



2025:DHC:6962



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 18th August, 2025

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O.M.P. (COMM) 445/2023 and I.A. 21460/2023**GAIL (INDIA) LIMITED****.....Petitioner**

Through: Mr. Rajshekhar Rao, Senior Advocate
with Mr. Debesh Panda, Ms. Meherunissa Anand,
Ms. Nivedita Jha and Mr. K. Sri Aditya,
Advocates.

versus**PETRON ENGINEERING CONSTRUCTION LIMITED****(THROUGH OFFICIAL LIQUIDATOR)****.....Respondent**

Through: Mr. Sandeep Bajaj, Mr. Soayib
Qureshi, Mr. Mayank Biyani and Ms. Anchal
Singh, Advocates.

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O.M.P. (COMM) 447/2023 and I.A. 21465/2023**GAIL (INDIA) LIMITED****.....Petitioner**

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**OMP (ENF.) (COMM.) 258/2023, EX.APPL.(OS) 1721/2023,
1722/2023, 1723/2023 and 1724/2023****PETRON ENGINEERING CONSTRUCTION LIMITED****.....Decree Holder**

Through: Mr. Sandeep Bajaj, Mr. Soayib



2025:DHC:6962



Qureshi, Mr. Mayank Biyani and Ms. Anchal Singh, Advocates.

versus

GAIL INDIA LIMITED

.....Judgement Debtor

Through: Mr. Debesh Panda, Ms. Meherunissa Anand, Ms. Nivedita Jha and Mr. K. Sri Aditya, Advocates.

+ OMP (ENF.) (COMM.) 259/2023, EX.APPL.(OS) 1725/2023, 1726/2023, 1727/2023 and 1728/2023

PETRON ENGINEERING CONSTRUCTION LIMITED

.....Decree Holder

Through: Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr. Mayank Biyani and Ms. Anchal Singh, Advocates.

versus

GAIL INDIA LIMITED

.....Judgement Debtor

Through: Mr. Debesh Panda, Ms. Meherunissa Anand, Ms. Nivedita Jha and Mr. K. Sri Aditya, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

O.M.P. (COMM) 445/2023 and I.A. 21460/2023

1. This petition is preferred on behalf of GAIL (India) Limited ('GAIL') under Section 34 of the Arbitration and Conciliation Act, 1996 ('1996 Act') seeking setting aside of arbitral award dated 09.05.2023 and order dated 19.06.2023 passed under Section 33 of the 1996 Act by the learned sole Arbitrator. Respondent herein was the Claimant before the Arbitrator while GAIL was the Respondent.



2. To the extent relevant and shorn of unnecessary details, the facts are that Respondent is a private limited company engaged in the business of engineering, procurement and construction of plants for oil and gas refineries and power, cement, petrochemical, fertilizer sector etc., both in and outside India. Presently, Respondent is under liquidation by virtue of order dated 23.01.2020 passed by NCLT, Mumbai in Company Petition (I.B.) No. 1374/2017 and was represented by a Liquidator in the arbitral proceedings. Petitioner is a Public Sector Undertaking engaged in processing and distribution of natural gas and is under the administrative control of the Ministry of Petroleum and Natural Gas.

3. Disputes which are subject matter of this petition emanate out of a Contract Agreement dated 21.05.2012. The backdrop of the disputes is that Petitioner decided to expand the petrochemical complex at Pata, U.P., to enhance its polymer capacity from 410 KTA to 810 KTA per annum by setting up the required revamp in the Gas Processing Unit ('GPU'), New Gas Cracker Unit, followed by production of LLDPE/HDPE Swing Unit, Butene-1 Unit, associated utilities and offsite facilities for Petrochemical Complex-II with existing similar capacity of Petrochemical Complex-I at Pata. To achieve this goal, Petitioner invited bids through Engineers India Limited ('EIL'), which was appointed as a Consultant for implementation of the project for carrying out composite works for GCU at Pata for Petrochemical Complex-II project. Scope of work in general involved mechanical works covering erection of equipment, fabrication and erection of structural steel, associated piping, civil works, chemical cleaning, associated electrical and instrumentation works, pre-commissioning, commissioning and post-commissioning activities. Fax of Acceptance



(‘FOA’) was issued to the Respondent on 02.03.2012 being a successful bidder and Contract Agreement was executed between the parties on 21.05.2012.

4. A Detailed Letter of Acceptance (‘DLOA’) dated 21.05.2012 was issued by the Petitioner detailing the terms and conditions of the contract which included General Conditions of Contract (‘GCC’) and Special Conditions of Contract (‘SCC’). Contract value was estimated to be around Rs.192,33,53,476/- inclusive of taxes and duties, except service tax as per Clause 6 of DLOA. Completion time for the work was 21 months for mechanical completion, commencing from date of issue of FOA i.e. 02.03.2012. Respondent was entitled to ‘Extended Stay Compensation’ (‘ESC’) at the rate of Rs.1,40,00,000/- per month, in accordance with Clause 7 of DLOA and Clause 5 provided for grant of interest bearing mobilization advance, to be deducted from the running bills. Resident Construction Manager, EIL was appointed as the Engineer-in-Charge (‘E-in-C’) of the project and scope of work/supply as also the time schedule for work completion were all detailed in Annexures I, II and III, respectively to the SCC.

5. On 16.03.2012, Respondent furnished a Contract Performance Guarantee of Rs.19,23,35,350/- in favour of the Petitioner as per Clause 4 of DLOA and also mobilised its resources to commence the project work. GCC read with SCC stipulated Petitioner’s obligations which were crucial for completion of the project and included supply of material, providing work fronts, drawings, land for construction of temporary field offices, godowns, workshops and assembly yards. Under Clause 45.1 of GCC, Respondent was entitled to extension of time for completing the work, only in case the



performance was delayed by Petitioner. As per the Respondent, it had achieved mechanical completion of the works in January, 2015 and the entire project was commissioned by March, 2015, after various extensions of time sought by Respondent and granted by the Petitioner and this fact was acknowledged by the Petitioner. Respondent sought ESC on 31.03.2015 but the response from the Petitioner was evasive. Petitioner continued to insist on additional work through emails and hand sketches etc. Respondent sought further extension of time till 31.05.2015 on 05.03.2015 and till 30.06.2016 on 10.05.2016. Final Extension of Time was granted by the Petitioner till 31.10.2015 vide letter dated 16.09.2015 and E-in-C issued certificate dated 26.05.2016, certifying that Respondent had achieved 99.5% completion of work.

6. In the meantime, on 24.11.2015, Respondent wrote to the Petitioner reiterating various difficulties faced by it on account of acts and omissions of the Petitioner and pointing out the delays in grant of additional work, piping parallelism job of C3R compressor, non-availability of work fronts and drawings. Petitioner replied to the letter after six months on 20.05.2016, refusing to accept that there was delay on its part. On 25.02.2016, Respondent raised the following claims:-

“(a) Final bill for an amount of INR 2,76,10,333 (Rupees Two Crores Seventy Six Lakhs Ten Thousand Three Hundred and Thirty Three Only) excluding service tax against construction and supply part of GPU Composite Works.

(b) Final bill for an amount of INR 38,67,05,247 (Rupees Thirty Eight Crores Sixty Seven Lakhs Five Thousand Two Hundred Forty Seven Only) excluding taxes, on account of extra charges towards:

- Escalation cost for differential manpower wages from the time of commencement of works till the completion;*
- Claim towards fire-proofing;*



- *Extended stay compensation;*
- *Reimbursement of Excise Duty;*
- *Reduction in contract value during the Project.”*

7. Petitioner rejected the claims on 26.02.2016 and on 15.02.2017 issued the completion certificate in favour of the Respondent, certifying the date of completion of work as 15.09.2016. On 23.03.2018, an application under Section 9 of Insolvency & Bankruptcy Code, 2016 ('IBC, 2016') was admitted against the Respondent and finally, Respondent was ordered to be liquidated by NCLT, Mumbai vide order dated 23.01.2020. Respondent invoked arbitration under Clause 107 of GCC and Clause 53 of SCC vide notice dated 16.08.2019 and upon failure of the Petitioner to appoint the Arbitrator, approached this Court and the sole Arbitrator was appointed vide order dated 14.01.2021.

8. Statement of Claim was filed by the Respondent on 30.03.2021 while Statement of Defence was filed on 07.06.2021. Subsequently, after permission by the Arbitrator, Petitioner filed its counter claim. After pleadings were complete, Arbitrator settled the following issues:-

“(a) Whether the Respondent is in breach of the terms and conditions of the Construction Contract dated 21.05.2012, if yes, effect thereof?

(b) Whether the Respondent has rightly imposed price reduction scheme on the Claimant, if yes, effect thereof?

(c) Whether the Respondent has illegally encashed Performance Bank Guarantee provided by the Claimant against the terms and conditions of the Construction Contract dated 21.05.2012, if so, effect thereof?

(d) Whether the Respondent has illegally withheld assets of the Claimant inside the Project Area and wilfully created impediments in site clearance and safe passage of Claimant's trucks from the said Project area, if yes, effect thereof?

(e) Whether the Claimant is entitled to its claims as specified in the Statement of Claims?



(f) Whether the Respondent could withhold the amounts due and payable to the Claimant on account of alleged sub-contractor dues?

(g) Whether the Claimant is entitled to interest against the sum of money specified as claims at items (I) to (XIV) at an interest rate of 18% or at any other rate to be decided by the Learned Tribunal and the period on which interest is entitled for and cost of arbitration?

(h) Whether the Respondent is entitled to the Counterclaims which are preferred by it?

(i) Whether the Claimant or the Respondent is entitled to costs, if so, then what amount?

(j) Relief?"

9. By a separate order, following additional Issue No. 8 was settled:-

"Whether the Respondent is entitled to the counterclaims which are preferred by it?"

10. Respondent examined one witness CW-1 on 31.10.2022 and 04.11.2022 and Petitioner also examined one witness RW-1 on 04.11.2022. Arguments were heard by the Arbitrator on 18.02.2023 and 11.03.2023, after which parties filed their written submissions. On account of Pandemic COVID-19, time for conclusion of arbitral proceedings and passing of arbitral award was extended with the mutual consent of the parties till 31.05.2023 and the Arbitrator pronounced the award on 09.05.2023 i.e. within the period of extended mandate.

11. For the sake of completeness, Respondent preferred the following claims:-

<i>Claim No. I</i>	<i>Payment of Final Bill amount in the sum of INR 9,84,82,967/- along with interest</i>
<i>Claim No. II</i>	<i>Compensation towards Extended Stay for INR 46,20,00,000/-</i>
<i>Claim No. III</i>	<i>Reimbursement of Input Credit of the Excise Duty on account of change in Service Tax Rules in the sum of INR 3,20,53,564/-</i>



<i>Claim No. IV</i>	<i>Fire proofing differential cost amounting to INR 1,54,79,250/-</i>
<i>Claim No. V</i>	<i>Reimbursement of illegally encashed Bank Guarantees amounting to INR 19,23,35,350/-</i>
<i>Claim No. VI</i>	<i>Reimbursement of Finance Charges incurred in the extension of Bank Guarantee to the tune of INR 1,62,28,293/-</i>
<i>Claim No. VII</i>	<i>Compensation towards escalation cost for manpower differential wages in the sum of INR 24,91,10,604/-</i>
<i>Claim No. VIII</i>	<i>Amount receivable against site clearance withheld by the Respondent (In the SOC, this amount is claimed at INR 40.00 lakh, however, during arguments, the Claimant stated that the amount withheld is INR 35.00 lakh)</i>
<i>Claim No. IX</i>	<i>Amount receivable against GST for INR 2,27,11,007/-</i>
<i>Claim No. X</i>	<i>Extended Overstay of Plant and Machinery in the sum of INR 15,38,50,000/-</i>
<i>Claim No. XI</i>	<i>Amounts deducted towards Interest on Mobilization advanced during the extended period in the sum of INR 1,68,08,398/-</i>
<i>Claim No. XII</i>	<i>Detention of PRS amounting to INR 8,97,18,347/-</i>
<i>Claim No. XIII</i>	<i>Service Tax on claims No. 2,3,4 and 7 in the sum of INR 10,62,10,079/-</i>
<i>Claim No. XIV</i>	<i>Interest on the aforesaid claims with effect from respective due dates to the date of payment</i>

12. The Arbitrator allowed some claims and rejected the others as follows:-

<i>Claim No.</i>	<i>Particulars</i>	<i>Amount Claimed (INR)</i>	<i>Tribunal's Decision</i>
<i>I.</i>	<i>Final Bill in the sum of INR 9,84,82,967/- along with interest</i>	<i>9,84,82,967</i>	<i>Allowed in the sum of INR 9,84,82,967/-</i>
<i>II.</i>	<i>Compensation towards Extended Stay - INR 46,20,00,000/-</i>	<i>46,20,00,000</i>	<i>Rejected</i>



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III.	<i>Reimbursement of Input Credit on the Excise Duty on account of change in Service Tax Rules in the sum of INR 3,20,53,564/-</i>	3,20,53,564	<i>Rejected</i>
IV.	<i>Fire Proofing differential cost amounting to INR 1,54,79,250/-</i>	1,54,79,250	<i>Rejected</i>
IV.	<i>Reimbursement of illegally encashed BG-INR 19,23,35,350/-</i>	19,23,35,350	<i>Allowed in the sum of INR 19,23,35,350/-</i>
VI.	<i>Reimbursement of Finance Charges incurred in the extension of BG to the tune of INR 1,62,28,293/-</i>	1,62,28,293	<i>Rejected</i>
VI.	<i>Compensation towards escalation cost for manpower differential wages in the sum of INR 24,91,10,604/-</i>	24,91,10,604	<i>Rejected</i>
VIII.	<i>Amount receivable against site clearance withheld by the Respondent (In the SOC, this amount is claimed at INR 40.00 lakh, however, during arguments, the Claimant stated that the amount withheld is INR 35.00 lakh)</i>	35,00,000	<i>Rejected</i>
IX.	<i>Amount receivable against GST for INR 2,27,11,007/-</i>	2,27,11,007	<i>Allowed with the condition that : (i) the same amount shall be deposited with the GST authorities by the Liquidator;</i>



			<i>and (ii) an undertaking by the Liquidator confirming the same.</i>
<i>X.</i>	<i>Extended Overstay of Plant and Machinery in the sum of INR 15,38,50,000/-</i>	<i>15,38,50,000</i>	<i>Rejected</i>
<i>XI.</i>	<i>Amounts deducted towards Interest on Mobilization advanced during the extended period in the sum of INR 1,68,08,398/-</i>	<i>1,68,08,398</i>	<i>Rejected</i>
<i>XII.</i>	<i>Detention of PRS amounting to INR 8,97,18,347/-</i>	<i>8,97,18,347</i>	<i>Allowed while discussing Claim No. 1</i>
<i>XIII.</i>	<i>Service Tax on claims No. 2, 3, 4 and 7 in the sum of INR 10,62,10,079/-</i>	<i>10,62,10,079</i>	<i>Rejected</i>
<i>XIV.</i>	<i>Interest on the aforesaid claims with effect from respective due dates to the date of payment</i>		<i>Interest @ 18% p.a. allowed till date of Award on the sums awarded minus INR 14,62,09,137/- Interest @12% p.a. allowed from the date of Award till payment on all the amounts awarded.</i>
<i>Counter Claim No.1</i>	<i>Mense Profit in the sum of INR 4,16,46,545/-</i>	<i>4,16,46,545</i>	<i>Allowed in the sum of INR 35.00 lakh already adjusted by the Respondent from the Final Bill</i>

13. Petitioner preferred a counter claim seeking mesne profits in the sum of Rs.4,16,46,545/-, which was allowed by the Arbitrator to the extent of



Rs.35,00,000/-, which had been earlier adjusted by the Petitioner from the final Bill. Subsequently, Respondent filed an application under Section 33 of the 1996 Act before the Arbitral Tribunal seeking correction of three errors in the arbitral award. By order dated 19.06.2023, the application was disposed of correcting errors and awarding a sum of Rs.8,97,18,347/- with respect to final Bill under Claim No. I and Rs.86,55,090/- under Claim No. VI. Interest on Claim No. 1 was allowed from 01.04.2018 and in respect of encashment of Bank Guarantee ('BG') in the sum of Rs.14,62,09,137/-, interest was granted from the date of the award and for the balance amount of Rs.4,61,26,213/-, Respondent was held entitled to interest from the date of invocation of BG i.e. 30.07.2018. One BG for Rs.3,94,71,624/- was invoked on 30.07.2018 and thus interest was allowed from the date of the award and for remaining amount of Rs.66,54,589/-, which was part of BG of Rs.15,28,63,726/-, invoked on 17.05.2019, interest @ 18% p.a. was awarded from 17.05.2019 till the date of the award. With respect to Claim No. VI, interest was held to be payable from the date of invocation of the arbitration i.e. 16.08.2019.

SUBMISSIONS MADE ON BEHALF OF THE PETITIONER:

14. Claims of the Respondent were time barred under Section 3 of the Limitation Act, 1963 and it was the duty of the Arbitrator to satisfy himself on this aspect, which he failed to discharge. Cause of action arose in favour of the Respondent when its claims were rejected on 26.02.2016. Arbitration notice was issued on 16.08.2019 i.e. after prescribed period of 3 years of limitation. The project was completed on 31.10.2015 and even from this date, limitation period expired much before the invocation notice was issued. In *Manindra Land and Building Corporation Ltd. v. Bhutnath*



Banerjee and Others, AIR 1964 SC 1336 and Nagpur Improvement Trust v. Sheela Ramchandra Tikhe (Dead) through Legal Representatives, (2019) 11 SCC 552, it was held that irrespective of whether the opponent sets up a plea of limitation or not, it is a duty of the Court to look into the aspect of limitation and not proceed with the application, if it is found to be beyond the prescribed period of limitation.

15. The Arbitral Award suffers from ‘patent illegality’ and deserves to be set aside. Arbitrator erroneously held that Respondent had completed 99.4% work by 02.05.2015 and only 0.06% work remained to be completed, out of which some work might have been completed between May, 2015 and December, 2015 i.e., the date upto which there were concurrent delays and therefore, only minuscule work was left, which was carried out after December, 2015. Arbitrator also erred in holding that plant had started functioning in 2015 itself and thus there was no justification for the Petitioner to invoke Clause 27 of GCC and reduce the contract amount by 5%. Arbitrator erroneously observed that no loss was suffered by the Petitioner as plant was functional in 2015. Patent illegality is evident from the fact that Respondent in its letter dated 02.05.2015, *albeit* stating that cumulatively 99.4% of the total work was achieved, conceded that balance piping work and insulation works were *inter alia* left, for which extension was sought. There is admission to this effect even in the subsequent letters dated 02.07.2015 and 02.09.2015, seeking time extension. Respondent continuously maintained that it was seeking extension to complete the remaining insulation work and there is no gainsaying that insulation and piping work were pre-requisites for completing the Hot Section and Cold Section in the GCU. *Sans* completion of both sections and insulation and



piping work, GCU was merely a machinery and not a working plant and the exact scope of 'Composite works for GCU' was specified in the Invitation for Bids.

16. Learned Arbitrator assumed that since one of the sections was working, GCU would be treated as complete. This is not only an erroneous assumption but also amounts to re-writing the contract between the parties, which was for construction of a complete GCU unit, with the obvious express need for insulation as mentioned in the 'Scope of Work', capable of producing ethylene and propylene and other products. While it is an undisputed position that Hot Section was complete in 2015, it is also not in dispute that Cold Section was incomplete, as is borne out from the correspondence exchanged between the parties. Evidence of Petitioner's witness Shri A.K. Bhagat established that Cold Section was completed only on 15.09.2016 and this vital evidence was completely glossed over by the Arbitrator. Moreover, the 'Scope of Work' included '*...post commissioning activities spill over beyond the contractual mechanical completion of work...*' and it was clearly enunciated that mere mechanical completion will not amount to completion of work under the contract. Arbitrator failed to consider the evidence of Shri Bhagat, who deposed that while E-in-C on one hand recommended grant of extension vide letter dated 26.11.2016, on the other hand, it wrongly concluded that due to delay in providing inputs owing to changes suggested by the Petitioner, delay upto December, 2015 was a concurrent delay, contrary to contemporaneous correspondence and the contract. He deposed that E-in-C's role was limited to making recommendations and Petitioner was entitled to disagree and reduce the price under the Price Reduction Schedule ('PRS'), in accordance with



Article 27 of GCC due to delays by the Respondent in completing the work. Shri Bhagat's testimony was not dented by the Respondent in cross examination. In this light, the finding of the Arbitrator that since the plant started functioning in 2015 itself, there was no justification in reducing the contract price, strikes at the very heart and soul of the contract and virtually amounts to re-writing the same.

17. Arbitrator has proceeded on a hypothesis that 99.4% of the work was completed by 02.05.2015, which is contrary to the evidence on record, more particularly, the Payment Calculation Sheet No. 57 dated 18.04.2015, which from the evidence of Shri Bhagat clearly disclosed that in the month anterior to when the Respondent claims completion of 99.4% work, the '*Executed Value of Contract*' was Rs.147,08,49,448/- till the date of issuance of the Calculation Sheet. Shri Bhagat also deposed that as per revised Completion Certificate dated 02.02.2018 issued by E-in-C, total executed value of work was Rs.180,70,76,736/-. If one was to proceed on the hypothesis of the Arbitrator, value of '*miniscule*' remaining work will be Rs.32.62 crores i.e., approximately 18% and this exposes the inherent fallacy in the Arbitral Award. In any event, Respondent had admitted that it sought ESC on site due to delay in execution of the project. If the project was complete, there was no need for the Respondent to keep its men, material and machinery on site and seek extension 11 times to complete the balance work. The observation in the award that only 0.06% work remained to be completed upto the date of concurrent delays and thus the balance work was only miniscule is inherently inconsistent with the evidence on record. As per documents on record, Respondent took provisional extensions 11 times through various letters, commencing from 02.07.2015 to 10.10.2016 to



complete the balance work, of which 7 extensions were sought after December, 2015. The executed value of work i.e., 0.06% from April, 2015 to September, 2016 was approximately Rs.32.26 crores i.e., 18% of total executed value of work.

18. GCU is used for processing liquid hydrogen fed into it, to produce ethylene and propylene in the requisite proportion, as per design. For GCU to execute this process, it is mandatory that both its Hot and Cold Sections are complete, since liquid hydrogen is first fed to the hot unit where the feed temperature is increased from ambient temperature to 850° C approximately, at a gradual pace in different equipment and is fed into the hot furnace, where the process of thermal cracking begins and the gas so cracked is cooled to the ambient temperature again, after passing it through a different equipment in the Hot Section. The gas so produced is then fed into the Cold Section, where it passes through several equipment and the feed temperature is reduced to -150° C, approximately, leading to production of ethylene and propylene along with other products. Therefore, it can be clearly seen that till both sections are completely commissioned, including insulation and piping, contract cannot be treated as fully executed.

19. Perversity in the award is further evident from the contradictory reasoning and approach taken by the Arbitrator in parallel proceedings between the same parties on the same day in an award passed in Case No. DIAC/2861/01-21 ('GPU case'), which has been separately challenged by the Petitioner in O.M.P. (COMM) 447/2023. From a reading of the two awards, juxtaposed with each other, it is clear that in the GPU case, recommendations of E-in-C, which were adverse to the Petitioner on the aspect of delay analysis and applicability of PRS, were not only completely



accepted by the Arbitrator but were made the basis of the conclusion that delay was also attributable to the Petitioner, while in the present case, recommendations of E-in-C favourable to the Petitioner, on both delay and applicability of PRS, have been ignored or deviated from by the Arbitrator, without any basis or reasoning. In the present case, the agreement between the parties clearly provided that time was of essence and contained a mechanism for price reduction in event of failure on the part of the Respondent to complete the work within the stipulated period, as in the case in O.M.P. (COMM) 447/2023. Respondent entered into the contract with its eyes wide open and was fully aware that the work it was going to undertake was part and parcel of a larger project of public interest and national importance worth nearly Rs.8,000 crores and it expressed no reservations in this regard, either at the stage of entering into the contract or during its performance or even when PRS was being levied during the subsistence thereof. Respondent was put to notice by the Petitioner that PRS will be levied for delay in completion of work. Without prejudice to the stand of the Petitioner in the GPU case, if the Arbitrator had adopted the same yardstick in the instant case, burden ought to have been cast on the Respondent to lead expert evidence to contradict the recommendation of E-in-C. Admittedly, no such evidence was led by the Respondent and yet the Arbitrator, adopting a different yardstick, disagreed with E-in-C's conclusion that since both parties were responsible for concurrent delays, it cannot be said that Petitioner committed breach of the contract. Basis this conclusion, it was held that the Petitioner was not justified in imposing PRS.

20. The Arbitral Tribunal completely erred in holding that imposition of PRS was unjustified. E-in-C carried out detailed delay analysis and found



that there were concurrent delays only till December, 2015 but thereafter the delay was solely attributable to the Respondent. With PRS being capped at 5% for delay upto 70 days, from January, 2016 to September, 2016 and the delay being solely attributable to the Respondent, imposition of PRS was not vulnerable to interference by the Arbitrator. In effect, PRS was not levied beyond 70th day *albeit* delay was more than 70 days as found by E-in-C, a fact not traversed by leading any expert evidence, by the Respondent. Therefore, the impugned award is in the teeth of E-in-C's recommendation as also evidence on record and contrary to Section 28(1) of the 1996 Act.

21. Submission of the Respondent that Petitioner was required to prove the loss suffered by it in order to levy PRS, drawing sustenance from the judgments of this Court in ***Engineers India Limited v. Tema India Limited, 2016 SCC OnLine Del 86*** and ***R.B. Enterprises v. Union of India, 2023 SCC OnLine Del 8321***, is plainly in the teeth of the contract between the parties, which provided in Clause 27.1 that in the event, Respondent fails to complete the work within the stipulated period, Total Contract Price shall be reduced by ½% of Total Contract Price per completed week of delay or part thereof, subject to a cap of 5%. Parties had unequivocally agreed that this would be deduction in price on account of delay and not a penalty. Clause 27.3, provided that if Respondent achieved completion of work in all respects prior to time schedule stipulated in the SCC, Petitioner shall pay to the Respondent relevant sum mentioned in SCC as bonus for early completion, subject to cap of 2.5% of Total Contract Price. It goes without saying that if Respondent had completed the work within stipulated time, it would have earned bonus under the same contractual arrangement and would not have questioned the contractual provisions. Respondent cannot



question imposition of PRS, which is clearly distinguishable from Liquidated Damages ('LD'), for which proof of loss is required upon breach of the contract. This very argument raised by another party was considered by this Court in ***Videocon Telecommunications Limited v. IBM India Private Limited, 2018 SCC OnLine Del 11606*** and negated, holding that termination charges were not contingent only on breach of the agreement and could not be construed as Liquidated Damages in terms of Section 74 of the Indian Contract Act, 1872 ('Contract Act') and were clearly a part of contractual considerations, agreed to by the parties. In ***Gail (India) Limited v. Punj Lloyd Limited, 2017 SCC OnLine Del 8301***, Division Bench of this Court while construing Clause 57.2.1 akin to Clause 27 herein, held that overall cap on damages at 20% includes intermediate liquidated damages contemplated under Clause 57.1.1 and were of a kind contemplated in judgments in ***Maula Bux v. Union of India, (1969) 2 SCC 554*** and ***Bharat Sanchar Nigam Limited v. Reliance Communication Limited, (2011) 1 SCC 394***.

22. Learned Arbitrator failed to appreciate the fallacy of the stand of the Respondent inasmuch as terms of the contract were clearly known to the parties and it was open to the Respondent to not participate in the tender if the prescribed conditions were unacceptable. Respondent did not raise any reservation in respect of Clause 27.1 thereof even during execution of the contract and it is no longer *res integra* that having participated in the tender, party cannot turn around and challenge its conditions. Reliance of the Respondent on the judgment in ***Tema (supra)***, is misplaced and it is not disclosed that the Supreme Court declined to interfere in the interpretation of Clause 12 of the contract therein, which provided for price reduction, on the



ground that parties had gone to arbitration with an understanding that Clause 12 pertained to levy of LD, but Arbitrator, notwithstanding the pleadings, erroneously held that Clause 12 was a Price Reduction Clause and thus no proof of loss or damage was required and thus exceeded his jurisdiction, which is not the case here.

23. Case pertaining to GPU Contract was pending before the Arbitrator when the arbitral proceedings started in respect of the present contract. In the GPU Contract case, Arbitrator proceeded on the basis that recommendations of E-in-C would be acceptable to the Petitioner, contrary to Clause 27.1, which provided that E-in-C's recommendations will be final and binding on the Respondent. Arbitrator was under a solemn obligation to maintain consistency insofar as essential reasoning was concerned while deciding the dispute under the GCU Contract, where recommendations of E-in-C were in favour of the Petitioner or at least afforded opportunity to the Petitioner to present its case, if he was inclined to adopt a reasoning inconsistent with the reasoning in the GPU Award, following the principle of issue *estoppel*, emphasised in ***Arnold & Ors. v. National Westminster Bank plc, (1991) 2 AC 93.***

24. Learned Arbitrator has committed patent illegality while dealing with counter claim of the Petitioner. Petitioner claimed Rs.4.16 crores towards *mesne profits* over 5 acres of land which Respondent was utilizing, however, Arbitrator restricted the award to Rs.35 lacs *inter alia* on the ground that Respondent itself raised Claim for a sum of Rs.40 lacs under Claim No. VIII towards 'Site Clearance' and took no steps to mitigate the damages, if any, overlooking that Petitioner had established that it suffered a continuous loss of well over Rs.35 lacs since Respondent continued to unlawfully occupy a



huge parcel of land belonging to the Petitioner. Shri Bhagat through his evidence proved the quantum of loss basis the actual market rent of the land. Lack of *bona fides* on the part of the Respondent is evident from e-mail dated 08.06.2023 sent by it after passing of the award, informing Petitioner that it was vacating the land. Neither the Arbitrator directed the Respondent to vacate the premises nor awarded compensation for loss caused and re-scripted the contractual stipulations i.e., Articles 2.5 and 69 of GCC read with Article 59 of SCC, which formed the basis of the counter claim.

25. Learned Arbitrator awarded Rs.2,27,11,007/- in favour of the Respondent in respect of GST amount, subject to an affidavit of undertaking by the Liquidator that the amount shall be deposited with the GST Authorities. This is a perverse direction, being contrary to law, inasmuch as if implemented, it will result in a loss of Rs. 2,27,11,007/- to the Petitioner, which it will never be able to recover given the circumstances of the case. Contract between the parties provided for GST being a reimbursable item between the parties and Petitioner's liability arose only after the Respondent discharged its primary liability to deposit GST. In fact, the Arbitrator observed that the stand taken by the Petitioner was the correct position in law and yet awarded Rs.2,27,11,007/- in favour of the Respondent. Had the money been deposited by the Respondent in a timely manner and returns filed, Petitioner would have reimbursed that amount and claimed input tax credit for a like value but not having claimed input tax credit, if the direction in the award is to be implemented, double prejudice shall be caused to the Petitioner. Arbitrator was never authorised under the contract to act as an *amicable compositeur* in terms of Section 28 of the 1996 Act.

26. The award suffers from another patent illegality inasmuch as



Arbitrator has awarded exorbitant rate of interest i.e., 18% per annum on the ground that Respondent had paid interest @ 19.75% per annum on Mobilization Advance. This is again contrary to the express terms of the contract, which provided for 19.75% interest on Mobilization Advance to dissuade contractors from seeking such an advance and causing loss of principal amount to the Petitioner. Bidders in such like contracts are expected to be financially sound and fully solvent, which the Respondent was far from. Arbitrator disregarded the fact that contract was designed to create an economic disincentive to draw from a Mobilization Advance that causes loss of principal amount to the Petitioner and erroneously awarded the same rate of interest in favour of the Respondent in teeth of the principle laid down by the Supreme Court in ***Fortune Infrastructure (Now known as M/s Hicon Infrastructure) and Another v. Trevor D'Lima and Others, (2018) 5 SCC 442***. Principles on which interest is to be awarded under Section 31(7) of the 1996 Act are well settled and Arbitrator was bound to exercise the discretion in consonance with these yardsticks. [Ref: ***State of Rajasthan and Another v. Nav Bharat Construction Co., (2002) 1 SCC 659*** and ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another, (2007) 2 SCC 720***].

27. The Arbitral Award is in the teeth of Section 28(1)(a) of the 1996 Act which requires the Arbitrator to decide the disputes submitted to arbitration in accordance with substantive law for the time being in force in India. The Arbitrator has decided the disputes *inter se* the parties in a manner negating Petitioner's right under Section 55 of Contract Act, without deciding whether time was of essence. Even if it is assumed for the sake of argument that time was not of essence, second part of Section 55 clearly provides that



promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. The only way Respondent could have escaped its liability was by invoking Sections 62 and 63 of Contract Act, which was not done. This Court in *Amazing Research Laboratories Ltd. through its Authorized Representative v. Krishna Pharma (Through its Sole Proprietor), C.K. Velmurugan, (2023) SCC OnLine Del 1498*, set aside the arbitral award for violation of provisions of the Contract Act and the present award being in violation of provisions of Section 55 deserves to be set aside in terms of Section 28(1)(a). In a nutshell, the Arbitral Award has created a situation where statutory rights of the Petitioner to claim compensation stand waived, without waiver being pleaded much less proved and disregarding vital evidence in respect of which there was no cross-examination.

SUBMISSIONS MADE ON BEHALF OF RESPONDENT:

28. Petitioner never raised the issue of claims of the Respondent being barred by limitation before the Arbitrator and has raised this ground for the first time in the present petition. In *Union of India v. Ibrahim Uddin, (2012) 8 SCC 148*, Supreme Court held that Court cannot travel beyond pleadings as no party can lead evidence on an issue/point not raised in the pleadings. In *Hindustan Construction Company Limited v. National Highways Authority of India, 2023 SCC OnLine SC 1063*, Supreme Court held that Section 34 cannot be used as a corrective lens. Even otherwise, claims of the Respondent were not time barred, inasmuch as work was completed by the Respondent on 15.09.2016 and CIRP was initiated against the Respondent by NCLT, Mumbai in CP(IB) No.1374/2017 on 23.03.2018. Respondent invoked arbitration vide notice dated 16.08.2019 and Petitioner



replied to the same on 13.09.2019. Respondent approached this Court immediately by filing Arb. P. No.79/2020 for appointment of Arbitrator and vide order dated 14.01.2021, Sole Arbitrator was appointed.

29. Petitioner has challenged the award broadly on two grounds: (i) Arbitrator has given contrary findings in the two cases, which were being simultaneously heard. While in the present case, recommendation of E-in-C for imposition of PRS is rejected on grounds that Respondent had admittedly completed 99.4% of the work on 02.05.2015 and no evidence was led by the Petitioner to substantiate actual loss under Clause 27, while in GPU case Arbitrator accepted the recommendations, which were against the Petitioner, purely on the ground that E-in-C's recommendations are binding and there is no reason to differ therefrom. These objections are based on a misconception of the Petitioner that there are contrary findings in the Arbitral Awards in the two cases. Arbitrator has given entirely different reasons to accept the report of E-in-C in one case and reject the same in the other. In the present case, the Arbitrator rightly came to a finding that upto 02.05.2015, 99.4% work was completed and plant had started functioning. This finding was rendered, basis the documents on record reflecting that only miniscule work remained after December, 2015 and only minor work was completed between May, 2015 and December, 2015, the date upto which there were concurrent delays. These findings were based on Petitioner's Annual Report for 2014-15, acknowledging that gas cracking and polymer production had commenced in March, 2015, corroborated by e-mail dated 01.04.2015 from Petitioner's General Manager (Projects), confirming commissioning and congratulating for completion of work. Additionally, Petitioner's witness RW-1 Mr. Akhilesh Kumar Bhagat



conceded in his cross-examination that the hot section was commissioned in March, 2015, with polymer production being underway.

30. There is also no merit in the objection of the Petitioner that Arbitrator erred in holding that in the absence of proof of loss suffered by the Petitioner, it was not justified in imposing PRS. Arbitrator rightly held that proof of loss was necessary to claim LD, unless the contract expressly excludes such requirement. In the present case, Petitioner failed to adduce even a shred of evidence of quantifiable loss due to alleged delay in completion of the work and thus any deduction under Clause 27 was punitive and unenforceable under Section 74 of the Contract Act. Position of law on this aspect is now settled. [*Ref.: R.B. Enterprises (supra); Tema (supra); and Indian Oil Corporation Ltd. v. Fiberfill Engineers, 2024 SCC OnLine Del 8133*]. Petitioner's reliance on *Punj Lloyd (supra)*, is entirely misplaced as that case concerned a specific contractual structure under Clause 57.2 of SCC involving stage-wise liquidated damages for missed interim milestones in a pipeline project. In stark contrast, in the present case, the dispute is of completion of a polymer plant, which was operational by March, 2015, thereby rendering PRS imposition, post-commissioning, wholly inapplicable. Crucially, in *Punj Lloyd (supra)*, there was unilateral delay, solely attributable to the contractor, whereas in the present case, Arbitrator has rendered a finding that delay was concurrent, basis Petitioner's own document and E-in-C's recommendations. In *Punj Lloyd (supra)*, liquidated damages were enforced under a tiered structure with pre-estimated 20% cap, while here Petitioner has failed to demonstrate and plead any quantifiable loss. In its discretion, exercised judicially, Arbitrator attributed evidentiary value to E-in-C's final recommendations, especially in



the absence of any rebuttal or contrary expert evidence, and the findings warrant no interference in a petition filed under Section 34 of the 1996 Act.

31. Petitioner's reliance on *Tema (supra)* is fundamentally misplaced. In the said case, both parties unequivocally treated Clause 12 as one for liquidated damages and the Arbitral Award was set-aside because the Arbitrator re-characterised this clause as a price reduction clause, thereby exceeding the scope of reference under Section 28(3) of the 1996 Act, whereas in the present case, both parties have always understood Clause 27 as an LD clause. Petitioner's contention that PRS is not in the nature of LD, is contradictory to its own pleadings and the case set up before the Arbitrator. Petitioner has throughout in the related correspondence and in the Statement of Defence used the terms 'PRS' and 'liquidated damages' interchangeably, treating them as synonymous, both in language and intent. This is exemplified by Petitioner's own averment in para 3.27 of Statement of Defence, wherein it refers to the deduction of PRS in the context of R.A. Bill Nos.64 and 65 describing the same as 'PRS/LD (liquidated damages)'. Arbitrator therefore rightly considered the legal character of PRS in this light and assessed its imposition on the basis of established principles governing LD, including delay and binding effect of E-in-C's delay analysis. Once it was established through E-in-C's final recommendation that delays were not solely attributable to the contractor and PRS BG was released without reservation, no claim for PRS, whether termed as price reduction or as LD, could have survived. Petitioner cannot distance itself from pleadings an aprobate and reprobate in the same breath. *[Ref.: Karam Kapahi v. Lal Chand Public Charitable Trust and Another, (2010) 4 SCC 753]*.

32. Arbitrator rightly allowed Claim No.(V) of the Respondent directing



reimbursement of unlawfully encashed Contract Performance Bank Guarantee ('CPBG') amounting to Rs.19,23,35,350/-. This decision followed a comprehensive factual and legal analysis, whereby the Arbitrator held that the encashment in two tranches on 31.05.2018 and 22.05.2019 was neither contractually sanctioned nor legally tenable, particularly, in light of Respondent's liquidation status under IBC, 2016. As regards first tranche, Arbitrator found that CPBG was invoked solely on the ground that Respondent's final Bill had a negative value, however, in its findings under Claim (I), Arbitrator held that this computation was fundamentally flawed due to unjustified deductions, most notably, improper imposition of PRS and upon correction, Arbitrator held that Respondent was in fact entitled to Rs.11,24,27,354/- under the final Bill and consequently, invocation of CPBG for Rs.3.94 crores was entirely unwarranted.

33. With regard to second tranche of Rs.15.28 crores, Arbitrator noted that Petitioner attempted to justify encashment on the basis of mesne profits and anticipated liabilities towards sub-vendors but had never raised any counter-claim for mesne profits for the relevant period i.e. 01.01.2017 to 30.04.2019 and had placed no cogent material on record to quantify the alleged loss. Hence, there was no basis to award mesne profits beyond Rs.35 lacs, already withheld from the final Bill. Regarding reliance on sub-vendors dues by the Petitioner, Arbitrator rightly held that even if Petitioner believed that it was contractually entitled to retain funds for anticipated liability, it had not disbursed any payments to sub-vendors nor filed any claim with the Liquidator and consequently, retention of funds was deemed legally untenable. Arbitrator rightly applied statutory regime of IBC noting that any third party dues must be addressed in liquidation process and cannot be



independently withheld by the employer from funds otherwise due to the corporate debtor.

34. Petitioner's objection to the award of Rs.2,27,11,007/- under the Head of GST reimbursement, that such direction amounts to re-writing of contractual terms as also that GST was reimbursable only upon Respondent depositing the tax with the authorities and reflecting it in its returns, thereby enabling the Petitioner to claim Input Tax Credit, has no merit. Arbitrator acknowledged that no doubt, GST liability initially falls on the supplier and ultimate burden lies on the service recipient, but considering that Respondent was under liquidation and hence unable to deposit the GST due to financial constraint, it was held that Petitioner's retention of GST amount cannot be sustained indefinitely, especially, when tax component was part of admitted final Bill verified by E-in-C. Importantly, Arbitrator adopted a balanced and legally sound approach by directing the Petitioner to release the GST amount subject to an affidavit of undertaking by the Liquidator that the said amount shall be deposited with the GST Authorities. This condition preserves Petitioner's right to claim ITC upon proper deposit and ensures compliance of statutory tax obligations. The direction does not impose any additional financial burden on the Petitioner and on the other hand, facilitates lawful compliance through Liquidator, preventing a situation where Petitioner withholds a legitimate tax amount while also disclaiming any tax responsibility.

35. Petitioner's attempt to impugn well-reasoned findings of the Arbitrator regarding its counter-claim for mesne profits is wholly unfounded. Arbitrator has not ignored the oral testimony of Mr. A.K. Bhagat and market rental valuations, as alleged. Arbitrator's findings rest on



three settled legal principles: (a) absence of proven or quantified loss; (b) Petitioner's failure to mitigate alleged damages; and (c) satisfaction of claim through prior recovery via E-in-C's recommended withholding. Arbitrator rightly held that Respondent took several documented steps to vacate the site but was obstructed by third party vendors, a fact within the knowledge of the Petitioner. No notice for vacation was ever issued by the Petitioner nor any application under Section 17 of the 1996 Act was filed seeking interim relief. No material was placed on record indicating steps taken to mitigate the loss, if any. Arbitrator rightly emphasized on the settled law that party claiming damages must mitigate its losses and relying on Halsbury's Laws of England (Vol. 12, para 1193) and judgment of the Supreme Court in ***Muralidhar Chiranjilal v. Harishchandra Dwarkadas and Another, AIR 1962 SC 366***), held that Petitioner took no steps to mitigate the alleged loss and this glaring omission disentitles the Petitioner from damages under Sections 73 and 74 of the Contract Act.

36. Petitioner's assertion that it proved 'actual and continuing loss' is unsubstantiated. No market-based rental valuation, credible computation or contemporaneous documentary proof was submitted to justify enhancement of mesne profit claim from Rs.35 lacs to Rs.2.16 crores and Arbitrator rightly confined the award to Rs.35 lacs, the amount actually withheld earlier, based on E-in-C's recommendation. Petitioner's heavy reliance on a post-award e-mail dated 08.06.2023 to allege malafides in the Respondent seeking to vacate the land is irrelevant. This post-facto correspondence can be no ground to assail a well-reasoned Arbitral Award.

37. Petitioner's challenge to award of interest @ 18% p.a. until the date of award deserves to be rejected, being contrary to well-settled principles under



Section 31(7)(a) of the 1996 Act. Arbitrator's discretion to award interest is unquestionable in the absence of any contractual bar and admittedly, in the present case there is no clause restricting such discretion. Arbitrator has exercised his jurisdiction judiciously awarding interest @ 18% for pre-award period and 12% post-award, after excluding Rs.14.62 crores attributable to sub-vendor liability. Rate of interest was pegged close to 19.75%, which the Respondent actually paid to the Petitioner on mobilization advance under the same contract. The interest is merely compensatory and neither speculative nor punitive. None of the objections raised by the Petitioner fall within the scope of Section 34 of the 1996 Act and the petition deserves to be dismissed.

ANALYSIS AND FINDINGS:

38. On a factual note, tenders were invited in December, 2011 by the Petitioner for setting up GCU Plant at Pata, UP for its Petrochemical Complex-II, Project. Respondent being a successful bidder was awarded the contract and the contract agreement was executed on 21.05.2012 with contract value of Rs.192,33,53,476/-. Completion period was 21 months from 01.12.2013. DLOA was issued and Respondent furnished BG of Rs.19,23,35,350/-. Respondent was entitled to 'Extended Stay Compensation' @ Rs.1,40,00,000/- per month in accordance with Clause 7 of DLOA dated 21.05.2012. Clause 5 provided for interest bearing mobilization advance to be deducted from running bills.

39. Resident Construction Manager, EIL was appointed as Engineer-in-Charge of the Project and scope of work, scope of supply and time schedule for work completion were detailed in Annexures I, II and III, respectively to the SCC. GCC read with SCC stipulated Petitioner's obligations, which was



crucial for completing the Project and included supply of material, providing work fronts, drawings, land for construction of temporary field office, godowns, work shops etc. Pertinently, under Clause 45.1 GCC, Respondent was entitled to 'Extension of Time' for completing the work, only in case performance was delayed due to the Petitioner. Relevant clauses of GCC, SCC and DLOA are as follows:-

Relevant provisions of GCC

"2.2 Scope of work: The Scope of work is defined in the Technical Part of the Tender Document. The Contractor shall provide all necessary materials, equipment, labour, etc. for the execution and maintenance of the work till completion unless otherwise mentioned in the Tender Document.

10.1 Time Schedule: The work shall be executed strictly as per the Time Schedule specified in the Tender Document. The period of construction given in Time Schedule includes the time required for mobilization as well as testing, rectifications if any, retesting and completion in all respects to the entire satisfaction of the Engineer-in-Charge.

25.1 Time for Mobilization: The work covered by this Contract shall be commenced within fifteen (15) days, the date of letter/Fax of Intent and be completed in stages on or before the dates as mentioned in the Time Schedule of completion of work. The Contractor should bear in mind that time is the essence of this Agreement. Request for revision of construction time after tenders are opened will not receive consideration. The above period of fifteen (15) days is included within the overall completion schedule, not over and above the completion time to any additional work or any other reasons.

27.1 Price reduction schedule: Time is the essence of the Contract. In case the Contractor fails to complete the work within the stipulated period, then, unless such failure is due to Force Majeure as defined in Clause 26 here above or due to Employer's defaults, the Total Contract Price shall be reduced by ½% of the Total Contract Price per complete week of delay or part thereof subject to a maximum of 5% of the Total Contract Price, by way of reduction in price for delay and not as penalty. The said amount will be recovered from the amount due to the Contractor/Contractor's Contract Performance Security Payable on demand.

The decision of the Engineer-in-Charge in regard to applicability of Price Reduction Schedule shall be final and binding on the Contractor.

27.2 All sums payable under this clause is the reduction in price due to delay in completion period at the above agreed rate.



27.3 Bonus For Early Completion

If the Contractor achieves completion of Works in all respect prior to the time schedule stipulated in the SCC, the Employer shall pay to the Contractor toe relevant sum, if mentioned specifically in SCC, as bonus for early completion. The bonus for early completion, if provided specifically in SCC, shall be payable to the maximum ceiling of 2½% of the total contract price.

() Partial earlier completion may not always produce net benefits to the Employer, for example where utilization of the completed Works requires (a) the fulfillment of all parts of the Contract (e.g. the training of personnel); or (b) the completion of all Sections (e.g. in pipeline laying, where early completion of the laying of pipeline would not be useful if the compressor is still under installation); or (c) certain seasonal effects to take place (e.g. onset of the rainy season, for impounding a reservoir); or (d) other circumstances. Also a more rapid drawdown of budgeted funds may be required. All such factors should be considered prior to toe inclusion of a bonus clause in the Contract.”*

45.1 Delays by employer or his authorised agents: In case the Contractor’s performance is delayed due to any act or omission on the part of the Employer or his authorised agents, then the Contractor shall be given due extension of time for the completion of the work, to the extent such omission on the part of the Employer has caused delay in the Contractor’s performance of his work.

Relevant provisions of SCC

12.1 As a Contract Security, the Contractor to whom the work is awarded, within fifteen days of such award of contract shall furnish a Contract Performance Guarantee in favour of the Employer/Consultant in the form of an irrevocable and unconditional Bank Guarantee as per proforma approved by Employer/Consultant. This Bank Guarantee shall be issued by any Indian Nationalised/Scheduled Bank or reputed International Bank as stipulated at Clause 63.2 below. The Guarantee amount shall be 10% of the Contract Price as awarded, for the faithful performance of the contract strictly in accordance with the terms and conditions of the Contract. The Guarantee shall be valid till expiry of ninety days after the end of Defect Liability Period.

12.2 In the event completion of works is delayed beyond the Scheduled Completion Date for any reasons whatsoever, the Contractor shall have the validity of the Guarantee suitably extended to cover the period mentioned above.

12.3 The Employer/Consultant shall have an unqualified option under this Guarantee to invoke the Banker’s Guarantee and claim the amount thereunder in the event of the Contractor failing to honour any of the



commitments entered into under this Contract and/or in respect of any amount due from the Contractor to the Employer/Consultant. In case the Contractor fails to furnish the requisite Bank Guarantee as stipulated above, then the Employer/Consultant shall have the option to terminate the Notification of Award of Work and forfeit the Bid Security/ Earnest Money amount and no compensation for the works performed shall be payable upon such termination.

12.4 Upon completion of the Works as per Completion Schedule stipulated in the Contract, the above said guarantee shall be considered to constitute the Contractor's warranty/guarantee for the work done by him or for the works supplied and their performance as per the specifications and any other conditions against this Contract. The warrantee/guarantee shall remain in force for 12 months from the date of issuance of certificate of completion and acceptance against this Contract as per GCC. The Contractor shall also arrange for the Performance Guarantee to remain valid until the expiration of the Guarantee period for the entire works covered under the Contract.

12.5 In the event of Completion of Project being delayed beyond the Scheduled Completion Date, the Employer/Consultant may, without prejudice to any other right or remedy available to the Employer/Consultant, operate the Bank Guarantee to recover the compensation for delay leviable as per GCC. The Bank Guarantee amount shall thereupon be increased to the original amount, or the contractor may alternatively submit a fresh Bank Guarantee for the equivalent amount of compensation for delay recovered.

13.2 Taxes, Duties and Levies:

Bidder shall consider the rate of Service Tax (including Cess) without considering composition scheme of Service Tax, the same shall be reimbursed by the Employer to the Contractor against submission of invoices issued in accordance with Service Tax Rules to enable the Employer to claim Cenvat Credit on Service Tax paid. In case Contractor does not furnish such invoices enabling the Employer to claim Cenvat benefit, then such amount shall not be reimbursed to the Contractor irrespective of whether the Contractor has paid such amount to the Tax authorities.

37.1.1 In case the time of completion of work is delayed beyond the time schedule indicated in the bidding document plus a grace period equivalent to 1/5th of the time schedule or 8 weeks, whichever is more, due to reasons solely attributable to the Employer/Consultant, the contractor shall be paid extended stay compensation in order to maintain necessary organizational set up and construction tools, tackles, equipments, etc. at the site of work. The bidder shall mention the rate for such extended stay compensation per month in the 'Price Part' which will be considered for



evaluation. The period for the purpose of evaluation shall be 1/5th of the time schedule or one month, whichever is less.

56.1.1 Defect Liability Period shall be 12 months from the date of Contractual Mechanical Completion.

Relevant provisions of DLOA

6.0 Taxes and Duties

The contracted rate is inclusive of all taxes and duties but excluding Service Tax on ceiling amount of INR 49,06,43,000 shall be applicable as per the provisions of Tender Documents.

The Service Tax shall be reimbursed by Employer to Contractor against submission of invoices issued in accordance with Service Tax Rules to enable the Employer to claim Cenvat Credit on Service Tax paid. In case Contractor does not furnish such invoices enabling the Employer to claim Cenvat benefit, then such amount shall not be reimbursed to the Contractor irrespective of whether the Contractor has paid such amount to the Tax Authorities.

7.0 Compensation for Extended Stay

Extended Stay Compensation @ INR 80,00,000/- per month, if applicable, shall be payable extra as per the provisions of the Tender Documents.”

40. As noted above, the objections in the present petition are limited to imposition of PRS, amount receivable under GST, reimbursement of amount under BG encashed by the Petitioner and rate of interest as also partial rejection of counter-claim of the Petitioner. Before proceeding further, it will be pertinent to allude to the law on scope of interference with an Arbitral Award under Section 34 of the 1996 Act. Under the unamended Section 34(2) as it stood prior to Amendment Act, 2016, *inter alia* interference in an Arbitral Award was envisaged if it was in conflict with Public Policy of India and the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705*** and ***Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49***, held that an award will be contrary to Public Policy of India if it was: (a) contrary to fundamental policy of Indian law; or (b) contrary to interest of India; or



(c) contrary to justice or morality; or (d) patently illegal. ‘Patent illegality’ was recognized as a ground to interfere in Arbitral Award in several judgments of the Supreme Court including ***McDermott International Inc. v. Burn Standard Co. Ltd. and Others*, (2006) 11 SCC 181.**

41. Arbitration and Conciliation (Amendment) Act, 2016 was introduced with effect from 23.10.2015 and the expression ‘Public Policy of India’ was by Explanation I, restricted to cases where the award was: (i) induced or affected by fraud or coercion; (ii) violative of Section 75; (iii) violative of Section 81; (iv) in contravention with Public Policy of Indian Law; or (v) in conflict with most basic notions of morality and justice. This, however, did not entail review of the award on merits of the dispute. In ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)*, (2019) 15 SCC 131**, the Supreme Court 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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 [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .



35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

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 v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204. 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* [*ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

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 v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, 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 v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, 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 v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

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

42. In ***PSA SICAL Terminals Private Limited v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others***, (2023) 15 SCC 781, the Supreme Court referring to the earlier judgments on the issue, including in *Associate Builders* (supra), *Ssangyong* (supra), *MMTC Limited v. Vedanta Limited*, (2019) 4 SCC 163, etc. held that it is more than settled legal position that in an application under Section 34, Court is not expected to sit as an Appellate Court and re-appreciate evidence. Scope of interference will be limited to grounds provided under the said provision and interference will be warranted if the award is in violation of ‘public policy of



India’, which has been held to be ‘fundamental policy of Indian law’. Judicial intervention on account of interfering on merits in the award would not be permissible *albeit* principles of natural justice contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act would continue to be grounds of challenge. A decision which is perverse, though would not be a ground for challenge under public policy of India, would certainly amount to patent illegality and a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on ground of patent illegality.

43. It would also be useful to refer to the judgment of the Supreme Court in ***State of Jharkhand and Others v. HSS Integrated SDN and Another, (2019) 9 SCC 798***, where the Supreme Court held that Arbitral Tribunal is the master of evidence and findings of fact arrived at, based on appreciation of evidence, are not to be scrutinized as if the Court was sitting in appeal. To the same effect is the judgment of the Supreme Court in ***Maharashtra State Electricity Distribution Company Limited v. Datar Switchgear Limited and Others, (2018) 3 SCC 133***. Recently, in ***Hindustan Construction Company Limited v. National Highways Authority of India, (2024) 2 SCC 613***, the Supreme Court re-stated that Courts should not customarily interfere with the Arbitral Award which is well-reasoned and view of the Arbitrator is a plausible view. Relevant passages from the judgment are as follows:-

“26. The prevailing view about the standard of scrutiny — not judicial review, of an award, by persons of the disputants’ choice being that of their decisions to stand — and not interfered with, (save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily choose the path of least interference, except when absolutely necessary). By training, inclination and experience, Judges tend to adopt a corrective lens; usually,



commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say (under Section 37), and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible — and this Court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.

27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in *State of U.P. v. Allied Constructions* [*State of U.P. v. Allied Constructions*, (2003) 7 SCC 396] : (SCC p. 398, para 4)

*“4. ... It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co. v. State of Kerala* [*Sudarsan Trading Co. v. State of Kerala*, (1989) 2 SCC 38]). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law.”*

44. It is trite that re-writing of the contractual covenant by the Arbitrator is against the law of the land and enough to vitiate the Arbitral Award. Starting from one of the earlier judgments of the Supreme Court in ***Union Territory of Pondicherry and Others v. P.V. Suresh and Others*, (1994) 2 SCC 70**, to ***Maharashtra State Electricity Distribution Company Limited v.***



Maharashtra Electricity Regulatory Commission and Others, (2022) 4 SCC 657, to refer to a few to avoid prolixity, it has been held that neither a Court nor an Arbitrator can re-write clauses of a commercial contract. In a recent judgment ***OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited and Another, (2025) 2 SCC 417***, the Supreme Court reiterated and re-affirmed that Arbitral Tribunal must decide in accordance with terms of the contract and where the Arbitral Award is against the contractual terms, the award would be patently illegal *albeit* the Arbitral Tribunal has the jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties, including correspondences exchanged etc. If the conclusion of the Arbitrator is based on a possible view of the matter, Court should not interfere, however, where on full reading of the contract, the view is not a possible view, the award will be perverse and as such amenable to interference. Importantly, it was also held that ordinarily terms of the contract are to be understood in the way the parties intended. An unexpressed term cannot be read into a contract except where the term was always obviously intended by the parties to give business efficacy to the contract and although tacit, forms part of the contract.

45. With these judgments in the backdrop, I may now examine the rival submissions of the parties on the objections raised by the Petitioner against the impugned Arbitral Award dated 09.05.2023. As referred in the Award, the GPU case had reached the stage of final arguments and the parties agreed that arguments in this case will be heard after arguments concluded in the GPU case.

46. Insofar as the argument of the Petitioner that claims of the



Respondent were time barred, first and foremost, this plea was never raised before the Arbitrator and hence, there was no occasion for the Arbitrator to deal with the issue. Limitation is a mixed question of law and fact. Had the Petitioner raised this objection before the Arbitrator, Respondent would have had the opportunity to rebut the plea and lead evidence. Be that as it may, even otherwise, claims of the Respondent are not time barred, inasmuch as going by the Petitioner's case, work was completed on 15.09.2016. CIRP was initiated against the Respondent by NCLT, Mumbai in CP(IB) No. 1374/2017 on 23.03.2018. Respondent invoked arbitration vide notice dated 16.08.2019 and Petitioner replied to the same on 13.09.2019. Respondent approached this Court immediately by filing Arb. P. No.79/2020 for appointment of Arbitrator and vide order dated 14.01.2021, Sole Arbitrator was appointed.

47. Coming to the issue of imposition of PRS, learned Arbitrator was of the view that there was no justification on the part of the Petitioner in invoking Clause 27 GCC and reducing the contract amount by 5% as also *prima facie* no loss was suffered by the Petitioner since the plant was functional. While the Respondent alleged that the Project was commissioned in March, 2015, Petitioner contended that the Project was, in fact, completed only on 15.09.2016. After a detailed 'delay analysis' and examination of the report of E-in-C, Arbitrator agreed with the Petitioner that Project was completed only on 15.09.2016, however, disagreed on imposition of PRS on the ground that by 02.05.2015, 99.4% of the work was complete and the balance work was only miniscule, besides the fact that the plant was functional in 2015 itself as per Petitioner's Annual Report 2014-15 and e-mail dated 01.04.2015, acknowledging this position. Basis this, it was held



that retention of PRS amounting to Rs.8,97,18,347/- from the final Bill for Rs.9,84,82,967/- was illegal. Relevant paragraphs from the award are as follows:-

Delay Analysis

137. The record reveals that vide letter dated 10.10.2016 addressed to EIL, the Claimant had mentioned various reasons, which according to the Claimant, led to the delay in work. It is stated by the Claimant that though the Claimant was at all times ready, willing and able to execute the contract within the contractual timelines, it was prevented from achieving timely completion by various factors beyond its control. Following are the factors highlighted by the Claimant in the said communication.

	Reason for delay	No. of days of Delay
i)	Delay in provision of Isometrics/Drawings	275
ii)	Delay in handing over foundations	348
iii)	Delay caused by revision in GA drawings	84
iv)	Delay/Non-provision of material	634
v)	Hindrances at the site	103
vi)	Delay caused by execution of additional jobs / works and modification in scope of work	332
vii)	Delay on account of procurement	840
viii)	Delay in approval of extra items	
ix)	Other delays	

138. The letter also mentions that the Claimant has been repeatedly communicating the aforesaid delays by way of contemporaneous letters/e-mails as well as in the periodical meetings which were held between the parties. After mentioning the aforesaid factors, the Claimant has recounted the details of each of these purported delays and has also mentioned the number of days of delays in respect of



each of them. It is mentioned in the said letter that the Claimant was granted provisional Extension of Time in the following manner:

S. No.	Date of letter from PECL	EOT from letter from EIC	Extension to complete work up to
1	26.11.2013	28.11.2013	31.03.2014
2	23.03.2014	24.03.2014	30.06.2014
3	24.05.2013	10.09.2013	31.12.2013
4	18.06.2014	06.07.2014	30.09.2014
5	18.09.2014	11.10.2014	30.11.2014
6	04.10.2014	22.12.2014	Reasonable time extn
7	06.11.2014	12.11.2014	31.01.2015
8	08.01.2015	28.01.2015	31.03.2015
9	05.03.2015	24.03.2015	31.05.2015
10	02.05.2015	19.05.2015	31.07.2015
11	02.07.2015	30.09.2015	30.09.2015
12	01.09.2015	21.09.2015	30.11.2015
13	04.11.2015	27.11.2015	31.12.2015
14	03.12.2015	24.12.2015	31.01.2016
15	03.01.2016	25.01.2016	29.02.2016
16	03.02.2016	26.02.2016	31.03.2016
17	18.03.2016	31.03.2016	30.04.2016
18	13.04.2016	26.04.2016	31.05.2016
19	10.05.2016	25.05.2016	30.06.2016
20	14.06.2016	28.06.2016	31.07.2016
21	23.07.2016	28.07.2016	31.08.2016
22	24.08.2016	30.08.2016	15.09.2016

139. Request was made to finally issue a consolidated Extension of Time letter for the entire period from 01.12.2013 until 15.09.2016 without resort to Clause 27 of the GCC (PRS clause).

140. EIL undertook Delay Analysis after considering the submission of the Claimant in respect of each of the aforesaid factors pointed out by the Claimant. Entirety. The Respondent also alleged delays on the part of the Claimant. EIL considered and analysed those reasons as well and recorded its findings as under:



Delay Analysis

The Kick off meeting was held on 22.03.2012 at site and accordingly, site was mobilized progressively from 23.04.2012, after allotment of land and power supply to M/s. PECL. M/s. PECL could complete the works by 15.09.2016 only with a total delay of 33 months and 15 days. The detailed analysis for the activities having impact on delay during execution against various contentions of agency is elaborated as under:-

1) Delay due to drawings:- All the civil GADs and Piping GADs were released well within the CCD. Majority of isometrics accounting for more than 5 lakh ID out of 5.6 lakh ID were released till CCD (Refer MOM dated 02.12.2013, page no. 24-26 of Annexure-A). Though there were certain delays in issuance of drawings as referred in PECL letter dated 09.05.2012. ISOs were issued progressively and further isometrics were issued on 11.05.2012 (transmittal no. 744, refer page no. 3 of Annexure A). Planning isometrics issued were good for fabrications which were later converted to AFC. AutoCAD drawings sought by PECL for structural were not required for fabrication/erection; hence no delay is admissible regarding same. M/s. PECL letter dated 06.07.2012 regarding resource mobilization was duly replied by letter No. 2972 dated 07.07.2012. PECL referred letters dated 28.08.2012, 27.09.2012, 15.09.2012, 16.10.2012, 02.01.2013, 22.04.2015 were duly replied by our letter No. 3601 dated 31.08.2012. MOM dated 20.10.2012 transmittal no. 1458 dated 16.11.2012, letter no. 4156 dated 22.10.2012, letter no. 5126 dated 11.01.2013 and mail dated 11.07.2015 respectively (page no. 4-16 of Annexure A). M/s. PECL letter dated 30.06.2014 for compensation for extended stay was refuted vide EIL letter No. 12151 and 12987 dated 11.07.2014 and 30.09.2014 respectively (page no. 17-34 of Annexure A).

It may be appreciated that in project of such mammoth proportions, revision of drawings is inevitable. The quantum of these revised drawings vis-à-vis quantum of work involved was meagre in comparison to total quantum of work. M/s. PECL was never in dearth of front during currency of contract which can be amply understood vide our various letters dated 21.04.2012, 28.06.2012, 07.07.2012, 31.08.2012, 01.09.2012, 22.10.2012 (page no. 35-41 of Annexure A) and so on. Last drawing provided to M/s. PECL was the PSV line of 110-PA-515. This line was earlier laid with CS metallurgy but was revised as per licensor requirement to LTCS metallurgy (Licensor punch list attached for reference). This drawing was issued, after due deliberation between EIL, GAIL and licensor, on 22.09.2015 after suitable material availability (page no. 42 of Annexure A). This job was completed within a week. **Hence the delay up to 29.09.2015 may be considered as concurrent delay.**

2) Delay in handing over of foundations:- It is a matter of record that all the major foundations were released to PECL for execution well before CCD. 73 no. foundations released after CCD (shown in Annexure 3 of M/s. PECL letter) are mainly small filter foundations which were done with payments (refer EIL letter no. 12151 dated 11.07.2014 (page no. 18-34 of Annexure A). M/s. PECL letter dated 06.07.2012 and 17.07.2012



regarding resource mobilization was duly replied by letter no. 2972 dated 07.07.2012 (page no. 4 of Annexure A) where it was clarified that reference for various EDDs of equipment delivery and drawing release schedule may be taken from EIL Planning Department by M/s. PECL. Refer MoM dated 24.08.2012 and 04.09.2012 (page no. 43-47 of Annexure A) against PECL letter dated 11.08.2012 regarding insufficient work front. Also refer our letter dated 31.08.2012 (page no. 5-6 of Annexure A) regarding the same stating that more than 250 MT equipment erections delayed due to inadequate resources mobilized by M/s. PECL.

M/s. PECL referred letter dated 28.02.2013 about the list of equipment for which foundation was not found was incorrect as many of the equipment listed were already erected (refer attached reports of 110-PA-560 A/B, 110-PA-802A/B, page no. 48-51 of Annexure A). PECL letter regarding erection of 110-VV-241 was duly resolved and equipment was erected on 05.08.2013 (refer DPR of 05.08.2013, page no. 52 of Annexure A). PECL letter dated 08.01.2014 regarding delay in works was replied on 09.01.2014 vide letter no. 9793 (page no. 35-56 of Annexure A). PECL letter dated 18.11.2014 regarding delays in foundation handover was found incorrect when several of the listed equipment where either pipe spools or already erected (refer page no. 57 of Annexure A). PECL has elaborated the delay in erection of pumps in J-zone but majority of the pumps (9 out of 17) got erected before 30.06.2013 (refer erection reports of 110-PA-342 A/B and 343 A/B, page no. 58-61 of Annexure A). Hence, there was no issue of front even before the CCD. It may be noted that critical equipment like compressor and huge no. of static equipment erected could not be grouted for more than six months after erection due to shortage of epoxy and non-shrink grouting material. Inordinate delay in grouting of C2r/C3r compressor is an example of improper planning of M/s. PECL causing a *delay of nine months* after certification of alignment by foreign vendor.

Delayed mobilization of 1200 MT crane (intimated vide letter dated 11.01.2013, 13.04.2013, page no. 12-13 of Annexure A), severe breakdowns of various cranes, lack of other machineries like JCB, trailers, etc. accessories like plates, mats, slings, etc. and manpower led to delay in heavy erections (intimated vide letters dated 01.09.2012, 11.01.2013, 26.02.2013, 13.04.2013, 23.04.2013, 14.06.2013, 24.07.2013, 02.12.2013 (page no. 40, 12-13, 62-77 of Annexure A). These delays in erections of critical equipment were having cascading effects on connected piping works. Also progressive release of minor fronts for erection was never a constraint for delay in completion of other activities. Therefore, the claims of insufficient work front due to delay in handing over of foundations refuted vide aforesaid and various other letters dated 10.09.2014, 11.07.2014, 30.09.2014 and others (page no. 18-20, 78-80 of Annexure A). Last equipment i.e., 110-PA-935 A/B were erected on 09.01.2015 after its delivery by the vendor (page no. 81 of Annexure A). All major adjacent piping was completed earlier. Balance connections were completed in week time. Hence the delay up to 15.01.2015 is not solely attributable to M/s. PECL on this account.



3) Delay caused by revision in GA drawings: All the major GA drawings related to Piping, structural steel, grating, etc. were issued well before CCD. Some minor DCN drawings given till 19.09.2014 (refer page no. 144 of Annexure I). PECL has referred letter dated 31.12.2013 regarding returning of 110-VV-425 platform design drawing for GCU which was replied by our letter no. 9720 dated 02.01.2014 (page no. 82-83 of Annexure A). It was clarified that works are to be executed as per the drawings released and the SOR quantity is only indicative.

There was an inordinate delay in procurement of bought out materials by M/s. PECL which was amply highlighted vide our letter dated 11.01.2013, 26.02.2013, 13.04.2013, 23.04.2013, 14.06.2013, 24.07.2013, 04.11.2013, 02.12.2013, 14.12.2013, 31.12.2013, 09.01.2014, 11.07.2014, 10.09.2014 etc. (page no. 40, 12-13, 18-20, 62-77, 84-93 of Annexure A). Due to delay in platform erection works, the fronts for column internal agencies were also affected. Regarding increase in quantities, please note that the quantities of individual items may vary as per contract provisions and it is contractor's obligation to complete the same. As such, increase in quantities does not qualify as a reason for delay. Delay up to 10.10.2014 can be considered not solely attributable to M/s. PECL on this account owing to DCN-260 issued on 19.09.2014.

4) Delay/Non-provision of material: It may be noted that sufficient material was always available but works were delayed due to inadequate manpower mobilized by M/s. PECL. By the end of November 2013 i.e., at CCD, nearly 1.25 lakh ID welding and 2.25 lakh IM erection was balance. PECL referred letter dated 28.08.2012 regarding lack of material and availability of insufficient drawings was refuted by EIL vide letter No. 3601 dated 31.08.2012 (page no. 5-6 of Annexure A). It was also highlighted in the letter that front was available for more than 3 lakh ID while PECL has fabricated hardly 60,000 ID. Referred letter dated 16.10.2012 of PECL was replied vide our letter No. 4156 dated 22.10.2012 (page no. 1-11 of Annexure A).

It is a matter of record that PECL could not lift materials as per issued MIVs (in some cases more than 10 months) due to inadequate trailers/resources. This became prevalent after 2013 as can be observed from our mails dated 13.09.2012, 12.12.2013 (refer page no. 21, 94 of Annexure A), letter no. 6447, 7718, 12151 dated 23.04.2013, 24.07.2013 and 11.07.2014 (page no. 66-68, 71-72, 18-20 of Annexure A). In fact, works were affected due to improper planning and warehousing by PECL. Due to inefficient system of warehousing, piping material already issued to PECL were not traceable for which re-issue was done to save time as highlighted vide our letter dated 31.10.2014, 05.11.2014, 12.11.2014, 19.11.2014 (page no. 95-101 of Annexure A). Continuous changing of RCM/store-in-charges aggravated the problems.

In February 2014, a list of approx.. 8000 ID shortage was submitted by PECL. It is worthwhile to note that nearly 50,000 ID fabrications was balance in February 2014 end. As such, material has never been constraint in delay in works. Huge front was always available which could not be liquidated due to inadequate manpower which can be



inferred by our various letters dated 28.06.2012, 01.09.2012, 11.07.2014, 30.09.2014 etc. (page no. 36-37, 40-41, 17-20 of Annexure A).

As per client requirement of changing the 150 # valves / flanges in BDD standard connection to 300 # SS 304 CRYO valves / flanges was raised. Earlier, the works were completed as per P&ID and ISOs. But after detailed deliberation with Licensor, EIL HO piping, it was insisted by GAIL to change these valves (2" – 80 no's valves and their flanges) with flanges. Accordingly, material procurement was initiated in early May 2015 and additional material was procured and work was completed by end November. It is a matter of record that final material allocated for works at site was allocated on 24.11.2015 for completion of BDD system (page no. 102 of Annexure A). Hence, delay up to end Nov.2015 is not solely attributable to PECL on this account.

5) Hindrances at the site:- It is understood that in the project of the magnitude of GCU, where multiple contractor are working in tandem, fronts are released in progressively with simultaneous working of contractors. PECL has been allocated with adequate area for fabrication yard and crane storage vide our letter No. 2092 dated 16.05.2012 ((page no. 103 of Annexure A). Even separate graded area of 125 X 75 was allocated for blasted/painted spools vide mail dated 16.10.2012 (page no. 104 of Annexure A) in reply to PECL letter dated 10.10.2012. But even those areas were under-utilized as highlighted vide our letter dated 11.01.2013 (page no. 12-13 of Annexure A). Also, poor spool management by PECL was highlighted in our various mails and OQAs (OQA No. 03, 12, 15A, 16, page 105-108 of Annexure A). This led to damage and loss of fabricated spools. PECL referred letters dated 15.07.2013, 22.07.2013 were duly replied vide our letter No. 7641, 7718 dated 18.07.2013 24.07.2013 (page no. 109-110, 71-74 of Annexure A). Covered space for insulation was refuted as warehousing of bought out items comes under contractor scope of work as per SCC clause no. 76.

PECL has elaborated the delay in erection of 23 pumps on 18.05.2013 but many pumps got erected before 30.06.2013. Hence there was no issue of front even before CCD (page no. 58-61 of Annexure A). Erection in grid 36-40 in W-zone started on 22.05.2013 (page no. 111 of Annexure A) though highlighted by PECL in their letter dated 19.05.2013. Also, PECL letter dated 15.07.2013, 22.07.2013 were duly replied vide our letter No. 7641, 7718 dated 18.07.2013 and 24.07.2013 (page no. 109-110, 71-74 of Annexure A). From erection reports, it can be seen that erection in grid 24-30 W-zone started on 15.03.2013 while grid 12-18 in cold zone started on 28.04.2013 though these were highlighted in their letters (page no. 112,113 of Annexure A).

PECL letter dated 08.03.2014 regarding approaches were suitably addressed vide our letter dated 14.03.2014 (page no.114-115 of Annexure A). Several approaches were facilitated through civil contractor from time to time for expediting the works as discussed with GAIL. Further erection report for line fouling highlighted vide letter dated 06.04.2013 is included in page no. 116 of Annexure A.



PECL contention of front release in haphazard manner is incorrect. In fact, all fronts have been released in sequential manner which is evident from records and site. Entire cold pipe rack and adjacent tech-structures have been released progressively from one side. It is worthwhile to mention that four no. of tech structures adjacent to cold pipe rack under PECL scope was delayed which affected the continuous front generation badly. Hot pipe rack was also released progressively from north. Various holds in piping erection front mentioned in PECL letter were replied vide letter dated 23.04.2013, 14.06.2013, 24.07.2013 (page no. 66-74 of Annexure A). Also difficulty in placing hydra/crane was duly apprised at site and vide letters dated 23.04.2013, 14.03.2014 (page no. 66-67, 114-115 of Annexure A). Other stated site related hindrances were resolved well within CCD. Delay up to 30.03.2014 can be considered not solely attributable to PECL on this account.

6) Electrical works: The erection, testing and commissioning work in SS-31 was carried out by PECL. After all civil clearances, base frame work was started only by May 2013. CEA approval for energization of the sub-station SS-31 was obtained on 26.06.2014 and the sub-station was commissioned on 30.06.2014. The time taken for the said work is found reasonable as procurement of structural steel, safety items, and copper flexible for HT panels; modifications in HT but duct, battery bank commissioning and statutory approvals were involved. (Refer page no. 162-167 of Annexure A). Hence, delay up to 30.06.2014 is not attributable to the contractor on this account.

After commissioning of SS-31, Motor to load work for 200 motors were carried out from July, 2014 to October, 2014. VFD panel for motor 703A/B and 704A/B was received in the month of July, 2014 and same was commissioned from 09.12.2014 to 12.12.2014 by M/s. Milton Roy representative. The mentioned works were carried out in tandem with other agencies. Also, capacitor bank foundation clearance was provided in October 2014 from civil and same was installed and commissioned only by December 2014. (Refer page 159 of Annexure A). Hence, delay up to 31.12.2014 is not attributable to the contractor on this account.

110-PA-935 A/B motor in cold pipe rack area was installed in January 2015 and no load of same could only be completed by 24.02.2015 after all clearances by other departments. There was an upward increase in the executed quantities of earthing system due to site conditions and actual requirements in January 2015. The earthing works was completed in February 2015, the time taken for which is found reasonable. Hence delay up to 28.02.2015 is not solely attributable to the contractor on this account.

Additional work of 500 (approx.) fighting fixtures was envisaged in February 2015 in caustic, DOX, air, compressor, CG compressor, C2/C3 compressor, TS12, Furnace 110, 120, 130, near Motor 305/306, VV-935, BFW area of GCU for achieving desired lux level. Also 150 fixtures (approx.) work were carried out as per M/s. GAIL requirement in PSV rack areas of cold pipe rack and hot pipe rack, w zone area (18 mtr and 24 mtr elevation) of hot pipe rack area and also 8 no's Ground mounted pole



were installed in caustic area, BFW pump area as per the requirements. (Refer page 160, 161 Annexure A) PO for procurement of lighting cables was placed on 13.03.2015 (Ref: GAIL/C&P/ A096-110-XT-PR-0240/309/1982) and same was received on site on 13.04.2015 and works were carried out and completed only by September 2015 although the same could have been completed by 31.07.2015. Hence delay till July 2015 is not attributable to the contractor on this account.

7) Instrumentation works: Cable trench from GCU-II Control Room to unit area was released in Sep 2013 and Connectivity of ICPR on 21U and 21Y was made available in November 2013. Cabling of these areas could be completed by March 2014. Delay up to March 2014 can be considered as concurrent delay on this account.

3 nos. LCP installation clearance at VHP area was received in the month of October 2014. Installation of LCP and related cable tray work, cable laying work was completed on December 2014. The delay up to December 2014 is not solely attributable to M/s Petron. 50 nos. analyzer and 58 nos. Gas detectors installation front clearance was released after February 2015. Due to delay in completion of site activities and probability of damages and accommodation of dust and particles of Analyzers and Gas detectors resulting to their performance, installation clearance of Analyzers and detectors was kept on hold. Clearance of the same was given in February 2015 after completion of major site work and completed in month of April 2015. These were delayed due to PECL. Hence no delay beyond December 2014 is tenable on this account.

Loop checking / commissioning of for Vendor Packages Supplied FF instruments could be completed by June end after receipt of Instrument DD Files. Around 64 nos. PSV recalibration and reinstallation was done in the month of May 2015 to June 2015 due to change in set pressure as per licensor and client requirement (page no. 144-156 of Annexure A). The delay up to June 2015 is not solely attributable to M/s. Petron on this account. As per PECL, instrument air was received in the month of December 2014 for airline charging and Control Valve stroke checking. Stroke Checking of Control and On-Off valves was completed on 06.06.2015. Control Valve Stroke checking was possible using portable air compressor or Nitrogen cylinders. No delay on this account is tenable.

8) Delay caused by execution of additional and modification in works/ jobs: Regarding increase in quantities, it may be noted that the quantities of individual items may vary as per contract provisions and it is contractor's obligation to complete the same. It may be noted that total executed value shall be within total contract value. Last communication regarding hydro jetting can be referred vide mail dated 13.09.2014 addressing balance hydro jetting lines (page no. 117 of Annexure A). Increased quantities of work whether it is fire proofing, structural or painting was intimated well within CCD as latest equipment data sheet and line schedules were provided within CCD. As such, increase in quantities does not qualify as a reason for delay.



9) Other Delays:- Several extra items were executed wherever SOR rates were not available. Same were duly processed in line with contract requirements.

Amercoat: The requirements for Amercoat in the higher dia of pipes were available with PECL since long but neither extra item analysis was submitted nor procurement action was taken. Though extra item submitted by PECL in May 2015 and was processed immediately, certain supporting documents could not be submitted by PECL up to September 2015. See EIL mail dated 03 September 2015 (page no. 118 of Annexure A). Upon submission of requisite documents to GAIL, same was approved on 24.09.2015 (page no. 119 of Annexure A). However, despite approval, the works were delayed later by PECL, and could be completed up to December 2015. As such, no delay or impact admissible on this account.

Handrail painting extra item analysis could not be submitted by PECL till first week of May 2015. Refer EIL mail dated 05.05.15 (page no. 120 of Annexure A) reminding early submission of rate analysis and resuming handrail paint works. Same was forwarded on 16.05.2015 upon submission by PECL on 07.05.2015 and approved on 08.07.2015 (page no. 121 of Annexure A). As such, no delay or impact admissible on this account.

Cold Acoustic Insulation: While item for cold acoustic insulation was available in the contract, certain deviation was required to be processed as per works executed as per site requirements. Works were executed by early 2015 and major payments were received by PECL for materials as per payment terms. However, due to certain changes, deviation permit was processed and extra item was proposed on 23.04.2016 duly signed by PECL which got approved on 27.09.2016 by client (page no. 122 of Annexure A). There was no impact on time of completion of works due to same as these activities were completed long back and material payments were received earlier.

Dual Insulation: For Dual insulation, material was arranged from available material within premises and issued to PECL in End February 2015. Only application was required to be done by PECL which could have been completed by April 2015. However, PECL delayed the same inordinately. Even submission of extra item for same was delayed by PECL till August 2015. After submission of supporting documents, same was forwarded on 27.10.2015. After submission of supporting documents, same was forwarded on 27.10.2015 and approved on 22.01.2016 by client (page no. 123 of Annexure A). Keeping in view only Installation works, no impact on other works is admissible on this account. Delay up to April 2015 can be considered as concurrent delays on this account.

Catalyst loading is a sequential commissioning activity which is performed after completion of all works, dry out of lines and clearance from client. Accordingly, after completion of prerequisites, vendor was called by client and same was completed on 15.03.2016 (refer mail dated 15.03.2016 page no. 124 of Annexure A). As various other prerequisite



activities were delayed by PECL leading to delay in completion of this activity, no delay in admissible on this account.

It may be noted that Provisional Time Extension were granted without prejudice to the contract clause of levying PRS. Also, various request letters of PECL for Provisional Time Extension were replied negating various incorrect submissions."

"Delay due to reasons attributable to the Contractor:

Further to our pointwise comments on the letter submitted by M/s. PECL, following issues are highlighted which have significant bearing on delay in completion of works:

- a) **Delay in initial mobilization by PECL:** After KOM on 22.03.2012, PECL mobilized slowly from end April 2012 with its first piping welding done on 23.05.2012 i.e., after two months of KOM (page no. 125-126 of Annexure A). PECL did not mobilize fully till 01.09.2012. Even fabrication shed and yard were not developed till 01.09.2012 which led to dumping of fabricated spools haphazardly in soil which can be understood from letter dated 01.09.2012 (page no. 40-41 of Annexure A).
- b) **Highly inadequate deployment of manpower including welders and supervisors by PECL throughout the currency of the contract:** PECL has been repeatedly communicated about the need for augmentation of manpower. PECL was always behind the scheduled welding ID despite availability of front/drawings/materials and hence they were consistently been advised for augmentation of welders. Same is the case with the backlog in erection front. Refer duly signed attached MoM dated 12.06.2012, 26.06.2012, 03.07.2012, 11.09.2012, and letter dated 01.09.2012, 23.04.2013, 09.01.2014 and 11.07.2014 for reference (page no. 127-135, 40-41, 66-68, 53-56, 18-20 of Annexure A).
- c) **Delay in mobilization of machineries like cranes, trailers, etc.:** PECL did not mobilize any crane till 12.06.2012 (page no. 127-128 of Annexure A) and were throughout the currency of the contract, in the backlog of erection front for both equipment as well as piping. This backlog had cascading effect of delay on the whole project. PECL was reluctant to even have basic resources like JCB etc. Regarding cranes, PECL moved 450 MT crane from GPU to GCU but remained breakdown for months at a time. Even critical equipment like 1200 MT crane could not be deployed till 13.04.2013. Also lack of trailers affected transportation of materials adversely specially piping. This led to huge backlog of MIVs to be lifted by the contractor. This can be understood vide our mail dated 13.09.2012, 12.12.2013 (refer page no. 21, 94 of Annexure A), letter no. 6447, 7718, 12151 dated 23.04.2013, 24.07.2013 and 11.07.2014 (Refer page no. 66-68, 71-72, 18-20 of Annexure). Due to lack of mobilization of crane, EIL/GAIL



extended support for allocating 150/250 MT crane as per PECL requirements.

- d) **Inordinate delays in procurement of various materials like structural steel, insulation material including PUF supports, grouting material (epoxy and non-shrink), fire-proofing materials, etc.** This part contributes to major delay on the account of contractor. PECL inordinately delayed structure procurement even up to Sor quantity. Though quantities exceeded beyond Sor quantities but the quantities of individual items may vary as per contract provisions and it is contractor's obligation to complete the same. Refer letter No. 12151 11.07.2014 in this regard (refer page no. 18-20 of Annexure A). Critical equipment like compressor and huge no. of static equipment erected could not be grouted for more than six months after erection due to shortage of epoxy and non-shrink grouting material. Refer letter No. 12151 dated 11.07.2014 (page no. 18-20 of Annexure A)

Regarding PUF pipe supports, major material was not ordered till 08.01.2014 (refer page no. 136 of Annexure A). Due to exigency of work, certain project specific approvals for the same were accorded to help in expediting the works like PUF support supplied by M/s. Multiproduct. As far as insulation material is concerned, PECL failed miserably in calculating/ordering the quantum of material required as per drawings issued. Also, inadequate manpower and improper cash flow has led to delay in insulation job at site. Insulation material was short supplied mainly in small bore which led to loss of work. This can be understood by mail dated 23.08.2016 (refer page no. 137-138 of Annexure A). It is a matter of great disappointment that PECL was not able to complete insulation jobs till 15.09.2016 even when their major welding jobs were over by June 2015.

- e) **Extremely poor cash flow at site:** Due to poor cash flow management by PECL, various site mobilization of resource as well as materials supply and labour payments were badly affected. Site witnessed workers strike often due to delay in disbursement of wages by PECL. Several complaints from vendors/suppliers were received for huge outstanding payments which were forwarded to PECL for early compliance. Several helps were extended by EIL/GAIL including increased frequency of billing per month, improvement in billing break-up and advance against 10% BG midway during contract, etc. However, PECL failed to live up to commitments and complete the works in time.
- f) **NDT works:** Till 01.09.2012, there was no proper place finalized for storage and baking of electrodes (reference page no. 40-41 of Annexure). Also by that date, PECL was facing huge radiography backlog, acute shortage of QA/QC engineers and IBR welders. This remained persistent throughout CCD which was highlighted vide our letters No. 9325 dated 28.11.2013, 14.12.2013, 31.12.2013 (reference to page no. 139, 86-90 of Annexure). NDT works



suffered badly due to inadequate no. of radiography sources. A huge backlog accrued due to same. Refer letter No. 5419 dated 06.02.2013 (reference page no. 140 of Annexure A) and various MoMs regarding same. Even on CCD, PECL NDT backlog was more than 1700 (MoM dated 02.12.2013, page 24-26 of Annexure A). Additional selenium source mobilization was delayed by PECL which adversely affected the loop clearances. PWHT works also progressed slowly due to inadequate no. of recorders. PWHT backlog just after CCD was around 1500 joints (page no. 141 of Annexure A)

- g) **E&I works** have been delayed due to inadequate manpower. Delay in procurement of trays, glands, angle, section for tray supports and other bought out items. Huge backlog of E&I was agreed by PECL at the time of CCD during MOM dated 02.12.2013 (page no. 24-26 of Annexure A). PECL failed to provide front even in its own structures namely TS-2, 9, 10, 12. Delay in piping has sequential delay on the Instrumentation works.
- h) **GI piping works:** GI piping works were standstill till 11.07.2014 almost one year after CCD (reference page no. 18-20 of Annexure A). All major materials were procured by PECL but adequate gangs were not deployed leading to huge delay in completion of jobs. The final hydro test of GI works by PECL could only be completed by March 2015.
- i) **P91 piping works:** Due to lack of manpower and improper management, PECL was not able to erect a single pipe till 01.08.2013 and only 1700 ID out of 8000 ID was completed till that date (page no. 142-143 of Annexure A). Lack of welder/fitter was again highlighted in our letter no. 9325 (page no. 139 of Annexure A). By CCD, PECL had only achieved half of the fabrication scope as highlighted vide our letter no. 9497 (page no. 157-158 of Annexure A). Final hydro test of P91 could only be completed by 08.09.2014.
- j) **Mismanagement in local issues:** It is a matter of record that PECL failed in proper management of local issues leading to several strike and work stoppages."

141. After conducting the Delay Analysis on the factors alleged by both the sides in the aforesaid manner, EIL recorded its conclusions and recommendations as under:

"Conclusion:

From above, it is amply clear that PECL failed miserably in completing the project in time due to inadequate mobilization,



frequent change of RCM, extreme delays in procurement of bought out materials like Structural steel, insulation materials, consumables, etc., poor cashflow at site, mismanagement in local issues, etc. Due to certain inputs provided owing to late changes suggested by Licensor/client, the delay up to December 2015 can be considered concurrent delays. However, delay in completion of various activities beyond December 2015 up to 15.09.2016 required for contractual mechanical completion as detailed in Clause 2.0 of IFB in conjunction with Clause 5 and Annexure III of SCC were solely attributable to M/s. PECL.

Recommendation:

In view of above, it is amply clear that major reasons for delay in completion of works are attributable to M/s. PECL and reasons for delay beyond December 2015 were solely attributable to PECL. Hence, the Final Time Extension up to 15.09.2016 for the subject contract may please be granted to M/s. PECL with levy of maximum 5% PRS on Part I contract value (Refer Note of Annexure III of SCC) as per Clause No. 27 of GCC. Extended Stay Compensation is not payable with contract provisions."

Claimant's submissions:

142. Thus, as per the analysis of EIL, delays up to December, 2015 were concurrent, where both the parties were responsible. However, delays beyond December, 2015 and up to 15.09.2016 were solely attributable to the Claimant and for this reason, EIL recommended that extension of time be given to the Claimant with levy of maximum 5% PRS as per Clause 27 of GCC. It also stated that in view thereof, Extended Stay Compensation is not payable to the Claimant.
143. The submission of the Claimant is that even if the finding of EIL on each of these reasons for delay is accepted, its Conclusion and Recommendation are faulty which do not flow from those findings. The Claimant has laid its two-pronged challenge to the Conclusion and Recommendations. In the first place, it is mentioned that adopting the date of commission of the Project as 15.09.2016 is



faulty and in fact, the Unit was commissioned by March, 2015. To support this plea, the Claimant has referred to the following documents:

- a) Annual Report for the year 2014-15 of the Respondent where the Respondent has accepted that the unit had been commissioned in March, 2015 in the following words:

"Your company has doubled the petrochemicals production capacity of Pata plant to 900,000 TPA. The mechanical completion of the project has already been achieved. All the utilities are successfully commissioned. The gas cracking and polymer production has started in March, 2015."

- b) E-mail dated 01.04.2015 addressed by the General Manager (Projects) of the Respondent to EIL, which reads as under:

"Congratulations

Heartiest congratulations to all the agencies and associates made contribution in successful completion since inception of this mammoth project from soil testing, enabling, piling, civil and structure, building and composite works, Packages, etc.

Your committed and untiring efforts made it possible to achieve commissioning of various units.

Once again congratulation and thanks to you all."

144. The Claimant has drawn the attention of the Tribunal to e-mail dated 31.05.2017 written by EIL to the Claimant wherein assertion of the Claimant that the Respondent had commissioned the unit on 31.03.2015 is disputed with the following statements:

"Your statement that M/s. GAIL had commissioned the units on March 31, 2015 and taken over complete system and operating commercially is also not based on facts. As per the official document available with us, Cold Section of the GCU-II has been commissioned in January 2016 and if Cold Section itself has been commissioned in January 2016, then how the total GCU-II including Cold Section could be commissioned by March 2015 needs to be internally reviewed at your end."



145. In order to rebut the correctness of the aforesaid assertion of EIL, the Claimant has referred to the cross examination of the Respondent's witness Shri Akhilesh Kumar Bhagat (RW-1) who has given following answers to questions No. 5 and 7.

"Q.5 Will it be correct to say that GCU project was commissioned by the Respondent in March, 2015?

Ans. It is stated that only hot section of GCU project was commissioned by the Respondent in March, 2015 and cold section was not completed by the Claimant that is why EIL had issued provisional completion certificate on 15.09.2016.

Q.7 Will it be correct to say that gas cracking and polymer production was started by the Respondent in March, 2015?

Ans. It is correct."

146. It is thus submitted that the date of commissioning of the unit is to be taken as March 2015 and thus, attributing the delay on the part of the Claimant for the period beyond December, 2015 till 15.09.2016 is totally misconceived.

147. Apart from the above, the Claimant submits that even if the work was completed in September, 2016, in any case, the record shows that the Claimant had completed 98.2% of the Project as on 05.03.2015, even as per the Respondent. Further, by 02.05.2015, 99.4% work had been completed. Therefore, the Claimant was able to substantially complete the Project and the plant had also started working. In these circumstances, there is no reason for imposing PRS.

148. Another argument raised by the Claimant, which flows from the aforesaid contention, is that when the plant had started working, it necessarily follows that the Respondent suffered no loss. In the



absence of any loss suffered by the Respondent, there is no question of invoking the provisions of PRS. To summarise the conclusion of EIL, and resultantly the imposition of PRS, is questioned by the Claimant by raising the following pleas:

- i) Up to December, 2015, the delays mentioned by EIL are concurrent and the Claimant is not held solely responsible for this period. On the contrary, the responsibility is fastened upon the Claimant for delay after December, 2015 and up to 15.09.2016 and that is the sole reason for imposition of PRS. However, the Project itself had been commissioned much prior to December, 2015 and therefore, there is no valid reason for imposition of PRS on the basis of alleged delay beyond 2015.
- ii) Even as per the Respondent, by May, 2015 (which is the period of concurrent delays), 99.4% work had been completed and therefore, there was no justification in imposition of PRS.
- iii) In the absence of any loss suffered by the Respondent, invocation of PRS and deduction of Contract Price amounts to penalty which is impermissible under the Indian Contract Act.

Respondent's submissions

149. The learned counsel for the Respondent, during arguments, referred to various correspondence as well as minutes of Review meetings conducted from time to time in order demonstrate that there were delays on the part of the Claimant and the Claimant could not adhere to the stipulated date of completion i.e., 30.12.2013. It was also shown that extension of time was given vide communication dated 21.12.2013 subject to imposition of PRS and the condition that no extension compensation would be granted. It has also tried to



demonstrate that there was no delay in payments by the Respondent to the Claimant. Likewise, in the extensions given on 11.07.2014, 11.10.2014, 12.11.2014 and 23.07.2015, the extensions were again given by imposing PRS with no extension compensation.

150. The Respondent also refers to letter dated 18.03.2016 of the Respondent wherein the Claimant requested not to deduct PRS/LD on the ground that it was facing financial crunch. [However, this letter does not show that the Claimant had accepted the levy of PRS/LD by the Respondent as this letter clearly states that “*there is adequate fund is available with you against this Contract to safeguard against levy of PRS, if required at a later stage*”.] The Respondent has also heavily relied upon the analysis conducted by EIL which has already been reproduced above.

151. However, there is no specific answer to the aforesaid three contentions raised by the Respondent on the basis of which legality of invocation of PRS clause is questioned by the Claimant.

Tribunal's view:

152. The Tribunal is of the view that in the absence of any expert evidence led before the Tribunal on quantum of delay, the Tribunal should proceed on the basis of exercise undertaken by EIL insofar as Delay Analysis is concerned. The Tribunal thus accepts that till December, 2015, the delays were concurrent and both sides are responsible for delay. However, it is difficult to accept that the Project was commissioned in 2015 itself. It would be interesting to note that in Claim No.2 preferred by the Claimant, which relates to compensation towards the extended stay, the Claimant has itself taken the date of completion of Project as 15.09.2016 and calculated



the compensation up to that date. Further, it appears that some work still remained to be completed which was completed at a later date and the Project was treated as completed only on 15.09.2016.

153. Having said so, the Respondent's own record shows that by 02.05.2015, 99.4% work had been completed. Thus, as on that date, only 0.06% work remained to be completed. Out of this, some work must have been completed between May, 2015 and December, 2015 (the date up to which there are concurrent delays). Therefore, only miniscule work was left which was done after December, 2015. More importantly, the plant had started functioning. This is demonstrated from various documents which are referred to by the Claimant and taken note of above and to which there is hardly any refutation by the Respondent. Thus, in such a state of affair, when the plant started functioning in 2015 itself on the substantial completion of the Project [99.4% by 02.05.2015], the Tribunal does not find any justification on the part of the Respondent in invoking Clause 27 and reducing the Contract amount by 5%. *Prima facie*, no loss is suffered by the Respondent as the Plant had started running. Above all, the Respondent has not produced any evidence of loss suffered by it in spite of Claimant's specific plea that the Respondent has not suffered by it.

154. With the aforesaid analysis, points (a) and (b) for determination framed on 03.08.2021 are answered as under:

"Points for determination:

- (a) Whether the Respondent is in breach of the terms and conditions of the Construction Contract dated 21.05.2012, if yes, effect thereof?
- (b) Whether the Respondent has rightly imposed price reduction scheme on the Claimant, if yes, effect thereof?"



155. The Tribunal concludes that since both the parties were responsible for concurrent delays, it cannot be said that the Respondent committed breach of the terms and conditions of the Contract. However, the Respondent was not justified in imposing Price Reduction Scheme (PRS) on the Claimant.

48. Indisputably, the contract in question was for a lump-sum amount of Rs.192.33 crores and was to be completed within 21 months from the date of FOA i.e. by 01.12.2013. Respondent completed the work but admittedly, not within the initial stipulated period of completion. Both parties blamed each other for the delay in completion. While Respondent claims that work was completed in March, 2015 and plant was functional, Petitioner asserts otherwise and claims that completion was on 15.09.2016 and as noted above, Arbitrator agreed with the Petitioner on this aspect. From the table extracted above by the Arbitrator with regard to Extension of Time, it is clear that as many as 22 extensions were given by the Petitioner. E-in-C was required to conduct the delay analysis and make recommendation as to which party was responsible for the delay. Report of E-in-C on delay analysis, relevant part of which is extracted in paragraph 140 of the Award and is referred to in the earlier part of this judgment, shows that he analysed the delay under different heads, i.e. delay due to drawings, handing over foundations, revision in GA drawings, delay/non-provision of material, hindrances at site, electrical works, etc. and came to a conclusion that Respondent miserably failed in completing the Project in time due to inadequate mobilization, frequent change of RCM, extreme delays in procurement of material such as structural steel, insulation materials, consumables etc. It was also concluded that delay upto December, 2015 was



a concurrent delay but delay in completion of activities beyond December, 2015 and upto 15.09.2016, required for contractual mechanical completion, as detailed in Clause 2.0 of IFB in conjunction with Clause 5 and Annexure-III of SCC, was solely attributable to the Respondent.

49. In light of this conclusion, E-in-C recommended that final time extension upto 15.09.2016 be granted to the Respondent with levy of maximum 5% PRS on Part-I contract value, but extended stay compensation was not payable. As noted above, Respondent questioned E-in-C's Report on two-fold grounds: (a) adopting 15.09.2016 as date of commission of the project was faulty; and (b) plant was functional on time and thus Petitioner suffered no loss for it to claim PRS. It bears repetition to state that on the first aspect, the Arbitrator disagreed with the Respondent, but agreed on the second aspect, holding that major part of the work was completed in 2015 and even otherwise Petitioner had not produced any evidence of loss suffered by it.

50. Having examined the rival pleas and after carefully perusing the contractual provisions, E-in-C's Report and the relevant part of the Award, I am of the considered view that there is merit in the contention of the Petitioner that it was entitled to impose PRS due to delay in completion of the contract by the Respondent. Parties entered into the contract agreement for the work of '*Composite Works for GCU at Pata, UP for Petrochemical Complex II Project.....*' and the scope of work as per Clause 2.1 of Invitation for Bids was as follows:-

"... 2.1 The scope of work involved in general shall include Mechanical Works related to Gas Cracker Unit of GAIL Pata Petrochemical Complex covering erection of equipment, fabrication and erection of structural steel, associated piping, civil works, chemical cleaning, associated electrical and instrumentation works, pre commissioning, commissioning



and post commissioning activities. The detailed scope of work shall be as defined in the Bidding document. The scope of work has further been divided into two parts as under.

FIRST PART (A096/T-078/11-12/MS/41)

*This part involves works comprising of erection and equipment and packages, fabrication, erection and testing of associated piping, chemical cleaning, supply fabrication and erection of steel structure, underground piping, **insulation**, painting, book up, supply and installation of instrumentation ducts, supply and installation of electrical cable trays, civil and structural works including supply of materials, hydro testing of piping, pre-commissioning including supply of manpower for carrying out pre-commissioning activities up to contractual Mechanical Completion.*

PART A (A096/T-078/11-12/MS/41_A)

*This part involves supply of requisite manpower for carrying out the commissioning activities **and post commissioning activities spill over beyond the contractual mechanical completion of work.** Detailed scope of work and supply shall be as given in the Bidding document.*

2.2 Both the Parts, i.e, First Part and Part A together shall be awarded to one Contractor ...”

51. Learned Senior counsel for the Petitioner explained that GCU i.e. Gas Cracker Unit is used for processing liquid hydrogen to produce Ethylene and Propylene in the requisite proportion. For the GCU to be able to execute this process, it is mandatory that both the hot section and cold section are completed since liquid hydrogen is first fed to the hot unit, where feed temperature is increased from ambient temperature 850°C. approximately, at a gradual pace in different equipment and is fed to hot furnace, where the process of thermal cracking begins. The gas so cracked is subsequently cooled down to ambient temperature again, after passing it through different equipment in hot section. The gas so produced then falls into the cold section, where it passes through several equipment and feed temperature is reduced to -150°C. approximately, finally leading to production of Ethylene and Propylene and other products.



52. From the documents on record, more particularly, letter dated 02.05.2015, wherein Respondent claimed that it had achieved 99.4% of the total work, it is evident that balance piping and insulation work *inter alia* were remaining, for which extension was sought. This position stands substantiated from Respondent's letters dated 02.07.2015 and 02.09.2015 seeking extension. As explained on behalf of the Petitioner, piping and insulation work were crucial for completing the two essential sections of GCU i.e. hot and cold and completing one, without the other, meant that what was installed was only a machinery and not a working plant. Admittedly and as brought forth by Mr. A.K. Bhagat RW-1, only the hot section was completed in 2015 while the cold section was completed only by 15.09.2016. Therefore, conclusion of the Arbitrator that by completion of 99.4% work by 02.05.2015, Respondent had discharged major part of its liability and there was no justification for imposing PRS, is contrary to contractual terms and scope of work. *Sans* completion of insulation and piping work, GCU was a machinery and could not be called a working plant and moreover, in the scope of work itself, it was clearly provided that post-commissioning activities may spill over beyond the contractual mechanical completion of work, clearly bringing out that mechanical completion of the hot section in 2015 would not mean that GCU was commissioned. This finding is also inherently inconsistent with contemporaneous correspondence, whereby for completing remaining 0.6% work, Respondent took provisional extensions 11 times, starting from 02.07.2015 to 10.10.2016, of which 7 extensions were post December, 2015 and approximate work left after this period was worth Rs.32.62 crores i.e. 18% of total executed value of work. This position is



substantiated by Petitioner's Payment Calculation Sheet No.57 dated 18.04.2025.

53. Petitioner has also questioned E-in-C's report to the extent of observation that till December, 2015 the delay was concurrent. Referring to the extension letters and Clause 27 GCC which clearly provided that time was essence of the contract as also detailed affidavit of Mr. A.K. Bhagat, it was urged that each time the extension was given, it was subject to right of the Petitioner to impose PRS as per Clause 27 GCC. Petitioner could not deny the report of E-in-C that till December, 2015 the delay was not concurrent and to this extent no interference is called for. However, for the subsequent period delay was solely on account of lapses by the Respondent, even as per E-in-C's report, which contains in depth analysis of all factors. While delay attributable to the Respondent is more than 70 days as per E-in-C's recommendation, PRS was capped at 5% under the contract and hence, no fault can be found with the action of the Petitioner in deducting PRS at 5% of the contract value. Relevant part of the evidence affidavit of Mr. A.K. Bhagat is as follows:-

"42. The Claimant had then requested for final time extension up to 15.09.2016 vide letter dated 10.10.2016 and raised extraneous issues which were an afterthought and not based on correct facts. The said letter has been annexed as Annexure R-38 to the documents filed by the Respondent. I hereby tender the said document in evidence and request that it be marked as an Exhibit by this Hon'ble Tribunal. Accordingly, a detailed delay analysis was carried out by EIL and based on facts and observations, the final time extension was recommended to the Respondent for completion of composite works under the Contract, with levy of maximum 5 % PRS on Part I contract value in terms of Clause No.27 of the GCC. EIL gave reasons and concluded that it was amply clear that major reasons for delay in completion of works are attributable to Claimant. Hence, the aforesaid was intimated through a letter dated 26.11.2016, which has been annexed as Annexure R-39 to the documents filed by the Respondent. I hereby tender the said document in



evidence and request that it be marked as an Exhibit by this Hon'ble Tribunal.

43. Without prejudice to the correct recommendation concluded by EIL apropos levy of maximum 5% PRS on the Claimant through the above-mentioned letter dated 26.11.2016, it is submitted that the delay due to drawings up to 29.05.2015 is solely attributable to the Claimant. Reliance is placed on: (i) EIL's letter No. EIL/Gail-Pata-II/A096/CWGCU/001/1863 dated 21.04.2013, (ii) minutes of meeting between the parties herein dated 22.05.2012; (iii) EIL's letter dated 28.06.2012; (iv) EIL's letter No. EIL/Gail-Pata-II/PECL/01/2855 dated 28.06.2012; (v) EIL letter No. EIL/Gail-Pata-II/ A096/PECL/01/2972 dated 07.07.2012; (vi) minutes of meeting between the parties herein dated 24.08.2012; (vii) EIL's letter No. A096/PECL-GCU/19-42/3601 dated 31.08.2012; (viii) minutes of meeting between the parties herein dated 04.09.2012; (ix) minutes of meeting between the parties herein dated 11.09.2012; (x) minutes of meeting between the parties herein dated 20.10.2012; (xi) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/4156 dated 22.10.2012; (xii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/4437 dated 17.11.2012; (xiii) EIL's letter No. A096/PECL-GCU/01/4966 dated 01.01.2013; (xiv) EIL's letter No. EIL/GAIL-Pata-II/A096/PECL-GCU/01/5239 dated 22.01.2013; (xv) EIL's letter No. EIL/GAIL-Pata-II/A096/PECL/01/5286 dated 28.01.2013; (xvi) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/5419 dated 06.02.2013; (xvii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/5716 dated 26.02.2013; (xviii) EIL's letter No. EIL/Gail-Pata-H/A096/PECL/01/5970 dated 16.03.2013; (xix) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/6321 dated 13.04.2013; (xx) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/6447 dated 23.04.2013; (xxi) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/7148 dated 14.06.2013; (xxii) EIL's letter No. A096/PECL-01/19-42/CONT/7550 dated 12.07.2013; (xxiii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/7641 dated 18.07.2013; (xxiv) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/7718 dated 24.07.2013; (xxv) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/7821 dated 01.08.2013; (xxvi) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/7853 dated 03.08.2013; (xxvii) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/7969 dated 13.08.2013; (xxviii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/8207 dated 02.09.2013; (xxix) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/904 dated 04.11.2013; (xxx) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9325 dated 28.11.2013; (xxxi) minutes of meeting between the parties herein dated 02.12.2013; (xxxii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9389 dated 02.12.2013; (xxxiii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9497 dated 14.12.2013; (xxxiv) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9693 dated 31.12.2013; (xxxv) EIL's letter No. A096/GCU-PECL/19-42/GAIL/14470 dated 05.02.2016; and



(xxxvi) EIL's letter No. EIL/Gail-Pata-11A/ 096/PECL/15316 dated 02.09.2016. The contents of all the above-mentioned communications establish that the delay due to drawings up to 29.05.2015 is solely attributable to the Claimant. As regards to delay in handing over of foundations, it is submitted that the delay up to 15.01.2015 is solely attributable to the Claimant. For the aforesaid, reliance is placed on EIL's letter No. EIL/Gail-Pata-II/A096/PECL/15316 dated 02.09.2016, contents of which establish that the delay is solely attributable to the Claimant. As regards to the delay caused in revision in GA drawings, it is submitted that the delay up to 10.10.2014 is solely attributable to the Claimant. For the aforesaid, reliance is placed on EIL's letter No. EIL/Gail-Pata-II/A096/PECL/15316 dated 02.09.2016, contents of which establish that the delay is solely attributable to the Claimant. As regards to delay in respect of non-provision of material, it is submitted that the delay up to November end in the year-2015 is solely attributable to the Claimant. Reliance is placed on EIL's letter No. EIL/Gail-Pata-II/A096/PECL/15316 dated 02.09.2016, contents of which establish that the delay is solely attributable to the Claimant. As regards to delay due to hinderances at the site, it is submitted that the delay up to 30.03.2014 is solely attributable to the Claimant. Reliance is placed on EIL's letter No. EIL/Gail-Pata-II/A096/PECL/15316 dated 02.09.2016, contents of which establish that the delay is solely attributable to the Claimant. As regards to the delay in electrical works, it is submitted that the delay up to July 2015 is solely attributable to the Claimant. Reliance is placed on: (i) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/7718 dated 24.07.2013; (ii) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/7940 dated 12.08.2013; (iii) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/904 dated 04.11.2013; (iv) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9389 dated 02.12.2013; (v) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9497 dated 14.12.2013; (vi) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/9793 dated 09.01.2014; (vii) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/12391 dated 20.03.2015; and (viii) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/12620 dated 21.04.2015. The contents of all the above-mentioned communications establish that the delay in electrical works up to July 2015 is solely attributable to the Claimant. As regards to delay in instrumentation works, it is submitted that the delay up to July 2015 is solely attributable to the Claimant. Reliance is placed on: (i) EIL's letter No. EIL/Gail-Pata-II/A096/PECL/01/10979 dated 03.04.2014; (ii) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/12757 dated 08.09.2014; (iii) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/13461 dated 22.11.2014; and (iv) EIL's letter No. A096/PECL-GCU-01/19-42/CONT/12945 dated 11.06.2015. The contents of the aforementioned communications establish that delay up to July 2015 in electrical works is solely attributable to the Claimant. As regards to delay caused by the execution of additional works and modification of works is solely



attributable to the Claimant. Reliance is placed on EIL's letter No. EIL/Gail-Pata-II/A096/PECL/15316 dated 02.09.2016, contents of which establishes that the delay due to execution of additional -works and modification works is solely attributable to the Claimant. As regards to various delays dealt with under paragraph 9 of the letter dated 26.11.2016, it is submitted that even those delays are solely attributable to the Claimant for which, reliance is placed on EIL's letter No. EIL/Gail-Pata-II/A096/PECL/15316 dated 02.09.2016, contents of which establish that the other delays as dealt under paragraph 9 of the letter dated 26.11.2016, are solely attributable to the Claimant. In view of the above, it is most respectfully submitted that the final time extension recommendations were reviewed by the Respondent, and it was observed that the mobilization was delayed by the Claimant. Additionally, some of the major delays were due to: (i) highly inadequate deployment of manpower, including welders and supervisors; (ii) delay in mobilization of machineries like cranes, trailers, etc.; (iii) delay in procurement of various materials like structural steel, insulation materials (including PUG supports, grouting material (epoxy and non-shrink), fire proofing materials, etc.; (iv) extremely poor cash flow at the worksite; (v) delay in NDT works, electrical and instrumentation works, GI piping works, P91 piping works; (vi) mis-management of local issues, etc. Hence, it is reiterated that delay in completion of GCU works is solely attributable to M/s PECL.

44. Due to all such lapses on part of the Claimant, the project got substantially delayed. That with the sole intention of getting the works completed on time and to ease the viability of the Claimant as a commercial concern, since the Respondent was losing out badly due to delay in the said Project, the Respondent kept on agreeing to the provisional extensions subject to levying Price Reduction Schedule....”

54. There is no gainsaying that Respondent entered into the contract with its eyes open and without any reservation to imposition of PRS. Clause 27 reads as follows:-

“27 Price Reduction Schedule:

27.1 Time is the essence of the CONTRACT. In case the CONTRACTOR fails to complete the WORK within the stipulated period, then, unless such failure is due to Force Majeure as defined in Clause 26 here above or due to EMPLOYER's defaults, the Total Contract price shall be reduced by ½% of the total Contract Price per complete week of delay or part thereof subject to a maximum of 5% of the Total Contract Price, by way of reduction in price for delay and not as penalty. The said amount will be recovered from amount due to the Contractor/Contractor's Contract



Performance Security payable on demand.

The decision of the ENGINEER-IN-CHARGE in regard to applicability of Price Reduction Schedule shall be final and binding on the CONTRACTOR.

27.2 All sums payable under this clause is the reduction in price due to delay in completion period at the above agreed rate.”

55. By mutual agreement, parties had agreed that if the contractor failed to complete the work within the stipulated time, then, unless the failure was due to force majeure or employer's default, total contract price shall be reduced by ½% of the total contract price per completed week of delay or part thereof, subject to maximum of 5% by way of reduction in price for delay and not as penalty. Respondent was thus fully aware and conscious of the consequences of its failure to abide by the stipulated time period under the contract. Therefore, the finding of the Arbitrator that completion of 99.4% work, would absolve the Respondent of its contractual obligations and that imposition of PRS was not justified, is wholly untenable in light of the contractual provision. In fact, by so observing, learned Arbitrator has re-written the contractual bargain between the parties, which is impermissible in law. Significantly, there is no discussion on Clause 27 GCC and its impact in the entire award. Emphasis of the Arbitrator on the Annual Report for the year 2014-15 and e-mail dated 01.04.2015 does not take away the case of the Petitioner for imposing PRS, in light of E-in-C's report, which was accepted by the Arbitrator.

56. There is also merit in the contention of the Petitioner that in the present case, Respondent has not led any independent evidence to contradict E-in-C's report. Petitioner urged and rightly so, that in GPU case where E-in-C's report was adverse to the Petitioner on aspects of delay and PRS,



Arbitrator accepted the report and wholly banked on it to hold that there was concurrent delay upto 31.10.2015 and since no contrary expert evidence was led by the Petitioner, imposing PRS was not justified, but in the present case, the Arbitrator did not adopt the same yardstick by shifting the burden on the Respondent to lead expert evidence to contradict E-in-C's report to the extent that final time extension upto 15.09.2016 may be granted with levy of 5% PRS.

57. On the second argument of the Respondent that Petitioner was unable to substantiate any loss and hence imposition of PRS was illegal and unjustified, suffice would it be to note that Clause 27 is in two parts and is peculiar to the contracting parties herein. The first part provides for price reduction while Clause 27.3 provides that if Respondent achieved completion of works in all respects prior to the time schedule stipulated in Clause 27.3, then Petitioner shall pay a certain sum as bonus for early completion with a capping of 2.5%. This was thus a commercial bargain and a package deal under the contract, dependent on fulfilment of obligations under the contract. Simply put, if Respondent had completed the contract before time, Petitioner was liable to pay bonus. Likewise, if Respondent delayed completion of the contract, it must bear the burden of PRS. In this sense, the PRS clause is different from LD clauses, where breach of contractual obligations and consequent proof of loss are *sine qua non* to claim damages and thus the judgements in ***R.B. Enterprises (supra)***; ***Tema (supra)***; and ***Indian Oil Corporation (supra)***, are of no avail to the Respondent.

58. To come to this conclusion, I find strength from the judgment of this Court in ***Videocon Telecommunications Limited (supra)***, where one of the



issues for consideration before the Court was with respect to payment of termination charges. It was contended by the Petitioner assailing the Arbitral Award that the charges were in the nature of penalty/LD and since Respondent had led no evidence of any loss suffered, termination charges were not payable. *Per contra*, Respondent contended that termination charges were payable irrespective of the reason for pre-mature termination of the agreement and were part of the agreed terms. Construing the clause, Court held that the termination charges were not contingent only on breach of the agreement and thus cannot be treated as liquidated damages in terms of Section 74 of the Contract Act and that termination charges were clearly a part of contractual consideration agreed to by the parties. In the present case, a bare perusal of Clause 27 indicates that imposition of PRS was not contingent on breach or proof of loss. It was simply an agreed condition of contract between the parties that for failure to complete the project, a certain percentage of the total contract value was to be deducted from the final Bill. Hence, this Court is unable to agree with the Arbitrator that Petitioner was not justified in imposing the PRS on account of concurrent delays by the parties. As held by the Supreme Court, if an Arbitrator decides contrary to a commercial bargain between the parties and rewrites the contract, the award suffers from patent illegality and becomes vulnerable. This part of the award is, therefore, set aside holding the Petitioner entitled to deductions towards PRS from the final Bill.

59. The next claim allowed by the learned Arbitrator is with respect to reimbursement of Rs.19,23,35,350/- on account of encashment of BG. Respondent claimed the said amount alleging that BG was illegally encashed. It was urged that in terms of Clause 12 SCC, Respondent was to



furnish CPBG of 10% of the contract price, which it did on 16.03.2012. As per Clause 12.1 SCC, Petitioner was to return CPBG on expiry of 90 days after the end of Defect Liability Period under Clause 56.1.1 SCC, which was 12 months from date of Contractual Mechanical Completion i.e. 01.12.2013. Petitioner was solely responsible for the delays. Contract was completed in January, 2015 and entire project was commissioned in March, 2015, however, Contract Completion Certificate was issued on 15.02.2017, certifying that date of completion of work was 15.09.2016. Thus, CPBG could be detained at best only upto 15.12.2017, which is 90 days from 01 year of Defect Liability Period. However, Petitioner illegally encashed the CPBG on 31.05.2018 to the tune of Rs.3,94,71,624/- and adjusted the amount in recoveries made in its bills. For the remaining amount of Rs.15,28,63,726/-, CPBG was encashed on 22.05.2019, contrary to its earlier stand for invocation and encashment.

60. It was further urged that in its Statement of Defence, Petitioner had stated that BG was encashed due to Respondent's irregularities and corrupt practices, however, after understanding that this position was unacceptable, Petitioner justified encashment on ground of adjusting a shortfall towards mesne profits for the period 01.01.2017 to 30.04.2019 and anticipated liability of sub-vendors of an amount of Rs.14,62,09,137/-. It was also argued that Petitioner never laid any claim for mesne profits for this period and the assertion was made for the first time in Statement of Defence.

61. *Per contra*, Petitioner urged that after recovery of shortfall of Rs.3,94,71,624/- qua the final Bill, balance CPBG was invoked on 22.05.2019 due to corrupt practices of the Respondent by claiming excess amount of Rs.5.43 crores in the final Bill; GST of Rs.2.27 crores in the final



Bill without depositing the same in the Government Treasury or filing the Return etc. It was also urged that it had the right to encash CPBG towards accumulated mesne profits due and payable by the Respondent towards wrongful possession of the site/land of the Petitioner beyond the contractual period.

62. Learned Arbitrator held that there was no justifiable reason for the Petitioner to keep the BG alive after 15.12.2017. It was observed that there were concurrent delays till December, 2015 and Respondent had executed 99.4% of the work by 02.05.2015 and also that the contract period was completed by 15.09.2016. As per Clause 56.1.1 SCC, Defect Liability Period was applicable till 15.09.2017 and CPBG had to be extended upto 03 months, i.e. till 15.12.2017, which was agreed to by both the parties. The Arbitrator held that since some of the deductions in the final Bill including PRS have been held to be unjustified, invocation of BG in the sum of Rs.3,94,71,624/- was unjustified. With regard to remaining amount of Rs.15,28,63,726/-, it was held that the same was encashed against claim of mesne profits and anticipated liability of sub-vendors. Petitioner was not entitled to mesne profits, save and except, to the tune of Rs.35 lacs, already retained by the Petitioner by deduction from the final Bill and insofar as non-payment of sub-vendors is concerned, while the action of the Petitioner in encashment was justified, in fact, the amount was never paid to the sub-vendors and in the meantime, Respondent went into liquidation. Therefore, under IBC, sub-vendors could prefer the claim only before the Liquidator and the amount retained by the Petitioner will have to be remitted back to the Respondent. For these reasons, claim No.(V) was allowed in favour of the Respondent in the sum of Rs.19,23,35,350/-.



63. Respondent claimed Rs.19,23,35,350/- on account of reimbursement of BG, which according to it was illegally encashed. As per Clause 12 of SCC, Respondent was to furnish CPBG of 10% of contract price, which it did by furnishing BG dated 16.03.2012. Clause 12.1 required the Petitioner to return CPBG on expiry of 90 days after end of Defect Liability Period, which was 12 months from 01.12.2013 i.e. date of Contractual Mechanical Completion. Respondent claimed that Contract Completion Certificate was issued on 15.02.2017 certifying date of Completion of Work as 15.09.2016 and therefore, CPBG could be retained at best upto 15.12.2017 whereas Petitioner urged that CPBG was kept on hold due to several reasons such as contractual obligations not being completed at site; engagement of several sub-contractors by the Respondent without approval by the Petitioner; excess claim of Rs.5.43 crores in the original final Bill as also GST, without depositing the same in the Government Treasury or filing returns etc.

64. The learned Arbitrator allowed the claim for reimbursement of the BG encashed by the Petitioner. It was held that BG in the sum of Rs.3,94,71,624/-, was encashed only on the ground that the final Bill of the Respondent was in the negative, however, since some of the deductions by the Petitioner are found to be unjustified including PRS, invocation of BG to this extent was unjustified. Insofar as encashment for remaining amount of Rs.15,28,63,726/- is concerned, it was held that the same was encashed by the Petitioner against claim of mesne profit for the period 01.01.2017 to 30.04.2019 and for anticipated liability of sub-vendors but Petitioner was in fact not entitled to mesne profit over and above Rs.30 lacs, which it retained from the final Bill and insofar as dues of sub-vendors were concerned, encashment may be justified at the relevant time but the amount retained by



the Petitioner was not paid to the sub-vendors and in the meantime, Respondent went into liquidation and sub-vendors could file their claims only before the Liquidator. On these counts, encashment was held unjustified. Looking at Clause 12.1 of SCC which prescribed the period within which CPBG was to be returned as also actual finding that BG could not be indefinitely retained by the Petitioner and that too for reasons, some of which were found unjustified, this part of award calls for no interference.

65. Coming to claim IX of the Respondent with respect to GST for Rs.2,27,11,007/-, the learned Arbitrator found as a matter of fact that Respondent had not deposited the said amount towards GST with the authorities and Petitioner could not be faulted in its action to deduct this amount. However, having so held, a direction was issued to the Petitioner to pay the said amount to the Respondent subject to furnishing of an affidavit of undertaking by the Liquidator that on receipt of this amount, the same shall be deposited by him with the GST Authorities and the sole basis for this direction was that Respondent was in liquidation. In my view, this direction is contrary to the law in the GST regime. Contract between the parties provided for GST being a reimbursable item and liability of the Petitioner arose only after Respondent discharged its primary liability to deposit GST and admittedly, when no such payment was made by the Respondent and even return to this effect was not filed with the GST authorities, no liability could be imposed on the Petitioner to release this money to the Respondent. Learned Arbitrator has virtually rewritten the contract between the parties, which is impermissible and beyond the remit of the Arbitrator. Moreover, as rightly flagged by counsel for the Petitioner, had the Respondent filed its returns and deposited the money with GST



authorities on time, Petitioner would have reimbursed the amount and claimed input tax credit for a like value, which it will be unable to do now even assuming that the money paid to the Respondent is deposited with the GST authorities, as directed by the Arbitrator. This part of the award cannot be sustained and is accordingly set aside.

66. Coming now to the award of interest by the Arbitrator, interest has been awarded @ 18% per annum on BG amount of Rs.14,62,09,137/- from the date of the award and on balance amount of Rs.4,61,26,213/- from the date of invocation of BG. Petitioner challenges the awarded interest on the ground that it is exorbitant and also questions the reasoning of the Arbitrator justifying the rate of interest on the ground that the interest rate is in keeping with the rate of interest of 19.75% per annum paid by the Respondent on the mobilization advance. This according to the Petitioner amounts to rewriting the contract between the parties. It was urged that rate of interest on mobilization advance is to dissuade contractors from seeking such an advance and causing loss of principal to the Petitioner. Bidders of such contract are expected to be financially sound and fully solvent, which the Respondent was far from. By awarding nearly the same rate of interest to the Respondent, Arbitrator has caused unjust enrichment and gain to the Respondent against the law laid down by the Supreme Court in ***Fortune Infrastructure (supra)***. The argument is that principles on which interest is awarded under Section 31(7) of the 1996 Act are well-settled by judgments of the Supreme Court in ***Nav Bharat Construction (supra)*** and ***Krishna Bhagya Jala Nigam (supra)***, which have been disregarded by the Arbitrator. *Per contra*, Respondent argued that Petitioner's challenge to the award of interest @ 18% per annum is contrary to provisions of Section



31(7)(a) of the 1996 Act whereby an Arbitral Tribunal has the sole discretion to award interest, in absence of any contractual bar and in the present case, there is no clause in the contract which restricts such discretion. Learned Arbitrator exercised the discretion judiciously awarding the interest by pegging it close to the rate of interest of 19.75%, which Respondent actually paid to the Petitioner on mobilization advance under the same contract.

67. Perusal of the award on this aspect shows that the learned Arbitrator allowed 18% interest per annum for the pre-award period, keeping in view the fact that Respondent had also paid interest @ 19.75% per annum on mobilization advance and @ 12% post-award excluding Rs.14.62 crores with respect to sub-vendor liability. It was rightly argued by the Respondent that in the absence of an express bar in the contract between the parties, it is the Arbitrator who enjoys absolute discretion to award interest including post-award interest. Under the 1996 Act, power of the Arbitrator to award interest is governed by Section 31(7) which is in two parts. Under Clause (a), in the absence of an agreement between the parties to the contrary, an Arbitrator can award interest for the period between date of cause of action to the date of award and clause (b) provides that unless the award otherwise directs, the sum directed to be paid by the Arbitrator shall carry interest @ 2% higher than current rate of interest from the date of the award to the date of payment. In ***Morgan Securities and Credits Private Limited v. Videocon Industries Limited***, 2022 SCC OnLine SC 1127, it was held that both clauses (a) and (b) of Section 31(7) are qualified. While clause (a) is qualified by the arbitration agreement, clause (b) is qualified by the arbitration award and placement of the phrases is crucial to their



interpretation. As can be seen from the amended Section, the phrase '*unless otherwise agreed by the parties*', occurs at the beginning of clause (a) qualifying the entire provision while phrase '*unless the award otherwise directs*', occurs after the words '*a sum directed to be paid by an arbitral award shall*' and before the words '*carry interest at the rate of two per cent*', and therefore, the phrase qualifies the rate of post-award interest. It is settled that the Arbitrator has a wide discretion to grant: (a) pre-reference; (b) *pendente lite*; and (c) post-award interest. In ***North Delhi Municipal Corporation v. S.A. Builders Ltd., 2024 SCC OnLine SC 3768***, the Supreme Court held that grant of post award interest serves a salutary purpose and primarily acts as a disincentive to the award-debtor not to delay payment of arbitral amount to the award-holder.

68. In ***Morgan Securities (supra)***, albeit the Supreme Court was dealing with unamended Section 31(7)(b), it was held that Section 31(7)(a) confers a wide discretion on the Arbitrator to grant pre-award interest and determine the rate of interest, the sum on which it is to be paid and the period and when a discretion has been conferred in regard to grant of pre-award interest, it would be against the grain of statutory interpretation to pre-suppose that legislative intent was to reduce the discretionary power of the Arbitrator for grant of post-award interest under clause (b). It was observed that clause (b) only contemplates a situation where the arbitral award is silent on the post-award interest, in which event the award-holder is entitled to the post-award interest @ 18% stipulated in Section 31(7)(b), the unamended provision. It was held that the Arbitrator has the discretion to grant post-award interest and this discretion is not fettered by clause (b) albeit it is open to the Arbitrator to decline interest in its discretion. It was



highlighted that purpose of granting post-award interest is to ensure that the award-debtor does not delay the payment of the awarded amount. With proliferation of arbitration, issues involving both high and low financial implications are referred to arbitration and Arbitrator takes note of various factors such as financial standing of the award-debtor and circumstances of the parties in dispute before awarding interest. No provision under the 1996 Act restricts the exercise of discretion to grant post-award interest by the Arbitrator though Arbitrator must exercise the discretion in good faith taking into account relevant considerations and must act reasonably and rationally. It was concluded by the Supreme Court that according to Section 31(7)(b) only where the Arbitrator does not grant post-award interest, provisions of second part of sub-clause (b) will come into play.

69. In the present case, learned Arbitrator has exercised its discretion on a sound reasoning and in the limited scope of Section 34 of the 1996 Act, this Court is of the view that this part of the award warrants no interference as no patent illegality has been pointed out by the Petitioner which goes to the root of the matter. Moreover, Arbitrator has awarded the same yardstick as was agreed to by the Petitioner for interest on mobilization advance. In ***Aksh Optifibre Limited v. Nantong Siber Communication Co. Ltd., 2024 SCC OnLine Del 4011***, has held that it is well-settled that fundamental policy of Indian law does not refer to violation of any Statute but fundamental principles on which Indian law is founded. Any difference or controversy as to rate of interest clearly falls outside the scope of challenge on the ground of conflict with the public policy of India unless it is evident that the rate of interest awarded is so perverse and so unreasonable so as to shock the conscience of the Court *sans* which no interference is warranted in the



award, whereby interest is awarded by the Arbitrator. Against the said judgment, the Supreme Court dismissed the SLP (C) No. 22495/2024 on 21.10.2024.

70. Insofar as counter claim of the Petitioner towards mesne profits is concerned, learned Arbitrator has allowed the claim to the extent of Rs.35 lakhs, already adjusted by the Petitioner in the final Bill. As rightly flagged by the Respondent, the award on this aspect rests on three legal principles: (a) absence of proof or quantification of loss; (b) Petitioner's failure to mitigate damages; and (c) satisfaction of the claim through prior recovery based on E-in C's recommendation. Arbitrator has returned a finding of fact that Respondent could not vacate the office site despite several documented steps taken to vacate on account of obstructions and impediments created by local vendors who did not allow the Respondent to remove its machinery, equipment and material. Arbitrator has also returned a finding of fact that Respondent had taken all necessary steps to ensure that the site was clear by writing several letters to the Petitioner and had also sought Police help through many communications to the Superintendent of Police, which were placed on record. Significantly and more importantly, the Arbitrator also noted that the circumstances because of which the Respondent was not able to remove its material etc. were within the knowledge of the Petitioner, but no steps were taken to mitigate the situation. Simple measures could have been adopted by the Petitioner by issuing formal notice for vacation but it failed to do so. Alternatively, Petitioner could have initiated steps to remove the machinery, equipment and material from the site to be stocked at some place so that the site could have been utilized for its own purpose, but even this was not done.



71. Learned Arbitrator placed reliance on the law of mitigation of damages citing Halsbury's Law of England (4th Edition Volume II) Paragraph 1193, which states that Plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon Defendant's wrong and, if he fails to do so, he cannot claim damages for any loss which he ought reasonably to have avoided. Reliance was also placed on the judgment of the Supreme Court in *M/s. Murlidhar Chiranjilal v. M/s. Harishchandra Dwarkadas and Anr.*, AIR 1962 SCC 366, wherein the Supreme Court examined the scope of Section 73 of the Contract Act and observed that Plaintiff has a duty to take all reasonable steps to mitigate the losses consequent on the breach. Additionally, the Arbitrator also took note of the fact that no counter claim was preferred by the Petitioner earlier when the BGs are invoked and the Petitioner was satisfied in withholding an amount of Rs.35 lacs on recommendation of E-in-C.

72. It is undisputed that Petitioner took no steps to mitigate the loss, assuming there was any, *albeit* Respondent is right that Petitioner was unable to substantiate actual and continuing loss. No market based rental valuation, credible computation or contemporaneous documentary proof was placed on record to justify the enhancement of mesne profits from Rs.35 lacs to Rs.4.16 crore. Learned Arbitrator has applied its mind and come to factual findings as also noted that no steps were taken to mitigate the loss, if any. The adjudication by the Arbitrator is well-reasoned and based on material on record and calls for no interference. Insofar as Petitioner's reliance on post-award e-mail dated 08.06.2023 is concerned, there is no merit in the allegation that this was an act of *mala fide* on the part of the Respondent. As found by the Arbitrator, Respondent was prevented in vacating the site and



as and when, it was in a position to do so, Petitioner was informed accordingly. Moreover, this was a post-award communication and cannot be of any consequence to assail the award.

73. For all the aforesaid reasons, this petition is partly allowed setting aside the impugned arbitral award to the extent the learned Arbitrator has held that imposition of PRS was unjustified and has directed release of the retained amount of PRS to the tune of Rs.8,97,18,347/-. Pending application also stands disposed of.

O.M.P. (COMM) 447/2023 and I.A. 21465/2023

74. This petition is filed on behalf of the Petitioner under Section 34 of the 1996 Act assailing the arbitral award dated 09.05.2023 passed by the learned sole Arbitrator as also order dated 19.06.2023 passed under Section 33 of the 1996 Act.

75. To the extent relevant the factual matrix as pleaded in the petition is that Petitioner is operating an integrated gas based Petrochemical Complex-I at Pata, District Auraiya, Uttar Pradesh since 1999. This complex recovers Ethane Propane from Natural Gas for producing Petrochemicals and plant capacity is 400 KTA per annum to produce polymer. Petitioner decided to expand the complex to enhance the polymer capacity to 810 KTA per annum by setting up required revamp in the Gas Processing Unit ('GPU'), new Gas Cracker Unit, followed by production of LLDPE/HDPE Swing Unit, Butene-1 Unit, associated utilities and off-site facilities.

76. It is averred that between 02.12.2011 to 12.01.2012, Petitioner invited bids through EIL, which was appointed as Consultant to the project, for carrying out certain composite works for setting up a GPU at Pata. Scope of work involved mechanical works covering erection of equipment,



fabrication and erection of structural steel, associated piping, civil works, chemical cleaning, associated electrical and instrumentations work, pre-commissioning, commissioning and post-commissioning activities. On 28.01.2012, Respondent submitted its bid and being a successful bidder, received a FOA on 02.04.2012 along with Terms and Conditions incorporated in GCC and SCC and on 11.05.2012, a contract agreement was executed and signed between the parties.

77. It is averred that on 06.06.2012, a DLOA was issued to the Respondent. Contract value was estimated to be around Rs.67,07,56,553/- inclusive of all taxes and duties, except service tax. Completion time for the work was 16 months for mechanical completion, starting from date of issue of FOA i.e. 22.04.2012. Resident Construction Manager, EIL was appointed as E-in-C of the project. Scope of work and supply as also time schedule for work completion were detailed under Annexures-I, II and III of the SCC. Respondent was entitled to 'Extended Stay Compensation' per month @ Rs.80 lacs in accordance with Clause 7 of DLOA.

78. It is averred that on 04.06.2012, Respondent furnished CPBG of Rs.6,70,75,650/- in favour of the Petitioner in terms of Clause 4 of DLOA and also mobilised its resources to commence the project work. Contractual date of completion was 21.08.2013 and from time to time, Petitioner granted extension of time to complete the work between 2012 to 2015. Work was finally completed on 31.10.2015. On 20.05.2016, final Letter of Extension was issued by the Petitioner granting extension upto 31.10.2015. Final Bill to the tune of Rs.3,46,85,469/- was submitted by the Respondent on 27.06.2016, in tune with recommendation of E-in-C. On 07.09.2016, Petitioner issued Completion Certificate. CIRP was initiated against the



Respondent on 23.03.2018 by NCLT, Mumbai. On 19.08.2019, Respondent invoked arbitration and on 23.01.2021, order of liquidation was passed by NCLT.

79. Respondent approached this Court in ARB. P. No. 78/2020 under Section 11 of the 1996 Act for appointment of the Arbitrator, which was allowed and vide order dated 14.01.2021, learned Arbitrator was appointed. Respondent filed its Statement of Claim on 31.03.2021 while Statement of Defence was filed by the Petitioner on 31.05.2021. Rejoinder and sub-rejoinder were filed thereafter. On 03.08.2021, learned Arbitrator settled the following issues for consideration:-

“(a) Whether the Respondent is in breach of the terms and conditions of the Construction Contract dated 22.02.2012, if yes, effect thereof?

(b) Whether the Respondent has rightly imposed price reduction scheme on the Claimant, if yes, effect thereof?

(c) Whether the Respondent has illegally withheld assets of the Claimant inside the Project Area and created impediments in site clearance and safe passage of Claimant's trucks from the said Project area, if yes, effect thereof?

(d) Whether the Respondent was entitled to direct the Claimant to extend the Performance Bank Guarantee beyond the stipulated time period prescribed under the Construction Contract dated 22.02.2012, if no, effect thereof?

(e) Whether the Respondent could withhold the amounts due and payable to the Claimant on account of alleged sub-contractor dues?

(f) Whether the Claimant is entitled to its claims as specified in the Statement of Claims?

(g) Whether the Claimant is entitled to interest against the sum of money specified as claims at items (I) to (XI) at an interest rate of 18% or at any other rate to be decided by the Learned Tribunal and the period on which interest is entitled for and cost of arbitration?

(h) Whether the Claimant or the Respondent is entitled to costs, if so, then what amount?

(i) Relief?”



80. Petitioner filed its affidavit of admission/denial on 02.11.2021 while Respondent filed the affidavit on 08.11.2021. Oral evidence was led by the respective parties, which concluded on 13.08.2022 and thereafter arguments were heard and award was reserved on 28.01.2023. As the learned Arbitrator notes in the award, in the GCU case, proceedings were held along side and award was reserved on 28.01.2023. Arbitrator decided to pronounce the award in this case after hearing the parties in the GPU case where the arguments were concluded on 13.03.2023. However, awards were pronounced in both the cases simultaneously. Following table indicates the claims raised by the Respondent and the Arbitrator's decision thereon:-

Claim No.	Particulars	Amount Claimed (INR)	Tribunal's Decision
I	Amount payable under Final Bill	3,46,85,469	Allowed in the sum of INR 22,20,000/-
II	Extended Stay Compensation	20,00,00,000	Rejected
III	Reimbursement of Excise Duty	1,87,73,335	Rejected
IV	Fire Proofing Differential Cost	57,84,493	Rejected
V	Finance Charges for extension of Bank Guarantee	60,36,808	Rejected
VI	Escalation cost for Differential Wages	3,74,14,692	Rejected
VII	Claim arising due to reduction in scope of work/contract value	7,81,38,712	Allowed in the sum of INR 37,01,360/-
VIII	Amount Receivable against Site Clearance	24,03,731	Rejected
IX	Extended Overstay and Hire Charges of Plant and Machinery	12,21,75,000	Rejected
X	Amount deducted towards Interest on mobilization advance during the extended period	73,50,058	Rejected
XI	Interest on the aforesaid claims with effect from respective due dates to the date of payment		Allowed; Details contained in para 233 of the Award

81. As can be seen from the award, learned Arbitrator allowed Claims No. (I) and (VII) and awarded interest thereon @ 18% per annum on the



awarded claims till the date of the award keeping in view that Respondent paid interest @ 19.75% per annum on mobilization advance. *Qua* Claim No. (I), interest was allowed from 07.10.2016 and in respect of Claim No. (VII) from 23.03.2018 as modified by order dated 19.06.2023. Post-award interest was granted @ 12% per annum.

CONTENTIONS ON BEHALF OF THE PETITIONER:

82. Crux of the disputes between the parties revolves around Clause 27 of GCC, whereby time was agreed to be essence of the contract and it was agreed that in case the contractor failed to complete the work within the stipulated period, then, unless such failure was due to *force majeure* or employer's defaults, total contract price shall be reduced by ½% of the total contract price per completed week of delay or part thereof, subject to maximum of 5%, by way of reduction in price for delay and not as penalty. It further provided that decision of E-in-C in regard to applicability of Price Reduction Schedule shall be final and binding on the contractor. Respondent entered into the contract with its eyes open and with no reservation to this provision and therefore cannot question the imposition of PRS. There was a delay of more than 26 months in completing the project by the Respondent, over and above the 16 months of scheduled completion period stipulated in the contract. At every juncture, Respondent requested for Extension of Time, which was granted but without prejudice to Petitioner's right to impose PRS as per Clause 27 GCC. In any event, the levy of PRS was capped at 5% and even though the delay was much more, the levy was @ ½% per week for a maximum of ten weeks. Learned Arbitrator has completely glossed over Clause 27 which enabled the Petitioner to impose PRS if the contractor delayed completion of work.



Arbitrator is a creature of the contract and cannot rewrite the contract between the parties.

83. Learned Arbitrator has erred in relying on the conclusion and recommendation of E-in-C, which was contrary to E-in-C's own correspondence prior to the final extension upto 31.10.2015. Record shows that Respondent claimed multiple extensions from 31.12.2013 till 31.10.2015. The delay in completing the work was for reasons attributable to the Respondent and Petitioner cannot be blamed. Respondent submitted final Bill claiming Rs.3,46,85,469/-. E-in-C had forwarded the invoice through its letter dated 07.09.2016 to the Petitioner recommending payment of the said amount, which the Petitioner contested. Various letters written by the Respondent and E-in-C reflect that the delay was solely attributable to the Respondent and overlooking its earlier letters finding fault with the Respondent, surprisingly E-in-C gave a report concluding that delays pertaining to the contractor were concurrent with delays not solely attributable to the contractor like shutdown, additional requirements, front clearance etc. and therefore overall delay in completion upto 31.10.2015 could not be attributed to the Respondent alone. In light of this erroneous conclusion, E-in-C recommended that Final Time Extension be granted upto 31.10.2015, without levy of PRS.

84. Learned Arbitrator's acceptance of the report and recommendation was based on a finding that since parties had not led any expert evidence on delay and had only referred to communications addressed during the execution of the contract blaming each other, E-in-C's recommendation became significant, more particularly, because applicability of PRS was final and binding on the contractor. This finding strikes at the root of the



award and makes the same patently illegal for various reasons. E-in-C was not a fact finding body *inter se* the parties and its opinion or recommendation was not even an excepted matter that would be impervious to scrutiny by the Arbitrator. At the highest, it was a recommendation and not binding on the Petitioner, more so, in light of Clause 27 of GCC. Arbitrator has also erred in holding that no evidence was led by the Petitioner to contradict E-in-C's recommendation inasmuch as Petitioner had led evidence of Mr. A.K. Bhagat, who in his evidence affidavit had pointed out several contradictions in the final recommendation and its earlier correspondence addressed to the Respondent alluding to several instances where work was delayed due to failure of the Respondent at different stages. Testimony of Mr. A.K. Bhagat was not demolished or dented by the Respondent in cross-examination and in fact, the award does not even deal with this issue. By treating E-in-C's recommendation as final and binding, Arbitrator has completely disregarded the contract between the parties and the vital evidence of Mr. A.K. Bhagat.

85. The best evidence of perversity in the impugned award is the contradiction in the approach of the Arbitrator in the present case and the GCU case *albeit* parallel proceedings were being conducted in both the cases. In the GCU case, recommendations of E-in-C were favourable to the Petitioner and Respondent had not led any contrary expert evidence, despite which the Arbitrator held that the recommendations could not be accepted and decided contrary to the said recommendation. In the instant case, following the same criteria Arbitrator ought not to have accepted E-in-C's recommendation since no contra evidence was led by the Respondent. Moreover, Petitioner's right to impose PRS arises from Section 55 of the



Contract Act but there is no analysis in the award as to whether time was of essence or not. Even assuming that time was not of essence, promisee is entitled to compensation from the promisor for any loss occasioned by promisor's failure under second part of Section 55. The award is therefore in the teeth of Section 28(1)(a) of the 1996 Act which requires the Arbitrator to decide the disputes in accordance with substantive law for the time being in force in India.

86. Learned Arbitrator paid no heed to the fact that several Extensions of Time were granted to the Respondent over the years at Respondent's insistence to complete the work and each time, the extension was without prejudice to Petitioner's right to impose PRS under Clause 27. Therefore, Petitioner never waived its right to impose PRS. Throughout the currency of the contract, Respondent raised no issue of imposition of PRS which was deducted from time to time and performed the contract without any demur or protest.

87. Exorbitant rate of interest of 18% per annum has been awarded by the Arbitrator taking the interest @ 19.75% per annum paid by the Respondent on mobilization advance as a yardstick. This amounts to rewriting the contract, which provided for 19.75% interest on mobilization advance to dissuade contractors from seeking advance and causing loss to the Petitioner. The Arbitrator has created an economic disincentive to draw mobilization advance and the award of interest has caused unjust enrichment to the Respondent and an unwarranted loss to the Petitioner.

CONTENTIONS ON BEHALF OF THE RESPONDENT:

88. There was inordinate delay by the Petitioner in fulfilling the obligations under the contract. Respondent commenced work in a time



bound manner and mobilized its resources even without taking the mobilization advance, however, on account of various defaults by the Respondent, timelines prescribed under the contract could not be met. The delays are completely attributable to the Petitioner or at the highest are concurrent, as found by E-in-C and stated in its letter dated 20.05.2016. The drawings, work front and equipment constitute important part of any construction project, without which project cannot be executed on time and these were not made available to the Respondent on time. Parties jointly agreed that piping erection work would commence by July, 2012 but the first civil work front was received by the Respondent only on 12.09.2012. Illustratively, there was delay in getting erection front in the offsite area as also for hook up joints in the existing unit (GPU, LPG and GCU). Respondent invested its own funds and the delays led to several additional costs as a result of which there was no option but to approach the Petitioner for mobilization advance at a high rate of interest of 19.75% per annum for timely completion of the project. Due to delays by the Petitioner, Respondent sought Extension of Time under Clause 44.1 of GCC from time to time, which was granted. In various letters to the Petitioner such as letters dated 27.09.2014 and 30.07.2014, Respondent elaborated the reasons attributable to the Petitioner causing obstruction in completion of the work. The balance work that remained after 03.03.2015 was only pertaining to shut down job for which extension was sought and was recommended by E-in-C.

89. On 07.09.2016, E-in-C addressed a letter to the Petitioner certifying the work and recommending payment of Rs.3,02,84,585/- to the Respondent. Imposition of PRS was completely arbitrary and wrongful. As per Clause 27 of GCC, PRS was to be imposed only as a price deduction and



not penalty. No PRS was deducted/adjusted for the entire duration of alleged delay from September, 2013 to October, 2013 and in any event, deduction of PRS was never approved by E-in-C, which was a pre-requisite under Clause 27. Moreover, Petitioner did not suffer any loss either on account of loss of profit or incurring any expenses for reasons attributable to the Respondent. Hence, the deduction of Rs.2,31,10,004/- on account of PRS was illegal and unjustified. Learned Arbitrator has rightly relied on the opinion of E-in-C that the delays upto 31.10.2015 were concurrent and not solely attributable to the Respondent. As per Clause 27, decision of Engineer-in-charge with respect to applicability of PRS was final and binding *albeit* on the Respondent and conscious of the fact that the opinion was not binding on the Petitioner, learned Arbitrator further examined if Petitioner had led any expert evidence on delay which would indicate anything contrary to E-in-C's report. Since no evidence was led by the Petitioner to controvert the finding of the E-in-C, learned Arbitrator held that both parties had only referred to communications exchanged blaming each other and in this backdrop, there was no reason to differ from the view taken by E-in-C. Petitioner is unable to point out any patent illegality in this part of the award and therefore, there is no scope of interference in a petition under Section 34 of the 1996 Act.

90. Arbitrator's analysis for grant of interest cannot be faulted under Section 31(7) of the 1996 Act as it is the discretion of the Arbitral Tribunal to decide the period for which interest has to be awarded as also the rate of interest, so long as it is not so exorbitant as to shock the conscience of the Court. A party cannot take advantage of its own wrongs. Once Petitioner illegally withheld the monies due to the Respondent, it was liable to pay



interest as compensation. Looking to the fact that Respondent had paid interest @ 19.75% per annum on mobilization advance to the Petitioner, Arbitrator deemed it proper to award interest @ 18% per annum *qua* claim No. (I) w.e.f. 07.10.2016 and w.e.f. 23.03.2018 in respect of Claim No. (VII). Post award interest has been awarded @ 12% per annum and no ground has been made out to interfere with the award of interest.

ANALYSIS AND FINDINGS:

91. This petition relates to a GPU contract with an estimated value of Rs.67,07,56,553/- inclusive of all taxes and duties except service tax. Indisputably, completion time for the work under the contract was 16 months starting from 22.04.2012. On 04.06.2012, Respondent furnished CPBG for a sum of Rs.6,70,75,650/- in favour of the Petitioner in terms of Clause 4 of DLOA and mobilized its resources. Under Clause 45.1 of GCC, Respondent was entitled to Extension of Time for completion of work in case performance was delayed due to factors attributable to the Petitioner. Respondent was entitled to Extended Stay Compensation at the rate of Rs.80 lacs per month in accordance with Clause 7 of DLOA. Equally undisputed is a fact that work was not completed within the time stipulated in the contract and was completed by 31.10.2015 after several time extensions sought by the Respondent and granted by the Petitioner. As noted above, Respondent made a number of claims but the Arbitrator allowed Claim No. (I) to the tune of Rs.22,20,000/- as against the claimed amount of Rs.3,46,85,469/- as also Claim No. (VII) arising due to PRS to the extent of Rs.37,01,360/- as against claim of Rs.7,81,38,712/-. Interest was awarded @ 18% per annum till the date of the award in respect of claim No. (I) from 07.10.2016 and in respect of claim No. (VII) from 23.03.2018. Post award



interest was granted @ 12% per annum.

92. The main controversy between the parties relates to PRS under Clause 27 of GCC, which is extracted hereunder, for ready reference:-

“27 Price Reduction Schedule:

27.1 Time is the essence of the CONTRACT. In case the CONTRACTOR fails to complete the WORK within the stipulated period, then, unless such failure is due to Force Majeure as defined in Clause 26 here above or due to EMPLOYER’s defaults, the Total Contract price shall be reduced by ½% of the total Contract Price per complete week of delay or part thereof subject to a maximum of 5% of the Total Contract Price, by way of reduction in price for delay and not as penalty. The said amount will be recovered from amount due to the Contractor/Contractor’s Contract Performance Security payable on demand.

The decision of the ENGINEER-IN-CHARGE in regard to applicability of Price Reduction Schedule shall be final and binding on the CONTRACTOR.

27.2 All sums payable under this clause is the reduction in price due to delay in completion period at the above agreed rate.”

93. Clause 27 enables the Petitioner to reduce the total contract price by 1/2% per completed week of delay or part thereof subject to a maximum of 5% of the total contract price. Decision of E-in-C on the applicability of PRS was final and binding on the contractor under this Clause. From a reading of the clause, it is evident that time was the essence of the contract and PRS could be imposed if the contractor failed to complete the work within the stipulated time unless such failure was due to *force majeure* or employer’s defaults. Both parties blame each other for the delay. While Respondent submits that delay was attributable to the Petitioner, Petitioner asserts otherwise.

94. Be it noted that Resident Construction Manager, EIL was appointed as the E-in-C of the project. As and when a request letter was received from the Respondent for Extension of Time, E-in-C examined the issue and



gave his recommendation, whereafter Petitioner approved the grant of extension. As can be seen from the documents on record, extensions were granted from 2013 upto 31.10.2015. As noted by the Arbitrator, Respondent requested for final extension upto 31.10.2015, enumerating as many as 14 reasons in its letter dated 24.10.2015 which caused the delay. E-in-C undertook analysis of these reasons and concluded that in respect of most of these causes, delay was not attributable to the Respondent. In light of this conclusion, E-in-C recommended that Final Time Extension upto 31.10.2015 be granted without levy of PRS as the reasons for delay upto this period were not solely attributable to the contractor. Having so recommended, E-in-C also opined that since certain reasons for delay were attributable to the contractor, Extended Stay Compensation was not payable. Petitioner questions the opinion of E-in-C on the ground that the delays were solely attributable to the Respondent as also that the opinion of E-in-C was not binding on the Petitioner *albeit* it did bind the Respondent.

95. In order to decide the issue as to whether PRS was rightly imposed, learned Arbitrator conducted detailed 'delay analysis' to find out which party was responsible for delay. In this context, the Arbitrator observed that various correspondences exchanged between the parties, where they blamed each other, were not required to be looked into for the reason that an independent Engineer appointed for the project by the Petitioner itself had carried out delay analysis which was contained in the letter dated 20.05.2016 (R-36). The Arbitrator noted that parties had not led any expert evidence on delay which could indicate either that the delay was concurrent or was solely attributable to the Respondent. Parties only referred to *inter se* correspondence blaming each other and in this scenario, delay analysis by



E-in-C assumed significance, moreover, when the decision was binding on the contractor. After analysing E-in-C's report, Arbitrator was of the opinion that there was no reason to take a different view other than the view taken by E-in-C. Relevant paragraphs from the award are as follows:-

"132. Insofar as retention of money on account of PRS is concerned, it needs to be decided as to who is responsible for delay. Here, the Tribunal finds that the Claimant has blamed the Respondent for delay for so many reasons (already mentioned while stating the case of the Claimant) and the Claimant had also written letters to the Respondent in this behalf. The Claimant accepts initial delay but argues that it is of no consequence. It is submitted that contract was to be performed in sixteen months' time and there is no progress stages mentioned. Therefore, initial delay on the part of the Claimant would not matter so long as the Claimant could complete the work within sixteen months. It is argued that this initial delay on the part of the Claimant, thus cannot be attributed to the Claimant for the entire period of the Contract, more so when subsequent delays are on the part of the Respondent.

Delay Analysis

133. The Tribunal need not refer to the various correspondence exchanged by the parties blaming each other because of the reason that EIL, which is the Independent Engineer appointed in this Project, by the Respondent itself, has done the Delay Analysis. This is contained in letter dated 20.05.2016 addressed by EIL to the Respondent (annexed as R-36 at page 170 of SOD). It may be mentioned that that the Claimant had requested for final extension up to 31.10.2015 enumerating as many as fourteen reasons vide its letter dated 24.10.2015 which, according to the Claimant, caused delay. EIL undertook the analysis of each of these purported reasons with reference to the record and gave its conclusions stating that in respect of most of these causes, delay was not attributable to the Claimant. After this analysis, EIL recorded its conclusions and recommendations as under:

"Conclusion:

Major reasons for delay in completion were progressive release of drawings. Works to be required to be done during Shut downs of '2014 and 2015'etc., delay in procurement of bought out items, internal financial/local issues of PECL, etc.

Though certain delays were attributable to the contractor like delay in procurement of bought out items, Financial constraints, Completion of Insulation works, etc. certain activities pertaining to existing units were required to be done in shutdowns only. The second shutdown was taken in May '15. Certain requirements of additional



modifications and stubs were suggested later by GAIL and finally the normalization of steam lines along with associated jobs were completed in October after clearance for same. Activities are plotted on Bar Chart (Annexure-I for reference.

As the delays pertaining to Contractor were concurrent with delays not solely attributable to contractor like shutdown, additional requirements, front clearance, etc. overall delay in completion up to 31st October 2015 was not solely attributable to the contractor.

Recommendation:

In view of above, it is recommended that the Final Time Extension up to 31.10.2015 may please be granted without levy of PRS as the reasons for delay up to 31.10.2015 were not solely attributable to the Contractor. As certain reasons for delay during execution of contract were attributable to Contractor also, Extended Stay Compensation is not payable to the contractor in line with Contract provisions. Same has been duly refuted to the Contractor. M/s. PECL in their request letter confirmed that they shall not claim any amount against reduction in executed value beyond 25% of Awarded Contract Value in case no PRS is levied."

134. It can be seen from the above that in the opinion of EIL, there were certain delays attributable to the Claimant. However, these delays were concurrent with the delays not solely attributable to the Claimant and the overall delay in completion up to 31.10.2015 was not solely attributable to the Claimant. On that basis, EIL recommended that Final Extension of Time up to 31.10.2015 be granted without levy of PRS. EIL also stated that since certain for delay were attributable to the Claimant also, Extended Stay Compensation is not payable to the Claimant and the Claimant had agreed for the same in case no PRS is levied. Clause 27 relates to 'Price Reduction Schedule' (PRS) which has already been reproduced. It mentions that in case of delay on the part of the Contractor in failing to complete the work within the stipulated period (as time is the essence of the contract), the Total Contract Price shall be reduced by ½% of the Total Contract Price per complete week of delay subject to maximum of 5% of the Total Contract Price. Important provision therein is the second sub-para of Clause 27.1 which reads as under:

"The decision of the Engineer in Charge in regard to applicability of Price Reduction Schedule shall be final and binding on the Contractor."

135. It is, thus, clear from this provision that insofar as question of delay is concerned, it is the Engineer In Charge who is to take the decision and on that basis, he would also decide about the applicability of PRS. Such a decision is made "final" and "binding on the Contractor". No doubt, it



does not mention about the binding nature of the decision of the Engineer In Charge on the Employer/ Respondent. However, as it is binding on the Contractor, presumption is that insofar as Employer is concerned, it would be acceptable to it, more so when the Engineer In Charge is appointed by the Employer. Interestingly, for delay on the part of the Contractor to execute the work, there is no provision for imposition of Liquidated Damages (LDs). On the contrary, the Contract makes a provision for Price Reduction in the Contract Price in Clause 27. Insofar as Clause 27.3 provides for bonus also for early completion and the maximum bonus is 2½% of the Total Contract Price. Further, Clause 47 stipulates that in case there are delays on the part of the Employer, or his authorised agents, no adjustment in the Contract Price shall be allowed and only Extension of Time shall be granted. Issues have arisen as to whether such price reduction clause is in the nature of penalty clause and is contrary to the provisions of Contract Act which does not allow any 'penalty' for breach but only damages which are actually suffered by the other side. Some case law in this behalf has emerged in Indian Courts as well as UK courts. However, since no such argument was raised by the Claimant on the validity of this clause, it is not necessary to go into this issue. The limited purpose of mentioning the aforesaid state of affairs was to highlight that such a provision has to be strictly construed.

136. In the present case, the Parties have not led any Expert evidence on delay which could indicate concurrent or critical delays either on the part of the Claimant or the Respondent. Both the parties have referred to communications addressed during the execution of the Contract on the basis of which they blame each other. In this scenario, Delay Analysis conducted by the Engineer In Charge who is an independent person, assumes significance more particularly when the decision of the Engineer In Charge in regard to applicability of PRS is treated as final and binding on the Contractor.

137. That apart, after hearing the parties, the Tribunal does not find any reason to take a different view other than the view taken by EIL/Engineer In Charge.

138. There is another aspect of the matter which needs to be emphasised at this stage. Initially, while granting the extensions of time (EOTs), the Respondent had reserved its right to invoke PRS clause in case it was proved after actual completion that delay was attributable to the Claimant. The Respondent had even taken Bank Guarantee from the Claimant in respect of the said PRS while releasing interim payments to the Claimant. However, it is pertinent to mention that the Respondent released the said BG on 02.04.2016. Thus, as on that date, the Respondent felt that it was not necessary to keep the BG alive from which it can be inferred that the Respondent did not want to impose PRS. The question of PRS has been



raised by the Respondent in the SOD. Prior to that, there is no communicating conveying such a decision to the Claimant.

139. During the course of final arguments, the Respondent has stated that PRS was being levied upon the Claimant after 21.08.2013 i.e., Contractual Completion Date and had relied upon the calculation sheets (@ 61-106 of Additional Documents). These facts were never pleaded by the Respondent and are, in any case, inconsequential as held by the Hon'ble Supreme Court in the case of *Union of India v. Ibrahim Uddin* [para 69(vii)] wherein it was held that "the court cannot travel beyond pleadings, as no party can lead evidence on an issue/point not raised in the pleadings, and in case, such evidence has been adduced, or a finding of fact has been recorded by the court, it is just to be ignored. "

140. It may be mentioned that in its communication dated 02.09.2013, EIL had highlighted certain major areas where delay occurred due to inadequate resource deployment and delay in procurement of bought out items by the Claimant. However, that was the initial delay. What matters is the final analysis undertaken by EIL.

141. Even at the time of issuance of the completion certificate i.e., on 07.09.2016. the Respondent did not mention anything about PRS. The earlier documents show that the Respondent 'retaining' amount on account of PRS but there was no 'deduction' made in this behalf.

142. Deductions/withholding of amount on this account, therefore, is unsustainable. The Tribunal is, therefore, of the opinion that the Respondent has not made out a case for invocation of Clause 27.1/PRS.

143. Insofar as withholding of the amount on account of alleged dues of the sub-contractors are concerned, though the Respondent has tried to highlight that the amount is payable to the sub-contractors, it has not given any answer to the legal proposition advanced by the Claimant that since the Claimant company is now in liquidation, the sub-contractors can raise the claim before the Liquidator. The Tribunal finds force in the submission of the Claimant and therefore, holds that the amount of INR 22,20,000/- withheld on this account is also unsustainable and has to be released to the Claimant.

"Points for Determination

(a) Whether the Respondent is in breach of the terms and conditions of the Construction Contract dated 22.02.2012, if yes, effect thereof?

(b) Whether the Respondent has rightly imposed price reduction scheme on the Claimant, if yes, effect thereof?

(e) Whether the Respondent could withhold the amounts due and payable to the Claimant on account of alleged sub-contractor dues?"

Thus, PODs (a), (b) and (e) stand answered."



96. Having analysed the award, the report of E-in-C and contemporaneous documents, I am of the view that Petitioner is unable to point out any patent illegality in this part of the award, which goes to the root of the matter, warranting interference in the limited jurisdiction under Section 34 of the 1996 Act. Clearly, E-in-C, EIL conducted a delay analysis and concluded and recommended as follows:-

“Conclusion:

Major reasons for delay in completion were progressive release of drawings. Works to be required to be done during Shut downs of ‘2014 and 2015’ etc., delay in procurement of bought out items, internal financial/local issues of PECL, etc.

Though certain delays were attributable to the contractor like delay in procurement of bought out items, Financial constraints, Completion of Insulation works, etc. certain activities pertaining to existing units were required to be done in shutdowns only. The second shutdown was taken in May ‘15. Certain requirements of additional modifications and stubs were suggested later by GAIL and finally the normalization of steam lines along with associated jobs were completed in October after clearance for same. Activities are plotted on Bar Chart (Annexure-I for reference.

As the delays pertaining to Contractor were concurrent with delays not solely attributable to contractor like shutdown, additional requirements, front clearance, etc. overall delay in completion up to 31st October 2015 was not solely attributable to the contractor.

Recommendation:

In view of above, it is recommended that the Final Time Extension up to 31.10.2015 may please be granted without levy of PRS as the reasons for delay up to 31.10.2015 were not solely attributable to the Contractor. As certain reasons for delay during execution of contract were attributable to Contractor also, Extended Stay Compensation is not payable to the contractor in line with Contract provisions. Same has been duly refuted to the Contractor. M/s. PECL in their request letter confirmed that they shall not claim any amount against reduction in executed value beyond 25% of Awarded Contract Value in case no PRS is levied.”

97. Petitioner placed heavy reliance on earlier communications of E-in-C, pointing out delays on the part of the Respondent. It is true that at the initial stages there were delays by the Respondent, which position was conceded



during the arbitral proceedings, but the entire delay upto 31.10.2015 cannot be attributed to the Respondent as brought forth by E-in-C in its in-depth analysis. It is noted by E-in-C that major reason for delay in completion of the work was progressive release of drawings. Certain delays were attributed to the Respondent also, such as delay in procurement of bought out items, financial constraints, completion of installation work etc. However, after a complete analysis, E-in-C concluded that the delays pertaining to the Respondent were concurrent with delays not solely attributable to the contractor and hence, recommended final extension of time without imposition of PRS. Petitioner led evidence of Mr. A.K. Bhagat, its own employee who primarily highlighted the earlier correspondence of E-in-C blaming the Respondent but this in my view, as rightly held by the Arbitrator, was inconsequential since the final analysis of E-in-C was that the delay was concurrent. No expert evidence was led by the Petitioner to traverse the report of E-in-C and the Arbitrator thus had no basis or reason to take a different view. In fact, the Petitioner conveniently accepted the recommendation of E-in-C to the extent that Extended Stay Compensation was not payable.

98. The Arbitrator has looked at this issue from another angle and rightly so. It is noted that initially while granting Extension of Time, Petitioner had reserved its right to invoke PRS clause, in case it was proved after actual completion that delay was attributable to the Respondent and Petitioner had also taken a BG in respect of the said PRS, while releasing interim payments to the Respondent. However, the BG was released on 02.04.2016, which implied that Petitioner did not want to impose PRS. Arbitrator also rejected the contention of the Petitioner that PRS was being levied after 21.08.2013



i.e. contractual completion date, on the ground that these facts were never pleaded by the Petitioner. Clause 27 could be invoked by the Petitioner only where the delay was solely attributable to the Respondent, which is not the case here. Therefore, in light of the final analysis undertaken by E-in-C holding that the delay in completing the project by the Respondent was concurrent with delays not solely attributable to the Respondent and the recommendation that PRS not be imposed, which has found favour with the Arbitrator, no ground to interfere is made out.

99. Learned Arbitrator has allowed Claim No. (I) towards final Bill to a certain extent after holding that deduction on account of PRS was unlawful and unjustified and calls for interference. As for interest, it bears repetition to state that it is the discretion of the Arbitrator under Section 31(7) to decide the period of interest as also the rate. The interest awarded does not shock the conscience of the Court and the Arbitrator in its discretion has worked out a delicate balance with the rate of interest paid by the Respondent to the Petitioner on the mobilization advance. This part of the award is not vulnerable to interference in the present petition.

100. There is no merit in the present petition and the same is accordingly dismissed along with pending application.

OMP (ENF.) (COMM.) 258/2023, EX.APPL.(OS) 1721/2023, 1722/2023, 1723/2023 and 1724/2023 and
OMP (ENF.) (COMM.) 259/2023, EX.APPL.(OS) 1725/2023, 1726/2023, 1727/2023 and 1728/2023

101. List these petitions for consideration on 16.09.2025.

JYOTI SINGH, J

AUGUST 18, 2025/YA/S.Sharma/Shivam