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O.P.No.862 of 2018

In the High Court of Judicature at Madras

Reserved on
18.11.2025

Delivered on:
02.12.2025

Coram:

The Honourable Mr.Justice N.ANAND VENKATESH

Original Petition No.862 of 2018

M/s.Oil & Natural Gas Corporation
Ltd., MM Department, Thalamuthu
Natarajan Building, Tower II
8th Floor, Gandhi Irwin Road,
Egmore, Chennai-8.

...Petitioner

Vs

M/s.Idealis Mudchemie Private
Limited, No.2, North Crescent
Road, T.Nagar, Thyagarayanagar,
Chennai-17.

(name and address of the
respondent amended as per
order of the Court dated
18.9.2025 vide Memo dated
18.9.2025 by NAVJ)

...Respondent

PETITION under Section 34(2)(A(IV) and (V) and (B)(2) of the
Arbitration and Conciliation Act, 1996 praying to set aside the
arbitration award dated 02.5.2018 passed by the 2nd respondent, which
had arisen out of the dispute between the petitioner and the 1st



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respondent in contract dated 16.4.2012 and direct the 1st respondent to pay the costs of the petition.

For Petitioner : Mr.R.Yashod Vardhan, SC
assisted by
Ms.D.Monisha for
M/s.AAV Partners

For Respondent : Mr.S.R.Raghunathan for
Ms.Akila

ORDER

This is a petition filed by the petitioner – M/s.Oil and Natural Gas Corporation Limited challenging the award passed by the learned Arbitrator dated 02.5.2018.

2. Heard both.

3.The facts leading to filing of this petition are as follows :

(i) Vide tender dated 31.12.2010, the petitioner called for bids for supply of baryte powder for a total quantity of 3,19,912 MTs having specific gravity of 4.15. The respondent submitted their bid on 23.2.2012. The respondent became the successful bidder. Pursuant to



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that, a letter of award (LoA) dated 23.2.2012 was issued by the petitioner to the respondent for the supply of 45,360 MTs of baryte powder at an ex-works price of Rs.4,869/- per MT + applicable taxes. Thereafter, the petitioner and the respondent entered into a rate contract dated 16.4.2012 in this regard. The contract was for a duration of two years from the date of the LoA dated 23.2.2012 to 22.2.2014.

(ii) Vide letter dated 08.3.2012, The respondent furnished a performance bank guarantee for Rs.99,39,000/- in favour of the petitioner. Later, by means of an amendment to the rate contract dated 06.3.2014 marked as Ex.C.6, the contract was amended to extend the duration upto 30.9.2014.

(iii) The respondent supplied 16,250 MTs of baryte powder during the contract period till February 2014. Even during the extended period of time, 7,000 MTs were supplied by the respondent. Thus, in total, the respondent supplied 23,250 MTs as against their contractual obligation to supply 45,360 MTs.

(iv) On the grounds of short supply, supply of sub-standard material and delayed supplies, the petitioner made the following deductions as per the terms of the contract:



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(1) Deduction to the tune of Rs.6,63,661.74 Ps. towards shortfall of the quantities supplied

(2) Deduction to the tune of Rs.53,25,855/- towards liquidated damages and

(3) Deduction to the tune of Rs.16,21,807/- towards supply of sub-standard material.

In total, a sum of Rs.76,11,323.74 Ps was deducted.

(v) The petitioner also took steps to invoke the performance bank guarantee and at that point of time, the respondent filed an application in O.A.No.1314 of 2015 against the petitioner and ICICI Bank, Nungambakkam before this Court under Section 9 of the Act and sought for an order of interim injunction against encashment of the performance bank guarantee till the completion of the arbitral proceedings. Later, the said application was allowed by order dated 07.4.2016 and once again, at the instance of the respondent, pursuant to a petition in O.P.No.445 of 2016 filed under Section 11 of the Act, an Arbitrator was appointed.

(vi) Thereafter, before the learned Arbitrator, the respondent filed the claim statement before the learned Arbitrator making the



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following claims:

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S.No.	Description	Column No.	Amount in Rs.	Total Rs.
I	Shortfall in payment			
	Interest due on delay in payments	31	29,78,731.11	
	Shortfall in payment of Invoices	33	89,64,810.74	
			1,19,43,541.85	
	Total (upto) 30.6.2016)			
	Interest from 01.7.2016 to 06.2.2017 @ 12% p.a. for 220 days		8,63,861.66	1,28,07,403.51
II	Non submission of C Form			
	Tax amount	12	9,74,871.18	
	Interest from due date upto Jan 2017	15	2,04,546.69	
	Total		11,79,417.87	11,79,417.87
III	Damages/Revenue Loss			
	a) Claim on account of revenue loss		2,32,54,344.00	
	b) Loss on account of blocked production (balance quantity of contract		55,23,393.00	
	c) Finance cost (holding cost) on account of delay in lifting		4,77,828.00	2,92,55,565.00
			Total Rs.	4,32,42,386.38

(vii) The respondent also sought for payment of *pendente lite* interest at the rate of 18% per annum from the date of the claim till the date of payment.

(viii) Before the learned Arbitrator, the petitioner filed a statement of defence and justified the deductions made as per the terms of the agreement between the parties. The petitioner also sought for a counter claim in the following terms:



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"(a) to declare that the claimant has failed to perform its obligations under the Rate Contract dated 16.4.2012 read with the 'General Conditions of Contract' executed between the parties and is in breach of the agreement between the parties;

(b) to declare that the invocation of the performance bank guarantee dated 08.3.2012 by the respondent vide communication dated 23.12.2015 was valid and legally enforceable;

(c) to render an award directing the claimant to pay to the respondent/counter claimant an amount of Rs.10,47,31,900/- (Rupees ten crores forty seven lakhs thirty one thousand and nine hundred only) towards damages/losses suffered by the respondent/ counter claimant on account of the non performance by the claimant of the contract between the parties; and

(d) for costs of the present arbitration proceedings as also all litigation costs in respect of the proceedings before the High Court of Madras in O.A.No.1314 of 2015 and O.P.No.445 of 2016 and all ancillary legal costs in connection with the present dispute."

(ix) The learned Arbitrator, based on the pleadings, framed the following issues:



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"1. Whether, on a conjoint reading of the Tender dated 31.12.2010, the bid dated 13.9.2011 placed by the claimant, the Letter of Award dated 23.2.2012 and the Rate Contract (and amendments thereto) - the 'General Terms and Conditions' applicable inter se the parties are those contained at pages 95-123 of Annexure R/1 or those contained at pages 24-45 of Annexure C/5?

2. Whether the terms of the contract found in Annexure-II of Annexure R/1 pages 95-123 can be regarded as overridden/superseded by the terms of the document at pages 24-45 of Annexure C5? Whether the claimant has committed any breach of the obligation of the contract between the parties?

3. Whether the respondent has committed any breach of the obligation of the contract between the parties?

4. Whether the claimant's due performance of the obligation of the contract stood frustrated?

5. Whether any plea allegedly taken by a third party can serve as the basis of an absolute defence against non-performance by the claimant of its contractual obligations?

6. Has the claimant suffered any loss under various heads claimed and is the respondent liable to compensate the claimant for such loss, if any, suffered by the claimant?



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7. *Has the respondent suffered any loss under various heads claimed and is the claimant liable to compensate the respondent for such loss, if any, suffered by the respondent?*

8. *Whether the respondent is entitled to the claim of the amount of Rs.10,47,31,900/- (Rupees Ten Crore, Forty Seven Lakh, Thirty One Thousand and Nine Hundred only) towards damages or losses as claimed by it?*

9. *Whether there was any shortfall in payments made by the respondent to the claimant under the contract?*

10. *Whether the levy of liquidated damages by the respondent under the contract is justified or not ?*

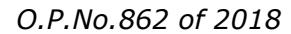
11. *Whether the claimant is entitled to claim interest in view of the terms contained in the contract?*

12. *Whether the claimant is entitled to claim for damages in view of the terms of the contract?*

13. *Whether the parties are entitled to the reliefs sought for and also for cost?*

14. *To what other relief the parties are entitled?"*

(x) Before the learned Arbitrator, the respondent/claimant examined C.W.1 and C.W.2 besides marking Ex.C.1 to Ex.C.35. On the side of the petitioner, R.W.1 was examined and Ex.R.1 to Ex.R.41



(xi) On considering the pleadings, evidence and the facts and circumstances of the case, the learned Arbitrator passed the following award:

(vii) *The invocation of performance bank guarantee dated 08.3.2012 by the respondent is not valid and legally enforceable. But, the claimant should approach the High Court, Madras for*



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seeking direction for the release of the performance bank guarantee dated 08.3.2012.

(viii) The respondent shall, apart from the amount awarded, pay the admitted amount of Rs.14,01,553/- also which are pending due for payment by the respondent.

(ix) The claimant is entitled to interest at the rate of 9% p.a. on the awarded amount and also on the admitted amount from the date of award till date of payment.

(x) There is no order as to costs."

(xii) Aggrieved by the award passed by the learned Arbitrator, the petitioner is before this Court.

4. After filing of the above original petition, the original respondent namely M/s.Oren Hydrocarbons Private Limited underwent corporate insolvency resolution process (CIRP). The CIRP was initiated against the respondent by an order passed by the National Company Law Tribunal, Chennai on 09.11.2021. Since no viable plan was received, liquidation was ordered against the respondent on 10.5.2023 and the Liquidator was appointed. While discharging his functions under the Insolvency and Bankruptcy Code, 2016, the Liquidator sold the original respondent company as a going concern on 09.7.2024 to



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the said M/s.Idealis Mudchemie Private Limited, which was the successful auction purchaser. Pursuant to that, the name of the original respondent was also changed in the file of the Registrar of Companies, Chennai from M/s.Oren Hydrocarbons Private Limited to M/s.Idealis Mudchemie Private Limited. A memo was also filed before this Court in this regard and by order of this Court dated 18.9.2025, the name of the respondent was also amended suitably.

5. The learned Senior Counsel appearing on behalf of the petitioner focussed his arguments only on three grounds. He submitted as follows:

(a) The recovery of liquidated damages was lawful and it was in terms of the agreement. But, the learned Arbitrator went wrong in rendering a finding that the contract stood discharged by frustration by applying Clause 24 of the General Conditions of Contract (GCC), which dealt with *force majeure* and that it could not be applied to the facts of the present case since the said Clause itself described various events, which would constitute a *force majeure* and none of such events was the reason for the contract getting frustrated.



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(b) If the finding of the learned Arbitrator that the contract was discharged by frustration is to be accepted, then, only Section 56 of the Indian Contract Act, 1872 will apply whereas *force majeure* is covered under Section 32 of the Indian Contract Act, 1872.

(c) Admittedly, the respondent supplied only 23,250 MTs against their contractual obligation of 45,360 MTs and Clause 12 of the GCC provided for recovering from the supplier the liquidated damages and not by way of penalty, a sum equivalent to 0.5% of the contract price per week for failure to supply as per the schedule upto a ceiling of 5% of the contract price.

(d) In the case in hand, time was not the essence of the contract and therefore, notice was not required to be issued under Section 55(3) of the Indian Contract Act, 1872. Hence, such deduction made by the petitioner was perfectly justified under the terms of the contract.

(e) Baryte was a regular and critical chemical used by the petitioner in drilling operation and it has been used as a weighing agent to suppress high formation pressure and to prevent blow outs. Therefore, the same was taken into consideration and the liquidated damages were fixed at a very conservative level on a genuine pre-



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estimate and it was not a clause *in terrorem*.

(f) Apart from that, the learned Arbitrator went wrong in rendering a finding that the respondent was not able to supply the baryte powder only because of the stoppage of supply of baryte lumps by the Andhra Pradesh Mineral Development Corporation (APMDC) and hence, the contract was frustrated. This finding cannot at all be sustained since Clause 24 of the GCC did not include within itself a separate eventuality of the supply of baryte powder by the respondent dependent on the supply of baryte lumps by the APMDC. Therefore, there was an absolute obligation on the part of the respondent without any reference to the supply of baryte lumps by the APMDC and on failure to perform the same, the respondent was bound by the specific terms of the contract, which contemplated the recovery of liquidated damages and the same cannot be prevented by putting against the petitioner the *force majeure* clause.

(g) The learned Arbitrator had rendered a finding that the petitioner did not prove any losses suffered and therefore, they were not entitled to the liquidated damages. According to the petitioner, this finding was rendered without taking into consideration the fact that the baryte powder is a very critical chemical used by the petitioner in



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the drilling operations and without the same, there was a risk of blowout that could cause huge monetary losses besides loss of human precious life, which cannot be easily estimated in monetary terms. Therefore, the pre-estimated liquidated damages provided under Clause 12 of the GCC, which were utilised by the petitioner for deduction towards delayed supplies and the non supply of baryte powder were just and lawful. The finding rendered otherwise by the learned Arbitrator suffered from patent illegality and it was in conflict with the Public Policy of India.

(h) The next ground that was raised on the side of the petitioner pertained to double counting. According to the petitioner, the respondent made a claim of Rs.89,64,810.74 Ps towards shortfall in the payment of invoices. In the award, the learned Arbitrator failed to take note of the fact that a sum of Rs.14,01,553/- formed part of the total claim of Rs.89,64,810.74 Ps. But, the said sum of Rs.14,01,553/- was independently granted in favour of the respondent. This finding of the learned Arbitrator suffered from patent illegality.

(i) The last ground that was raised on the side of the petitioner was regarding the grant of pre-award interest, which, according to the petitioner, was contrary to Clause 33.6 of the GCC. Section 31(7) of



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the Act provides that unless and otherwise agreed by the parties, an award for a sum of money may include interest. However, there was an agreement between the parties, which prohibited the grant of pre-award interest. The learned Arbitrator went wrong in awarding the pre-award interest by narrowly interpreting the scope of Clause 33.6 of the GCC.

6. In so far as the rejection the counter claim made by the petitioner was concerned, the learned Senior Counsel appearing on behalf of the petitioner did not make any serious contentions presumably since the present respondent namely M/s.Idealis Mudchemie Private Limited had come into picture by buying the original respondent company namely M/s.Oren Hydrocarbons Private Limited as a going concern under Regulation 32(e) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, expressly without liabilities. Therefore, no claims or liabilities can now be maintained against the respondent and the said M/s.Oren Hydrocarbons Private Limited was acquired on a clean slate basis. This position of law is now too well settled and therefore, the learned Senior Counsel appearing on behalf of the petitioner did not harbour



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much on this issue.

7. Per contra, the learned counsel appearing on behalf of the respondent made the following submissions:

(i) In the petition filed under Section 34 of the Act, the petitioner raised grounds by confining themselves to either error of law or failure to appreciate the facts in the right perspective. Both these contentions would fall within the realm of re-appreciation or interpretation of evidence, which is impermissible under Section 34 of the Act.

(ii) The view taken by the learned Arbitrator, on a bare reading of the various clauses in the agreement, was a possible view and this Court cannot sit on appeal and review it nor re-appreciate the evidence on the merits of the case.

(iii) The learned Arbitrator rendered findings on the issue of frustration of contract by relying upon Ex.C.5, Ex.C.13, Ex.C.15, Ex.C.25, Ex.C.29 and Ex.R.7 and such findings were available at paragraphs 56 to 68 of the award. Those findings were based on the facts and circumstances of the case, interpretation of the clauses in the agreement and appreciation of evidence, which does not warrant the interference of this Court.



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(iv) In so far as the deduction made by the petitioner towards shortage in the delivery of the baryte powder was concerned, the learned Arbitrator appreciated the evidence, arrived at a conclusion and rendered a finding that the petitioner was not entitled to make any deduction. Even in so far as the deduction made for defective quality of baryte powder, the learned Arbitrator rendered a finding, which was a possible view.

(v) In so far as finding of the learned Arbitrator to the effect that the petitioner did not prove any loss due to short supply/defective supply of the baryte powder was concerned, the learned Arbitrator rightly relied upon the judgment of the Hon'ble Apex Court in ***Kailash Nath Associates Vs. Delhi Development Authority [reported in 2015 (4) SCC 136]*** and rendered a finding that only when the loss was proved, the claim of liquidated damages could be sustained and that since the petitioner did not prove the loss, the learned Arbitrator rightly rejected the claim towards liquidated damages.

(vi) In so far as the issue of payment of interest was concerned, the learned Arbitrator fixed the rate of interest at 9% and granted a sum of Rs.14,02,577/- towards interest on delayed payment. This award of interest could not be held to be excessive or in violation of



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any terms of the agreement between the parties.

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(vii) In so far as the last ground taken on the side of the petitioner to the effect that there was double counting of a sum of Rs.14,01,553/- was concerned, it was not even a ground that had to be taken in a petition filed under Section 34 of the Act and the same could not be raised at the time of arguments.

(viii) In the light of all the above submissions made on the side of the respondent, the learned counsel sought for dismissal of this petition.

8. This Court has carefully considered the submissions of the learned counsel appearing on either side and perused the materials available on record and more particularly the impugned award passed by the learned Arbitrator.

9. Before this Court gets into the exercise of dealing with major issues that were addressed by the learned counsel appearing on both sides, at the outset, this Court has to deal with one preliminary issue, which was raised on the side of the respondent namely that the grounds raised in the petition filed under Section 34 of the Act do not



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sufficiently explain as to how the findings/award of the learned Arbitrator suffer from patent illegality.

10. The answer to this preliminary objection is not far to seek and it has been explained by the Hon'ble Apex Court in the decision in ***State of Chhattisgarh Vs. SAL Udyog (P) Ltd. [reported in 2022 (2) SCC 275]***, the relevant portion of which is as follows:

"24. We are afraid, the plea of waiver taken against the appellant State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent Company having regard to the language used in Section 34(2-A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the High Court ought to have interfered by resorting to Section 34(2-A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In



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other words, the respondent Company cannot be heard to state that the grounds available for setting aside an award under Sub-Section (2-A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the Sub-Section is "the Court finds that". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an award, would not be available in an appeal preferred under Section 37 of the 1996 Act."

11. The Hon'ble Apex Court, in the said judgment, held that the word '**if the Court finds that**' occurring in Section 34(2A) of the Act is wide enough to enable the Court acting on its own to set aside the award if patent illegality appears on the face of the award.

12. In the case in hand, at paragraph 13 of the petition filed under Section 34 of the Act, various grounds have been raised, which dealt with illegality in the findings relating to frustration and levy of liquidated damages. In the considered view of this Court, that will suffice to enable this Court to see if those findings, on the face of it or



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on a plain reading of the award, can be tested to arrive at a conclusion as to whether they suffer from patent illegality.

13. Broadly, three grounds have been canvassed seriously by both sides and it will suffice to focus on those grounds and see if the findings rendered by the learned Arbitrator fall foul of any of the contingencies provided under Section 34 of the Act as was explained by the Hon'ble Apex Court in the decision in ***Ssangyong Engineering & Construction Co. Ltd. Vs. NHA*** ***[reported in (2019) 15 SCC 131]***. They are:

(i) deduction made by the petitioner towards liquidated damages to the tune of Rs.53,25,855/-

(ii) double computation of Rs.14,01,533/-, which, according to the petitioner, already formed part of the total award of Rs.89,64,810.74 Ps and

(iii) pre-award interest granted by the learned Arbitrator in the teeth of Clause 33.6 of the GCC.



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14. This Court will now proceed to deal with the first issue. There is no dispute regarding the fact that the APMDC was the only source for getting baryte lumps and that there was no other alternative source to supply the same. Therefore, the respondent could have purchased baryte powder having the specific gravity of 4.15 only if the APMDC supplies baryte lumps. The fact that the APMDC is the only source for the supply of baryte lumps is further substantiated by their own conduct and even the petitioner managed to carry on with their operation when the supplies were stopped from the respondent by obtaining the material directly from the APMDC at a higher price. This is evident from Ex.R.21. It is also evident from the deposition of R.W.1, who answered for question No.130 that the failure on the part of the respondent and another supplier to supply the material necessitated the petitioner to enter into a fresh contract with the APMDC. The sole Arbitrator has sufficiently discussed about the same in the award and therefore, it is not necessary for this Court to further deliberate on this crucial fact.

15. When the petitioner and the respondent entered into the contract, the respondent independently undertook to provide baryte



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powder as per the delivery schedule and neither of the parties considered that the non supply of the baryte lumps by the APMDC would constitute an event of frustration or an event of *force majeure*. Thus, on a plain reading of the agreement between the parties, it is seen that the respondent has been obligated to supply baryte powder as per the delivery schedule. In view of the same, the specific stand taken by the petitioner before the learned Arbitrator was that the failure of the APMDC to supply baryte lumps cannot constitute *force majeure* as per the contract.

16. It will be relevant to extract Clause 24 of the contract as hereunder:

"Clause 24 - FORCE MAJEURE:

In the event of either party being rendered unable by Force Majeure to perform any obligation required to be performed by them under the contract, the relative obligation of the party affected by such Force Majeure shall be suspended for the period during which such cause lasts.

The term "Force Majeure" as employed herein shall mean acts of God, War, Civil Riots, Fire directly affecting the performance of the Contract, Flood and Acts and Regulations of respective



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government of the two parties, namely ONGC and the CONTRACTOR.

Upon the occurrence of such cause and upon its termination, the party alleging that it has been rendered unable as aforesaid thereby, shall notify the other party in writing, the beginning of the cause amounting to Force Majeure as also the ending of the said clause by giving notice to the other party within 72 (seventy two) hours of the alleged beginning and ending of the cause respectively. If deliveries are suspended by Force Majeure conditions lasting for more than 2 (two) months, ONGC shall have the option of cancelling this contract in whole or part at his discretion without any liability at his part.

Time for performance of the relative obligation suspended by force majeure, shall then stand extended by the period for which such cause lasts."

17. The learned Senior Counsel appearing on behalf of the petitioner submitted that the parties consciously decided to include a *force majeure* clause in the agreement that defined all those events, which would end the enforcement of the contract due to those eventualities and that they consciously did not choose to include the clause with regard to non supply of baryte lumps by the APMDC to the



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respondent as one such eventuality and that therefore, Section 56 of the Indian Contract Act, 1872 will not have any application in this case.

18. It is seen from the evidence that the contract of the respondent with the APMDC was only upto 07.8.2014 and that the respondent, for the reasons best known to them, failed to notify the petitioner about the alleged impossibility of the performance of the contract until 11.12.2014. A reference can be made to Ex.C.15 in this regard. The contract ended on 30.9.2014. When that being the case, if, according to the respondent, the performance of the contract had become impossible, Clause 24 of the GCC provides for giving a notice of frustration within 72 hours of the event. The learned Arbitrator rendered a finding that this was merely a formality.

19. It must also be kept in mind that seven other companies, which had secured the supply contracts under the same tender, had completed their contracted supplies during the same time period and it was only the respondent, which took a stand that the stoppage of supply from the APMDC had frustrated the contract.



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20. The eventualities, which may lead to *force majeure*, have been specifically provided in Clause 24. In other words, Clause 24 is exhaustive of all events that would render the contract void. However, the parties consciously did not include the supply of of baryte powder being dependent on the supply of baryte lumps by the APMDC, which would also constitute as one of the events for a *force majeure*.

21. If the supply of baryte lumps by the APMDC to the respondent is a condition precedent to enable the respondent to supply baryte powder to the petitioner, there was absolutely no difficulty for the parties to have factored it as one of the eventualities under the *force majeure* clause. However, the obligation on the part of the respondent was absolute and the respondent had to supply baryte powder as per the delivery schedule. In view of the same, since the *force majeure* eventuality is covered under the contract and if any of those eventualities had arisen, Section 32 of the Indian Contract Act, 1872 would have immediately come into operation. In such a scenario, Section 56 will have no application.



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22. Sections 32 and 56 of the Indian Contract Act, 1872 serve different purposes and can operate together depending on the circumstances of a contract's performance becoming impossible.

23. Section 31 of the Indian Contract Act, 1872 defines contingent contract thus:

A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract does or does not happen."

24. It is also relevant to take note of Sections 32 and 56 of the Indian Contract Act, 1872, which are as follows:

"Section 32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void."

.....

"Section 56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes



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impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹ Compensation for loss through non-performance of act known to be impossible or unlawful.— Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

25. Section 32 of the Indian Contract Act, 1872 deals with contingent contracts where the contract itself anticipates certain future uncertain events and stipulates consequences if those events occur. If the contract explicitly or implicitly provides for these contingencies and their outcome, Section 32 applies and the contract's terms govern the discharge of the obligations.

26. The distinction between Sections 32 and 56 of the Indian Contract Act, 1872 has been explained by the Hon'ble Supreme Court in ***Satyabrata Ghose Vs. Mugneeram Bangur & Co. [reported in***



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AIR 1954 SC 44], the relevant portion of which reads as under:

"According to the Contract Act, a promise may be express or implied [Section 9] . In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under Section 32 of the Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

27. Where the performance of a contract is dependent on the will of a third party, such a contract would be contingent in character within the meaning of Section 32 (See **Shardaprasad Vs. Sikandar [reported in AIR 1915 Nag 15]**).

28. In the case in hand, both the parties were well aware that supply of baryte powder by the supplier is dependent on the supply of baryte lumps by the APMDC. Though this was not expressly provided



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for in the *force majeure* clause, this was clearly an implied term.

29. A contract may be contingent based on an implied term as was pointed out by a Division Bench of this Court comprising of **Waller and Madhavan Nair, JJ** in **Sannidhi Gundayya Vs Illoori Subbaya [reported in AIR 1927 Mad. 89]**. In that case, the defendant had to supply rice to the plaintiff. The Government had imposed restrictions on the usage of railway wagons across the Presidency, on account of which, the defendant was unable to obtain the requisite number of wagons to supply the rice. The Division Bench held thus:

"In our opinion the reasonable view of the contract in this case is that the seller agreed to supply the promised number of bags of rice if after using best endeavours he was able to secure the necessary number of waggons. The obligation to perform the contract was not therefore absolute, but impliedly conditional."

30. This decision was followed by another Division Bench of this Court comprising of **T.Ramaprasada Rao and S.Maharajan, JJ** in **Bansilal Forma Vs. Thadava Cooperative Agricultural and Industrial Society Ltd. [reported in 1976 (1) MLJ 39]** wherein it



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was held that upon the failure of an implied term, which could be inferred from the intention of parties, the contract would be conditional in character. It was held thus:

"Generally all contracts are to be interpreted literally without any interpolation in its text. But there are myriad circumstances attendant upon contracts which sometimes prompt the interpretation of such contracts, unless the language is scrupulously plain, to read into the contract a term, which was predominantly in the minds of parties when they formed the same. Such an intention can be gathered from the surrounding circumstances, the conditions under which the contract was entered into, the compelling dents which the law would make in them for the general good and welfare of the community, etc. If such an irresistible intention which was at the back of the mind of the parties could be gathered by reasonable probe into the attendant circumstances governing the situation in a given case, then Courts as the authoritative interpreters of such contracts can imply a term in a contract, without unduly tinkering with it."

31. Section 56 of the Indian Contract Act, 1872 applies when the performance of the contract becomes impossible due to an unforeseen



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event not contemplated or provided for in the contract. In such cases, the contract is considered to be void and the doctrine of frustration applies discharging the parties from their obligations. The principles governing the applicability of Section 56 have been authoritatively laid down by the Hon'ble Supreme Court in **Satyabrata Ghose** wherein it was opined as under:

"In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they



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entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object [Morgan v. Manser, (1948) 1 KB 184] . This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Contract Act.”

32. The aforesaid principles have been reiterated in **Energy Watchdog Vs. Central Electricity Regulatory Commission**



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[reported in 2017 (14) SCC 80].

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33. Judged by the aforesaid tests, this is not a case where the performance of the contract has been rendered impossible by the happening of events, which were beyond the contemplation of the parties so as to attract Section 56. In fact, it is clearly evident that the parties had unambiguously understood that supply of baryte powder by the supplier is dependent on supply of baryte lumps by the APMDC. On a plain commonsensical reading of the contract, the supply of baryte lumps by the APMDC was an implied term in the contract. Thus, the performance of the contract by the seller was contingent upon the happening of an event collateral to the contract i.e. the supply of baryte lumps by the APMDC. The contract, thus, qualifies as a contingent contract within the meaning of Section 31 of the Act. When the event collateral to the main contract does not happen, the performance of the main contract is rendered impossible within the meaning of Section 32 of the Contract Act.

34. The learned Arbitrator has unfortunately overlooked the fact that the impossibility contemplated under Section 32 is not the same



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as Section 56. As pointed out earlier, the impossibility contemplated by Section 56 is one, which performance is discharged by an **"unexpected event or change of circumstances, which was beyond what was contemplated by the parties at the time when they entered into the agreement"** as pointed out by the Hon'ble Apex Court in **Satyabrata Ghose**. The findings of the learned Arbitrator that the contract stood frustrated on account of Section 56 is clearly perverse and suffers from a gross error of law warranting the interference.

35. The next issue is regarding the deduction made by the petitioner towards liquidated damages. It will be relevant to extract Clause 12 of the contract as hereunder :

"Clause 12 - FAILURE AND TERMINATION
CLAUSE/LIQUIDATED DAMAGES CLAUSE:

Time and date of delivery shall be the essence of the contract. If the contractor/supplier fails to deliver the stores, or any instalment thereof within the period fixed for such delivery in the schedule or any time repudiates the contract before the expiry of such period, the purchaser may, without prejudice to any other right or remedy, available to him to recover damages for breach of



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the contract:

(a) Recover from the Contractor/Supplier as agreed liquidated damages and not by way of penalty, a sum equivalent to 1/2% (half percent) of the contract/supply order price of the whole unit per week for such delay or part thereof (this is an agreed genuine pre-estimate of damages duly agreed by the parties) which the contractor has failed to deliver within the period fixed for delivery in the schedule, where delivery thereof is accepted after expiry of the aforesaid period. It may be noted that such recovery of liquidated damages may be upto a ceiling of 5% of the contract/supply order price of the whole unit of stores which the contractor/supplier has failed to deliver within the period fixed for delivery; or

(b) Cancel the contract/supply order or a portion thereof by serving prior notice to the contractor/supplier.

(c) It may further be noted that clause (a) above provides for recovery of liquidated damages on the cost of contract/supply order price of delayed supplies (whole unit) at the rate of 1/2% (half per cent) of the contract/supply order price of the whole unit per week for such delay or part thereof upto a ceiling of 5% of the contract/supply order price of delayed supplies (whole unit). Liquidated damages for delay in supplies thus accrued will be recovered by the paying authorities



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of the purchaser specified in the supply order; from the bill for payment of the cost of the materials submitted by the contractor/supplier or his foreign principals in accordance with the terms of supply order/contract or otherwise.

(d) Notwithstanding anything stated above, equipment and materials will be deemed to have been delivered only when all its components and parts are also delivered. If certain components are not delivered in time, the equipment and material will be considered as delayed until such time all the missing parts are also delivered."

36. Clause 12 of the GCC, which has been extracted supra provides that the petitioner can recover from the supplier the liquidated damages and not by way of penalty a sum equivalent to 0.5% of the contract price per week for the failure to supply as per the schedule upto the ceiling of 5% of the contract price.

37. The learned Arbitrator rendered a finding that since the petitioner had not proved that they suffered any losses, they would not be entitled to liquidated damages. Curiously, the learned arbitrator, after having rendered a finding that the contract was



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discharged by frustration, also went ahead to decide on the issue of liquidated damages and recorded that the ONGC was not entitled to the same. In the opinion of this Court, this was a needless excursion. Once the learned Arbitrator had concluded that performance of the contract stood discharged on account of frustration under Section 56, the question of awarding liquidated damages would not possibly arise. The application of Section 56 discharges both the parties from their respective obligations. Hence, the question of going into the issue of liquidated damages arises only when there is a finding of breach. It defies common sense and logic to simultaneously say that parties stood discharged from their contractual obligations by virtue of Section 56 and thereafter examine as to whether a party is liable for liquidated damages on account of breach of the very same contract. However, since the learned Arbitrator has dealt with the issue of liquidated damages, this Court thinks it fit to address that issue also.

38. The admitted position is that the respondent supplied only 23,250 MT against their contractual obligation to supply 45,360 MT of baryte powder. It is also not in dispute that the contract was initially fixed for a period of two years and thereafter, it was extended by



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another seven months.

39. I had an occasion to examine the entire law governing Section 74 of the Indian Contract Act in the decision in ***M/s.Prime Store, Rep. by its Partner Mr.S.Kaarthi & others Vs. Sugam Vanijya Holdings Private Limited & others [Arb.O.P. (Com.Div.) Nos.257 of 2021 & 209 of 2022 dated 08.10.2025]***, the relevant portions of which are extracted as hereunder:

"37. As pointed out by Nariman,J in Kailash Nath Associates Vs. Delhi Development Authority [reported in (2015) 4 SCC 136], Section 74 is a departure from English law and 'all stipulations naming amounts to be paid in case of breach would be covered by Section 74 and this is because Section 74 cuts across the rules of the English common law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise.'

38. However, unlike the facts in Fateh Chand, we are, in this case, concerned with the first situation viz., "where the contract names a sum to be paid in case of breach", and not with the second situation i.e., "where the contract contains any other stipulation by way of penalty,"



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which was the case in Fateh Chand. The jurisdiction of the Court to award compensation in case of breach of contract is unqualified, but is limited to the maximum stipulated. Another aspect of Fateh Chand is that it recognizes Section 74, which dispenses with "proof of actual loss or damage," but does not dispense with the requirement of showing legal injury i.e., loss or damage. This is a subtle, but important distinction.

.....

50. As noticed earlier, Section 74 of the Indian Contract Act provides that the party complaining of a breach, can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and if it is found to be such by the Court. There are two categories of stipulated payment for the breach of contract and they are : (a) a sum named in the contract as the amount to be paid in case of breach; and (b) stipulation by way of penalty. In both the categories of payment, the sum stipulated operated as the maximum amount or ceiling.

51. The nomenclature of "liquidated damages" or "penalty" is not relevant or conclusive or determinative and what is relevant is the entire clause read together. If the Court concludes that the stipulated payment is a



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genuine pre-estimate of anticipated loss in case of breach, the sum stipulated would be managed to be paid if the Court also concludes that it is difficult or impossible to prove the loss in the facts and circumstances of the case. In both the contingencies, i.e. in cases where the amount is fixed as compensation or it is stipulated by way of penalty, only reasonable compensation can be awarded.”

40. In the case in hand, the contract named a sum to be paid in case of breach. After perusing the case laws on the issue, this Court came to the conclusion that on considering the decision of the Hon'ble Apex Court in ***Kailash Nath Associates***, if damages or losses were not suffered, the law does not provide for a windfall. On further analysis, this Court also came to the conclusion that the Court must assess as to whether the sum stipulated is disproportionate to the legitimate interest of the innocent party in the enforcement of the primary obligations under the contract and in that process, if the Court finds that the sum is imposed *in terrerom*, as distinguished from a sum stipulated as a legitimate means of securing compliance with the primary obligation, it would be a penalty and it would remain unenforceable. On the other hand, if the sum named has the



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legitimate interest to secure compliance of the contract, the Courts would enforce them.

41. This Court also took into consideration the cases wherein it is difficult or impossible to prove the losses in the facts and circumstances of the case and in such event, if the Court finds the compensation to be reasonable, it can be awarded. This Court also carefully brought out the subtle difference between establishing a legal injury i.e. loss or damage as against proof of actual loss or damage. Keeping the above principle in mind, the facts of the present case must be analysed.

42. The learned Arbitrator has specifically mentioned in the award that baryte powder is a regular and critical chemical used by the petitioner in the drilling operations. It is used as a weighing agent to suppress high formation pressure and prevent blowouts. When the parties entered into the contract, this crucial aspect was factored in and a separate clause for liquidated damages was provided. If baryte powder is not used during the process, there is a high risk of blowout that could cause huge monetary losses besides danger to life and limb.



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This eventuality certainly cannot be estimated or proved in monetary terms and that is the reason as to why a pre-estimate of the loss was provided and it was capped at 5% of the total contract price. Even otherwise, the learned Arbitrator went wrong in not considering the evidence where the petitioner had to enter into a separate contract with the APMDC on 02.2.2015 for the purchase of 50,000 MT of baryte at a price of Rs.9,608/- per MT.

43. This is evident from the deposition of R.W.1 and more particularly the answers provided to question No.130. It is also evident from Ex.R.21, which was the contract entered into between the petitioner and the APMDC. Prima facie, this would further show that extra costs were incurred by the petitioner in view of the non supply on the part of the respondent. Thus, the petitioner has certainly established the legal injury. Hence, in the light of the above ratio in the decision rendered by me in ***M/s.Prime Store***, the petitioner would be certainly entitled towards liquidated damages to the tune of Rs.53,25,855/-. The first issue is answered accordingly.



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44. The second issue pertains to the additional amount of Rs.14,01,553/- awarded, which was alleged to be pursuant to double counting.

45. On a careful analysis of the material placed before this Court, it is seen that the sum of Rs.14,01,553/-, which was directed to be payable by the petitioner to the respondent in paragraph 110 of the award was actually a part of the sum of Rs.89,64,810.74 Ps. Even the learned counsel for the respondent was not able to independently account for this sum of Rs.14,01,553/-. This amount awarded by the learned Arbitrator is certainly a patent illegality as this would result in double counting the amount and payment of this amount twice over to the respondent. The second issue is answered accordingly.

46. The last issue pertains to the grant of pre-award interest.

47. Clause 33.6 of the GCC provides that the parties agreed that neither party would be entitled to any pre-reference or *pendente lite* interest on its claim. The parties also agreed that a claim for such interest made by any party would be void, which clause is available in



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Ex.R.1. Even though Section 31(7) of the Act provides that unless and otherwise agreed by the parties, an award for a sum of money may include interest. ***In the case in hand, the parties have agreed otherwise.***

48. The learned Arbitrator awarded pre-award interest by rendering a finding that this clause will apply only to claims and not to claim for interest on short payment. Such a finding is available in paragraph 96 of the award. In the absence of any specific explanation regarding the term '***claim***', such bar will have to be applied to any claim. Even a claim made in an arbitration would be covered under Clause 33.6 of the GCC.

49. Useful reference can be made to the judgment of the Hon'ble Apex Court in ***Jaiprakash Associates Ltd. Vs. Tehri Hydro Development Corporation (India) Ltd. [reported in 2019 (17) SCC 786]***, the relevant portion of which is extracted as hereunder:

"13.3. Conversely, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases. This proposition is predicated on



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the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in G.C. Roy case [Irrigation Deptt., State of Orissa v. G.C. Roy, (1992) 1 SCC 508] in the discussion that ensued thereafter : (SCC pp. 533-34, para 44)

'44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.'

(emphasis supplied)."



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50. In the light of the above clause that governs the parties and the bar in claiming *pendente lite* interest, the learned Arbitrator cannot disregard the terms of the contract and give a different interpretation to the clause, which was not intended by the parties. This finding rendered by the learned Arbitrator must be held to be patently illegal. The third issue is answered accordingly.

51. In the result, the above original petition stands allowed in the above terms and the award dated 02.5.2018 passed by the learned Arbitrator is set aside. No costs.

02.12.2025

Index : Yes
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