in advance so as to meet the timelines. Clauses 06.02.01, 06.02.03 and 06.02.09 of TS unambiguously provided that motors shall be synchronous for MAC, BAC and NTC respectively. On 23.11.2007, Atlas Copco, one of the preferred makes for compressor under Clause 06.02.07 sent confirmation to the Petitioner regarding technical feasibility of a synchronous motor with BAC and their past experience as suppliers for various projects. On 04.12.2007, Respondent sent data sheets for the compressors to MECON, where they suggested asynchronous



induction motor, to which MECON responded on 13.12.2007, reiterating its stand taken on 18.12.2007 that asynchronous motors shall not be acceptable. On the same day, Atlas Copco sent another email to the Petitioner sharing a reference list for BAC with synchronous motors. On 19.12.2007, Respondent offered to order MAC with synchronous motor stating that it was more expensive but maintaining that asynchronous motors could be used with no problem for the project. In the meetings between the Petitioner and Respondent on 20/21.12.2007, Respondent undertook to ascertain compatibility of synchronous motors to be provided by Privod, another vendor. MECON confirmed Privod as an approved vendor for synchronous motor for BAC and NTC on 27.12.2007, subject to compressor manufacturers confirming compatibility of these motors with the compressors and on 31.12.2007, Petitioner also approved Privod. On 10.01.2008, Respondent sent a letter to the Petitioner stating that compatibility of compressor and motors would be achieved during the execution of the project and followed it up with a letter dated 30.01.2008 stating that time was required to solve the compatibility issue. However, nothing was done thereafter and no confirmation was provided by the Respondent and there was complete failure to place orders for the LDIs i.e. compressors, leaving no option to the Petitioner but to terminate the contract on 01.07.2008.

- (k) The Tribunal erred in holding that Petitioner's rejection of Respondent's proposal for asynchronous motors was wrongful. The Tribunal was required to decide the respective obligations within the contractual terms and not as per proposed modifications. It was not



considered whether the deviations proposed were necessary for better performance of the plant and equipment and whether they affected the overall specifications and descriptions, which was the essential ingredient of Clause 03.04. The conclusion drawn by the Tribunal that asynchronous motors were a standard solution, technically better, easy to resource, more robust and reliable, etc. was based on no evidence or document on record. Moreover, once the contract provided for synchronous motors for MAC, BAC and NTC, the Tribunal could not go into the question of whether or not they were a non-standard solution. Tribunal overlooked that witness of the Respondent had agreed that the technical requirement of the contract was synchronous motor and which is why Privod was suggested as an additional vendor for synchronous motors. The expert witness of the Respondent in its report stated that synchronous motors are more efficient than asynchronous induction motors and convert electrical energy to mechanical energy at very low speeds and very high speeds. In fact, Clause 03.04 of TS did not apply in the case of synchronous motors as the only question was of a different vendor Privod, suggested by the Respondent on 19.12.2007, which was immediately approved by the Petitioner and therefore, the finding of the Tribunal that the delay that occurred after Privod was approved, subject to confirmation of compatibility, could not be attributed to the Respondent ordering the LDI, is wholly erroneous.

- (1) Tribunal erred in rendering a finding that the proposed PPU with 4 hours adsorption cycle time was not a deviation from the contract. This finding is contrary to not only the express language of Clause 06.02.03 of the TS but also Respondent's own offer and



subsequent written clarification/confirmation. Clause 06.02.03 nowhere specified that the 8 hours cycle against 'adsorber' comprised 4 hours adsorption followed by 4 hours regeneration, as erroneously observed by the Tribunal in paragraph 14.47. Despite noting in paragraph 14.46 of the Award that TS circulated with the NIT did not specify cycle time, Tribunal failed to consider that Clause 06.02.03 was specifically incorporated under the Contract pursuant to the technical offer of the Respondent. Minutes of Meeting dated 24-25.02.2007 and Respondent's own letter dated 06.06.2007 unambiguously and unequivocally showed that Clause 06.02.03 envisaged a PPU with an 8 hours adsorption cycle only. Tribunal has outrightly rejected the plea of the Respondent with respect to its offer for 8 hours adsorption in paragraph 14.61 of the Award, holding that the contract would have precedence, yet failed to appreciate the TS under Clause 06.02.03 which provided 8 hours cycle for adsorber and held in favour of the Respondent. The testimonies of Respondent's witnesses have not been correctly appreciated by the Tribunal. Ms. Tarasova, Respondent's witness in her cross-examination agreed that PPU with 8 hours adsorption time would be more expensive than a PPU with 4 hours cycle and therefore, it was evident that the deviation was proposed by the Respondent for its own convenience and lower cost. Mr. Quincy Jones, expert witness of the Respondent, admitted in his cross-examination that adsorption cycles in the PPU have a zero impact on the actual performance of the unit and opined that 4 hours adsorption cycle time is within the bounds of what is expected to be seen in a



typical ASU consistent with good engineering design and easier to transport, factors which were totally alien to Clause 03.04.

(m) Tribunal ignored the rebuttal testimony of Mr. Nehru, witness of the Petitioner, who stated that a longer cycle time requires less number of changes and pressurization, thereby increasing life of the adsorbent and efficiency and life of PPU. Respondent clearly understood a PPU with a 4 hours cycle as a deviation from the contract and which is why approval was sought under Clause 03.04 of TS. The reasons given in the letter dated 19.12.2007 for proposing a PPU with 4 hours cycle being: (a) it would be smaller and convenient to assemble, test and transport; and (b) would reduce wastage of time being Respondent's standard solution, were wholly alien to Clause 03.04 of TS, whereunder modifications could be sought and approved only for better performance of the plant and equipment, without affecting their overall description and specifications. Tribunal has not dealt with the issue of how the suggested deviation fell within the four corners of Clause 03.04 of TS. Tribunal's effort to justify the deviation as a good engineering practice is also outside Clause 03.04 of TS and therefore, the impugned Award is violative of Clause 03.04 of TS and Section 31(3) of the 1996 Act.

(n) It is a settled law that pre-contractual negotiations/correspondence are important to determine the intention and understanding of the parties for interpreting the contract which in this case is evident from Respondent's own offer in the bid, where PPU with 8 hours adsorption and 7 hours of reactivation was offered. Minutes of Meeting dated 24-25.02.2007 record Respondent's confirmation that



no deviation was proposed. In response to some queries raised by the Petitioner, Respondent clarified on 06.06.2007 that adsorption time of the PPU would be 8 hours. Deviations suggested were never approved by the Petitioner and post rejection of the proposed deviation, Respondent suggested that it would offer a design cycle of 8 hours, which would include 4 hours of adsorption and the design cycle would satisfy the contract. MECON, Petitioner's consultant recommended that the PPU offered was for 8 hours adsorption cycle and could not be changed. Basis this, Petitioner once again rejected the deviation sought and one of the reasons for termination of the contract by the Petitioner was the inability of the Respondent to supply the contracted PPU and its continued insistence on the deviation.

- (o) Tribunal has failed to appreciate that 06.01.01 of the NIT specification required all distillation columns to have structured packing and no deviation was proposed by the Respondent in its offer as per Clause 03.01 of the NIT specifications. Tribunal has wrongly found that the modification suggested by the Respondent was in compliance with Clause 03.04 of TS and it was the Petitioner who delayed in approving the same. This is contrary to Clause 03.04 of TS, which does not provide any time limit for approval of modifications sought in TS. In fact, as per record, Petitioner had given approval to the modification within 4 days of the Respondent giving clarifications on certain necessary details.
- (p) Finding of the Tribunal with respect to BEDs is also erroneous and contrary to record. The Tribunal in paragraph 14.14 has spelt out the reasons for which the BEDs were rejected by the Petitioner and



found them to be illegal. The observation that the changes proposed by the Respondent were wrongly not approved, overlooks the fact that there was no inherent right available to the Respondent to seek modifications under Clause 03.04 of TS. Another finding that is rendered in this context is that Petitioner had objected to progressive submission of drawings by its letter dated 20.11.2007 but a reading of the letter would itself demonstrate that Petitioner had only objected to piecemeal submission of drawings, without submission of connected/related drawings and cannot be faulted for delay in submission of the BEDs by the Respondent. Factually, MECON was unable to approve the drawings as they were not as per the TS of the Contract but were as per the deviations proposed by the Respondent and did not incorporate previous comments of MECON. Respondent refused to provide certain details insisting that the same would be provided in the DEDs. On account of all these contentious issues, BEDs could not be approved even upto the date of termination of the contract i.e. 01.07.2008 *albeit* the timeline for approval was 5 months i.e. upto December, 2007.

- (q) Paragraph 15.10 of the impugned award is in the teeth of Article 5 of the Contract, which provided that time was the essence of the contract and therefore, Petitioner had a right to rescind the contract, if there was non-compliance with time schedule in Appendix 2. Without any basis, Tribunal has rendered a finding that time was not of essence of the contract. Assuming that time was not of essence, Petitioner was still entitled to terminate the contract on account of Respondent's delay/breach. As per Clause 08.01 of GCC, facilities were to be completed within the time period stipulated in Article 5 of



the Contract or such extended time which the contractor was entitled under Clause 42. Tribunal failed to consider that Clause 42.1 of GCC permitted extension of time only in limited cases which were beyond the control of the contractor and delay/default of the contractor is not a ground on which time could be extended.

- (r) Findings by the Tribunal on damages are without any material or basis. Firstly, it was not open to the Tribunal to allow both 'loss of profit' and 'reliance losses' at the same time. The Tribunal has awarded damages in favour of the Respondent under both heads i.e. (a) advance payments made and expenses incurred by the Respondent (reliance losses) and (b) loss of profits and work done in preparation of BEDs and DEDs. This is in contravention of settled principles of law laid down by the Supreme Court in ***Kanchan Udyog Limited v. United Spirits Limited, (2017) 8 SCC 237***. Even otherwise, unilaterally projected profitability, which is a mere assumption, and not backed by cogent evidence, cannot be the basis of assessment of damages, which has been done in the present case. In ***Dileep Nevatia v. State Bank of India, 2015 SCC OnLine Bom 545***, it was held by the Bombay High Court that claim of damages must be both pleaded and proved.
- (s) Damages have been awarded for advance payments to the vendors on the basis of findings that LDIs including compressors could not be ordered by the Respondent due to delay in approval of BEDs. This was not only contrary to the findings in paragraphs 14.27 to 14.30 but based on an unintelligible reasoning. No unpriced Purchase Orders were submitted by the Respondent to the Petitioner for LDIs as then it would have become entitled to milestone payment of 5% in



terms of the contract, despite several notices. In fact, unpriced Purchase Orders were produced for the first time before the Tribunal as an after-thought and Respondent did not even claim the 5% payment. Quantum of additional expenses was calculated on the basis of Respondent's budget and Purchase Orders but no independent validation of budget was done either by the Tribunal or the independent expert of the Respondent. Record shows that till April, 2008, no orders for compressors were placed by the Respondent. No attempt was made to mitigate the losses. Duty to mitigate losses is accompanied with duty to refrain from resorting to unnecessary means that would aggravate the loss of a party. In the present case, instead of mitigating losses, Respondent went ahead and allegedly made advance payments to vendors in the absence of approvals from the Petitioner.

- (t) Tribunal has held the Respondent entitled to amounts for work done in preparation of BEDs (100%) and DEDs (50%) and without any reasoning held that there was no double counting of amounts. The finding is perverse and against public policy for the reasons: (a) as per Clause 02.01 of the contract, payment had to be released on submission and approval of process flow diagrams, general layout and single line diagram; (b) as per 02.03.01.01 of the contract, 75% payment was to be released at the end of each quarter on pro-rata basis and as per progress of submission and approval of design and engineering in accordance with approved billing schedule; (c) none of the DEDs were complete and approved by the Petitioner; (d) claim for damages in relation to BEDs and DEDs was waived by the Respondent; and (e) without any basis and merely on the statement



of the Respondent, the Tribunal came to a conclusion that there was no double counting, solely relying on the assessment report of Mr. Mayal, the witness of the Respondent.

- (u) Award of loss of profit was against the law of damages and public policy for the reasons: (a) Respondent had no presence in the Indian market as it is a Russian party and only to capture the Indian market, it had quoted low prices admitting that Petitioner was its strategic customer; (b) Respondent's expert witness failed to verify its budget for the contract and merely on anticipation of a profit, damages were awarded; (c) Tribunal mechanically relied on the calculation of additional revenues without any finding or evidence that additional revenues were payable by the Petitioner or whether they would be generated in reality based on the documents on record; and (d) Tribunal proceeded to award loss of profits basis the assumption that Respondent would have completed the contract without any disruption, overlooking that the contract was terminable at the option of both the parties.

Contention on behalf of the Respondent on merits of the Award:

- (a) Petitioner has sought to challenge an International Commercial Award under Section 34(2)(b)(ii) of the 1996 Act passed unanimously by a Three-Member Arbitral Tribunal appointed by the ICC as per ICC Rules. The scope of interference in an International Commercial Award is extremely narrow and on limited grounds under Section 34(2)(a) or (b) of the 1996 Act and reading of the petition shows that none of the grounds mentioned in these provisions are even averred. Petitioner is challenging the Award seeking a merit review or appeal and calling upon this Court



to re-interpret the contract and/or substitute the findings of the Tribunal by re-appreciating evidence, which is impermissible. The ground of ‘patent illegality’ is not available for assailing an award passed in an International Commercial Arbitration post-amendment to the 1996 Act by the Amendment Act of 2015. The three-fold grounds available in exceptional circumstances under ‘public policy’ are not made out in the present case inasmuch as Petitioner is unable to make out that making of the Award was induced or affected by fraud or corruption or was in violation of Sections 75 or 81; is in contravention of fundamental policy of Indian Law i.e. violates a Statute pertaining to public interest or disregards orders passed by superior Courts in India; or is opposed to the basic notions of justice i.e. shocks the conscience of the Court.

- (b) Considerations such as: (a) no reasons for the Award; (b) interpretation or construction of contractual provisions; (c) adjudication in ignorance of vital evidence or findings based on ‘no evidence’ are grounds falling within the ambit of patent illegality and are unsustainable in the present case as held by the Supreme Court in *Ssangyong (supra)*. The impugned award is *ex facie* a well reasoned award based on detailed examination of extensive documentary evidence running into over 5,000 pages and appreciation of testimonies of 3 fact and 2 expert witnesses produced by the Respondent and 3 fact and 1 expert witness by the Petitioner. Witnesses were cross-examined over 6 days and final hearing took place over 3 days. Findings of the Tribunal are neither unreasonable nor perverse or whimsical by any measure and the view taken by the Tribunal that termination of the contract by the



Petitioner was unlawful, is a view based on evidence, both oral and documentary and cannot be interfered within the narrow window available to the Court in case of an International Commercial Award.

- (c) Respondent is Russia's largest manufacturer of Air Separation Units and equipment and owns several patents over ASU related technology. It has built over 600 ASU's including 59 in India since 1946, when it was founded by Noble laureate physicist Mr. Peter L. Kapitsa. Its customers include the European Organisation for Nuclear Research (known as CERN), the Russian Space Agency (known as the Federal Space Agency and now known as the Roscosmos State Corporation for Space Activities), the Indian Space Research Organisation ('ISRO') and numerous European and Chinese Multi-National Companies.
- (d) Tribunal has rendered findings premised on interpretation of contractual terms and clauses that the contract afforded the Respondent flexibility to propose modifications for better performance of the ASU and looking at the concrete evidence led before the Tribunal, this finding cannot be held to be perverse, particularly in light of Clause 03.04 of TS, Article 7 of Contract Agreement and Clause 19 of GCC. Petitioner wrongly believes that it had the absolute discretion to reject the modifications proposed and assuming that it did, discretion has to be exercised judiciously and in good faith and not arbitrarily. Tribunal found that Petitioner was responsible for the delay in performance of the contract because it failed to approve the drawings and the documents submitted by the Respondent in a timely manner based on



overwhelming documentary and oral evidence on record, corroborated by the report of Comptroller and Auditor General of India ('CAG') that delays were the result of acute shortage of skilled personnel who could approve designs and drawings.

- (e) Clause 03.04 of TS entitled the Respondent to propose alternative schemes or modifications to the ASU, if the same were necessary for better performance of the plant as long as it did not affect the overall description and specification of the unit, including modifications to the 'list of preferred makers' under Clause 06.02.07 of TS. Clauses such as Clause 03.04 and 20.03.02/ 20.03.06 are common place in 'design and build' contracts for the betterment of the projects.
- (f) Respondent's implementation of the contract obligations was prompt and it commenced progressive submission of BEDs for approval without any delay. By 17.12.2007, Respondent had submitted all 42 BEDs for the ASU and had participated in several meetings to explain the technical details. Respondent sought Petitioner's approval for a PPU with an adsorber, which completed one duty cycle viz. adsorption and regeneration every 8 hours cycle and was a better option but Petitioner refused to consider the same only on specious ground that the proposal was outside the contractual specifications. Petitioner did not provide any technical ground for its refusal to consider the modifications with respect to the 8 hours cycle despite several meetings between the parties on this aspect.
- (g) Respondent required approval of BEDs before proceeding to the next stage of implementing the contract including ordering of



equipment which had long delivery schedules and finalizing the DEDs. However, despite prolonged correspondence, Petitioner refused to approve the BEDs on the frivolous ground that proposed modifications, etc. and the PPU offered were not in accordance with the contractual terms. Respondent's anguish on the lack of progress and Petitioner's conduct is evident from letter dated 16.01.2008, which is taken note of by the Tribunal. In February-March, 2008, parties had almost resolved all their disputes, however, Petitioner refused to agree that the proposed PPU was in accordance with the contract and the negotiations failed. On the heels of this meeting, Petitioner issued a notice to the Respondent under Clause 37 of the GCC threatening to initiate risk purchase action, despite which Respondent continued to work and explain his stand. Respondent assiduously provided detailed response to every communication of the Petitioner emphasizing that delays could be prevented if modifications were considered at the earliest but nothing progressed on Petitioner's end.

- (h) Petitioner's contention that Respondent proposed modifications to cut costs is unfounded. Respondent proposed itself as a vendor for two pieces of equipment, namely, part of the valves required for the coal box unit and the turbo expander as that would have enhanced the performance of the ASU and no contrary evidence on the performance was produced by the Petitioner. Reliance on CVC Guidelines to deny modifications was misplaced. Any party to a contract has the right to claim benefits under contractual clauses and in the present contract, Clause 03.04 entitled the Respondent to offer modifications, subject to the



conditions mentioned therein, which Petitioner refused to even consider and examine.

- (i) Tribunal's finding that Respondent's performance was delayed by Petitioner's unreasoned insistence on synchronous motors is well reasoned and based on evidence on record. Basis the motor speed and horse power required for the ASU, Respondent proposed the use of asynchronous induction motors and the expert evidence produced established its advantages. In fact, in the February, 2007 meeting, Petitioner also agreed to accept asynchronous motors but thereafter delayed the completion of formalities. Respondent agreed to nevertheless find out the solution with motor manufacturers and compressor suppliers, however, as the synchronous motors was not a standard solution, the suppliers wanted considerable time to design suitable synchronous motors compatible with the ASU in question. No evidence was brought on record by the Petitioner to support its case that the proposal for asynchronous motors was because it was a cheaper alternative. In fact, Respondent had proposed the use of asynchronous motors even before the contract was executed and therefore, it is incorrect for the Petitioner to contend that the issue was raised for the first time on 19.12.2007.
- (j) The issue of PPU is distinct from other technical specifications as the PPU design proposed by the Respondent was not a modification, as correctly found by the Tribunal. Clause 06.02.03 required an adsorber with 8 hours duty cycle i.e. an adsorber which takes 8 hours to return to its initial state after completing a cycle of adsorption and regeneration and therefore, Respondent's PPU was compliant with the TS as it had 8 hours duty cycle with 4 hours of



adsorption and 4 hours of regeneration and was wrongly treated as being a deviation from the Contract. Misconceived reliance was placed on cross-examination of Ms. Tarasova as she only explained that the proposed PPU design was tested, reliable and more efficient and cost effective. Assuming that the proposed modifications were not as per contract specifications, Clause 03.04 permitted the Respondent to suggest modifications. This contractual provision giving flexibility to the Respondent was overlooked as the Petitioner was not willing to look outside the initially prescribed TS, which it was bound to, when alternatives were offered by the contractor, exercising its rights under Clause 03.04 of TS.

- (k) Petitioner contended that MECON/Petitioner did not approve the BEDs as they were not in consonance with the TS and were based on additions and modifications. Contrary thereto and rightly so, the Tribunal held that Respondent was entitled to seek alternatives and modifications under Clause 03.04 of TS, Article 7 of Contract Agreement and Clause 19 of GCC and if the proposal was for the better performance of the plant and did not affect the description and specification of the unit, Petitioner was required to consider the proposal and rejection could not be for the reason that the proposal was not in consonance with the contractual technical specifications. No error can be found in this finding by the Tribunal, which is the plain reading of the clause or at best its interpretation.
- (l) Petitioner's contention that BEDs and DEDs were submitted belatedly is contrary to record. Respondent was required to complete the BEDs and submit them for approval within 20-21 weeks from 31.07.2007 as per Clause 02.02.01 of Appendix 2 to the



Contract Agreement. There was no contractual obligation on the Respondent to submit the drawings progressively. Nonetheless, the Respondent submitted the BEDs progressively through the course of October, November and December and submitted all BEDs by 17.12.2007. As admitted by Petitioner's witnesses and borne out from the record, MECON took at least a month to 1½ months to provide its comments. It was rightly noted by the Tribunal that the comments provided were qualitatively unsubstantial and served to delay the implementation of the contract. Tribunal rightly observed that MECON's comments were bureaucratic, unnecessary and did not justify delaying the approval of BEDs.

- (m) Petitioner's contention that delay in placing orders for LDIs was attributable to the Respondent, is unfounded and bereft of merit. Tribunal corrected observed that under the contract, *inter alia*, by Clauses 20.03.07 and 20.04.01.07, Respondent was not permitted to place firm orders for LDIs until Petitioner/MECON had given their approval to the drawings and documents involving LDIs. Practice of awaiting employer's approval before proceeding to order equipment is in consonance with the contract and in accord with the industry practice relating to 'design and build' contracts.
- (n) Tribunal correctly concluded that termination of the contract by the Petitioner under Clause 44.2 of GCC was wrongful and unjustified. From a bare reading of the Award, it is manifest that the Tribunal considered volumes of documents, contractual provisions, oral evidence and had the benefit of expert evidence, before coming to this conclusion, which is not open to interference in the present petition. Tribunal found from the evidence on record that there was



a genuine desire on the part of the Respondent to overcome issues and complete the contract pointing out to various communications exchanged between the parties. Finding was rendered that the contract could not be terminated on the ground of delay alone, as it incorporated a provision for extension of time and deduction of liquidated damages. Tribunal returned a finding of fact that delay was not attributable to the Respondent but was occasioned by wrongful actions of the Petitioner/MECON.

- (o) Tribunal has rightly awarded damages and other monetary reliefs to the Respondent under different Heads, which are natural consequences of holding the termination to be unlawful. At the time of termination of the Contract, Respondent had completed 50% of the DEDs and had submitted all the BEDs within the specified time and therefore, the Award for payments of the work done cannot be termed as perverse i.e. in conflict with public policy. Finding of the Tribunal that mitigation of losses was not possible, is the correct view. The drawings in question were specific to the contract and confidential in nature and could not be sold to any other party being tailor-made to the technical specifications of the present Contract.
- (p) Insofar as advance payments and expenses are concerned, advances were paid by the Respondent to 3 vendors for certain LDIs and Respondent had produced unsigned purchase orders for the equipment as well as proofs of payment, which were uncontroverted. Tribunal awarded USD 1,51,016 incurred by the Respondent towards expenses over the duration of the Contract. At no stage during the arbitration proceedings, Petitioner denied the



claim of expenses incurred and the objection is only an after-thought.

- (q) Award of loss of profit is challenged by the Petitioner without any basis. Loss of profit is generally awarded in construction contracts by the Courts where Awards are upheld and breach is found. In the instant case, Petitioner's expert witness admitted during cross-examination that there was a distinct possibility that Respondent would have earned profit on the contract. The amount was awarded by the Tribunal after a close scrutiny of the evidence produced by the parties including expert evidence, Respondent's financial track record and profit margins in similar contracts as well as basis the business of other companies in the same line. The Tribunal concluded that loss of profit at 3.8% of the total contract price minus the amount awarded for BEDs and the DEDs would be the correct estimate in the facts of this case. The argument of the Petitioner that the Tribunal erred in awarding the expectation as well as the reliance loss wrongly, is misconceived. Reliance on the judgment of the Supreme Court in *Kanchan Udyog (supra)*, is equally misconceived as the expectation and reliance loss can be awarded so long as the receiving party does not recover the same loss more than once.

25. I have heard learned Senior counsels for the parties and examined their contentions.

Preliminary objections: Analysis and Findings.

26. The preliminary objections raised on behalf of the Respondent can be encapsulated as: (a) petition was filed on 12.11.2018 after 3 months 16 days from the date of receipt of the Award on 27.07.2018 with no



application for condonation of delay at that stage; (b) filing on 12.11.2018 was *non-est* and complete and valid petition was filed only on 07.12.2018, which was beyond 3 months and 30 days from 27.07.2018 and delay cannot be condoned under the Proviso to Section 34(3); (c) assuming the Award was received on 06.08.2018 and petition was within 3 months on 12.11.2018, filing being *non-est*, limitation will not stop on this date and proper petition was filed beyond the 30 days condonable period on 07.12.2018; and (d) assuming that a valid filing was done on 06.12.2018, Petitioner has failed to make out a sufficient cause for condonation of delay. In a nutshell the argument was that seen from any angle petition is time barred and deserves to be dismissed on this ground alone.

27. The first and foremost question that needs an answer is: what is the starting point or date of commencement of limitation period of 3 months prescribed under Section 34(3) of the 1996 Act and the answer lies in the date of delivery of the Award, which intturn will impact other issues. Before proceeding to decide this issue, it would be pertinent to note that the arbitration proceedings commenced between the parties pursuant to Article 10.1 of the Contract which reads as follows:-

“10.1 Arbitration (Reference GCC Clause 6)

“Any disputes, differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably. If, however, the Employer and the Contractor are not able to resolve their disputes/differences amicably as aforesaid the said disputes/differences shall be referred for conciliation before Arbitration. The arbitration clause is to be invoked by the Contractor only on the failure of conciliation proceedings.””

28. The arbitration clause was in reference to Article 6 of GCC which is as follows :-



“Article 6 GCC

6. Settlement of Disputes

Conciliation & Arbitration

In case of disputes, the matter shall be referred for conciliation before arbitration. The applicable rules for conciliation proceedings shall be that of “SCOPE forum of Conciliation and Arbitration” (SCFA). The arbitration clause is to be invoked by the Contractor only on failure of conciliation proceedings. All contracts whose value is Rs.5.0 crores (for both Indian and foreign contractors) and below, shall go for ad-hoc arbitration where an impartial Arbitrator would be appointed by the Managing Director of BSP and the arbitration proceedings shall be governed by the Arbitration and Conciliation Act of 1996. The venue shall be Bhilal (CG). Arbitration of contracts with Indian parties, where the contract value is more than Rs. 5.0 crores and the contracts with foreign parties for value of more than Rs. 5.0 crores and up to Rs. 20 crores, shall be governed by the Rules of Indian Council of Arbitration (ICA/ "SCOPE Forum of Conciliation and Arbitration" (SCFA) as agreed by the Contractor. The venue shall be New Delhi. Arbitration with foreign contractor or in consortium contracts (including foreign contractor) where the contract value is more than Rs. 20 crores, shall be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. The venue of the arbitral proceedings shall be New Delhi.

During the pendency of the conciliation or arbitration proceedings, the Employer and the Contractor shall continue to perform their contractual obligations.”

29. Article 5.1 of the GCC provided that the contract including the arbitration proceedings shall be governed by and interpreted in accordance with laws of India and as per Article 6 of GCC, the venue of arbitration was New Delhi. Indisputably, Article 6 provided that arbitration with foreign contractor or with respect to consortium contracts including foreign contractor, where the contract value was more than Rs.20 crores, shall be governed by Rules of Arbitration of International Chamber of Commerce (ICC), Paris. Admittedly, the arbitration proceedings between the parties herein were governed by ICC Arbitration Rules, 2012. The controversy relating to the date of delivery of the Award essentially involves an interplay between ICC Notes 140 and 141 under Chapter XV titled



“Notification of Awards, Addenda and Decisions” which are extracted hereunder for ready reference and Sections 31(5) and 34(3) of 1996 Act :-

“XV - Notification of Awards, Addenda and Decisions

140. The Secretariat will notify to the parties an original of the Awards, addenda and decisions (Article 35(1)).

141. A courtesy copy of the PDF signed original of the Awards, addenda and decisions will be sent to the parties by email. The sending of a courtesy copy by email does not trigger any of the time limits under the ICC Rules of Arbitration.”

30. Case of the Petitioner is that on 27.07.2018, a courtesy copy of the Award dated 20.07.2018 was sent by the ICC through an e-mail but receipt of the courtesy copy will not trigger the timelines under the ICC Rules and commencement of limitation period of 3 months under Section 34(3) of the Act. I have bestowed my consideration on this issue. There is not the slightest scintilla of doubt that parties had agreed that ICC Rules shall be the governing Rules in case disputes arose pertaining to the present contract and parties resorted to arbitration. Party autonomy is the overarching principle of arbitration and this is echoed by the Legislature by enacting Section 2(6) of the 1996 Act, which provides that where Part-I of the 1996 Act, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorize any person, including an institution to determine that issue. The Supreme Court in **ONGC v. Afcons (supra)**, observed that party autonomy is a cardinal principle of arbitration. Having chosen ICC Rules as the governing Rules, the procedure prescribed therein was also the chosen mechanism for conduct of arbitration and binds the parties.

31. Perusal of ICC Note 140 shows that the Secretariat was required to notify to the parties the original of the Award, Addenda and Decisions. Note 141, in no uncertain terms, postulates that courtesy copy of the PDF



signed original of the Award by e-mail will not trigger any of the timelines under the ICC Rules. E-mail dated 27.07.2018 reflects that while attaching the copy of the Award, it was stated that the original of the Award will follow and the courtesy copy will not trigger the timelines under the ICC Rules. In view of the unambiguous language of ICC Note 141, I am unable to agree with the Respondent that the date of receipt of the courtesy copy of the Award on 27.07.2018 would be the starting point for computing limitation period of 3 months prescribed under Section 34(3) of the 1996 Act. Import of Note 141 is clear from its language where the expression 'courtesy copy' has been used followed by the words 'will not trigger timelines under the ICC Rules' and plain meaning and effect must be given to this Note, whereby receipt of courtesy copy is not intended to be construed as delivery of award for the purpose of commencement of limitation periods, either to seek correction of errors in the Award, if any, or for challenging the Award in Court.

32. Reliance on Articles 3 and 23 of the ICC Rules by the Respondent is misconceived as these Articles deal with pleadings and other written communications and not with the delivery of the Award, which is provided for under ICC Notes 140 and 141. Likewise, Article 34(1) is also incorrectly relied upon, as it only provides that once an Award has been made, the Secretariat shall notify to the parties the text signed by the Arbitral Tribunal and sending of the text cannot be construed as sending original signed Award. In my view, there is infact no conflict between ICC Note 141 and Sections 31(5) and 34(3) of the 1996 Act. Section 34(3) provides that an application for setting aside an award may not be made after 3 months from the date on which the party making that application has received the arbitral award and Section 31(5) provides that signed copy of



the Award shall be delivered to the party to the Award. Notes 140/141 operate in different fields and recognize two stages of service of the Award, a courtesy copy followed by the original award. By agreeing to be governed by ICC Rules, parties agreed that receipt of courtesy copy will not be treated as receipt of arbitral award and thus service of Award under Section 31(5) would be when original and not courtesy copy was received and consequently limitation period for filing objections under Section 34(3) would start running from the date of service of original award.

33. Respondent is not right in its contention that on signing of the Award, ICC Rules cease to apply and provisions of 1996 Act take over and thus Note 141 will be inapplicable for determining the timelines under Section 34(3) of 1996 Act. Section 31 of the 1996 Act deals with 'Form and Contents of the Arbitral Award' and also provides that after the Arbitral Award is made, signed copy shall be delivered to each party. Section 32 postulates that the arbitral proceedings shall be terminated by the final Arbitral Award or by an order of the Tribunal under sub-Section (2) and sub-Section (3) provides that subject to Section 33 and Section 34(4), the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings. It is thus clear that Section 32 comes into play when the entire procedure under Section 31 is complete. In ***Tecco Trichy (supra)***, the Supreme Court held that delivery of the Arbitral Award is not a formality and therefore, only after the Award is served on the parties under Section 31(5) in accordance with the requirement of the provision and/or other Rules governing the parties to the arbitration and the entire procedure envisaged under Section 31 is complete, Section 32 comes in to terminate the proceedings and that too, subject to Section 33 of the 1996 Act. Restricted interpretation cannot be given to the expression 'under



the ICC Rules' in Note 141, to mean and interpret timelines only under the Rules and hold that limitation will start running under Section 34(3) as soon as the courtesy copy is received. This would not only be contrary to the ICC Rules, which are the governing Rules by the choice of the parties but would lead to an inconceivable position of law in a given case, as rightly pointed out by the Respondent, where under Article 35(2) of ICC Rules, the period of 30 days available to a party to the arbitration proceedings to apply for correction of a clerical, computational, typographical or any error of similar nature in the Award from the date of its receipt, will not be triggered on receipt of the courtesy copy but limitation for challenging the Award under Section 34(3) of the 1996 Act, will commence prior thereto, from the date of receipt of a courtesy copy.

34. A somewhat similar issue arose before the Bombay High Court in *Adityasai Cotspin Pvt. Ltd. v. Louis Drayfus Commodities India Pvt. Ltd.*, **2015 SCC OnLine Bom 3410**, where Respondent had objected to the maintainability of the petition challenging the Award under Section 34 of the Act on limitation. Petitioner contended that under Section 34(3) read with Section 31(5) of the 1996 Act since signed copy of the Award was not received from the Arbitrator himself as provided under Cotton Association of India Rules, limitation under Section 34(3) did not commence. Respondent, on the other hand, contended that under the said Rules, Cotton Association had deputed a Secretary for providing all administrative assistance to the Tribunal including for issuing intimation that the Arbitrator had made an award. Disagreeing with the Respondent, the Bombay High Court observed that under Section 34(3) of the Act, a signed copy has to be delivered to each party and the Rules in question governing the arbitration between the parties provided for a procedure for arbitration,



starting from appointment of the Arbitrator to the delivery of the Award, as per which the Arbitrator was required to send a copy of the Award personally to the parties and therefore the copy received from the Secretary of the Association will not trigger the limitation period. Once the parties agreed to proceed with the arbitration in the mode and manner prescribed in the Rules of arbitration framed by the Cotton Association of India for all purposes, the said procedure will have to be followed and will bind the parties to the arbitration. First question is therefore decided in favour of the Petitioner, holding that receipt of the courtesy copy of the Award on 27.07.2018 did not trigger the timelines for challenging the Award under Section 34(3) of the Act.

35. Reliance on the judgment in *Imax Corporation (supra)*, by the Respondent is misplaced as the judgment has no applicability to the issue involved here. In the said case, the Supreme Court held that since the seat of arbitration was London, any objection to the Award could not be filed in India. In the said case, the arbitration clause contemplated an award in consonance with the ICC Rules, without specifying the applicable law for the arbitration agreement. In this context the Supreme Court observed that an express choice had been made by the parties regarding the conduct of arbitration i.e. applicability of ICC Rules but they had not chosen the place of arbitration and therefore when ICC chose London as the place of arbitration, law of U.K. will be attracted in all matters concerning arbitration and the High Court committed an error in observing that seat of arbitration itself was not a decisive factor to exclude Part-I of the Act. Judgment of the High Court was set aside and the petition filed under Section 34 of the Act before the Bombay High Court was dismissed.



36. The second and equally important issue that next arises for consideration is whether delivery of the Award to the counsel/authorized representatives of a party to arbitration agreements can be construed as delivery of the Award envisaged under Section 31(5) of the 1996 Act. In light of the finding above that courtesy copy of the Award will not trigger the timelines, receipt of the copies on 27.07.2018 by P.H. Sharma, S.B. Mathur, A.C. Rathi and Ashish Rastogi, will be inconsequential for the purpose of limitation.

37. As per the chronology of facts and narrative given by the Petitioner, original signed copy of the Award was received by the counsel for the Petitioner on 02.08.2018, which was then forwarded to the Legal Department of the Petitioner in the Corporate office at Delhi and received there on 06.08.2018. Petitioner contends that limitation period under Section 34(3) will commence from 06.08.2018 and not 02.08.2018. This argument is premised on the provisions of Section 31(5) of the 1996 Act, which provide that after the arbitral award is made, a signed copy shall be delivered to each 'party'. This Court finds merit in the contention of the Petitioner on this aspect. Section 31(5) of the 1996 Act provides that after the arbitral award is made, a signed copy shall be delivered to each party. The Supreme Court in *Tecco Trichy (supra)*, was in seisin of a case where the Arbitral Tribunal gave its award on 10/11.03.2001 and signed the same, which was delivered in the office of General Manager, Southern Railway on 12.03.2001 and acknowledged by some person in the office, perhaps the inward clerk, but the copy was received by the Chief Engineer on 19.03.2001. The Chief Engineer filed a petition under Section 34 of the 1996 Act on 10.07.2001 with an application seeking condonation of delay under Section 34(3). The question before the Supreme Court was: Which



was the effective date on which the Award was delivered for the purposes of starting point of limitation under Section 34(3) and in this context the next question that arose was: what is the meaning to be assigned to the term “party”? The Supreme Court observed that in large organisations like Railways “party” referred to in Section 2(h) read with Section 34(3) has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the arbitrator. The Supreme Court noted that in the facts of the case the Chief Engineer had signed the agreement, represented the Union of India in the arbitral proceedings and had direct knowledge of the arbitral proceedings. Significantly, it was also observed that Ministry of Railways has a very large area of operations, covering several divisions and departments. The General Manager is at the very apex of the division with various responsibilities including laying down policies, guidelines, giving administrative instructions, etc. for several departments. The day-to-day management of respective departments rests with the departmental Head, who exactly knows what the case is and is familiar with infirmities in the arbitral award, factual and the legal aspects of the questions involved and is in a position to take a decision to challenge or accept the Award. The Supreme Court observed that delivery of an award under Section 31(5) is not a matter of mere formality but is a matter of substance as it sets in motion several periods of limitation under Section 33(1) and 34(3) and so on. From a reading of this judgment, this Court is unable to accept that the expression “party” would mean a counsel representing a party in the arbitration proceedings.

38. The Supreme Court in *Benarsi Krishna (supra)*, relying on the judgments of the Supreme Court in *Tecco Trichy (supra)*, and *Ark*



Builders (supra), held that it is one thing for an advocate to act and plead on behalf of a party in a proceeding and it is another for an advocate to act as the party himself. The expression “party” defined in Section 2(h) of the 1996 Act clearly indicates a person who is a party to an arbitration agreement. The definition is not qualified in any way to include the agent of the party to such agreement and any reference in Section 31(5) and 34(3) can, therefore, only mean the party and not its agent or an advocate, empowered to act on the basis of a *vakalatnama*. Therefore, receipt of the Award by the counsel on 02.08.2018 cannot be construed as delivery of the signed copy of the Award on the petitioner. It was rightly argued on behalf of the Petitioner that SAIL has steel plants throughout the country, one of them being Bhilai Steel Plant (BSP), which in the present case was party to the contract dated 31.07.2007 and consequently the arbitration clause incorporated therein and therefore, signatory to the arbitration agreement. The arbitral award was received in the Corporate Office of the Petitioner in Delhi in the Legal department on 06.08.2018 and this would be the commencement point of limitation for the purpose of challenging the Award under Section 34(3) of the 1996 Act and not 27.07.2018 or 02.08.2018.

39. Thus, computed from 06.08.2018, the three months limitation period under Section 34(3) expired on 06.11.2018 and Petitioner was under a mandate of law to file the present objections before this date, whereas admittedly the objections were filed on 12.11.2018. Learned senior counsel for the Petitioner, however, urged that the filing was within the limitation period of three months and in support took the Court through the chronology of dates. It was urged that the three months period expired on 06.11.2018 but the High Court was closed on account of Diwali break from



04.11.2018 to 11.11.2018 and petition was filed immediately on 12.11.2018. This fact is not disputed by the Respondent and is fortified by the High Court calendar, which the Court perused during the hearing. Section 4 of the Limitation Act, 1963 provides that where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the Court reopens. This argument of the Petitioner has merit and is accepted.

40. The matter, however, does not rest here. Respondent has raised a serious objection that the petition filed on 12.11.2018 was a *non-est* filing in the eyes of law and to support this pointed out the defects in the filing, which have been elaborately brought forth in the earlier part of the judgment and are not repeated for the sake of brevity. In a nutshell, according to the Respondent, the defects pointed out by the Registry were: (a) Each page of the pleading be signed; (b) Blanks be filled in the Statement of Truth; (c) Statement of Truth be filed as per Commercial Courts Act; (d) Award not filed; (e) Total 300 pages filed without bookmarking and without pagination; (f) Affidavits be filed in support of the petition and applications with complete details of age, address, etc.; (g) Caveat report be obtained; (h) *vakalatnama* be filed and signed by counsel and all Petitioners; (i) All documents and power of attorney be stamped; and (j) Court Fees missing.

41. Both sides relied extensively on several judgments on the issue of *non-est* filing of a petition under Section 34(3) of the 1996 Act. Learned senior counsel for the Respondent pointed out a number of defects which were raised by the Registry when the initial filing of the petition was done on 12.11.2018. Learned Senior counsel for Petitioner broadly urged that all



defects pointed out at the time of filing of the petition are not necessarily fatal and the defects pointed out by the Registry in this case were curable. It was emphasized that as long as the ownership of the documents/petition can be established, filing cannot be termed as *non-est* and in this context heavily on the judgment of the Division Bench of this Court in ***Oriental Insurance (supra)***, where it was held that filing can be considered as *non-est* if petition is filed without signatures of either the party or its authorized and appointed counsel and for every defect, if curable. Right to prefer objections to assail an arbitral award is a valuable right and should not be taken away lightly, unless the party is found to totally callous. It was strenuously urged that the petition filed on 12.08.2018 was a detailed petition with extensive grounds signed by the authorized representative of the Petitioner on every page of the pleading; petition was verified and was signed by the counsel and was accompanied by Statement of Truth and *vakalatnama* with minor defect of absence of the welfare stamp. Requirement of filing the Statement of Truth was introduced by the Commercial Courts Act, 2015 and is applicable to suits and cannot be made strictly applicable to a petition under Section 34. Insofar as the non-filing of the Award along with the petition on 12.11.2018 was concerned, the argument was that this is not a defect which is fatal and in ***Oriental Insurance (supra)***, the Court had condoned the delay in filing the objection petition despite an objection that the Award was not filed at the time of filing the petition within the limitation period. Learned Senior Counsel for the Respondent on the other hand vociferously and with equal eloquence refuted the submission and argued that none of the defects pointed out by the Registry on first filing were curable and in any case, non-filing of the Award and filing defective Statement of Truth was fatal and relied on the



judgments in *Vidya Drolia (supra)*; *Panacea Biotec Limited (supra)*; *Planetcast Technologies Ltd. (supra)*; and *ONGC v. Sai Rama (supra)*.

42. I have perused the judgments produced and relied upon by both sides. Several judgments have been relied upon by both parties dealing with wide range of defects, but to avoid prolixity, I may refer to the judgment of the Supreme Court in *Vidya Drolia (supra)* and judgments of the Division Benches of this Court in *Oriental Insurance (supra)*, *ONGC v. Sai Rama (supra)*, *Planetcast Technologies Ltd. (supra)* and *Panacea Biotec Limited (supra)*, on the aspect of *non-est* filing. In *Vidya Drolia (supra)*, the Supreme Court held as under:

“186. The intention of the legislators to provide for Section 34 in its present form, is to have a limited review of the Award instead of a full-fledged appeal process. A party intending to object to an award, is first required to file an application under Section 34(1) indicating the objections along with the copy of an award and other necessary documents, which are required as proof to satisfy grounds provided under Sections 34(2)(a) and (b) of the Act. Such complete petition is required to be filed within the time period prescribed under Section 34(3) of the Act, failing which the appeal is rendered nugatory. The limitation prescribed under Section 34(3) is bound with the right to file objections itself. The objections filed under Section 34 must be relatable to the limited grounds provided under Section 34(2) of the Act. It is the legislative intention to provide for numerous limitations under Section 34 of the Act, which are required to be strictly adhered to so as to make Indian arbitration time-bound and commercially prudent to opt for the same. Section 37 of the Act, provides for limited appeal against Section 34 order, as well as against certain other specified orders.”

43. In *ONGC v. Sai Rama (supra)*, the Division Bench of this Court observed that every improper filing cannot be called *non-est*. Section 34 of the 1996 Act does not specify any particular procedure for filing an application to set aside the Award, however, it does set out the grounds on which such application can be made. Thus, the first and foremost requirement is that the petition must set out the grounds for setting aside the arbitral award and it is also necessary that the application is



accompanied by a copy of the Award as without a copy of the Award, which is challenged, it would be impossible to appreciate the grounds to set aside the same. Relevant passages from the judgment are as follows:

“32. It is material to note that Section 34 of the A&C Act does not specify any particular procedure for filing an application to set aside the arbitral award. However, it does set out the grounds on which such an application can be made. Thus, the first and foremost requirement for an application under Section 34 of the A&C Act is that it should set out the grounds on which the applicant seeks setting aside of the arbitral award. It is also necessary that the application be accompanied by a copy of the Award as without a copy of the Award, which is challenged, it would be impossible to appreciate the grounds to set aside the Award. In addition to the above, the application must state the name of the parties and the bare facts in the context of which the applicants seek setting aside of the arbitral award.

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37. It is, thus, necessary to bear in mind the distinction between the procedural requirements that can be cured and those defects that are so fundamental that the application cannot be considered as an application under Section 34 of the A&C Act, at all.

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41. We may also add that in given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as non est. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is non est. In order to consider the question whether a filing is non est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award; and the contents set out the material particulars including the names of the parties and the grounds for impugning the Award.”

44. In ***Panacea Biotec Limited (supra)***, the Division Bench was once again called upon to consider the issue of *non-est* filing in the context of a Section 34 petition. The Court held that Section 34(3) prescribes the procedure with regard to filing an application to challenge the Award. However, for ascertaining the date of filing, nature of defects noted in the petition play a significant role. On the specific issue of non-filing of the copy of the Award the Division Bench held as under:



“25. The first deficiency in the filing of the Objections under Section 34 of the Act, 1996 was that the Award was not filed along with the Petitions. A question arises if an application filed under Section 34 of the Act, 1996 which is not accompanied by a certified copy of the Award despite having received the Award, should be considered as a formal or a fatal defect.

26. The significance of filing of the Award along with the Section 34 Petition can be understood by referring to Section 39 of the Arbitration Act, 1940 which provides for an Appeal against an Order setting aside or refusing to set aside an Award. Section 41 of the Arbitration Act, 1940 requires the form and contents of an appeal under Section 39 to be in accordance to the provisions of the CPC i.e. Order XLI Rule 1 CPC as held in *Superintending Engineer v. B Subba Reddy*, (1999) 4 SCC 423.

27. Pertinently, such a specification has been excluded in the Act, 1996; in fact, the applicability of CPC has been specifically excluded under Section 19(1) of the Act, 1996. The Act, 1996 does not specify any such procedure or the documents to be accompanied while filing objections against an Award. However, the rules for a proper and valid filing have been applied as general principles of law over the years. Thus, defects in filing must not be of such nature that makes the filing hopelessly inadequate that it fails to hold the character of an application/petition under Section 34 of the Act, 1996.

28. In the case of *Vidya Drolia (supra)*, the Supreme Court explained that the intention of legislators to provide Section 34 of the Act, 1996 in its present form was to have a limited review of the Award instead of a full-fledged appeal process. The limitation prescribed under Section 34(3) is bound with the right to file objections itself. The objections must be relatable to the limited grounds provided under Section 34(2) of the Act. A party intending to object to an award, is first required to file an application under Section 34(1) indicating the objections along with the copy of an award and other necessary documents, which are required as proof to satisfy grounds provided under Section 34(2)(a) and (b) of the Act. Such complete petition is required to be filed within the time period prescribed under Section 34(3) of the Act, failing which the appeal is rendered nugatory.

29. Further, it was the legislative intent to provide fixed time frame for filing the petition under Section 34 which was required to be strictly adhered to so as to make the arbitration time bound and commercially prudent.

30. It is pertinent to note that the Apex Court in *Chintels India Limited v. Builders Private Limited*, (supra) observed that an application under Section 34 of the Act, 1996 must not only be within the time prescribed under Clause 3 of Section 34, but must also be in compliance with Section 34(2) & (2A) by setting out the grounds on which the application is made.

31. The pre-requisite of filing a copy of the impugned Award along with the Petition under Section 34 of the Act, 1996 has been emphasised by this



Court in Executive Engineer v. Shree Ram Construction, (2010) 120 DRJ 615 (DB) and SKS Power Generation (Chhattisgarh) Ltd. v. ISC Projects Private Limited, 2019 SCC OnLine Del 8006.

32. The Division Bench of this Court in Oil and Natural Gas Corporation Ltd. v. Joint Venture of Sai Rama Engineering Enterprises & Megha Engineering and Infrastructure Limited, 2023 SCC OnLine Del 63 had observed that though Section 34 of the Act, 1996 does not prescribe any particular procedure for filing an application to set aside an award, it definitely has to set out the grounds on which the application is made. It was also held that the application has to be accompanied by the impugned Award as it would otherwise be impossible to appreciate the grounds upon which the Award is challenged. It was observed as under:

“42. We may also add that in given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as non est. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is non est. In order to consider the question whether a filing is non est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award; and the contents set out the material particulars including the names of the parties and the grounds for impugning the Award.”

33. Further, in Brahmaputra Cracker and Polymer Ltd. v. Rajshekhar Construction Pvt. Ltd., 2023 SCC OnLine Del 516, the single bench of this Court held as under:

“15. A petition under Section 34 represents a challenge to the Award rendered by the Arbitral Tribunal. A petition which is not accompanied by a copy thereof cannot possibly be understood or recognised as a valid challenge presented under Section 34. The non-filing of the Award would clearly amount to a fundamental defect. This since the Award would constitute an essential element of the filing and be liable to be viewed as an inviolable prerequisite. A petition purporting to be under Section 34 of the Act which neither carries the grounds on which the Award is assailed or one which fails to annex a copy of the same cannot possibly be construed or accepted as an action validly initiated under Section 34 of the Act. It becomes pertinent to note that non-filing of an arbitral award was recognised to be a fundamental defect and one which would clearly render the filing to be non est both in Bharat Biotech as well as in Oil and Natural Gas Corporation Ltd. The basic precept of a non est filing was succinctly explained by the Division Bench in Durga Construction Co. to be a petition or an application filed by a party which is so hopelessly inadequate or suffering from defects which are clearly fundamental to the institution of the proceedings. Clearly therefore and if the aforesaid basic precepts are borne in mind, it is manifest that a petition which purports to be under Section 34 of the



Act cannot possibly be countenanced or accepted as such unless it is accompanied by a copy of the Award.

16. The Court also bears in mind that the filing of a petition or an attempted filing of a petition under Section 34 unaccompanied with a Statement of Truth or the Award should not be lightly countenanced especially where the same may be merely presented in order to stall the limitation period prescribed in Section 34 from commencing. Such attempts have to be clearly discouraged and disapproved. It is to ward off that greater mischief which convinces the Court to hold that the filing of a copy of the Award and the submission of the Statement of Truth must be recognised to be foundational, basic and indispensable requirements of a petition under Section 34 of the Act.”

34. Learned counsel on behalf of the appellant had placed reliance on the case of Ambrosia Corner House (supra), wherein the Single Judge of this Court had held the petition under Section 34 of the Act, 1996 to be valid even though it was not accompanied by the Award. However, the perusal of the judgment itself makes it evident that the impugned Award had not been e-filed in a separate folder as was required under the Delhi High Court (Original Side) Rules, 2018. In those peculiar circumstances, the objections were entertained and the first filing was not found to be non-est. Clearly, it is not as if the Award had not been filed along with the objections under Section 34 of the Act. The facts as involved in Ambrosia Corner House (supra) are, therefore, clearly distinguishable.

35. Further, it is observed that the reliance placed by the Counsels for the Appellants on Practice Direction issued by the Hon'ble High Court dated 30.08.2010 providing for the summoning of the entire Arbitral Record by the Court, is misplaced. A procedure enabling the Court to summon the Arbitral record cannot be equated with the requirement of the petitioner to file a petition accompanied by an Award. The arbitral record is of the entire proceeding which may be called subsequently, only when merit is found in the Petition under Section 34 of the Act, 1996 in the first instance, which the Court would be handicapped if Award is not filed in the first instance.

36. Therefore, it has been consistently held that non filing of the Award along with the Petition under Section 34 of the Act, 1996 is a fatal defect, making such filing as non-est. The objections under Section 34 must be on justiciable grounds as prescribed under Section 34(2) as such grounds can be ascertained only by referring to the Award made by the learned Arbitrator. The filing of an Award is not an empty procedural requirement since sans the Award, the Court is left absolutely clueless to comprehend the grounds taken in the objection Petition and thereby unable to decide whether the Petition merits Notice to be issued or outright rejection. In the absence of the Award, the grounds on which the objections have been taken cannot be appreciated and considered if they are within the scope of Section 34(2) and thus, such filing of objections without the impugned



Award render the entire objections incomprehensible for consideration under Section 34 of the Act, 1996.

37. The Award is, therefore, an absolute essential for the Court to proceed further, meaning thereby that the Court cannot proceed further until the Award is filed. The first step would commence only on filing of the Award and therefore, effective date of filing necessarily would be the date of filing of Award in support of the Petition and till then it cannot be considered valid filing. The necessary corollary is that non-filing of the Award is a fatal defect making the filing as non-est.

38. In the cases under consideration, in the present Appeal, the objections had been filed without being accompanied by the Award, which has been belatedly filed only on second re-filing dated 31.07.2019, which is beyond the period of three months and thirty days. It is a defect which is fatal and makes the initial filing on 31.05 2019 and subsequent dates of re-filing till 31.07.2019, as non-est.”

45. Following the aforesaid judgments, recently a Coordinate Bench of this Court in ***Union of India v. NCC Limited, OMP (COMM) 66/2023*** decided on 23.02.2024, dismissed the petition for want of copy of the Award at the time when the petition was originally filed. Therefore, the common thread that runs in all these judgments is that filing of a petition under Section 34 of the 1996 Act without the copy of the Award, is a *non-est* filing. Importance of filing an Award along with the petition cannot be underplayed for another reason. Section 31 of the 1996 Act deals with “Form and contents of arbitral award” and sub-Section (5) mandates that signed copy of the Award shall be delivered to each party. From years, there have been serious debates and arguments on different issues related to delivery of an Award on a party to the arbitration proceedings, such as date and mode of service and recipient of the Award and several judgments have been rendered on these issues. In fact, even in the present case, the date of delivery of the Award and the party on whom it was delivered, are the contentious issues between the parties. This being the importance and significance of delivery of an Award under Section 31(5), the question that begs an answer is: Can a party, which seriously argues on the date of



delivery of an award, casually argue that non-filing of the Award with a petition under Section 34 of the 1996 Act is inconsequential and the answer can only be an emphatic “No”. Clearly it cannot be comprehended that a petition filed to challenge an arbitral award, will be filed without the award under challenge.

46. Coming back to the facts, the undisputed position is that the arbitral award was not filed along with the petition on 12.11.2018, when it was originally filed and there were serious defects in the Statement of Truth and signing of affidavits, applications and power of attorneys etc. Even if for the sake of argument, Court was to overlook the other defects, which according to the Petitioner are curable in terms of the judgements cited, the filing was *non-est* being without the Award. It was argued on behalf of the Petitioner that the Division Benches in **ONGC v. Sai Rama (supra)**, and **Panacea Biotec Limited (supra)**, have not considered the earlier judgment in **Oriental Insurance (supra)** and are *per incuriam*. This Court is unable to agree with the Petitioner on this score as in **Oriental Insurance (supra)**, the Division Bench has not specifically dealt with the issue of non-filing of the Award and findings were rendered cumulatively. Moreover, the Supreme Court in **Vidya Drolia (supra)**, has held that party intending to object to an award is first required to file an application under Section 34(1) along with the copy of the Award, which view is binding on this Court even if *obiter dicta*.

47. Once it is found that the filing on 12.11.2018 was *non-est*, the consequence is that the petition was not filed within the limitation period of three months prescribed under 34(3) of the 1996 Act. Proviso to Section 34(3), however, provides a condonable period of 30 days beyond 3 months and if the Court is satisfied that the applicant was prevented by sufficient



cause from making the application within three months, it may condone the delay. The power is, however, circumscribed by a caveat that condonation cannot be granted beyond a period of 30 days as the legislature has used the expression “but not thereafter”. The next and the only other question that remains to be examined in the context of the petition being allegedly time barred is, therefore, to see if the re-filing of the petition was within 30 days from the date of expiry of 3 months limitation period and the nature of the filing, if the answer to the first question is in the affirmative.

48. Indisputably the limitation period of three months expired on 06.11.2018. The filing was done on 12.11.2018 on account of the High Court being closed for vacation till 11.11.2018. The 30 days period within which the delay can be condoned would commence from 06.11.2018 and expire on 06.12.2018 and, therefore, if a proper petition was not filed on or before 06.11.2018, this Court would have no power to condone the delay. Having perused the filing log and the objections pointed out by either side this Court finds that when the petition was re-filed on 06.12.2018, it was accompanied by the Award and all material defects had been removed, save and except, some minor defects such as plaint did not contain a statement notifying the authenticity of the documents/copies filed, Index-III was not signed etc. which in my view, cannot lead to terming the filing as *non-est* and these were also removed on 07.12.2018. In **ONGC v. Sai Rama (supra)**, the Division Bench observed as under:-

“37. It is, thus, necessary to bear in mind the distinction between the procedural requirements that can be cured and those defects that are so fundamental that the application cannot be considered as an application under Section 34 of the A&C Act, at all.

38. In the facts of the present case, the application filed on 23.01.2019 was not an application assailing the impugned award. That filing was clearly *non est*. Similarly, as the application filed on 04.02.2019 also related to another matter, which could not be considered as an application assailing the impugned award. The filing on 22.02.2019 was only 10 pages



of an Index. This too could not be construed as an application; however, the application filed on 20.02.2019 and 23.02.2019 cannot be construed to be non est.

39. *The defects as noted by the Registry in the filing log relating to the application filed on 20.02.2019 reads as under: -*

“TOTAL 6313 PAGES FILED. CAVEAT REPORT BE OBTAINED. COURT FEE BE PAID. AFFIDAVITS NOT ATTESTED NOT SIGNED. PLEASE CORRECT THE BOOKMARKING. VOLUMNS OF DOUCMENTS BE MADE. IN ADDITION TO THE E-FILING, IT IS MANDANTORY TO FILE HARD COPIES OF THE FRESH MATTERS FILED UNDER SECTION 9, 11 AND 34 OF THE ARB. ACT. 1996 WITH EFFECT FROM 22.10.2018. ORIENTATION OF DOCUMENTS BE CORRECT. PLEASE CORRECT THE BOOKMAKRING. ALL INDEXES BE PAGINATED.”

40. *It is relevant to note that the affidavits accompanying the application filed on 20.02.2019 were signed but not attested and to that extent, the defects as pointed out are not accurate. It is clear from the above, that none of the defects are fundamental as to render the application as non est in the eyes of law. All the defects, as pointed out, are curable defects. It is settled law that any defect in an affidavit supporting pleadings can be cured. It is seen from the record that the filing was also accompanied by an executed vakalatnama, however, the same was not stamped. It is also settled law that filing of a court fee is necessary, however, the defect in not filing the court fee along with the application can be cured. In view of above, we are unable to accept that the application, as filed on 20.02.2019 or thereafter on 23.02.2019, was non est.*

41. *We may also add that in given cases there may be a multitude of defects. Each of the defects considered separately may be insufficient to render the filing as non est. However, if these defects are considered cumulatively, it may lead to the conclusion that the filing is non est. In order to consider the question whether a filing is non est, the court must address the question whether the application, as filed, is intelligible, its filing has been authorised; it is accompanied by an award; and the contents set out the material particulars including the names of the parties and the grounds for impugning the Award.”*

49. I am of the view that complete petition was filed along with the Award on 06.12.2018 and the filing on this day cannot be termed as *non-est*. Therefore, if the Petitioner is able to make out a sufficient cause, delay can be condoned. Application has been filed on behalf of the Petitioner under Section 5 of the Limitation Act seeking condonation of delay



supported by an additional affidavit explaining the reasons for delay. It is stated that by an e-mail the original signed copy of the Award was received by the counsel for the Petitioner on 02.08.2018 (Thursday) *albeit* the same ought to have been delivered to the party to the arbitration agreement. The original signed copy of the Award was sent by the counsel to the legal department of the Petitioner at the Corporate Office in Delhi and was received on 06.08.2018 (Monday). Legal opinion was sent by the counsel on 17.08.2018 advising to challenge the Award. BSP was the signatory to the arbitration agreement. Plant was headed by the CEO, who alone had the power to decide whether to challenge the Award or to accept it. The agreement was signed by the Executive Director (Projects) of BSP under the aegis of the CEO. After examination of the Award and the legal opinion, complete files were sent to BSP in the fourth week of August, 2018. All documents etc. were thereafter put up in a note sheet dated 31.08.2018 for consideration by the Executive Director, BSP on 01.09.2018 and before CEO, BSP on 05.09.2018. The Competent Authority took the decision on the same day, i.e. 05.09.2018 to challenge the Award and was legally advised that the limitation will run from 05.09.2018. The decision was communicated to the legal department at Delhi where in furtherance of taking steps to challenge the Award it was decided to engage a new counsel. Some law firms and counsels were shortlisted and conferences were held to discuss the merits of the matter as also to understand the fee structure. Finally, the matter was entrusted to the counsel with documents in the first week of October, 2018. The documents ran into thousands of pages and after collecting them from the previous counsel were handed over to the new counsel on 12.10.2018. On 29.10.2018 the new counsel informed the officials of the Petitioner that



there were several missing volumes from the record including indexes and annexures in amended pleadings etc. Despite best efforts of the officials, complete record could not be retrieved and with the available material conferences were held between 11.10.2018 to 01.11.2018 for preparing the petition. It is further stated that office of the counsel for the Petitioner was closed for large parts of Diwali vacations from 04.11.2018 to 11.11.2018 and the petition was thus filed on 12.11.2018. As the arbitral record was voluminous running into more than 8000 pages it took time to file the petition. It was argued by the learned Senior counsel that the delay was unintentional, bona fide and beyond the control of the Petitioner. It was also argued that challenging an award is a valuable right and since Petitioner has made out a sufficient cause for not filing the petition within 3 months from the date of receipt of the original signed copy of the Award, the delay be condoned, in the interest of justice.

50. Having considered the explanation in the additional affidavit, this Court is of the view that Petitioner has made out a sufficient cause for condonation of delay. After receipt of the Award by the Legal Department on 06.08.2018, Petitioner's officials diligently pursued the matter for seeking legal opinion from the counsel, engaging a new counsel, holding conferences and discussions and there was no delay on the part of the Competent Authority in taking a decision. Delay is accordingly condoned.

Analysis and Findings on Merits:

51. Present contract relates to installation of 700 TDB ASU4 with associated facilities in Oxygen Plant-II, Bhilai. Under the contract, Respondent was required to design, manufacture and supply the required plant and equipment and erect and commission an ASU for BSP in 24 months. MECON was appointed as the Technical Consultant for the



project. Contract price was USD 26,912,000 and a sum of Rs.146,66,053/- was to be paid as CENVAT credit. In consonance with Clause 13.2 GCC, Respondent furnished two PBGs dated 21.08.2007 in favour of the Petitioner, one for USD 13,45,600 and the other in the sum of Rs.86,97,416/-. The contract was terminated by the Petitioner vide letter dated 01.07.2008.

52. The contract comprised of the main contract agreement; SCC; GCC; Contract Technical Specifications; General Technical Specifications; and safety in contract works. Relevant contractual provisions are as under:-

a. The Contract

“3.1 Effective Date (Reference GCC Clause 1)

The Effective Date of Contract is the date of signing the Contract. The Performance Bank Guarantee will be submitted by the contractor within 30 (thirty) days of signing of the contract.

Following actions are envisaged:

The letter of credit (L/C) shall be opened by the Employer within 15 (fifteen) days of receipt of Performance Bank Guarantee (PBG) from the contractor in the SBD format.

In case, there is delay in opening of letter of credit by the Employer, then, effective date shall be extended accordingly. However, in case, there is a delay in submission of PBG by the Contractor then the effective date of contract shall remain as date of signing of contract, provided L/C has been opened within 15 (fifteen) days of PBG submission.

5.1 Time for Completion (Reference GCC Clause 8 and Appendix-2)

Time is the essence of the Contract.

The Facilities will be completed in Twenty four (24) months from the Effective Date of the Contract. The Facilities shall be considered as completed on the date of commissioning mentioned in the commissioning certificate issued by the Employer. Performance Guarantee Parameters will be established by the Contractor within a period of six (6) months from the date of Commissioning. The Facilities shall be considered as completed in all respects only after establishment of performance guarantee parameters end completion of Defect Liability period of twelve (12) months from the date of issue of commissioning certificate. Bar Chart indicating the Time Schedule for completion of the Facilities is given in Appendix-2.



The Contractor shall arrange for supplies of the plant & equipment, structures and refractories in the logical sequence required for erection at site within the overall delivery schedule of the Contract as per Sub-Clause 11.7.2 of GCC.

6.2 If there is any difference between the Contractor and the Consultant on any matter about the implementation of this Contract, the matter shall be referred to the Employer, whose decision shall be final and binding on the Contractor and the Consultant.

*9.1.1 Liquidated Damages due to Delay in Completion of Facilities
(Reference GCC Sub-Clause 29.2)*

If the Contractor fails to attain “Completion of the Facilities” as defined in Clause 1 of GCC within the Time for Completion or any extension thereof under Clause 42 (Extension of Time for Completion) of GCC due to reasons not attributable to the Employer, the Employer shall recover the amount of Liquidated Damages, but not by way of penalty, by making deductions from the Contractor’s account or by encashment of Contractor’s Bank Guarantee (as per Sub-Clause 13.1.2 of GCC), at the rate of 0.5% of the total Contract Price plus escalations, if any, excluding taxes and duties paid or payable to the Contractor, per complete week of delay up to a maximum of 6% of the Contract Price plus escalation if any, excluding taxes and duties paid or payable to the Contractor, as specified in the Clause 29.2 of GCC.

In case, the Contractor is a Consortium, the Employer shall recover the amount of Liquidated Damages, but not by way of penalty, by making deductions from the account of each member of Consortium, or by encashment of their Bank Guarantees as per above clause, up to a maximum of 5% of the Contract Price plus escalation, if any, excluding taxes and duties of the respective Scope of Facilities as specified in Sub-Clause 7.11.1 of GCC. However, each member of Consortium shall be jointly and severally bound to the Employer for paying Liquidated Damages.”

b. The GCC

1.1 The following words and expressions shall have the meanings hereby assigned to them:

“Contract” means the Contract Agreement entered into between the Employer and the Contractor, together with the Contract Documents referred to therein; they shall constitute the Contract and the term “the Contract” shall in all such documents be construed accordingly.

“Contract Documents” means the documents listed in Article 1.2 (Contract Documents) of the Contract Agreement (including any amendments thereto).

“GCC” means the General Conditions of Contract hereof.



“SCC” means the Special Conditions of Contract.

“Technical Specifications” mean the technical specifications, schedules, detailed designs, statements of technical data, performance characteristics value and all other particulars of the Contract.

“GTS” means the General Technical Specifications.

“Day” means calendar day of the Gregorian Calendar.

“Month” means calendar month of the Gregorian Calendar.

“Employer” means Steel Authority of India Limited (SAIL), Bhilai Steel Plant and includes the legal successors or permitted assigns of the Employer.

“Engineer” means the person appointed by the Employer in the manner provided in Sub-Clause 17.1 (Engineer) hereof and to perform the duties delegated by the Employer.

“Consultant” means the person(s) named as such in the clauses 1.4 of SCC to perform the duties delegated by the Employer as specified in the Article 6 of the Contract Agreement.

“Contractor” means the person(s) whose bid to perform the contract has been accepted by the Employer and is named as such in the Contract Agreement, and includes the legal successors or permitted assigns of the Contractor. In case Contract is with Consortium of two or more members then the Contractor shall mean one or more members of Consortium as the case may be

“Contractor’s Representative” means any person nominated by the Contractor and approved by the Employer in the manner provided in Sub-Clause 17.2 (Contractor’s Representative) hereof to perform the duties delegated by the contractor. For side work Contractor’s Representative shall also mean the representative of Sub-Contractors and Sub-Contractor’s Sub-Contractors.

“Sub-Contractor”, including vendors, means any person to whom execution of any part of the Facilities, including preparation of any design or supply of any plant and Equipment is sub-Contracted directly or indirectly by the Contractor, and includes its legal successors or permitted assigns.

“Contract Price” means the sum specified in Article 2.1 (Contract Price) of the Contract Agreement, subject to such additions and adjustments thereto or deductions therefrom, as may be made pursuant to the Contract.

“Base Date” means the date given in Sub-Clause 2.1 of Appendix-4 which shall be considered in price variation formulae as given in Sub-Clause 2.3 to 2.9 of Appendix-4 of Contract Agreement.



“Facilities” mean the work specified in Clause 7 hereof, Technical Specification & Clause 1.4 of Appendix 1 and include the design & engineering work, civil engineering work, supply of the steel structures, plant and equipment, refractories & commissioning spares and installation services to be carried out by the Contractor under the Contract.

“Plant and Equipment” means permanent plant, equipment, machinery and things of all kinds to be provided and incorporated in the Facilities by the Contractor under the Contract but does not include Contractor’s Equipment.

“Installation Services” means all those services ancillary to the supply of the Plant and Equipment for the Facilities, to be provided by the Contractor under the Contract e.g., design & engineering, supervision work, Customs & Port clearances, loading & unloading, dismantling & modification, Intermediate storage, transportation and provision of marine or other similar insurance, inspection, expediting, site preparation works (Including the provision and use of Contractor’s Equipment and the supply of all construction materials required), installation, testing, pre-commissioning, commissioning, demonstration of performance guarantee tests, the provision of operations and maintenance manuals, training, etc.

“Contractor’s Equipment” means all plant equipment, machinery, tools, apparatus, appliances or things of every kind required in or for installation completion and maintenance of Facilities that are to be provided by the Contractor, but does not include Plant & Equipment, or other things intended to form or forming part of the Facilities.

“Site” means the land and other places upon which the Facilities are to be installed, and such other land or places as may be specified in the Contract as forming part of the Site.

“Effective Date” means the date of signing of Contract Agreement.

“Time for Completion” means the time specified in Article 5.1 within which completion of the Facilities as a whole (or of a part of the Facilities where a separate Time for Completion of such part has been prescribed) is to be attained in accordance with the stipulations made in the Contract Agreement and the relevant provisions of the Contract.

“Inspector”/“Inspecting Engineer” shall mean any person or firm nominated by or on behalf of the Employer or his duty authorized agent to inspect equipment, materials, supplies or work under the Contract.

“Pre-commissioning” means the checking, testing including conducting of Integrated trial runs (cold integrated trial runs in case



of Facilities involving operation at high temperature) and meeting other requirements specified in the Technical Specifications that are to be carried out by the Contractor in preparation for commissioning as provided in Clause 24 (Preliminary Acceptance) hereof.

“Preliminary Acceptance” of the Facilities means that the Facilities have been completed operationally and structurally and put in a light and clean condition, and that all work in respect of Pre-commissioning of the Facilities have been completed; in other words, that the Facilities are fit for start-up & Commissioning and Preliminary Acceptance Certificate has been issued as provided in Clause 24 (Preliminary Acceptance) hereof.

“Preliminary Acceptance Certificate” means the Certificate to be issued by the Employer on successful completion of Preliminary Acceptance Tests.

“Commissioning” means operation of the Facilities by the Contractor to a level of output not less than 98% of the Guaranteed Production Capacity as provided in Clause 25 (Commissioning) hereof.

“Commissioning Certificate” is the Certificate to be issued by the Employer as per Sub-Clause 25.3 hereof.

“Completion of the Facilities” means the Facilities have been commissioned as per Clause 25 (Commissioning). The Facilities will be considered completed in all respects and accepted when performance guarantee parameters are established as per Clause 27 (Performance Guarantee Test) and Final Acceptance Certificate has been issued as per Clause 28 hereof.

“Taking Over” means the Employer, after issue of the Commissioning Certificate, shall be responsible for the care & custody of the Facilities together with the risk of loss or damage thereto, and shall thereafter take-over the Facilities.

“Performance Guarantee Test” means the test(s) specified in the Technical Specifications to be carried out to ascertain whether the Facilities are able to attain the Performance Guarantees specified in the Technical Specifications in accordance with the provisions of Clause 27 (Performance Guarantee Test) hereof.

“Final Acceptance” means the acceptance by the Employer of the Facilities which certifies the Contractor’s fulfilment of the Contract in all respect including Performance Guarantees of the Facilities in accordance with the provisions of Clause 27 (Performance Guarantees Test) hereof.

“Final Acceptance Certificate” is the Certificate to be issued by the Employer as per Clause 28 hereof.



“Defect Liability Period” means the period of validity of the warranties given by the Contractor commencing from the date of issue of Commissioning Certificate of the Facilities, during which the Contractor is responsible for defects with respect to the Facilities as provided in Clause 30 (Defect Liability) hereof.

3.6 Entire Agreement

The Contract constitutes the entire agreement between the Employer and Contractor with respect to the subject matter of Contract and supersedes all communications, negotiations and agreements (whether written or oral) of parties with respect thereto made prior to the date of Contract.

13.5 Claims under Security (Bank Guarantee)

If the Employer considers itself entitled to any claim under any Bank Guarantee, it shall so notify the Contractor by registered airmail post specifying the default of the Contractor upon which it bases its claim, and it shall require the Contractor to remedy the same. If the Contractor fails to remedy or to take steps to remedy the same within fourteen days of receipt of such notice, then the Employer shall be entitled to call Security.

18.3 Progress Report

18.3.1 The contractor shall monitor progress of all the activities specified in the program referred to in sub-clause 18.2 (program of performance) hereof, and submit to the engineer a progress report along with computerized network analysis report every month.

18.3.2. The progress report shall be in a form acceptable to the engineer and shall indicate: (a) percentage achieved compared with the planned percentage completion for each activity; and (b) where any activity is behind the program, giving comments and likely consequences and stating the corrective action being taken.

18.4 Progress of Performance

18.4.1 If at any time the contractor's actual progress fall behind the program referred to in sub-clause 18.2 (program of performance) hereof or it becomes apparent that it will so fail behind the contractor shall at the request of the engineer prepare and submit to the engineer a revised program, taking into account the prevailing circumstances and shall notify the engineer of the step being taken to expedite progress so as to attain the completion of facilities within the time of completion under sub-clause 18.1 (Time of completion) hereof, or any extension thereof entitled under sub-clause 42.1 (Extension of the time for completion) hereof, any extended period as may otherwise be agreed upon between the employer and the Contractor.

18.5.2 The Contractor may execute the contract in accordance with its own standard project execution plan and procedures to the extent that they do not conflict with the provision contained in the contract.

19.1 List of approved Sub-Contractors/Vendors (Appendix 6) forming a



part of the Contract Agreement, specifies major items of supply or services and indicates name of approved Sub-Contractors/Vendors against each item. Insofar as no Sub-Contractor/Vendor is listed against any such item, the Contractor shall prepare a list of Sub-Contractors/Vendors for such item for inclusion in approved list given in Appendix-8 of the Contract Agreement.

The Employer shall give approval or comments on such list of sub-contractor/vendors proposed by a contractor within a period of 15 days.

The Contractor may from time to time propose any addition to approved list to the Employer for its approval in sufficient time so as not to impede the progress of work on the facilities. Such approval by Employer for any of the Sub-Contractors/Vendors shall not relieve the Contractor from any of its obligations, duties or responsibilities under the Contract.

19.2 The Contractor shall select the employ its Sub-Contractors/Vendors for such major item from those listed in its list referred to in Sub-clause 19.1 hereof. No Sub-Contractor/Vendor shall be placed with any such Sub-Contractors/Vendors for additional item until the Sub-Contractors/Vendors have been approved in writing by the Employer and their names have been added in the list of approved Sub-Contractors/Vendors given in Appendix 8 of the Contract Agreement.

20.1.1 The Contractor shall execute the basic and detailed design and the engineering work in compliance with the provision of the Contract, or where not so specified, in accordance with good engineering practice.

20.3.1 The Contractor shall prepare (or cause its Subcontractors to prepare) and furnish to the Engineer/Consultant the drawings/documents listed as Sub-clause 2.2 of Appendix-2 to the Contract Agreement for approval or review as specified and in accordance with the requirements of Sub-Clause 18.2 (Program of Performance) hereof.

20.3.2 Any part of the Facilities covered by or related to the drawings/documents to be approved by the Engineer/Consultant shall be executed only after the Engineer/Consultant's approval thereof.

20.3.5 Within fourteen (14) days after receipt by the Engineer/Consultant of any drawings / document requiring the Engineer / Consultant's approval in accordance with Sub-Clause 20.3.1 to 20.3.3 hereof, the Engineer / Consultant shall either return one copy thereof to the Contractor with its approval endorsed thereon or shall notify the Contractor in writing of its disapproval thereof and the reasons thereof and the modifications that the Engineer/ Consultant proposes.

The Engineer / Consultant will not give any new comments on revised drawing where all the comments have been incorporated in drawings if the Engineer / Consultant approved the drawings / document subject to modifications; the Contractor shall make the required modifications, whereupon the documents shall be deemed to have been approved.

20.3.6 The Engineer / Consultant shall not disapprove any document



except on the ground that the document does not comply with some specified provision of the Contract or that it is contrary to good engineering practice.

20.3.7 If the Engineer / Consultant disapproves the drawing / document, the Contactor shall modify the drawing / document and resubmit it for the Engineer / Consultant's approval in accordance with Sub-Clause 20.3.5 hereof. If the Engineer / Consultant approves the drawing / document subject to modification(s), the Contractor shall make the requirement modification, whereupon the document shall be deemed to have been approved.

29.2.1 If the Contractor fails to attain completion of the Facilities as defined in Clause 1 hereof, within the Time for Completion or any extension thereof under Clause 42 (Extension of Time for Completion) hereof, due to reasons not attributable to the Employer, the Employer shall recover the amount of Liquidated Damages, but not by way of penalty, by making deductions from the Contractor's account or by encashment of Contractor's Bank Guarantee at the rate of 0.5% of the Contract Price, per complete week of delay up to a maximum of 5% of the Contract price plus escalation, if any, excluding taxes and duties.

42.1 The Time(s) for Completion specified in the Appendix-2 shall be extended if the Contractor is delayed or impeded in the performance of any of its obligations under the Contract by reason of any of the following:

- a) any change in the Facilities as provided in Clause 41 (Change in the Facilities) hereof*
- b) any occurrence of Force Majeure as provided in Clause 39 (Force Majeure) hereof, or other occurrence of any of the matters specified or referred to in paragraphs (a) and (b) of Sub-Clause 34.2 hereof*
- c) any suspension order given by the Employer under Clause 43 (Suspension) hereof*
- d) The default by the Employer under Clause 10 hereof, if proved to be cause for delay in completion of the Facilities*

by such period as shall be fair reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor.

44.1 Termination for Employer's Convenience

44.1.1 The Employer may at any time terminate the Contract for any reason by giving the Contractor a notice of termination that refers to Clause 44.1 hereof.

44.1.2 Upon receipt of the notice of termination under Sub-Clause 44.1.1 hereof, the Contractor shall either immediately or upon the date specified in the notice of termination

- a) cease all further work, except for such work as the Employer may specify in the notice of termination for the sole purpose of protecting that part of the Facilities already executed, or any work required to*



leave the Site in a clean and safe condition

b) terminate all Subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) (II) below

c) remove all Contractor's Equipment from the Site, repatriate the Contractor's and its Subcontractors' personnel from the Site, remove from the Site any wreckage, rubbish and debris of any kind, and leave the whole of the Site in a clean and safe condition

d) In addition, the Contractor, subject to the payment specified In Sub Clause 44.1.3 hereof, shall

(i) deliver to the Employer the parts, of the Facilities executed by the Contractor up to the data of termination

(ii) to the extent legally possible, assign to the Employer all/ right, title and benefit of the Contractor to the Facilities and to the Plant and Equipment as at the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors

(iii) deliver to the Employer all drawings, specifications and other documents prepared by the Contractor or its Subcontractors as at the date of termination in connection with the Facilities.

44.2 Termination for Contractor's Default

44.2.2 If the Contractor

(a) has abandoned or repudiated the Contract

(b) has without valid reason failed to commence work on the Facilities promptly or has suspended the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed.

(c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause

(d) refuses or is unable to provide sufficient materials, services or labour (adequate resources) to execute and complete the Facilities in the manner specified in the program furnished under Clause 18 (Program of Performance) hereof, at rates of progress that give reasonable assurance to the Employer that the Contractor can attain completion of the Facilities by the Time for Completion as per Clause 8 hereof,

Then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor falls to remedy or to take steps to remedy the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the contract forthwith by giving a notice of



termination to the Contractor that refers to this Sub-Clause 44.2 hereof.

c. Appendix-2

1.1 The Facilities will be commissioned within 24 months from the effective date of the Contract as per Article 5 of the Contract Agreement and guaranteed performance parameters will be established by the contractor within six (6) months from the date of commissioning.(..)

2.1 Within four weeks from the Effective Date of Contract, the Contractor shall submit to the Engineer/Consultant preliminary list of all drawings and documents by title using the approved numbering system and indicating the schedule of submission of drawings in conformity with the time schedule given in clauses 2.2 and 2.3 hereof. This list shall be updated and submitted by the Contractor at the end of every quarter of the year.

d. Technical Specifications

03.04 The Tenderer may offer any alternative scheme or modification to the plant and equipment that he may think necessary for better performance of the plant. So far as that does not affect the overall description and specification of the unit. However, prior approval for all such alteration and modification shall have to be obtained from the Purchaser, Price alteration, if any, for such alternate proposal will be indicated separately.

06.02.07 List Of Preferred Makes

Tenderer shall refer "Preferred Makes Of Equipments & Supplies" attached as part of the Sep for the makes of various equipment & supplies as well as instructions for the same.

The makes of equipments shall be selected from makes & types being regularly used in plants that are working satisfactorily.

Reference list shall be provided by the Tenderer along with offer.

Tenderer shall clarify any deviation required in the offer. For heat exchangers vendors should have ASME U-stamp & ISO 9000 certification.

Makes for additional technological items is given below:

Technological Equipment

MAIN AIR COMPRESSOR & BOOSTER AIR COMPRESSOR & NITROGEN COMPRESSOR	: SIEMENS (DEMAG), ATLAS COPCO, KOBE MANTARBO, COOPER
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**BRAZED ALUMINIUM EXCHANGER: VENDER SHOULD BE
MEMBER OF ALPEMA**

EXPANSION TURBINES	: ATLAS, COPCO, CRYOSTAR PRAX AIR
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CRYOGENIC PUMPS (HPDUTY) : *CRYOSTAR, CRYOPUMP, ACD
CRYOMECH, ATLAS, COPCO*

OTHER CRYO PUMPS : *INDIAN COMPRESSORS LTD*
H T MOTORS *SEIMENS, ABB, GE, ALSTHOM*

53. Upon termination of the contract, Respondent sent a Request for Arbitration and a Three-Member Arbitral Tribunal was constituted. Parties filed their respective claims and counter-claims and based on the pleadings, Tribunal settled the following issues:

1.	Whether the delay in performance and execution of the Contract is attributable to the Claimant or the Respondent?
2.	Whether the suggestion of alternate schemes/modifications/deviations by the Claimant to the plant and equipment amounted to a breach of the Contract?
3.	Whether the termination of the Contract by the Respondent for setting up of a 700 TPD ASU with associated facilities at the Bhilai Steel Plant under clause 44.2 of the General Conditions of the Contract was just, proper and legal?
4.	Whether the risk purchase action by the Respondent, was just proper and legal?
5.	Whether the encashment of the Performance Bank Guarantees by the Respondent was just, proper and legal? If not, then whether the Claimant is entitled to damages towards the illegal encashment of the Performance Bank Guarantees?
6.	Whether the Claimant is entitled to damages on account of expenses incurred for preparation of drawings and documents on Basic Engineering Drawings and Detailed Design Engineering Drawings under the Contract? If yes, then in what amount?
7.	Whether the Claimant is entitled to damages on account of advance payments made by the Claimant to the vendors? If yes, then in what amount?
8.	Whether the Claimant is entitled to damages towards expenses incurred by the Claimant towards performance of the Contract? If yes, then in what amount?
9.	Whether the Claimant is entitled to damages towards loss of profit and goodwill? If so, then in what amount?
10.	Whether the Respondent is entitled to damages on account of differential contract price, for having to contract with an alternative agency for execution of the project?
11.	Whether the Respondent is entitled to damages on account of additional cost of power consumption?
12.	Whether the Respondent is entitled to differential cost of Oxygen purchased by the Respondent for the quantity of 172621.344 MT for the period 01.08.2009+ to 24.05.2011?
13.	Whether the Respondent is entitled to charges for Letter of Credit for 8 quarters?

54. On issue No.1, Tribunal rendered a finding that it was clear from the evidence that the main reason for rejection of BEDs was the changes



proposed to the TS in accordance with Clause 03.04, but the Petitioner wrongly took exception to any changes whatsoever. The reason for rejecting the BEDs was that Respondent ought to have provided BEDs reflecting the TS of various LDIs after placing orders with the vendors to which Respondent had an issue as this was contrary to industry practice, which required approval of BEDs before LDIs were ordered. Tribunal observed that BEDs were submitted by the Respondent by 17.12.2007 and simultaneously, Respondent was making enquiries from various vendors of LDIs with the intent to place orders when the BEDs were approved. Despite many reminders to approve BEDs, Petitioner delayed approvals and consequently, LDIs were delayed. Despite BEDs not being approved, Respondent, in order to ensure timely completion of the contract, did infact place orders for Main Heat Exchange etc. by 18.02.2008 and made advance payments. Respondent submitted its monthly progress reports regularly with action plans and fulfilled its duties under Clauses 18.03 and 18.04 of GCC. On the aspect of BEDs, Tribunal found that there was no breach by the Respondent of its obligations to produce DEDs and observed that in accordance with the industry practice, DEDs could only be finalized after approval of BEDs. Tribunal accepted that Respondent had done all it could to progress the civil works and site preparation as well as erection prior to approval of BEDs and the drawings and documents for the equipment to be ordered for the execution of the works, was wrongfully delayed by the Petitioner. To come to these conclusions, the Tribunal placed reliance on communications, evidence of witnesses including expert witnesses. Significantly, on MECON's performance, reference was made to 'Report of the Comptroller and Auditor General of India on Modernization and Expansion in Steel Authority of India Ltd.' Mr. Jones, Respondent's



witness had particularly relied on this in his reports and oral evidence. He stated that the report revealed the stand of the Ministry that at all times, more number of drawings were available than required for execution of the projects as the contractors were able to supply the drawings but the bigger issue was that the drawings were not getting approved. The Tribunal notes that the report also criticized lack of a consistent policy regarding appointment of Consultants and that there was an acute shortage of skilled supervisors and surveyors in MECON, which according to Mr. Nehru, had nothing to do with the project. On this report, the Tribunal observed that the complaints about lack of resources of MECON and slow approvals bear a close analogy to the experience on this project, as borne out from the records.

55. On the aspect of rejection of alternative schemes/modifications/deviations proposed by the Respondent to the plant and equipment, in terms of Clause 03.04 of TS, Tribunal observed that Respondent had an undoubted right to propose alternate schemes and modifications to the TS. The requisites for such proposals would, however, be that Respondent believes that proposed modification is necessary for better performance of the plant and does not affect the overall description and specifications of the unit and importantly prior approval of the Petitioner was must. Interpreting the mutual obligations under Clause 03.04, Tribunal held that when the Petitioner received an alternate scheme/modification or deviation to the TS of the contract, it was obliged to review the proposal against the parameters stipulated in Clause 03.04 and approve it if Respondent believed it was necessary for better performance of the plant and there was no compelling technical reasons to doubt it and it did not affect the overall description/specifications, but Petitioner could not reject the proposal on



any other ground. Tribunal further held that under Article 7 of the Contract and Clause 19 GCC, Respondent was under a mandate to engage vendors/sub-contractors, who were approved by the Petitioner and included in the approved list in Appendix-6 of the Contract. Both these provisions permitted the Respondent to propose additions or deletions from the list for Petitioner's approval. Clause 06.02.07 of TS also provided for an indication of preferred makers and Respondent maintained the list, which could be modified on the strength of Clause 03.04. Having so held, the Tribunal examined the specific modifications requested by the Respondent and the Petitioner's reasoning for not approving.

56. Under the head 'PPU', based on sound reasoning the Tribunal rendered a finding that Petitioner did not put forward any technical reason for rejecting the proposed PPU prior to termination of the contract other than the ground that it was not in accordance with the contract. In Tribunal's opinion, the explanations provided by Petitioner's witnesses were not acceptable as against the stand of the Respondent who had constructed 600 ASUs. Relevant part of the Award is as follows:-

"14.45 PPU is the pre-purification unit, which is part of the TSA. The TSA performs the function of absorbing impurities in the air, so that dust, carbon monoxide, and moisture are removed. There are two beds, so that when one is in use, the other is regenerated.

14.46 Prior to the Contract on 6 June 2007 the Claimant replied to technical queries, including at item 2, and further at A2

"2.	"Please indicate the specific features of your Air Purification System, which result in lower air loss of 0.3% instead of 2%.	Volume of gas in the absorber (including absorbed gas and volume of free space) equals 1579 Nm ³ . Loss of gas happens once in 8 hours during pressure release. Specific loss of gas = (1570 Nm ³ /1.9 x 600.3 x 8 hour 100% = 0.2% (check)."
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At A2, of the letter it was provided by the Claimant that the cycle time was (a) 2295 br (heating) (b) 5,11 br (cooling) and (c) 0.495 pressurisation time and 0.076 equalisation time; and absorbing time of 8 hours. It should be noted that the November 2006 Technical Specification sent to renderers, including the Claimant, in C2 on page 17 did not specify any



periods for cycle time, absorption or regeneration. All that was generally specified was a "regeneration system", with two sets of vessels (beds). The Respondent contends that the Claimant clearly indicated that they would supply a PPU which would have an 8 hour time for absorption and regeneration respectively. Refer to paragraph VIA. I, page 8 of the Respondent's Closing Submissions. Mr Shipov was asked by Mr Advani whether in the extracts above from the Claimant's letter of 6 June 2007, the Claimant was offering a lower air loss of 0.2% instead of 2% if the absorption cycle was for 8 hours and he answered that the Claimant did not say the loss of gas would become less from 2% to 0.2% but informed only if the cycle of absorption was 8 hours, the loss will be 0.2%. Ms Tarasova stated during cross-examination that this was offered because the Respondent had asked them to provide an absorption cycle of 8 hours, and regeneration time of 8 hours and it was possible.

14.47 The relevant provision in the Contract relating to the PPU is clause 06-02-03 of the Technical Specifications which specifies a radial bed type with an 8 hour duty cycle. A duty cycle is a repeated sequence of actions from the initial state to an identical initial state, which includes both adsorption and regeneration.

“02. Air Purification System

Adsorber Radial bed type with 8 hrs duty cycle with design margin of 51-90 min in case of delayed changeover.

Quantity One set of two vessels, capacity 2 x 100%.”

It is to be noted that there is no specified time for adsorption and regeneration. This provision was the same in the Tender Technical Specifications, and Mr Nehru admitted in cross-examination no mention was made of adsorption time.

14.48 On 14 December 2007, the Claimant submitted its design, which for the PPU had a complete cycle time of 8 hours with 4 hours for adsorption, and 4 for regeneration.

14.49 On 19 December 2007, the Claimant wrote to the Respondent, with various Addendums describing the basis of proposed technical solutions for PPP Addendum 6 stating:

"Addendum 6 Pre-purification unit (PPU)

The existing PPU of ASU-3 (QP-II BSP) made by BOC has 8 hours cycle of absorption. It is caused by the axial direction of flow in absorber. In order to make the speed of air acceptable for absorption you have to increase the diameter of absorber till more than 4m. It leads to necessity to make the height of the absorber not less than 4m. the amount of absorbent in such design shall be very big and enough for 8 hours of absorption.

The modern design of absorbers made by Cryogenmash has radial direction of air flow. This fact allows minimising the dimensions of



absorber and making it convenient for transportation by railways. That gives an opportunity to manufacture the absorber at our facilities, test it and deliver ready for installation at your site. The minimising of dimensions leads to 4 hour cycle of absorption. This parameter doesn't influence on anything in ASU but gives us an opportunity to use our standard solution (no waste of time), minimise the dimensions (no problems in delivery, assembling at site), to supply you the most guaranteed reliance PPU.

Taking into consideration the above mentioned aspects we do hope to receive your approval for 4 hours cycle of PPU as we can't proceed to the next step of design and planning the civil works without this decision."

14.50 At a meeting on 20 and 21 December 2007, 256 the Respondent and MECON rejected the Claimants proposal for a 4 hour adsorption and 4 hour regeneration cycle as being "not in accordance with the contract". On 27 December 2007, MECON also wrote to the Claimant advising that at a meeting on 24 and 25 July 2006, the Claimant had confirmed an 8 hour cycle time for adsorption and this was "included in the Contract", and the Claimant "was requesting for major changes in the Technical Specification of PPU which shall have substantial commercial implications due to reduced quantity of adsorbents as well as design and size of PPU system. Accordingly, it is recommended that M/s JSC Crynogen made shall be asked to supply PPU exactly in accordance with their offer and contract via absorption time of 8 hours".

14.51 By letter of 10 January 2008 to the Respondent, the Claimant provided technical justification for the duty cycle of 8 hours with 4 hours for adsorption and 4 hours for regeneration. The Claimant advised of several opportunities about many systems, including PPU to manufacture and supply a 16 hour cycle as well as 8 hours cycle. It referred to the Contract and set out reasons why its proposal satisfied the Contract and in particular item 6:

"6. The designed cycle is the following:

- Absorption	240 min (designed margin in case of delayed changeover - 72 min)
- Heating	76 min
- Cooling	140 min
- Filling	19 min
- Pressure release	5 min
Total	400 min (8 hours)".

14.52 MECON wrote to the Claimant on 14 January 2008, requiring again a PPV with or adsorption time of 8 hours "exactly in line with their offer, MOM and the contract" and warning the Claimant not to seek any delays by seeking modifications "which cannot be entertained at this stage". This was similar to a position adopted by MECON as early as its letter of 20 November 2007.



"The contract with M/s JSC Cryogenmash was signed on 31.07.2007. We regret to inform that M/s JSC Cryogenmash has been asking for several major deviations from the contractual stipulations just after signing the contract. This practice is not acceptable.

M/s JSC Cryogen mash shall note and ensure that the entire project is executed exactly as stipulated in the contract as it will not be possible for ESP to agree for my deviations.

M/s JSC Cryogenmash are contractually bound to execute the project time in line with the contract signed by ESP & JSC Cryogenmash."

14.53 On 18 January 2008, the Claimant in a letter to the Respondent reiterated that the essence of its proposals on the PPV, as explained in subsequent letters was "the absence of any deviation with the contract. We are trying to approve our best solution that is very reliable, and ready for immediate launching into manufacturing."

14.54 From 25 February 2008 to 6 March 2008 meetings took place between the parties, and MECON to try to resolve the technical issues. The minutes are controversial as the Claimant refused to sign them. The minutes state three vendors of PPU were offered by the Claimant, and the third was accepted, with an 8 hour adsorption cycle.

14.55 On 14 April 2008, the Claimant wrote to the Respondent expressing frustration at the deadlock in approval of its proposed PPU:

"If your aim is to break off the contract everything is clear. If you aim is to receive the needed amount of oxygen, nitrogen, and argon for doubling steel production in time then please follow our arguments in our letters H421/18 6095 and 25.12.2007 and H421/18-43 and 10.01.2008."

14.56 On 3 June 2008, the Claimant again referred to its proposal complying with the Contract and previous letters.

14.57 In that termination letter of 1 July 2008, 265 ground 4 relied upon was that the Claimant offered a PPU with 8 hours absorption cycle time. In this offer and "same should have been provided as per provisions of Contract. Insistence of M/s JSC Cryogenmash for providing PPU with 4 hours adsorption time was in violation of agreed contract." It seems the PPU was the only real major issue left at the time of termination. Refer to letter of 20 March 2008 from the Respondents.

14.58 In addition to the explanations given in contemporaneous correspondence set out above as to why 4 hour adsorption time and 4 hour regeneration was in accordance with the Contract, better performance of the plant, and does not affect the overall description and specifications of the unit, the following Claimant's witnesses/experts dealt with these criteria in their witness statements or testimony:

(a) Mr Shipov – paragraphs 13 to 15 of his Second Witness Statement. He states that the 8 hour duty cycle in the Contract was



misinterpreted by the Respondent to mean 8 hours only of adsorption. Despite various efforts to explain the technical specifications of the PPU to the Respondent, they and MECON disregarded the explanations and wrongly termed it a deviation. Cycle time of PPU has no effect on unit capacity, rather 4 hours adsorption substantially reduced energy consumption as opposed to 8 hours adsorption cycle, and is used in all modern installations by the Claimant.

(b) Ms Tarasova - paragraphs 23 to 25 of her first Witness Statement. She made similar comments as Mr Shipov above. She stated in cross-examination that the fluctuation of air in the system, would be less and the energy consumption is less. Also, the maintenance costs are lower as less adsorption material is used, and the total air loss in both systems is about the same. As to a question that on 8 plus 8 it is more expensive, she confirmed it probably would but the Claimant considered 4 plus 4 a much better technical solution, more stable and beneficial for the reasons above. On re-examination she confirmed it was more expensive because it was bigger, but this meant higher maintenance costs.

(c) Mr Quincy Jones – paragraphs 59 to 62 of his first Expert Report, in which he stated:

“61. In any event, changing the adsorption cycle time does not have a material impact on the ability to manufacture oxygen, nitrogen and argon within specifications. The ability to remove impurities like carbon dioxide and water vapour is governed by factors, including cycle time, flow rate, bed volume (length and diameter), impurity removal rate and adsorbent utilisation. A more active bed has faster adsorption and requires a smaller bed volume. Conversely, a less active bed has slower adsorption and requires a smaller bed volume. Conversely, a less active bed has slower adsorption and requires a larger bed volume. As the cycle time increases, the bed volume increases because there is more time available to remove impurities. A smaller bed volume consumes less power to regeneration than a larger bed. The optimal cycle time chosen, which is determined in a basic engineering design is a balance between capital, operating costs and bed dimensions. Therefore, the adsorption cycle time impacts bed volume, capital and inventory used in the process. The decision to choose an adsorption cycle time is typically made by the EPC contractor because they have full perspective of all design parameters, especially for a LSTK capital project.

62. The choice of the adsorption cycle time will vary as a function of site requirements, capital costs, operational costs and dimensional requirements. Cryogenmash’s choice of four-hour adsorption cycle time is within the bounds of what we would



expect to see in a typical ASU and is consistent with good engineering design. For example, a 2014 article attempts to analyse the current state of modern ASU design in Chino (the largest steel market and one the larger global users of ASU technology) agrees with Cryogenmash that the size of the adsorber is important for transportation and references a four-hour adsorption time at a plant produced by Hangyang Co. Ltd., the largest air separation company in China. It should be noted that a shorter adsorption cycle time results in a smaller bed size, less capital and lower power consumption."

In cross-examination he opined that the adsorption cycles in the PPU have "zero impact on the actual performance of the unit".

14.59 In contrast during the currency of the Contract, the Respondent provided no technical reasons for rejecting the PPU proposed by the Claimant, other than it was a deviation from the Contract (or offer prior to the Contract). In answer to a question from the Chairman, Mr Nehru confirmed this reason was the only one given during the Contract.

(a) Mr Nehru first Witness Statement paragraph 24 (Vol. XII A)

"Adsorption cycle of 8 hours is a major deviation from the Contract. I further say that the adsorption cycle of the air purification system was 8 hours, and the same was offered by the Claimant in its proposal to the Respondent. However, after signing the Contract, the Claimant insisted for providing PPU for 4 hours adsorption cycle."

In his Rebuttal Witness Statement to Mr Quincy Jones – paragraph 36 (Vol. XII A)

"The said deviation in the technical specifications of PPU required a major change in the Contract, and also had major commercial implications due to reduced quantity of adsorbent as well as the size of the PPU and regeneration heater. Moreover, a longer cycle time requires less number of changes as well as less pressurisation or depressurisation and thereby increasing the life of the adsorbent and efficiency and life of the PPU."

He also relied on the proposed PPU lowering the power consumption.

(b) Mr Tripathi – Rebuttal Witness Statement to Ms Tarasova – paragraph 13. He states that the 8 hour cycle does not substantially increase power consumption as the cycle has to be carried out three times, in contrast to six times for a 4 hour cycle and an 8 hour cycle requires less number of changeovers as well as less pressurisation and depressurisation thereby increasing the life of the absorbent and efficiency and life of the PPU.

Tribunal Finding

14.60 The proposed PPU with a 4 hour adsorption cycle time, and 4 hour regeneration was not a deviation from the Contract, which specifies an 8 hour cycle time.



14.61 The offer of 8 hour adsorption made by the Claimant prior to the Contract has no standing, and the Contract has precedence. There are clear judgments of the English Courts that existence of pre-contractual negotiations is not generally admissible to interpret a written agreement. For example, Investors Compensation Scheme v West Bromwich Building Society (1998) 1 WLR 896 and The Rio Asso (No. 2) (Reported in 1999) 1 Lloyd's Rep 115 at 24 CA. The principles of these cases have been cited with approval in several judgments in India. A summary of the principles of these cases can be seen in pages 91-103 of Lewison's Interpretation of Contracts.

14.62 Alternatively, if the Claimant's proposal was a modification to the Technical Specifications under Clause 03-04 of the Technical Specifications then the proposed modification was necessary for the better performance of the plant, and did not affect the overall description and specification of the unit. In this respect the Tribunal accepts the evidence presented by the Claimant, including Mr Jones that the advantages of the proposed PPU were:

- (a) Claimant could manufacture the adsorber at its facilities, test it and deliver ready for installation at the Respondent's site;
- (b) The minimising of dimensions leads to 4 hour cycle of adsorption. Usage of 4 hour cycle of adsorption would allow the Claimant to use its standard solution increasing time efficiency and ensuring supply of a guaranteed reliable PPU.
- (c) The fluctuation of air in the system would have been lesser.
- (d) The energy consumption is lower.
- (e) The maintenance costs are lower as less adsorption materials used.
- (f) The 4+4 hour cycle does not influence the ASU adversely, in any manner.
- (g) The proposed PPU did not suffer from wear and tear which would adversely affect the working of the equipment during its lifetime as these issues were addressed while designing the specification of the PPU.
- (h) The total air loss in both systems is the same on an average.

The Respondent at any time before termination of the Contract did not put forward any technical reasons for rejecting the proposed PPU other than it was not in accordance with the Contract. The explanations provided by the Respondent's witnesses later in witness statements and testimony are not accepted, and they were not experts in the area of ASV, unlike the Claimant (who had constructed 600 ASUs)."

57. Under the head 'Motors for Compressors', based on oral evidence and host of documents, Tribunal held that use of synchronous motors in the



contract was a non-standard one, not generally used in the industry and accepted Respondent's version that asynchronous motors was a standard solution, technically better, easy to resource, etc. and therefore, the modification suggested was for better performance of the unit and did not affect the overall description and specifications of the unit and found Petitioner's rejection to be wrongful. Relevant paragraphs from the Award are extracted hereunder:-

"14.63 The Contract provided for synchronous motors fitted into certain compressors, including the Main Air Compressor ("MAC"), Booston Air Compressor ("BAC"), Nitrogen Turbo Compressor of High Pressure ("NTC HP"), Nitrogen Turbo Compressor of Low Pressure ("NTC LP") and Centrifugal Air Compressor ("CAC").

14.64 The Claimant contends that use of synchronous motors is not standard market practice and asynchronous motors are more frequently used because of simple basic construction, robust quality, reliability and low maintenance costs.

14.65 The Claimant proposed a modification of the Technical Specifications to asynchronous motors pursuant to clause 03-04. However, the Respondent rejected the use of asynchronous motors on the ground this is what the Contract provided. The Claimant then approached vendors in the approved list under Appendix 6. However, since use of synchronous motors less than 5MW was a non-standard solution, none of the vendors provided synchronous motors for the compressors as a standard solution and consequently quoted very high prices for synchronous motors. In the circumstances, as the Claimant searched the market for a suitable vendor and at the instigation of Mr Nehru, approached Privod.

14.66 The Claimant's letter of 19 December 2007, set out reasons why asynchronous motors were technically better than synchronous motors. They pointed out on 600 ASU projects they had never used synchronous motors, the difficulties of finding suppliers and potential delays to the project if discussions on this issue were protracted. Further, they had discussed with the Russian manufacturer of synchronous motors, Privod who could not guarantee the parameters of the compressors.

14.67 Mr Jones confirms that use of synchronous motors was unusual

"So the issue here specifically with the synchronous motors – and I say this in my report – in my report I put a diagram and I say, yes, is it possible? Sure, you can secure synchronous motors, but because it's a non-standard solution, that means that you have issues with compatibility, you have to spend more time understanding and it's not



even – it's not even an issue of cost, you can't keep to the contractual deadline because it's a non-standard solution."

14.68 The Respondent at the meeting on 20 or 21 December 2007 agreed to provide approval for Privod within 3 days, or a vendor for synchronous motors, after examination of the details. They did not do so, and the Claimant sending a letter of 26 December 2007 which referred to 4 months trying to persuade the Respondent to use asynchronous motors, and discussions with Privod.

14.69 Eventually on 27 December 2007, the Respondent approved Privod as a vendor for synchronous motors but this was subject to confirmation from the compressor manufacturers and Privod on compatibility of the motors.

14.70 On 9 April 2008, the Respondent threatened risk purchase action under the Contract for delays in resolution of issues, including the synchronous motors.

"... instead of placing orders for compressor, M/s JSC "Cryogenmash" insisted upon provision of Asynchronous Motors for MAC, BAC & NTC's which is a major deviation with respect to the specifications in the Contract which is a major deviation with respect to the specifications in the contract which stipulated provision Synchronous Motors for these Compressors... The insistence of M/s JSC "Cryogenmash" for not providing Synchronous Motors after signing of the contract is not at all justified."

14.71 The arguments over non-approval of the proposed modifications of synchronous motors insistence on synchronous motors, difficulties in finding suppliers and delays once Privod was approved in principle, inevitably meant delays in ordering the compressors (compounded by non-approval of BEDs).

14.72 The Respondent argues the delay after approval in principle of Privod on 19 December 2007, were due to the Claimant trying to find a cheaper price from vendors. Paragraph D5 of the Respondent's Closing Submissions.

Tribunal Finding

14.73 The Tribunal finds that the use of synchronous motors in the Contract was a non-standard one not generally used in the industry. It accepts the Claimant's explanation that asynchronous motors are a standard solution, better technically, easier to source from suppliers, of more robust quality, more reliable, and has lower maintenance costs. It follows the requirements of 03-04 if the Technical Specifications were satisfied in that the proposed modification was necessary for the better performance of the plant, and did not affect the overall description and specifications of the unit. Therefore, the Respondent's rejection was wrongful. In the event, it unreasonably and stubbornly insisted on synchronous motors, as required by the Contract, and indeed this was the



only reason provided for rejection. Inevitably, delays occurred in finding a supplier until Privod were approved in principle on 21 December 2007, but subject to confirmations from compressor manufacturers and Privod on compatibility of the motors. Further delays then occurred but the Claimant cannot be blamed for any delays in ordering the LDI. The Respondent's argument that the delay was due to the Claimant finding a cheaper vendor is rejected, as there is no evidence this was the case."

58. For reasons mentioned in the Award and based on evidence, Tribunal decided Issue No.1 in favour of the Respondent, holding that Respondent was not responsible for critical delays in performance of the execution of the contract and Petitioner bears this responsibility. Issue No.2 was also decided in favour of the Respondent observing that there was no technical justification for rejecting the changes proposed under Clause 03.04.

59. Issue No.3 was whether termination of the contract by the Petitioner was just, proper and legal. Tribunal examined each of the 9 reasons provided in the termination letter separately and came to a conclusion that none of the cited reasons warranted termination of the contract under Clause 44.02 of the GCC. In view of these findings, Tribunal held under Issue No.4 that it was the Petitioner who had delayed the project and acted wrongfully and since Respondent cannot be held to be negligent in the context of Article 37, the Risk Purchase action was invalid and wrongful. Issues No. 5 to 11 pertain to consequential benefits of damages towards illegal encashment of the PBG, expenses incurred towards performance of the contract, advance payments to the vendors, loss of profit, etc. All issues were decided in favour of the Respondent and against the Petitioner. Interest @ 12% p.a. was awarded along with costs.

60. Before proceeding to examine the contentious issues raised by the parties herein, it is important to examine the limitations and contours of the power of this Court while exercising jurisdiction in a petition laying a challenge to an arbitral award under Section 34 of the 1996 Act, keeping in



backdrop that the Award impugned was passed in an International Commercial Arbitration as defined in Section 2(1)(f) of the 1996 Act. In *Ssangyong Engineering (supra)*, the Supreme Court delineated the parameters, on which Courts can interfere in an arbitral award. It is no longer *res integra* that the ground of ‘Patent Illegality’ brought in by insertion of sub-Section 2-A to Section 34 by the Amendment Act, 2015, is only available for challenging an award arising out of domestic arbitration and is no longer available to lay a siege to an award passed in an International Commercial Arbitration. There can be no quarrel that scope of interference in an arbitral award passed in an International Commercial Arbitration is extremely narrow and restricted.

61. An arbitral award, in a challenge under Section 34(2)(b)(ii) of the 1996 Act can be set aside, if it is in conflict with the ‘public policy of India’. This expression, which includes the expression ‘fundamental policy of Indian law’, was interpreted by the Supreme Court in 1993 in the landmark case of *Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644*, where the Supreme Court held that an award in violation of provisions of Foreign Exchange Regulation Act, 1973, being a statute enacted to safeguard national economic interest shall be contrary to public policy of India. It was further held that disregarding orders passed by the superior Courts in India could also be a violation of fundamental policy of Indian law with a caveat that contravention of a statute simplicitor would not attract the bar of public policy.

62. In *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49*, the Supreme Court re-affirmed the concept of fundamental policy of Indian Law as explained in *Renusagar (supra)* as well as three juristic principles viz. judicial approach, natural justice and absence of perversity



or irrationality, as explained in *Oil and Natural Gas Corporation Limited v. Western Geco International Limited*, (2014) 9 SCC 263, thereby expanding the scope of interference by the Courts. The 256th Law Commission, however, made recommendations which were aimed at narrow construction of the term fundamental policy of Indian Law, leading to an amendment in the 1996 Act in the year 2015. After an in-depth and detailed analysis of the earlier judgments and recommendations of the Law Commission, the Supreme Court in *Ssyanyong (supra)*, held as follows:-

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate Builders i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the Award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.

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36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco, as understood in Associate Builders, and paras 28 and 29 in particular, is now done away with.

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38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the Award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for



an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the Award.

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, 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).*

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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.*

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44. *In Renusagar, this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same."*

(emphasis supplied)

63. In *Ssangyong (supra)*, the Supreme Court noted that in *Renusagar (supra)*, the Supreme Court had delineated the scope of enquiry into the grounds raised under Sections 34 and 48 of the Act (equivalent to grounds under Section 7 of the Foreign Awards Act, 1961), after referring to the New York Convention. Para 45 of the judgment in *Ssangyong (supra)* refers to relevant paras in *Renusagar (supra)*, which are extracted hereunder for the sake of completeness and ready reference:-



“34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the Award would be refused if the court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the Award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of Clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of Clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of Clause (1) and sub-clauses (a) and (b) of Clause (2) of Article V postulates a challenge to the Award on merits.

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

‘It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the Award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the Award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.’ (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

‘The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.’

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds



mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the Award on merits.

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65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the Award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression “public policy” covers the field not covered by the words “and the law of India” which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the Award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that “public policy” in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the Award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

64. A Co-ordinate Bench of this Court in **Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649**, following the decision in **Renusagar (supra)**, elaborated on the connotation of the expression



‘fundamental policy’ as the basic and substratal rationale, values and principles which form the bedrock of laws in our country. Though in the context of a Foreign Award, the observations of the Court are extremely relevant even in the realm of International Commercial Arbitration and are to the following effect:-

“97. It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression “fundamental policy” connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

98. It is necessary to bear in mind that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression “fundamental policy of Indian law” is considered as a reference to a provision of the Indian statute, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the Awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression “fundamental policy of law” must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

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108. Having held that a simpliciter violation of any particular provision of FEMA cannot be considered synonymous to offending the fundamental policy of Indian law, it would also be apposite to mention that enforcement of a foreign award will invariably involve considerations relating to exchange control. The remittance of foreign exchange in favour of a foreign party seeking enforcement of a foreign award may require permissions from the Reserve Bank of India. There may also be a question whether the initial agreement pursuant to which a foreign award has been rendered required any express permission from RBI. However, as indicated earlier, the policy under FEMA is to permit all transactions albeit subject to reasonable restrictions in the interest of conserving and managing foreign exchange. India has not accepted full capital account convertibility as yet. Thus, there are transactions for which permission may not be forthcoming. Whereas certain transactions



are permitted under FEMA and regulations made thereunder without any further permissions; other transactions may require express permission from the RBI. However, these considerations can be addressed by ensuring that no funds are remitted outside the country in enforcement of a foreign award, without the necessary permissions from the Reserve Bank of India. This would adequately address the issue of public interest and the concerns relating to foreign exchange management, which FEMA seeks to address.

109. As discussed hereinbefore, this Court while considering the question whether to decline enforcement of a foreign award on the ground of public policy, is also required to consider the nature of the policy that is alleged to have been contravened. The approach that this Court would bear is one that favours enforcement of a foreign award and if the public policy considerations can be addressed without declining recognition of the foreign award, the Court would lean towards such a course.”

65. Be it noted that the reasoning of the Coordinate Bench of this Court commended itself to the Supreme Court in **Vijay Karia vs. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1**, where in the context of another statute viz. Foreign Exchange Management Act, 1999 (FEMA), the Supreme Court reiterating the principles laid down in **Renusagar (supra)** and affirming the reasoning in **Cruz City (supra)** held as follows:-

“88. This reasoning commends itself to us. First and foremost, FEMA — unlike FERA — refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of Reserve Bank of India may be obtained post facto if such violation can be condoned. Neither the Award, nor the agreement being enforced by the Award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. **Further, even if Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the Award does not become void**



on that count. The fundamental policy of Indian law, as has been held in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. “Fundamental Policy” refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the courts. Judged from this point of view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground.”

(emphasis supplied)

66. From the conspectus of the above judgments, it is clear that the scope of interference in the Award impugned before this Court is extremely narrow. The expression ‘Public Policy of India’ referred to in Section 34(2)(b)(ii) of the Act would mean and connote Fundamental Policy of Indian Law as explained in *Renusagar (supra)* and *Ssangyong (supra)*. An award in International Commercial Arbitration is impervious to jural interference on the ground of ‘patent illegality’ in sub-Section (2A) of Section 34 of the Act. Relevant would it be to note that any challenge to an award in respect of interpretation or construction of a contractual provision by an Arbitral Tribunal falls under ‘patent illegality’ and is thus no longer a ground to challenge an award arising out of an International Commercial Arbitration as categorically propounded by the Supreme Court in *Ssangyong (supra)*. Likewise, grounds of perversity which includes findings based on no evidence or in ignorance of vital evidence would fall under the ground of ‘patent illegality’ and only domestic awards other than awards in International Commercial Arbitration can be assailed on this ground.

67. From the conspectus of facts and the rival contentions raised by the parties, it is manifest that the primordial issue relates to interpretation of various clauses of the contract executed between the parties which are comprised in TS, GCC, Appendices, etc., and is beyond the pale of



challenge, being a ground under patent illegality. Even otherwise, interpretation of contractual provisions is the domain of the Arbitral Tribunal and in this context I may refer to the judgement in ***UHL Power Company Limited v. State of Himachal Pradesh, (2022) 4 SCC 116***, wherein the Supreme Court relying on several judicial precedents on the subject held that the High Court committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking a different view in respect of interpretation of the relevant clauses of the agreement governing the parties and virtually acting as a Court of appeal in the proceedings under Section 34 of the 1996 Act. It was reiterated that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the Arbitrator proceeds to accept one interpretation as against the other. Relevant passages are as follows:-

“15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.

*16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd. v. Vedanta Ltd.* [(2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)*

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the Award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or



morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. *A similar view, as stated above, has been taken by this Court in K. Sugumar v. Hindustan Petroleum Corpn. Ltd. [(2020) 12 SCC 539], wherein it has been observed as follows : (SCC p. 540, para 2)*

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

18. *It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. In Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [(2019) 20 SCC 1], the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)*

“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the Award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.”



19. In *Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.* [(2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552], adverting to the previous decisions of this Court in *McDermott International Inc. v. Burn Standard Co. Ltd.* [(2006) 11 SCC 181] and *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [(2012) 5 SCC 306], wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the Award ought not to be set aside on this ground, it has been held thus : (*Parsa Kente Collieries case* [*Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552], SCC pp. 244-45, para 9)

“9.1. ... It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

9.2. Similar is the view taken by this Court in *NHAI v. ITD Cementation India Ltd.* [(2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716], SCC para 25 and *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16], SCC para 29.”

(emphasis supplied)

20. In *Dyna Technologies* [*Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.*, (2019) 20 SCC 1], the view taken above has been reiterated in the following words : (SCC p. 12, para 25)

“25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the Award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

21. An identical line of reasoning has been adopted in *South East Asia Marine Engg. & Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd.* [(2020) 5 SCC 164 : (2020) 3 SCC (Civ) 1] and it has been held as follows : (SCC p. 172, paras 12-13)



“12. It is a settled position that a court can set aside the Award only on the grounds as provided in the Arbitration Act as interpreted by the courts. Recently, this Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [(2019) 20 SCC 1] laid down the scope of such interference. This Court observed as follows : (SCC p. 12, para 24)

‘24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the Award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.’

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator supported by reasoning. This Court in Dyna Technologies [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] observed as under : (SCC p. 12, para 25)

‘25. Moreover, umpteen number of judgments of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the Award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.’ ”

(emphasis supplied)

22. In the instant case, we are of the view that the interpretation of the relevant clauses of the implementation agreement, as arrived at by the learned sole arbitrator, are both, possible and plausible. Merely because another view could have been taken, can hardly be a ground for the learned Single Judge to have interfered with the arbitral award. In the given facts and circumstances of the case, the appellate court has rightly held that the learned Single Judge exceeded his jurisdiction in interfering with the Award by questioning the interpretation given to the relevant clauses of the implementation agreement, as the reasons given are backed by logic.”



68. Coming back to the present case and examining the contentions raised on the anvil of the principles laid down by the Supreme Court circumscribing the scope of interference, Court agrees with the Respondent that the impugned Award is a well-reasoned award and the findings are duly supported by a detailed analysis of documents, extensive correspondence between the parties during the execution of the contract, oral and documentary evidence including expert evidence. Tribunal has arrived at findings of fact and interpreted the Clauses of the contract including Clause 03.04, which is the prime bone of contention between the parties and in the limited window of interference in an International Commercial Award, this Court is unable to agree with the Petitioner that the Award deserves to be set aside. The contentions and arguments canvassed on behalf of the Petitioner, as noted above, show that an attempt is made to re-argue the entire case on merits, which is impermissible as this Court cannot enter into a merit-review of the award or re-appreciate the evidence as an Appellate Court.

69. The preponderant position evident from the conspectus and exposition of law aforesaid is that under Section 34 (2)(b)(ii) of the Act, an award of the Arbitral Tribunal can be challenged if it is in conflict with the public policy of India. By the Amendment Act, 2015, Explanation-1 was inserted and it was clarified that an award is in conflict with the public policy of India, only if: (a) making of the Award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or (b) it is in contravention with the fundamental policy of Indian Law; or (c) it is in conflict with the most basic notions of morality and justice. None of these grounds are made out by the Petitioner warranting interference in impugned Award. Explanation-2 clarifies that the test as to whether there is



contravention with fundamental policy of Indian Law shall not entail a review on merits of the disputes. Sub-Section (2A) was inserted by the same Amendment which provided an additional ground in case of purely domestic awards in India, where the Award is vitiated by ‘patent illegality’ appearing on the face of the Award, with a cautious caveat that award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence.

70. In the decision in *Ssyanyong (supra)*, the Supreme Court held that the expression ‘Public Policy of India’ whether contained in Section 34 or Section 48, would now mean the ‘fundamental policy of Indian Law’ as explained in paras 18 and 27 of *Associate Builders (supra)* i.e. relegated to the understanding of the expression in the case of *Renusagar (supra)*. To the extent it is relevant to the present case, in para 27 of *Associate Builders (supra)*, the Supreme Court held as under:-

“27. Coming to each of the heads contained in Saw Pipes judgment, we will first deal with the head “fundamental policy of Indian law”. It has already been seen from Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.”

71. The Supreme Court further held that the change made in Section 28(3) of the Act by the Amendment Act, 2015 would follow the observations of the Supreme Court in paras 42.3 to 45 in *Associate Builders (supra)*, that construction of terms of a contract is primarily the domain of the Arbitrator, unless the Arbitrator construes the contract in a manner that no fair minded or reasonable person would i.e. the view of the Arbitrator is not even a possible view to take. The challenge to the Award under this head would, however, fall under ‘patent illegality’ under Section



34(2A) of the Act and cannot be sustained in the present case as the impugned award is passed in International Commercial Arbitration.

72. Petitioner's main contention that the Tribunal has breached most basic notions of justice by foisting a unilateral alteration to the contract between the parties is misplaced and based on a misreading of the impugned Award and thus the judgements relied on will not aid the Petitioner. Tribunal has only interpreted the contractual terms including Clause 03.04 which is extracted hereunder for ready reference:

"03.04 The Tenderer may offer any alternative scheme or modification to the plant and equipment that he may think necessary for better performance of the plant. So far as that does not affect the overall description and specification of the unit. However, prior approval for all such alteration and modification shall have to be obtained from the Purchaser. Price alteration, if any, for such alternate proposal will be indicated separately."

73. The object and purpose of Clause 03.04 was to provide to the Respondent the flexibility to offer the best modern and technical solutions for better performance of the plant. In any case, Petitioner accepted most of the technical modifications suggested and thus even interpretation of Clause 03.04 no longer remained the contentious issue. Record reveals that Petitioner repudiated the contract due to its disagreement over the 8-hour cycle in the TS of the PPU, which is noticed by the Tribunal. The Tribunal also correctly observed that the main reason for the disputes was the flawed understanding of the Petitioner that no modifications could be suggested by the Respondent and therefore rejected the proposals on the sole ground that they were contrary to the TS agreed initially, overlooking that Clause 03.04 was also part of the agreed contractual terms and permitted the Respondent to suggest alternatives, subject to the riders stipulated therein. Petitioner took a microscopic view of the restrictions under the CVC guidelines and this added to the resistance to examine any modification, in complete



ignorance of the import of Clause 03.04 and the right thereunder to suggest alternatives, which was available to the bidders, as a condition of contract. Thus, contrary to the belief and understanding of the Petitioner, acceptance of alternatives offered under this clause would not have violated the CVC guidelines.

74. To decide issues 1 and 2, Tribunal examined whether the delay in performance and execution of the contract was attributable to the Respondent or the Petitioner. Tribunal noted that the first stage of the Project was the preparation of BEDs and their submission for approval within 5 months from the Effective date in accordance with the Time Schedule in Appendix 2 and thus the deadline was 31.12.2007. Clause 20.3.2 GCC provided that any part of the Facilities related to drawings to be approved by the Petitioner were to be executed only when approval was given for which Clause 20.03.05 of GCC provided 14 days after receipt of the drawings. Respondent had submitted complete list of drawings for BEDs by letter dated 10.10.2007, but despite progressive submission of the drawings by the Respondent, Petitioner failed to approve the BEDs within the stipulated time. On 13.12.2007, Respondent acknowledged receipt of 19 BEDs, out of which only one was approved and 18 were commented upon. Vide letter dated 14.12.2007, Respondent responded and assured that the revised drawings will be provided as it was interested in finishing the project expeditiously. On 17.12.2007, Respondent submitted the entire set of BEDs to the Petitioner and under Article 20.03.05, Petitioner was required to approve them by 31.12.2007. Tribunal relied on the evidence of Mr. Nehru, who stated that all 42 BEDs were provided by Respondent on 17.12.2007 and the first comment by Petitioner/Consultant was on 29.12.2007 or 10.01.2008. Significantly, Tribunal notes and extracts the



letter dated 16.01.2008, which evidenced Respondent's frustration for lack of approvals on time. Referring also to progress report dated 27.06.2008, Tribunal rendered a finding that Petitioner was responsible for the delayed approvals and accepted Respondent's stand that it satisfied its obligation as to the PERT Network. Tribunal also rendered a finding based on several communications exchanged, that Respondent apart from submitting the BEDs was simultaneously communicating with various vendors of LDIs with the intent to place orders when the BEDs were approved.

75. With respect to the contentious Clause 03.04 of the TS, Tribunal's interpretation was that it gave a right to the Respondent to propose alternate scheme and modification to the TS of the contract provided it believed that the proposed modification was necessary for better performance of the plant and did not affect the overall description and specifications of the unit and had prior approval of the Respondent. Tribunal held that when the Petitioner received an alternate scheme/modification in the TS of the contract, it was obliged to review the proposal against the parameters stipulated in Clause 03.04 and approve it unless there was any compelling technical reason to doubt it. Plain reading of Clause 03.04 supports this interpretation of the Tribunal. Tribunal observed that it was clear from evidence that the main reason for rejection of the BEDs was the changes proposed to the TS as per Clause 03.04, but Petitioner wrongly took exception to any change whatsoever. The other reason for rejection of BEDs that Respondent ought to have provided BEDs reflecting TS of various LDIs after placing orders with vendors, was also found to be unjustified by the Tribunal and it observed that many of the comments of the Petitioner were qualitatively insubstantial, bureaucratic and unnecessary. Finding of fact was rendered, based on several



communications mentioned in the award, that all BEDs were submitted by 17.12.2007 and Respondent was making simultaneous enquiries from various vendors of LDIs with intent to place orders when the BEDs were approved. Reliance was placed on documents on record to conclude that Respondent indeed placed orders for Main Heat Exchanger, BAC, NTC etc. On the DEDs, also the Tribunal concluded that whilst awaiting BEDs approvals, Respondent did not stand still and continued preparation of DEDs and there was no breach. In accordance with the industry practice, DEDs could be finalized and submitted only after approval of BEDs.

76. Taking this interpretation forward, the Tribunal notes that the November, 2006 TS sent to the tenderers did not specify any period for cycle time, adsorption or regeneration. It then referred to Clause 06.02.03 of TS relating to the PPU, which specified a radial bed type with an 8 hours duty cycle and noted that it did not specify time for adsorption and regeneration. A duty cycle is a repeated sequence of actions from the initial state to an identical initial state, which includes both adsorption and regeneration. Tribunal then notes that on 14.12.2007 Respondent submitted its design for the PPU with a complete cycle time of 8 hours i.e. 4 hours for adsorption and 4 for regeneration and on 19.12.2007, Respondent wrote to the Petitioner with various Addendums, describing the basis of proposed technical solutions. However, Petitioner and MECON rejected the proposal on the ground that it did not confirm to the original contractual specifications. On 10.01.2008, Respondent again provided technical justification for the duty cycle of 8 hours and also set out its reasons in the letter as to why its proposal satisfied the contract. MECON, however, persisted with its stand to adhere to the offer and the contract and warned the Respondent not to delay by seeking modifications. This was followed



by meetings between the parties to resolve the technical issues. The Tribunal looked into the correspondence and observed that perhaps, at the time of termination, the only real major issue left was the PPU. As the Award reflects that the Tribunal thereafter referred to the testimonies of Respondent's witnesses/experts, who categorically brought forth the advantages of their proposal and finally concluded that Petitioner provided no technical reasons for rejecting the PPU proposed by the Respondent other than it being a deviation from the contract or offer prior to the contract and this conclusion also emerged from the testimony of Mr. Nehru, Petitioner's witness. Having delved into the issue, Tribunal finally rendered a finding that the proposed PPU with 4 hours adsorption cycle time and 4 hours regeneration was not a deviation from the contract and the modification suggested was in consonance with Clause 03.04 of TS.

77. While there is substance in the contention of the Petitioner that in matters of contracts, the terms and conditions of the contract and/or technical specifications are to be strictly adhered, but what the Petitioner overlooks in the present case is that consciously, the parties had chosen to incorporate Clause 03.04 in the TS, which permitted the Respondent to offer alternative schemes/modifications/deviations, subject to the other conditions mentioned therein. As rightly noted by the Tribunal, once the Respondent proposed modifications, which it believed to be for better performance of the plant, Petitioner was obliged to examine the same. No doubt, Petitioner had the discretion to examine the proposal and disapprove it, if it had any cogent technical reason to do so, but it was not open to reject the proposal on the sole ground that it did not confirm to the original specifications in the TS. This is exactly what the Tribunal has fundamentally held, interpreting Clause 03.04.



78. Coming to motors for compressors, contract provided for synchronous motors fitted into MAC, BAC and NTC etc. On a detailed analysis of the documents and expert evidence on record, Tribunal found that the use of synchronous motors in the contract was a non-standard one, not generally used in the industry and accepted the Respondent's explanation that asynchronous motors were a standard solution, technically better, easier to resource, robust quality, more reliable and low maintenance cost. It was observed that Respondent proposed a modification, however, Petitioner rejected the same on the ground that this was not what the contract provided. Respondent approached the vendors in the approved list under Appendix 6 but as the synchronous motors were a non-standard solution, none of the vendors provided them and finally at the instance of Mr. Nehru, approached Privod. Tribunal held that the material showed that the alternative was for better performance of the plant and thus Petitioner's rejection was wrongful and it was unreasonably and stubbornly insisting on synchronous motors, as required by the contract, and indeed this was the only reason provided for rejection. Inevitably, delays occurred in finding a supplier and Privod's offer was subject to compatibility of the motors and confirmation from the compressor manufacturers. According to the Tribunal, the delay could not be attributed to the Respondent in ordering the LDIs. Tribunal found no evidence in support of the Petitioner's plea that Respondent delayed the process with an intent to find a cheaper vendor. In fact, the Tribunal held that the alternative suggested was not a modification or a deviation and even if it was, Respondent was entitled to suggest under Clause 03.04 and Petitioner had accepted the proposal. It is evident that these are findings of fact by the Tribunal based on voluminous documentary and oral evidence and are beyond the remit of



this Court to interfere given the grounds under Section 34(2) (a) or (b) of the 1996 Act.

79. Under issue No.3, the Tribunal examined all the 9 reasons for which the contract was terminated under Clause 44.2 and concluded that none of the cited reasons justified the termination. Relevant paragraphs of the Award are as follows:-

“15.8. Turning to the nine reasons provided by the Respondent in its termination letter to justify termination.

15.8.1. Long Delivery Items

The complaint about failure to order long delivery items, such as MAC, BAC, NTCs and Instrument Air Compressor has been dealt with in paragraphs 14.19 to 14.30 and 14.102 to 14.103 of this Award. The Tribunal concluded that there was no default by the Claimant in waiting for BEDs to be approved before ordering LPIs in accordance with industry practice, and in any event the Claimant did mitigate the delays caused by the Respondent in approval of BEDs it did and LDIs insofar as possible. It is also not accepted that the technical specifications were sufficient to order LDIs.

Therefore, this reason is not warranted to terminate the Contract.

15.8.2. Vendor Approval

The contention that the Claimant sought changes to preferred makers of critical items such as valves, compressors, turbo-expanders etc., without adequate justification and details, and not in the spirit of the Contract, is dealt with in paragraphs 14.42 to 14.101 and 14.103 of the Award. The Tribunal found the changes proposed by the Claimant were in accordance with Clause 03.04 of the Technical Specifications of the Contract, and:

- (a) Necessary for the better performance of the Plant and*
- (b) Did not affect the overall description and specification of the Unit. Sufficient details of the technical justifications for the changes were provided by the Claimant. No technical justifications were provided by the Respondent at the time, other than it wrongfully permitted no changes to the Contract. The Claimant was also permitted to propose additions and deletions from the Approved List of Subcontractors and Vendors or Preferred Makers, as stipulated by Article 7 of the Contract and Clause 19 of the GCC, and Clause 06-02-07 of the Technical Specification. When such charges were proposed, the Respondent procrastinated and delayed approval, and some proposed changes were never approved. The belated technical justifications relied upon by the Respondent's witnesses and testimony, were not accepted by the Tribunal.*



Therefore, this revision is not warranted to terminate the Contract.

15.8.3. Non-signing of the minutes of meeting held in February/March 2008

Meetings were held between the parties from 25 February 2008 to 7 March 2008 to try and resolve the disputes between the parties. In the CB there are two versions of the minutes and neither is signed. In her Second Witness Statement, Ms Tarasova, states at paragraph 15, that the Claimant did not sign the minutes as this was just the Respondent's version, and it did not reflect "the true correct version picture of what was discussed". This is corroborated by Item 4 of the Claimant's letter of 14 April 2008 which refers to the Respondent / Mecon not listening to any arguments and insisting on their position, and the Claimant would never sign documents that do not take into account their position. The PPU, contrary to what was stated in paragraph 8 of the minutes, was left unresolved and in particular the duration of the absorption cycle. Therefore, paragraph 8 advising an 8 hour duty cycle for PPU proposed by the Claimant is not correct. This 8 hour cycle is repeated in paragraph 19 on page 1362 of the minutes and in Annexure A at the top of page 1365. The Claimant's delegation left to get a plane back to Russia, but Mr Allin stayed to finish the discussion on the PPU and sign the minutes, but he did not. Mr Allin did not give evidence at the hearing. Mr Nehru refers to the PPU variants being provided by the Claimant during these meetings, and the Claimant walking away without signing them (in paragraph A(vii) page 20 of his first witness statement). Mr Tripathi deals with this meeting in paragraph 18 of his first witness statement, but merely states the minutes were not signed. Mr Popov was cross-examined on the meetings on Day 2 of the hearing, but could not remember what was discussed, but recalls parts of the draft minutes were not acceptable.

The fact the minutes were not signed means the Tribunal cannot accept the minutes one way or the other, as a definitive agreed record. Nor can the Tribunal draw an adverse inference against the Claimant for not signing them. The Respondent also could not lead any evidence to show that the stand of the Claimant on the said minutes did not reflect actual discussions between the parties.

Therefore, this reason is not warranted to terminate the Contract.

15.8.4. PPU

The contention in the termination letter is that a PPU with an 8 hours adsorption cycle time was provided under the Contract, and the Claimant's insistence on providing a PPU with a 4 hours adsorption cycle, was in violation of the Contract. This has been dealt with in paragraphs 14.45 to 14.62 of the Award. The Tribunal found that the proposed PPU with a 4 hour adsorption cycle time, and 4 hour regeneration time, was not a deviation from the Contract, which specifies an 8 hour cycle time. Reference may also be made to clause 20.3.6 at page 506 of Vol V-A which provides that MECON could not reject any drawings as long as it was not



contrary to the contract and against good engineering practice. Neither MECQN nor the Respondent could produce any evidence to show that the proposed 4 + 4 PPU suggested by the Claimant was contrary to the Contract or good engineering practice. Therefore, the stand of the Respondent in this regard is found to be without valid reason. The offer made by the Claimants prior to the Contract has no contractual standing. Alternatively, if it was a modification it complied with Clause 03-04 of the Technical Specifications and had many technical advantages. During the Contract the Respondent put forward no technical reasons for rejecting the PPU other than wrongfully it was not in accordance with the Contract. The later technical reasons put forward in witness statements and testimony by the Respondent are not accepted.

Therefore, this reason is not warranted to terminate the Contract.

15.8.5. **BEDs**

The contention in the termination letter is that the approval of BEDs was hampered by the Claimant submitting the same drawings, without incorporating the Respondent's comments, and insisting on modifications which were not in accordance with the Contract, and also submitting drawings on other projects. The Tribunal has dealt with this in paragraphs 14.1 to 14.16, 14.31 and 14.102 of the Award. The modifications proposed are covered in paragraph 15.8.2 above. In essence, the Respondent unjustifiably delayed approvals of BEDs with non-substantive, bureaucratic and repetitive comments. Behind a lot of the obstinacy was a stubborn resistance to consider any change/modifications to the Technical Specifications, and a fundamental misunderstanding of the level of detail reached for BEDs as opposed to DEDs.

Therefore, this reason is not warranted to terminate the Contract.

15.8.6. **Progress Reports and Action Plans**

The contention in the termination letter is that the Claimant had not submitted progress reports for several months, and never informed the Respondent regarding progress made. Further, it submitted no action plans to tackle the delays. This is dealt with in paragraphs 14.29 and 14.102(c) of this Award. The Tribunal concluded that the facts demonstrate that the Claimant fulfilled its duties under Clause 18.3 and 18.4 of the GCC to submit progress reports, revised programmes and action plans; or alternatively the Respondent was well aware of the progress and delays documented in numerous correspondence and meetings, and in any event, it was wrong to demand action plans when it had caused the delays and needed to give the necessary approvals.

Therefore, this reason is not warranted to terminate the Contract.

15.8.7. **Non-commencement of site preparation, ordering/supply of plant and Equipment and erection**

This is dealt with in paragraphs 14.34 to 14.37 of this Award. The Tribunal concluded that on the facts the Claimant had done all it could to



progress the civil works, site preparation and erection, supply of plant, prior to approval of BEDs. Further ordering of equipment for the execution of the works was wrongfully delayed by the Respondent.

Supply of plant and ordering of equipment was dealt with in paragraph 15.8.1 (in the case of LDI, but in any event for the avoidance of doubt if plant and equipment was put on LDI there was no evidence the Claimant delayed ordering).

Therefore, this reason is not warranted to terminate the Contract.

15.8.8 Release of payment by BSP

The contention raised is the Claimant had not completed any activity against which payment could have been made.

Even if this contention was correct, any delay in payment was due to the Respondent's wrongful actions, including delays in approval of BEDs (PFDs General Layout and SLDs) refusal to approve legitimate changes or inordinate delays in approving such changes legitimately proposed to Technical Specifications under Clause 03-04.

Therefore, this reason is not warranted to terminate the Contract.

15.9 None of the above nine reasons have been found by the Tribunal to warrant termination of the Contract under Clause 44.2 of the GCC. It has therefore not been demonstrated by the Respondent that the Claimant:

- a) abandoned or repudiated the Contract. There is no evidence of this, and the documentary evidence demonstrates a genuine desire on the part of the Claimant to overcome issues and complete the Contract. For example, its letter of 19 June 2008 refers to the issues in dispute, and "the best way for speeding up the progress is to make steps by both sides for mutual benefit" and "we suggest to organise meeting for resolving the above mentioned items and other critical problems after approval of 3 main documents". A letter on the same day, specifically about delayed BEDs, stated "the approval of the above mentioned items shall help us to finish Basic Engineering stage quickly and proceed to next stages and minimise the execution of the contract" and "we suggest the organising a meeting for resolving the above mentioned items and other critical problems". Further, not signing the minutes of 26 February/March 2008 cannot constitute abandonment. Earlier examples of the Claimant wanting, despite delays beyond its control, to get on with the Contract are the Claimant's letter of 14 April 2008, setting out the issues in dispute and their position and chasing for approvals of BEDs and in fact asserting it was the Respondent who "had no desire to execute the project at all". After this meeting and the argument about unsigned minutes, there was further correspondence, and submittal of drawings.*
- (b) without valid reason, failed to commence work on the facilities and has suspended the progress of the Contract Performance for more than 28 days, after receiving instructions from the Employer to*



proceed. There is no basis on the evidence presented in this arbitration for reliance on this ground;

- (c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations without just cause. There is no basis to allege persistent neglect, on the evidence presented in this arbitration;
- (d) refuses or is unable to provide sufficient materials, services in labour (adequate resources) to execute and complete the facilities in a manner specified in the programme furnished under Clause 18 at rates of progress that give reasonable assurance to the Employer that the Contractor can attain completion of the facilities by the time for completion as per Clause 8. There is no basis for this ground on the evidence presented in this arbitration.

It further transpires from the records that all the issues, which were relied upon by the Respondent as reasons for termination of the Contract, were subsequently resolved as recorded in the disputed minutes of the meeting of February/March, 2008 save and except otherwise of the issue with regard to the PPU which issue is also found to be untenable and not valid for the reasons stated hereinbefore. Therefore, the decision to terminate the Contract was unreasonable and very drastic and not supported by any valid reason."

80. Having held the termination to be illegal and wrongful, Tribunal determined the next issue whether Risk Purchase was valid and answered it in favour of the Respondent referring to and relying on communications sent by the Respondent indicating their intent to conclude the contract expeditiously and anguish in not finding a headway. Risk Purchase under Clause 37 GCC provided commission of certain acts and omissions to constitute 'negligence'. Basis the meaning of the term 'negligence' taken from the judgment of this Court in **BSES Rajdhani Power Ltd. v. Sh. S.S. Gupta, 2011 SCC OnLine Del 2153**, Tribunal found as a matter of fact that Petitioner caused delay and acted wrongfully and Respondent could not be held to be negligent in the context of Article 37 and thus the risk purchase action was also wrongful. Relevant observations are as follows:-

"16.9. From several communications sent by the Claimant, it is amply clear that soon after the execution of the Contract, the Claimant began preparations of the BEDs and submitted them to the Respondent within the



required time frame for their review and approval. In order to maintain the terms and upkeep the integrity of the Contract and time schedule prescribed therein, the Claimant also simultaneously started finalizing designs of the various equipments and negotiations with vendors of LDIs and other equipment so as to enable it to expedite placement or the order for the same. Further, the Claimant took efforts to propose the changes to the drawings and designs of documents to facilitate smoother execution of the Contract.

16.10. In light of the Tribunal's findings in this Award that it was the Respondent who caused the delays to the Project and acted wrongfully, it follows that in those circumstances the Claimant cannot be held to be "negligent" in the context of Article 37, and the Risk Purchase Actions were invalid and wrongful. Further, although the Risk Purchase Actions were issued under Clause 37, but the same was not pursued further and did not culminate into any final action under Clause 37. It continued to try to resolve issues in dispute with the Claimant but eventually wrongfully terminated the Contract under Clause 44.2. Further, Clause 37 is a separate and independent remedy from Clause 44.2."

81. Insofar as the claims for damages are concerned, Tribunal observed and found as follows:-

"In paragraph 3, page 36 of the Amended SOC, USD 494,773 is claimed for BEDs and USD 994,477 for DEDs. This is a total of USD 1,489,250.

The Tribunal finds that the Claimant is entitled to damages for preparation of BEDs and DEDs in the Award of USD 1,489,250 which expenses have been documented and proved, plus interest (see paragraph 24 later). However, an election was made by the Claimant on 3 December 2017, at the hearing in New Delhi not to pursue this claim but the claim for Work Done in preparation of BEDs and DEDs in Mr Mayal's Expert Report (see paragraph 21.14). Therefore, this claim was waived by the Claimant."

21. ISSUE 9: WHETHER THE CLAIMANT IS ENTITLED TO DAMAGES TOWARDS LOSS OF PROFIT AND GOODWILL AND WORK DONE ON PREPARATION OF BEDs AND DEDs

21.1 The Claimant submits that but for the wrongful termination of the Contract by the Respondent, it would have earned revenues consistent with the terms of the Contract. It is entitled to recover the damages on account of losses arising from the Respondent's actions. The claim has evolved and been revised during the course of the arbitration. In the Amended soc, a sum of USD 11,241,713 was claimed, which included loss of profit and goodwill Loss of goodwill has not been pursued by the Claimant. Its expert on this issue, Mr Montek Mayal of FTI Consulting, in a detailed first Expert Report dated 19 May 2017 and Rebuttal Expert Report of 17 August 2017, gave his opinion on lost profits suffered by the Claimant as a



result of the wrongful acts of the Respondent, and quantified the claim as follows:

Table: Mr. Mayal's assessment of the Claimant's Lost Profits (INR)		
		Amount
Amount due to JSCC	[A]	107,686,739
Additional revenues	[B]	1,288,050,795
Additional expenses	[C]	1,239,502,518
Lost Profits (INR)	[A]+[B]-[C]	156,235,016
Lost Profits (USD)		3,017,241

Source: Mr Mayal's First Expert Report, Table 5-8

21.2 He did not take into account in this calculation advance payments made by the Claimant to vendors (paragraph 2.16 of his First Report), or bank guarantees. He did assess the amounts due for work completed, including BEDs and DEDs, and calculates this at USD 2,722,265 (see Table 5.1 to his First Report), and incorrectly classified this as part of the lost profit claim.

21.3 For the lost profit calculation, he assessed the additional revenues that the Claimant would have earned if the Respondent had not breached the Contract. The additional expenses the Claimant would have incurred in earning the additional revenues (by reference to the Claimant's original budget) and expenses it actually incurred if the Respondent had not breached the Contract. Absent all supporting information to the Budget of 18 May 2007 he received from the Claimant, he compares expense margins to budgets according to certain benchmarks, and compared gross margins the Claimant earned on five other projects.

21.12 The issue of claiming both wasted expenses and Work Done, and loss of profit, was discussed between counsel and the Tribunal on Day 9 of the hearing, 3 December 2017. Reliance was placed by Mr. Advani on' the judgment of the Supreme Court in Kanchan Udyog Ltd Vs. United Spirits Ltd, (2017) 8 SCC 237 where the Court after referring to the commentary in Pollock and Mulla observed. "... both reliance loss and expectation loss cannot be maintainable simultaneously.... The Claimant has to choose between the two measures. the party cannot claim reliance losses to put himself in a better position than if the contract had been fully performed; else the Award for reliance losses would confer a windfall on the plaintiff". Mr Alam however, stated that Pollock and Mulla was straight on the point, as there may be circumstances where a party can claim both direct expenses (reliance interests) as well as loss of profit (expectation interests). The extract he relied upon in the Contract and Specific Relief Acts by Pollock and Mulia, 14th Edition pages 1165-1166 reads as follows:

"Although the rules.' as to damages seek to protect both the expectation and the reliance interests, the innocent party cannot ordinarily recover both expectation loss, viz, loss of profit, and reliance loss, viz., expenses incurred in reliance of the promise; that



would involve double counting. He has to choose between the two measures.

However, he cannot claim reliance losses to put himself in a better position than if the contract had been fully performed, else, the Award of damages for reliance losses would confer a windfall on the plaintiff, and would increase the damages in proportion to the claimant's inefficiency in performance, rather than in proportion to the gravity of the breach, and probably offend normal principles of causation. In such cases, therefore, the plaintiff can recover the loss on account of wasted expenditure or outlay only to the extent of the expected gain; and the onus of proving lies on the party committing breach to show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed.

However, a mixed claim for capital expenditure and for loss of profit (seeking reliance losses and expectation losses) may lie in appropriate cases. for example, where the plaintiff really seeks only the net profits lost by the breach; viz. by deducting from the anticipated gross return, the costs of performance, capital outlay, and the salvage value of capital asset employed. The true principle is also stated that there is no logical objection if the plaintiff combines various types of claims, but the plaintiff cannot combine them so as to recover more than once for the same loss."

The important principle is that there cannot be double counting. Later, on 3 December 2017, Mr Alam advised an election was only required if there was double counting. As to the claim for Work Done in preparation of the BEDs and DEDs, the advances paid to vendors and claim for encashment of bank's guarantees was not counted in this. However, when pressed by the Tribunal, he elected to have the 5% claimed in Table 5.1, page 55 of the Report, (and give up the claim for USD 1,489,250.)

21.13 It is settled law laid down by the Supreme Court of India where in a works contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. In A.T. Brij Paul Singh vs. State of Gujarat (1984) 4SCC 59 the Court held that 15% of the value of the remaining parts of the works contract can measured as damages for loss of profit. The judgment is followed in Dwardkadas vs. State of M.P. & Anr. (1999) 3SCC 500 and MSK Projects India (JV) Limited vs. State of Rajasthan & Anr. (2011) (10) SCC 573 where the Court held that claim for damages as expected profit out of contract cannot be disallowed on ground that there was no proof that the contractor has suffered actual loss to the extent of amount claimed on account of breach of contract. Similarly, in Mohd. Salamatullah vs. Govt of AP (1977) 3SCC 590 the Court upheld the Award granting 10% of the value as damages towards the loss of profit. This principle has been adopted by the various High Courts of India in cases involving



construction contracts entered into with a view to earn profits. The Hon'ble Bombay High Court, following the ratio given by the apex court of India has held that "in the government contracts which are undertaken by the contractor for earning profits, it is implicit that once there is breach, the object of earning profit is nullified. Once such fundamental breach occurs, the party is presumed to have suffered loss of profit."

21.14 The Claimant's claim for loss of profit falls to be considered on the basis of these cases, the principles of compensation for recovering damages for a wrongfully terminated contract as set out in paragraph 18,' and on the facts and evidence presented in the arbitration. Both experts, Mr Mayal and Mr Singh were excellent and credible experts, and to their credit made necessary concessions in cross-examination. Both experts agree that the common approach to assessing loss of profit was to measure damages by reference to the sum to put the Claimant in the same economic position it would have occupied, but for the wrongful acts and omissions by the Respondent. This accords with Section 73 of the ICA, and also as per this provision the loss must be foreseeable and not remote. A party claiming damages under Section 73 is under a duty to mitigate loss, insofar as reasonably possible.

21.15 Mr Mayal has done his best to calculate the loss of profit, based on all the information he was able to find, or was provided by the Claimant. Based on the documents he relied upon:

21.16 The Claimant's Budget for the Contract of 18 May 2007 showed a profit margin of 13%. He assesses a profit margin of 3.8% (INR) and 1% (USD). Mr Singh shows from the Claimant's financial statements that for 2007 and 2008 the PBT was for 8.60% and 3.84% respectively. It is true that Mr Mayal was not able to verify all the line items in the Budget but clearly the Claimant anticipated a profit. Whilst it was the lowest bidder it has not been demonstrated it expected to make a loss, to the contrary as stated in the Budget. Further, Mr Singh in cross-examination admitted PBT was the appropriate reference point for determining profitability and it was possible for the lowest bidder to make a profit (and the fact a contract was long term does not disentitle a contractor from a loss of profit claim). Also, we agree with Mr Mayal that interest should not be taken into account in a loss of profit claim as the Claimant did not raise any additional debt specifically for the project, and most of the interest came into the 2009 finance statement.

21.17 There were complications and confusion between the Claimant's claim for BEDs and DEDs ("wasted costs"), the claim for 5% milestone for completion of 100% of BEDs and 50% of DEDs in Mr Mayal's report (mischaracterised as "lost profits"), and the lost profits claim. This was cleared up and clarified on Day 9 of the hearing on 3 December 2017. In short, there was double counting between the wasted costs claim of the Claimant and the 5% milestone claim, but in accordance with India law and Pollock and Mulla, the Claimant cannot claim both "expectation and reliance interest". "Expectation loss" being loss of profit and "reliance



loss" being for work done. However, a mixed claim may succeed if there is no double counting. On Day 9, Mr. Allam on behalf of the Claimant made an election to claim his 5% milestone of 100% BEDs and 50% DEDs and not the wasted costs claim for USD 1,489,250. In effect he waived this wasted cost claim, on behalf of the Claimant.

21.18 Now turning to the question of possible double counting. In Appendix 5.1.3 of his First Report, Mr Mayal set out the basis of his calculation of amounts due to the Claimant.

Table 5-1-3: Amounts due to JSCC

Item	Amount (USD)	Amount (INR)	Comment/source
Contract Price excluding training charges (A)	26,821,000	157,625,700	Appendix 1 to the Contract Agreement.
5% of Contract Price payable on submission and approval of PFD, GL and SLDs [B]=[A] x 5%	1,341,050	7,881,335	Clause 2.1 of Appendix 3 to the Contract Agreement. The PFD, GL and SLDs were submitted by JSCC in December 2007. On that basis, I assume the payment would have been made at the end of December 2007.
Price for BED (C)	494,803 ⁽²⁾	1,090,000	Tables 1 and 2 at Appendix 1 to the Contract Agreement.
75% of the BED price payable pro rata [D] = [C] x 75%	371,102	817,500	Clause 2.3.1.1 of Appendix 3 to the Contract Agreement. The PERT network confirms the start and completion dates of the BED as 6 August 2007 and 31 December 2007, respectively.
			Accordingly, I assume that the relevant amounts are payable pro-rata over the period August to December 2007.
Price for DED [E]	1,859,197 ⁽²⁾	9,810,000	Tables 1 and 2 at Appendix 1 to the Contract Agreement.
50% of 75% of the DED price payable pro rata [F] = [E] x 75% x 50%	698,199	3,678,750	Clause 2.3.1.1 of Appendix 3. The PERT network confirms the start and completion dates of the DED as 20 November 2007 and 30 May 2008 respectively. Accordingly, I assume that the relevant amounts are payable pro rata over the period November 2007 to May 2008.
Total amount due [B]+[D]+[F]	2,409,351	12,377,585	

Source: Exhibit: FT1-2, pp69 to 93; and Exhibit: FT1-15.

Notes: [1] Amounts exclude all taxes and duties.

[2] The price for "supply of drawings and documents" (USD 118,000) is split between the BED and the DED in proportion of their respective total prices agreed under the Contract.

Signature Not Verified

Digitally Signed
By: KAMAL KUMAR
Signing Date: 04.05.2024
16:49:13

O.M.P. (COMM) 509/2018



He then in Appendix 5.1.3 of his First Report calculates that the "additional revenues" (figure (8) in Table 5.8) are the Contract Price of USD 26,912,000 less

amounts due to the Claimant above of USD 2,409,381 i.e. a net total of USD 24,502,647. From this he deducts additional expenses (Figure (C) of Table 5-8), as set out at Appendix 5-3 of his Report. He excludes payments of 100% of the BED and 50% of the DED. See also table 5.3 to his First Report. The total expenses are USD 23,797.81.

In conclusion, the Amounts Due to the Claimant of USD 2,409,381, plus Additional Revenues of USD 24,502,649 i.e. total the Contract Sum of USD 26,912,000. Therefore, if expenses of USD 23,791,811 are deducted there is a profit of USD 3,114,189. It follows that the figure in Table 5.8 of USD 3,107,000 is incorrect. This revised figure equates to about 1.7% profit margin.

Based on Mr Mayal's assessment there is no double counting.

22. TRIBUNAL FINDING ON WORK DONE IN PREPARATION OF BEDS AND DEDS AND ON LOSS OF PROFIT

22.1 Work Done in preparation of BEDs and DEDs

There is no doubt in the evidence presented that the Claimant completed preparation of 100% of the BEDs and 50% of the DEDs.

Therefore, as the Contract provided, it is entitled to USD 2,722,265, which the Tribunal awards.

22.2 Loss of Profit

The Tribunal finds, that the Claimant is entitled to loss of profit based on the authorities above, and Indian law. What is the appropriate loss of profit? Generally, in 2007 and 2008, the Claimant was across its global projects achieving PBT of 6.22% (see Table 3 to Mr Singh's Report). Accordingly, Mr Mayal at paragraph 3.18 of his First Report, from 2005 to 2008 for the ASU segment of the Claimant's business, the operating margin was 11%. However, looking at Table 5.7 of his Report, additional expenses as a percentage of additional revenue (INR) a percentage of 3.8% is arrived for this Contract.

Despite the conflicting margins for overheads on Mr Mayal's report, the Tribunal finds that the Claimant is entitled to a profit margin of 3.8% (as this is based on this Contract not across the Claimant's global business). For the computation of loss of profit, the sum awarded towards the BEDs and DEDs USD 2,722,265 (see paragraph 22.1 above) is to be deducted from the total contract price of USD 26,912,000 since the milestone payment already includes the profit margin. Therefore, the loss of profit is computed on the sum of USD 24,189,735 i.e. the total contract price minus the 5% milestone payment. This means $USD\ 24,189,735 \times 3.8\% = USD\ 919,209.93$; and this sum is awarded for loss of profit.



Therefore, the Tribunal finds that the Claimant is entitled to loss of profit, as part of the compensation for the wrongful termination of the Contract.”

82. Admittedly, Respondent had claimed USD 1,489,250 plus 18% interest as damages for expenses incurred in preparing the BEDs and DEDs. While assessing the claims towards loss of profit, the Tribunal noted the passages from the Law of Contract and Specific Relief Act by Pollock and Mulla, 14th Edition, which states that a mixed claim for capital expenditure and loss of profit (seeking reliance losses and expectation losses) may lie in an appropriate case, for instance, where Plaintiff only seeks net profits lost by the breach, viz. by deducting from the anticipated gross return, costs of performance, capital outlay and the salvage value of capital asset employed. The principle is that there is no logical objection if the Plaintiff combines various claims and the only caveat is that Plaintiff cannot combine them so as to recover more than once for the same loss. Relying on this passage, the Tribunal first crystallized the principle that ‘there cannot be double counting’. Having so observed, the Tribunal notes that Respondent had given up the claim for USD 1,489,250 and elected to claim 5% payable on achieving the first milestone. Thereafter, the Tribunal entered into a detailed discussion and calculation on the loss of profit based on expert reports from both sides including the concession made by Petitioner’s expert Ms. Singh that the drawings that were created by the Respondent for this project were specifically for the project and confidential and restricted for use in the project and on this basis concluded that mitigation of damages was not possible. Noting that Respondent had given up the claim for damages on the work done on BEDs and DEDs and elected for 5% payment on first milestone being achieved, the Tribunal proceeded to examine the assessment of claims in Mr. Mayal’s report with



respect to loss of profit. Delving into detailed calculations, Tribunal found that the Respondent in its report had assessed the additional revenues taking the contract price and deducting the amount of USD 2,409,381 i.e. net total of USD 24,502,647. From this, additional expenses were deducted, as set out in Appendix 5-3 of Mr. Mayal's report and then payments of 100% of the BEDs and 50% of the DEDs were excluded. Finally, the Tribunal concludes that despite the conflicting margins for overheads, Respondent was entitled to a profit margin of 3.8%, based on this contract and not his global business and after deducting the sum of USD 2,722,265 from the contract price of USD 26,912,000, since the milestone payment included the profit margin, awarded loss of profit along with other claims. Clearly there was no double counting. Actual expenses incurred made under the Heads 'advance payments to vendors and preparation of BEDs and DEDs' have been awarded basis the evidence led in support of the claims and rightly so, in view of the finding that the termination was wrongful.

83. From a close reading of the impugned Award, I am unable to agree with the Petitioner that the Tribunal has re-written the contract between the parties, foisting unilateral obligations, making the Award vulnerable. Tribunal has decided within the four corners of the contractual provisions and even if two interpretations are possible this Court cannot interfere, considering that the ground of patent illegality is not available to assail an arbitral award passed in International Commercial Arbitration and even otherwise interpretation of a contract is the domain of the Tribunal, unless the view is wholly perverse.

84. In my view, the Award is *ex-facie* well-reasoned and in consonance with the public policy of India and does not fall within any parameter on



2024:DHC:3400



which an International Commercial Arbitration Award can be assailed and/or set aside. For all the aforesaid reasons, this Court is of the view that the impugned Award merits no interference.

85. Petition is accordingly dismissed along with pending applications.

JYOTI SINGH, J

APRIL 30, 2024/kks/KA/shivam

Signature Not Verified

Digitally Signed
By: KAMAL KUMAR O.M.P. (COMM) 509/2018
Signing Date: 04.05.2024
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