

**In the High Court at Calcutta
Ordinary Original Civil Jurisdiction
Commercial Division**

The Hon'ble Mr. Justice Sabyasachi Bhattacharyya

**AP-COM/245/2024
IA No: GA/1/2022
Kessels Engineering Works Pvt. Ltd.
Vs.
Neo Metalicks Limited**

With

**EC/143/2021
Neo Metaliks Ltd.
Vs.
Kessels Engineering Works Pvt. Ltd.**

For the Kessels Engineering	:	Mr. Pradeep Chhindra, Adv.(VC), Mr. Pratik Ghose, Adv., Mr. Avishek Roy Chowdhury, Adv., Mr. Parth Dhawan, Adv., Ms. Pratibha Rathi, Adv.
For the Neo Metaliks	:	Mr. Sakya Sen, Sr. Adv., Mr. Pranit Bag, Adv., Mr. Dhruv Chadha, Adv., Mr. Sidhartha Sharma, Adv., Mr. Rishav Dutt, Adv., MD. Danish Taslim, Adv., Ms. Patrali Ganguly, Adv.
Heard on	:	29.08.2024, 25.09.2024, 26.09.2025, 24.10.2025, 14.11.2025, 28.11.2025, 05.12.2025, 19.12.2025, 09.01.2026, 20.02.2026, 27.02.2026, 27.03.2026 & 10.04.2026.
Reserved on	:	10.04.2026.
Judgment on	:	15.05.2026.

Sabyasachi Bhattacharyya, J.:-

1. AP-COM/245/2024 is an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) assailing an arbitral award dated July 22, 2020, as amended on February 22, 2021, passed by a three-member Arbitral Tribunal. EC/143/2021 is an application for enforcement of the said award. The Presiding Arbitrator and one of the other co-Arbitrators passed a separate ‘majority’ award while the other co-Arbitrator penned his dissenting award subsequently.
2. For the sake of convenience, the application under Section 34 is taken up for adjudication first, since the connected enforcement application will be subject to its outcome.
3. The challenge has been preferred on several grounds, two of which are threshold in nature, hitting at the very root of the arbitral award. The first limb of such grounds is that the majority award is vitiated by fraud and/or corruption and is liable to be set aside under Section 34(2)(b) of the 1996 Act; the second being premised on the alleged violation of Section 31(2) of the 1996 Act, since no reason for the abstinence of the dissenting Arbitrator from putting his signature on the majority award is disclosed in the award.
4. The second set of grounds pertains to the merits of the case. The first component of such challenge is that the arbitral award is contrary to the express terms of the contract entered into between the parties on December 15, 2004 for manufacturing, supply and commissioning of a Bleed Cum Condensing Steam Turbine Generator Set (TG Set) by Kessels to Neo

Metaliks, the claimant/respondent for captive power generation by the latter in its plant. Kessels argues that in the impugned award, the Arbitral Tribunal rewrote the contract between the parties and added words to Clause 14 of the contract, which is the guarantee clause. Thirdly, the majority award on the extinction of price is completely contrary to the evidence-on-record. Fourthly, the majority award on extra expenditure on electricity, diesel and petrol is also completely contrary to the records. The majority award, it is contended, is tainted by patent perversity since it overlooked material evidence and granted claims without those being substantiated by cogent evidence.

5. That apart, it is alleged that the majority award failed to consider that Neo Metaliks was estopped by conduct from making any claim that the machine was defective. The award is also challenged on the ground of perversity, since positive evidence of Kessels was allegedly ignored in the majority award.
6. Learned counsel for Kessels (respondent/petitioner) argues that the Presiding Arbitrator, in whose first person the majority award was written, was not in a mental and physical position to pass the award at the relevant juncture. It is submitted that the award was reserved by the Tribunal, after ten years of arbitral proceeding, the records of which goes into more than twenty volumes, on January 18, 2020.
7. Kessels, the petitioner herein and respondent in the arbitral proceedings, submitted its written submissions on February 28, 2020.

- 8.** Between April 21 and May 28, 2020, the Presiding Arbitrator was hospitalised. After being released, he was again hospitalised between June 14 and July 20, 2020.
- 9.** The claimant Neo Metaliks submitted its written submissions before the Tribunal on June 11, 2020, immediately prior to such second phase of hospitalisation.
- 10.** The award was passed on July 22, 2020, that is, on the second day after the discharge of the Presiding Arbitrator on July 20, 2020. It is argued that the Presiding Arbitrator could not have passed the award within a day of being discharged from the hospitalization as he was seriously unwell for a period of two months during the Covid-19 period.
- 11.** It is argued that the Presiding Arbitrator was admitted in the hospital on April 21, 2020 in the first place due to worsening symptoms of Lewy Body Disease (LBD), which is a progressive brain degenerative disease. He collapsed on April 24, 2020 and had to have a tube inserted in his trachea for the airways to remain open, was sedated and put on ventilator the same day, having tested Covid positive. Such symptoms increased since December 2019, just prior to the award being reserved. Therefore, it is contended that from April 21, 2020 and perhaps even sometime earlier, the Presiding Arbitrator was not in a shape of reading, writing, consulting and certainly not writing a 120-page award.
- 12.** During the period of hospitalization in April–May, 2020, the Presiding Arbitrator suffered from altered mentation, post-cardiac arrest status and ventilator support, which led to altered state of mind, confusion, amnesia

and disorientation as to space, time and self. He also suffered from Hypoxic Encephalopathy, that is, brain injury due to lack of oxygen to the brain, and had a history of Parkinsons Disease, being on medication for the same. He received multiple blood transfusions and had to be hospitalized multiple times, with high fever on occasions, being diagnosed with Urinary Tract Infection (UTI) and Lower Respiratory Tract Infection (LRTI). The infections were so severe that his kidney functions were compromised, and several bacterial infections were detected in his chest and urine. Thus, it was not possible for the Presiding Arbitrator to process the voluminous data involved in writing the award, being mentally and physically incapacitated, and had no opportunity for consultation, discussions and deliberations with the other Arbitrators or application of mind. Hence, it is contended that the Presiding Arbitrator blindly signed the awards on dotted lines. The co-Arbitrator who signed the majority award was appointed by Neo Metaliks itself. Such mindless signing of the award, it is argued, is nothing short of playing fraud or corruption on Kessels.

- 13.** It is argued that the ingredients of fraud have been pleaded in the Section 34 Application. Additionally, it is argued that Section 34(2)(b) of the 1996 Act empowers the court of its own to find if fraud exists on the basis of the materials before the court, even *de hors* any pleading *per se*.
- 14.** In support of such proposition, learned counsel cites *Devas Employees Mauritius Pvt. Ltd. v. Antrix Corporation Ltd.*, reported at 2023 SCC OnLine Del 1608, *Union of India v. Rashmi Metaliks*, reported at 2023 SCC OnLine

Cal 2272 and WBSIDC v. Kaushalya Infrastructure, reported at 2023 SCC OnLine Cal 2142.

15. For the proposition that fraud/corruption always takes place in secrecy and therefore ought to be inferred from the surrounding circumstances, taken altogether, learned counsel appearing for Kessels cites *Maharashtra State Board of Secondary Education v. K.S. Gandhi & Ors.*, reported at (1991) 2 SCC 716 and *MSEB v. National Transport Company*, reported at 1992 Mah LJ 1505.
16. Learned counsel for Kessels, the award debtor/petitioner, next contends that Section 31(1) of the 1996 Act is couched in mandatory form, requiring an arbitral award to be made in writing and signed by all the members of the Arbitral Tribunal. Thus, signing of the award is not a ministerial act or empty formality which can be dispensed with. A conjoint reading of sub-sections (1), (2), (3) and (5) of Section 31 makes it clear that in case of a Tribunal consisting of three Arbitrators, the majority award ought to state the reasons for any omitted signature of the third Arbitrator.
17. Section 29(1) of the 1996 Act, it is contended, states that only the majority award is the award in the eye of law and therefore makes it even more significant that the reason for not signing is contained in the majority award itself.
18. The rationale behind Section 31(2) is the need to ensure that all the members of the Tribunal have had an opportunity to participate in the decision-making process of preparing the award. It ought to be apparent

from the record that all three Arbitrators have deliberated on the making of the award before it is pronounced and delivered to the parties.

19. The reason for omission of the signature, it is argued, has to be relevant and adequate and only mentioning the fact that the award is not signed by the third Arbitrator is not sufficient.
20. In *Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies*, reported at (2021) 7 SCC 657, it is submitted, it was held that the minority award has to be pronounced on the same day as the majority award, as the Tribunal becomes *functus officio* thereafter. Thus, the reason for non-signing of the majority award has to be demonstrated on record at the time of the pronouncement of the majority award, upfront and not implied in the award.
21. In the present case, the majority award contains no reason for the omission of signature of the dissenting Arbitrator, whereas in the minority award, the third Arbitrator recorded that he was only informed on July 22, 2020 that the Presiding Arbitrator and the other co-Arbitrator allowed the claims of the claimant, being unable to agree with which the dissenting Arbitrator had decided to write a separate award, which was delivered on July 30, 2020. Therefore, it is submitted that the third Arbitrator could not have any participation/discussion with the other Arbitrators prior to preparation of the award, which is a *sine qua non* for any arbitral award. The very grain of arbitration, it is argued, requires a consolidated decision-making process to be a *sine qua non* and the third Arbitrator, who was actually appointed by

the court and was not a nominee Arbitrator of the petitioner, had to be consulted in the true sense of the term.

22. In support of such contention, learned counsel cites the following judgments:

- (i) *ISC Projects Private Ltd. v. Steel Authority of India Limited*, reported at 2025 SCC OnLine Del 1133;
- (ii) *Abu Hamid Zahiea Ala v. Golam Sarwar*, reported at 1916 SCC OnLine Cal 183;
- (iii) *Maharashtra State Electricity Distribution Company Ltd. and Others v. Deltron Electronics*, reported at (2017) 2 Mah LJ 605;
- (iv) *Mahanagar Telephone Nigam Ltd v. Siemens Public Communication Network Ltd*, reported at (2005) 80 DRJ 584; and
- (v) *Project Director, National Highways Authority of India Shri Krishna Pal Singh Chauhan v. Jogendar Parsottam Shetiya and Others*, reported at 2021 SCC OnLine Guj 3179.

23. The argument of Neo Metaliks, to the effect that the pronouncement of a separate minority award by the third Arbitrator itself was the reason for omission of his signature in the majority award, is refuted by learned counsel appearing for Kessels on the ground that it is contrary to the express words of Section 31(2), which requires a reason to be contained in the majority award. Secondly, the reason has to show that the dissenting Arbitrator was consulted prior to making of the award and not merely reflect his disagreement with the majority award. Moreover, once the award is pronounced, the disagreement is of no value.

- 24.** Regarding the contention of Neo Metaliks that the reason for omission of signature has been furnished in the amended award of February 22, 2021 is controverted by Kessels on the ground that the mere recording of the fact that the third Arbitrator has published his award separately is not sufficient reason under Section 31(2). Such reason has to be aligned to the purpose of introduction of the Section, showing that the minority Arbitrator has been consulted during the process of preparation of the award, which is not reflected even in the amended award.
- 25.** It is next reiterated that the reason for non-signing of the award ought to be contained in the majority award itself, on a conjoint reading of sub-sections (1) and (2) of Section 31 of the 1996 Act. For such proposition, learned counsel cites *Government of India v. Acome*, reported at 2008 SCC OnLine Del 808. It is argued that such non-signing by the third Arbitrator goes to the root of the matter and vitiates the majority award as a whole.
- 26.** On merits, learned counsel for Kessels argues that the Tribunal based its reliefs solely on the Guarantee Clause in the contract (Clause 14). Even for the purpose of implied warranty, the award refers to 18 months as described in the Guarantee Clause, treating the implied warranty as express warranty.
- 27.** It is contended that Clause 1.4 of Schedule-I of the Contract clearly provides that the machine would be considered to be examined on safe hand over for commercial operation and performance testing. Thus, the finding of the Tribunal that the scope of commissioning continued even after such point of time was patently contrary to Clause 14. In the absence of any mention in the agreement that the scope of commissioning shall be deemed to be

continuous rated performance, the Tribunal committed a patent illegality in holding so contrary to the Guarantee Clause itself.

- 28.** It is argued that the admitted case of the parties is that the machinery was supplied to Neo Metaliks on December 28, 2006. The first limb of Clause 14 stipulates the warranty period as 18 months from the date of successful commissioning or 24 months from the date of dispatch of machinery, whichever is earlier. Thus, even if taken to be 24 months from the date of supply, that is till December 28, 2008, the TG Set-in-question was rejected under the warranty clause much thereafter, only on July 27, 2009. Thus, no claim for the breach of warranty survived after December 28, 2008 and any claim thereafter was beyond the terms of the contract. The Tribunal, it is submitted, completely overlooked the second limb of Clause 14, fixing the warranty period till 24 months after the dispatch of the machinery.
- 29.** During the period of warranty, repairs were effected to the concerned TG Set, charges of which were paid by Neo Metaliks without raising any demur, thus waiving the right to claim breach of warranty.
- 30.** Even for the purpose of implied warranty, the majority award traces the claim to the terms of the express warranty of 18 months, thereby testing the implied warranty also on the parameter of the express warranty. This clearly brings the case either under Section 16(2), proviso, or Section 16(4) of the Sale of Goods Act, 1930 (for short the “1930 Act”).
- 31.** Additionally, Section 16(4) of the 1930 Act clearly states that if there is any express condition/warranty which is inconsistent with any implied condition/warranty, it is the former which shall prevail. Thus, since in the

instant case Clause 14 of the agreement clearly stated that the effectiveness of the machine is covered for a period of either 18 months from date of commissioning or 24 months from the date of supply, the same is clearly contrary to any implied condition/warranty of merchantable quality for more than what is provided for in the contract. Hence, no claim can be entertained beyond the guarantee period. Learned counsel relies on *Dickson v. Zizinia and Another reported at S.C. 20 L.J.C.P. 73* in support of such argument.

- 32.** Moreover, there was no manufacturing defect in the TG set attributable to any fault in the merchantable quality for various reasons. First, the machine was operated and run for staggered periods of 80 days, 65 days, 29 days, 47 days, 32 days and 20 days, which is a substantial period of time. Secondly, the machine was commissioned on December 28, 2006 and was in possession of the purchaser, Neo Metaliks and used till July 27, 2009, that is, for more than two and a half years, much beyond the guarantee period. Thirdly, the property in the goods had already passed to the purchaser as mentioned in Clause 7.1 of the agreement. Also, the repairing charges were paid by the purchaser/M/s. Neo Metaliks without any protest and demur, although the vendor (Kessels) was bound to provide services of repairs free of cost during the warrantee period. Moreover, there was a Performance Bank Guarantee (PBG) by Kessels to Neo Metaliks which was never invoked by the latter at any point of time, clearly indicating that there was no manufacturing defect in the machine *per se*.

- 33.** Clause 14 of the contract, it is argued, only refers to “successful commissioning” which was interpreted in the majority award to mean “continuous” functioning of the machine without any snag for months, even in the absence of the said term in the clause itself.
- 34.** By the logic of the majority award, every break in the functioning of the machine would break the chain of continuous running, the consequence of which would be that it would amount to decommissioning or no successful commissioning on every such occasion, which is an absurd interpretation which ought to shock the conscience of the court. By such reasoning, no machine would ever be commissioned on the slightest of break in functioning. Such perverse interpretation, it is argued, can clearly be gone into by the court under Section 34 of the 1996 Act, as enunciated in *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, reported at 2024 SCC OnLine SC 522. A perverse interpretation of the contract which does not make sense to a person of ordinary prudence, it is argued, would make it patently illegal.
- 35.** Learned counsel for Kessel further argues that that the majority award on the extinction of price of the machine is completely contrary to the evidence on record. Whereas the respondent, as claimant, has been awarded an amount of Rs.1,33,50,000/- for the turbine TG Set on the alleged billing break-up provided by Kessels, the award failed to note that as per the evidence of CW2, the invoice itself mentions the price of the turbine to be Rs.40,00,000/-. Thus, the claim could have been awarded up to only such actual price of the turbine. This shows a complete non-application of mind which is patently illegal.

- 36.** The majority award, it is submitted, erroneously recorded that there was no cross-examination on this point of any witness, thereby overlooking specific questions put to the CW1 as to how he is deposing that the extinction price is Rs.1,33,50,000/-, to which he said that he cannot comment on it as it is a commercial matter. Moreover, unless the claimant stands on its legs, there was no need to cross-examination of any of the witnesses. The majority award failed to note such discrepancy and blindly approved the claim.
- 37.** That apart, it is argued that the turbine is still lying in the possession of the purchaser/Neo Metaliks, having never been returned to the vendor. Also, Rs.38,00,000/- was never paid to Kessels for supply of the TG Set, a counter claim in which regard was raised by Kessels and was denied by the majority award on the pretext that the machinery was unable to perform up to its guaranteed potential.
- 38.** Learned counsel next contends that the majority award on extra expenditure on diesel, petrol and electricity is also completely contrary to the record, thus illegal. Although Exhibit 107 was relied on by the Tribunal for granting the claim for increased cost of electricity, the claimant's witness, one Mr. Kesharvanee, resiled from the exhibit in his cross-examination, deposing that he does not know anything pertaining to the table reflected therein as those were matters relating to commercial aspect and he could not depose on the same.
- 39.** Again, Exhibit 108, which was relied on by the Tribunal for grant of increased cost due to expenses incurred on high-class diesel, was resiled

from by the said Mr. Kesharvanee in his cross-examination on similar grounds.

- 40.** Exhibit 115 is comprised of internal ledgers of the claimant, for substantiating the table at Exhibit 108. Since the primary document itself was resiled from, the document in support of the same could not have been taken note of. In any case, it is argued that internal self-serving documents in the form of ledgers cannot tantamount to evidence against a third party. The ledger was also not substantiated by the claimant's witness by supporting documents. The witness also could not have first-hand knowledge of whether the generator was being used to generate electricity or not. In the ledgers as well, substantial amount of Furnace Oil is also reflected. Furthermore, there is no material to show whether the diesel was used for generating electricity or for other purposes like running cars or other equipment.
- 41.** Ashok Kumar Aggarwal, CW2, further stated that the electricity sourced from Damodar Valley Corporation (DVC) was cheaper as compared to the diesel generator sets. But no steps were taken by the claimant for mitigation of losses on that count. In the absence of any proof of steps being taken by the claimant towards mitigation of losses, no damages could be awarded in favour of the claimant at all. The balance sheet for the year 2008-09 was produced by Mr. Ashok Kumar Aggarwal, CW2, which showed that the claimant had not shown any expenditure on electricity and fuel in the expenditure for the year 2008-09. Thus, the claims relating to the same were false.

- 42.** That apart, it is argued that the expenditure on electricity or diesel can never be damages for the alleged breach of contract for the reason that such cost is factored into the price of the final product, that is, pig iron produced by the purchaser. Hence, it amounts to unjust enrichment of Neo Metaliks inasmuch as the said cost is any way recovered from the sale of pig iron. Thus, such damages could not be saddled on Kessels.
- 43.** It is further argued by Kessels that the correct means of determining damages was to calculate the difference between cost of production of electricity by the TG Set and by other means. Instead, the Tribunal directed the entire cost of electricity for the concerned period to be paid by Kessels.
- 44.** The concept of restitution cost does not apply, it is argued, as it refers to the disgorgement of unjust enrichment, no case regarding which has been pleaded.
- 45.** Neo Metaliks has not made out any case that it could not run its plant commercially in the absence of the TG Set. Moreover, the logbook of Neo Metaliks itself showed that the TG Set was being operated after being commissioned. The balance sheet of the company also shows that it was selling pig iron in the year 2007 and 2008, thus reflecting that the commercial operations of the plant had started and it was operating in the said years.
- 46.** Additionally, learned counsel for Kessels argues that Section 59, sub-sections (1) and (2) of the 1930 Act provides that in case of violation of warranty, the claimant can either claim extinction of price or damages suffered due to such violation. As per sub-section (2), further damages on

the basis of the very same breach of warranty can be claimed in addition to extinction of price; however, the claim for electricity consumption is not for further damages arising out of the alleged breach of any warranty by Kessels.

- 47.** Learned counsel for Kessels next argues that Neo Metaliks, the claimant, was estopped by its conduct from making any claim on the basis that the machine was defective. The Performance Bank Guarantee furnished by the vendor Kessels was never invoked by the claimant/Neo Metaliks during the period of guarantee, for which it was valid, thus waiving any right of claiming on the basis of manufacturing defect on the machine. That apart, repair charges were paid every time when repairs were carried out to the machine during the guarantee period without any demur or protest by Neo Metaliks, whereas Kessels was bound to provide such service free of cost during the guarantee period. Thus, the question of manufacturing defect in the machine ought to be ruled out.
- 48.** Learned counsel for Kessels further contends that positive evidence adduced by it was ignored by the Tribunal. For example, even after the replacement of the turbine-in-question with a new one, Neo Metaliks is still depending substantially on the procurement of electricity through the DVC, which would be evident from a table furnished by Kessels. Hence, during the period of 2010 till 2014 (four years), the period for which damages on account of electricity was awarded, roughly the same amount of money was spent by Neo Metaliks as after replacement by a new turbine.

- 49.** Even otherwise, it is argued that the machine was run constantly at high vibration levels, leading to its malfunctioning. Thus, the machine was not inherently defective but mishandled by Neo Metaliks. The machine was operated at unusually high levels of vibration for days on end without any justification, which is borne out by the logbook notings of Kessels as well as the cross-examination of Mr. Bharat Sawhney. The security system was bypassed by the people in charge on behalf of Neo Metaliks, violating the safety protocol of the machine and tampering with its functioning, the consequence of which cannot be borne by the vendor Kessels.
- 50.** Unskilled manpower was used to handle the machine, it is alleged, which led to defects in the TG Set. Out of the 54 people shown in the list of personnel who were handling the machine and functioning in the CPP Plant of Neo Metaliks at the relevant period, most did not have the relevant experience (at least more than five years) and 15 were freshers. The attending in shifts shows who were handling the TG Set. The logbook of Neo Metaliks, it is submitted, clearly shows that a supervisor of its own plant mentioned that there were no Shift-in-Charges during the shifts of running of the CPP. The evidence of RW2, Bharat Bhushan Sawhney and RW3 categorically states that the machine was being run by inexperienced persons, which could not be controverted by any contrary evidence.
- 51.** Thus, it is argued that the majority award ought to be set aside both on the threshold issues as well as on merits.
- 52.** Learned senior counsel appearing for the claimant/respondent Neo Metaliks argues that the allegation of fraud made by Kessels is on the basis of

assumption and presuppositions, such as the award was written by the Presiding Arbitrator only after the second stint of hospitalization and that a judgment is written only after submission of written notes of arguments and prior to submission of the same, no discussion or deliberation begun.

- 53.** It is pointed out that the arbitral proceeding was continued for a considerable period spanning over 89 sittings and oral arguments were concluded as long back as on January 18, 2020. Detailed minutes were prepared for each sitting when oral arguments were made. Thus, there is no reason to assume that the Arbitrators were required to wait for written notes before commencing the writing of the award.
- 54.** The Presiding Arbitrator was hospitalised in the first phase almost three months after conclusion of oral arguments, primarily on account of a cardiac arrest resulting in altered mentation. However, during discharge from the first stint of hospitalization, there was no mention of altered mentation. Rather, the Presiding Arbitrator was found to be “well conscious”.
- 55.** During the second stint of hospitalization, there was even no mention of any “altered mentation” and the discharge summary showed that the Presiding Arbitrator was neurologically stable. Learned senior counsel submits that Kessels has failed to disclose as to when and how it obtained confidential medical records of the Presiding Arbitrator. The challenge to the physical and mental capacity of the Presiding Arbitrator, it is submitted, is a mere afterthought.

- 56.** No objection to continuance of the proceedings were raised by Kessels, despite having several opportunities to be aware of the alleged incapacity of the Presiding Arbitrator.
- 57.** This is borne out by the fact that Neo Metaliks submitted its stamp papers to the Tribunal on July 6, 2020 during the second stint of hospitalization of the Presiding Arbitrator. The application of Neo Metaliks under Section 33 of the 1996 Act for amendment of the award was heard on several occasions, on which Kessels was duly represented. Notably, on February 29, 2021, Kessels recorded its no objection to the application. Despite having thus actively participated in the proceeding under Section 33, having undertaken such objection, it is argued that Kessels is now estopped from raising the plea as to the physical and mental incapacity of the Presiding Arbitrator at the relevant period.
- 58.** Learned senior counsel submits that Kessels has a history of making such unfounded allegations in respect of the instant proceedings. In fact, the Delhi High Court, by an order dated July 8, 2024, had rejected Kessels' application to terminate the mandate of the Tribunal on account of the ill-health of the Presiding Arbitrator.
- 59.** Learned senior counsel next contends that Kessels has not pleaded the particulars of alleged fraud and have failed to discharge the burden of proof which is substantially heavy in allegations of fraud. It is not the case of Kessels that Neo Metaliks is party to the alleged fraud.
- 60.** Learned senior counsel cites in this regard the judgments in *Kapur Vysya Bank v. Srei Equipment Finance Limited (AP-COM / 947/2024)* and *Union of*

India & Ors. v. Rahul Kumar Thakur (AP-COM/657/2024). Learned senior counsel also relies on *A.L. Narayanan Chettyar and Anr. v. Official Assignee of the High Court of Rangoon*, reported at 54 LW 606 and *Union of India v. Chaturbhai M. Patel and Co.*, reported at (1976) 1 SCC 747.

61. It is argued that finding of fraud in the making of an award, in effect, casts a direct aspersion on the Presiding Arbitrator and he ought to have been given an opportunity to explain his position in regard to the allegations. Learned senior counsel cites in support of such proposition *Kothari Industrial Corporation Limited v. Southern Petrochemicals Industries Corporation Limited* reported at (2021) SCC OnLine Mad 5325 and *Medeor Hospital Limited Formerly Rockland Hospitals Limited v. Ernst and Young LLP* reported at (2023) 5 HCC (Del).
62. With regard to the violation of Section 31(2) of the 1996 Act, learned senior counsel appearing for Neo Metaliks argues that, as per the said provision, the signature of two members in case of a three-member Tribunal is sufficient, so long as the reason for non-signing of the third member “is stated”. The said requirement has been substantially complied with in the present case. In support of such argument, learned senior counsel submits that the very publication of a minority award by the dissenting Arbitrator furnishes a reason for non-signing of the majority award by such dissenting Arbitrator. Moreover, the amended award dated February 22, 2021 further records the passing of a separate minority award. Also, Kessels itself has treated the amended award dated February 22, 2021 as the final award under challenge in the instant proceedings.

- 63.** Without prejudice to the aforesaid argument, learned senior counsel submits that mere non-signing by the dissenting Arbitrator ought not to result in the award being set aside as a whole. Section 29(1) of the 1996 Act provides for decisions of a Tribunal to be made by the majority. The contravention of Section 31(2), at best, amounts to a procedural irregularity not going to the root of the matter. Admittedly, the purported non-signing by the dissenting Arbitrator has not resulted in any conceivable harm to the parties and no situation has arisen where the parties or this Court is unaware as to the reason for non-signing of the dissenting Arbitrator.
- 64.** In this regard, reliance is placed on a Delhi High Court judgment in *MMTC Limited v. Aust Grain Exports Pty. Ltd.* [OMP (COMM) 6/2022].
- 65.** On merits, learned senior counsel for Neo Metaliks argues that an application under Section 34 is not a regular appeal and the grounds provided in Section 34 of the 1996 Act are not attracted in the present case, in view of the claims awarded to Neo Metaliks being based on cogent reasoning and evidence and a reasonable interpretation of the contract clauses.
- 66.** Learned senior counsel cites *Ssaynong Engg. & Construction Co. Ltd. v. NHAI*, reported at (2019) 15 SCC 131, and *Associate Builders v. DDA*, reported at (2015) 3 SCC 49 in support of such contention.
- 67.** The Tribunal, it is contended, recorded that the machine-in-question was not free from defect and could not be satisfactorily run by the claimant to meet the purpose for which the contract was entered into and the claimant raised complaints regarding the running of the machines from time to time,

which is an admitted position. Thus, the TG Set could not be commissioned and had to be rectified and/or repaired several times. Such findings are based on exhibits and documents on record. Hence, there was no “successful commissioning” of the machine at any point of time, as a natural consequence of which there was breach of the condition under the contract to supply the turbine to operate at a running capacity, enabling the claimant to generate electricity to run its captive power plant.

- 68.** Hence, the Tribunal found that Kessels is guilty of committing breach of the condition and Neo Metaliks has elected to treat the breach as a breach of warranty and the conditions for invoking Section 59 of the 1930 Act has been fulfilled. Hence, the claimant/Neo Metaliks is entitled to sue for extinction of the price.
- 69.** The Tribunal rejected the contention of Kessels that the non-functioning of the TG Set could be attributed to improper start up and running, noting that Kessels’ engineers were present at the site but never indicated any improprieties in respect of start-up and running. The argument of non-functioning of the TG Set being attributable to higher vibration levels was rejected by the Tribunal due to lack of evidence in support of such case. Rather, Neo Metaliks produced several logs (Exhibits 637 and 667) complaining of vibration levels to Kessels, which were not replied to.
- 70.** It is argued that such findings are based on appreciation of evidence and do not call for any interference as no perversity or patent illegality has been disclosed.

- 71.** Learned senior counsel argues that the Tribunal properly interpreted the Guarantee Clause by distinguishing between mere commissioning and “successful” commissioning. The clause would not be satisfied by merely putting machine and running it but would also require that it ran successfully for a period of at least 18 months at running capacity. Such stipulation was intended by the parties to the contract keeping in mind the admitted intended lifespan of the machine to be 25 years.
- 72.** The above interpretation, it is argued, cannot be said to lead to an absurdity or being unreasonable for the above reasons. The Tribunal, it is submitted, arrived at findings of fact based on appreciation of evidence to the effect that the short periods of non-idle time and its continued failure after each run itself showed that the TG Set supplied by Kessels was incapable of performing as per the contract and therefore could not have been commissioned. Sporadic running of the TG Set on the basis of the chart provided, established that it was not running satisfactorily.
- 73.** As regards the award of the claim on account of repair and maintenance, it is argued that there was no dispute with respect of the quantum of costs claimed by Neo Metaliks on account of maintenance and repair, which was duly noted by the Tribunal. Despite not having reserved such right, Neo Metaliks was entitled to claim a refund of repairing cost, since the repairer of the machine was the manufacturer itself, and knowing the defects of the machine, it was expected to be capable of repairing the same. However, despite having received repair charges, Kessels failed to repair the machine

properly. The same points were raised before the Tribunal but were turned down and cannot be re-agitated under Section 34 of the 1996 Act.

- 74.** Learned senior counsel next argues that the claims with regard to increased costs of electrical energy and additional expenditure on high-speed diesel oil were substantiated by ample evidence. The Tribunal found that Neo Metaliks was entitled to claim damages in addition to the extinction price since the damages in the present case were not in the nature of loss of profit but on account of increasing expenses for buying energies/diesel oil, which the claimant could have avoided had the machine run effectively and in accordance with the parameters contained in the contract. The estimation of extra cost of energy was determined only after installation of the new turbine on January 8, 2010 which estimation was calculated on the basis of the money which could have been reduced from Rs.9/43 per KWH to Rs.2.57 per KWH if the TG Set supplied by Kessels could function properly and in accordance with the contract.
- 75.** For granting electricity charges, a chart, summarising the increased expenditure on electricity on account of non-functioning TG Set and monthly bills raised by DVC (underlying invoices) were taken into consideration by the Tribunal, which noted that the figure summarised in the chart was the difference between the total bill amounts and the minimum contract value.
- 76.** As regards the costs of high-speed diesel oil, a chart summarising the increased expenditure on account of requirement, being Exhibit 107, as well as the ledger entries, evincing the consumption/payment of the high-speed

oil (Exhibit 115) were taken into account by the Tribunal which, upon a careful perusal of the evidence, noted that there was no cross-examination effectively made by Kessels' counsel to Neo Metaliks' witness on such count. Such appreciation of evidence, it is argued, ought not to be interfered with under Section 34 of the 1996 Act.

77. Thus, Neo Metaliks seeks the dismissal of the challenge under Section 34 of the 1996 Act.

78. From the arguments advanced by the parties, there transpires two categories of challenge to the award, pertaining respectively to threshold issues and issues touching the merits of the case.

79. The **threshold issues** are listed below:

- (i) *Whether the majority award is vitiated by fraud/corruption;*
- (ii) *Whether the majority award, being violative of Section 31(2) of the 1996 Act, ought to be set aside.*

80. The **issues on merits** are as follows:

- (i) *Whether the award is contrary to the express terms of the contract, entailing interference under Section 34 of the 1996 Act;*
- (ii) *Whether the award of claims on extinction of price and extra expenditure on electricity and high-speed diesel are contrary to law and evidence;*
- (iii) *Whether the claimant/respondent (Neo Metaliks) was barred by estoppel from making its claims;*
- (iv) *Whether the counter claim of the petitioner ought to have been allowed.*

81. The above issues are decided as follows:

THRESHOLD:

(i) Whether the majority award is vitiated by fraud/corruption

82. The petitioner raises a grave allegation as to the majority award being tainted by fraud and/or corruption, on the premise that the Presiding Arbitrator signed on dotted lines, in view of his debilitated mental and physical condition due to repeated ailments and hospitalization during the relevant period.
83. Both sides have argued on the standard of proof to be met to establish the ground of fraud.
84. At the outset, it may be noted that Section 34(1) of the 1996 Act provides that recourse to a court against an arbitral award may be made *only by an application* for setting aside such award in accordance with sub-section (2) and sub-section (3). Thus, an application under Section 34 is a prerequisite for the Section 34 Court to set aside an award.
85. However, two distinct sub-sets have been created as to the trigger for such interference. Whereas sub-section (2)(a) of Section 34 stipulates that an arbitral award may be set aside by the Court only if “the party making the application establishes on the basis of the record of the arbitral tribunal that...”, sub-section (2)(b) stipulates that an arbitral award may be set aside by the Court only if “the Court finds that...”.
86. Sub-section (2-A) uses the expression “may also be set aside”, thereby establishing a link with the immediately preceding sub-section (2) by using

the link-word “also”, thus also requiring an application to be made as a prerequisite. Under the said sub-section, an award can be set aside if it is vitiated by patent illegality appearing on the face of the award.

- 87.** Thus, if the award is to be set aside on any of the grounds stipulated in Clause (a) of sub-section (2), the party making the application under Section 34 *has to establish on the basis of the record* the grounds stipulated therein. On the other hand, for an interference under sub-section (2)(b) and sub-section (2-A), there is no such requirement of the applicant establishing the grounds but the *Court* may interfere if it *finds*, even *suo motu*, from the records and/or on the face of the award that any of the grounds provided therein is established.
- 88.** Since the ground of fraud/corruption comes under Clause (b) of sub-section (2) of Section 34, although an application is necessary to activate the Court’s jurisdiction under Section 34, there is no requirement of the applicant establishing such ground. Thus, rigours akin to Order VI Rule 4 of the Code of Civil Procedure, necessitating the particulars of the alleged fraud being disclosed in the application, are not attracted.
- 89.** However, for the Court to come to a finding of fraud/corruption, higher standards have to be met than a mere preponderance of probability and such allegation has to be proved beyond reasonable doubt. Thus, although the role of the applicant is only confined to bringing to the notice of the Court the alleged fraud/corruption and the applicant is not necessarily required to disclose specific details or particulars of fraud, the court itself has to be satisfied beyond reasonable doubt, from the arbitral records

and/or on the face of the award that such high ground of fraud/corruption has been established.

- 90.** Such view finds support in *A.L. Narayanan Chettyar (supra)*¹, where the Privy Council categorically held that an allegation of fraud, like any other charge of a criminal offence, whether made in a civil or criminal proceeding, must be established beyond reasonable doubt, and a finding on the question cannot be based on mere suspicion and conjecture. Again, in *Chaturbhai M. Patel (supra)*², the Hon'ble Supreme Court reiterated that "however suspicious may be the circumstances, however strange the coincidences and however grave the doubt, suspicion alone can never take the place of proof". The Hon'ble Supreme Court went on to observe that "in our normal life we are sometimes faced with unexplained phenomenon and strange coincidences for, as it said, truth is stranger than fiction". In such circumstances, after going through the judgment of the High Court in the said case, the Hon'ble Supreme Court recorded its satisfaction that the appellant had not been able to make out a case of fraud as found by the High Court.
- 91.** A co-ordinate Bench of this Court, in *Rahul Kumar Thakur (supra)*³, held that since no case of concealment of vital documents or false statements had been made out, which had a causative link with the facts constituted

¹ *A.L.Narayanan Chettyar and Anr. v. Official Assignee of the High Court of Rangoon, reported at 54 LW 606*

² *Union of India v. Chaturbhai M. Patel and Co., reported at (1976) 1 SCC 747*

³ *Union of India & Ors. v. Rahul Kumar Thakur (AP-COM/657/2024)*

and culminating the award, it could not be said that there was corruption on the part of the Arbitrator.

92. Thus, the parameters of fraud/corruption have to be construed in the above backdrop of judicial precedents.

93. In dealing with the allegation of fraud/corruption, certain dates are relevant in the present case, which are narrated below.

- After prolonged hearing over almost a decade, spread over 89 sittings, the Arbitral Tribunal reserved the award on January 18, 2020.
- The petitioner herein (respondent before the Tribunal) filed its written notes of arguments on February 28, 2020 (which was purportedly given to the dissenting Arbitrator on March 2, 2020).
- The Presiding Arbitrator was hospitalised between April 21 and May 28, 2020.
- The claimant (present respondent) filed its written notes of arguments on June 10, 2020.
- The Presiding Arbitrator was hospitalised for the second time on June 14, 2020 and was discharged on July 20, 2020.
- The majority award was passed immediately thereafter, on July 22, 2020.

94. The plinth of the petitioner's contention is that it is to be assumed that the Tribunal passed its award only after having the written notes of arguments of both parties, the last of which was filed on June 10, 2020. Since the Presiding Arbitrator was hospitalised soon thereafter on June 14, 2020 and remained hospitalised up to July 20, 2020, it was not possible for him to

prepare the lengthy award and deliver it on July 22, 2020, only a couple of days after his second discharge.

- 95.** However, there are certain chinks in the said line of argument.
- 96.** First, although the Presiding Arbitrator was admitted to hospital at the first instance with altered mentation, when he was discharged on May 28, 2020, there was no specific note in his discharge papers as to his mental condition still remaining the same. Thus, at least from May 28, 2020 onwards, there is no clear sign that the Presiding Arbitrator suffered from altered mentation. Although he was again hospitalised on April 21, 2020 due to worsening symptoms of Lewy Body Disease, which is a progressive brain degenerative disease, there is no specific proof that at the time of his discharge on May 28, 2020, such debilitation of mental faculties persisted.
- 97.** Notably, at the second instance of hospitalisation between June 14 and July 20, 2020, the reason for hospitalisation was high fever, UTI (Urinary Tract Infection) and Lower Respiratory Tract Infection. The Presiding Arbitrator's kidneys were malfunctioning and there was bacterial tract infection. He was apparently discharged with advice to have assisted sitting in the bed and also to walk with the help of a walker. Hence, the second instance of hospitalisation was prompted not by any mental disease, but his ailment operated at a physical level.
- 98.** Hence, at least from May 28, 2020 till July 22, 2020, when the award was passed, there is no clear proof that the mental condition of the Presiding Arbitrator was such that he was not capable of authoring the majority award.

- 99.** The second fallacy in the petitioner's argument is that it assumes axiomatically that an arbitrator always commences preparing his/her award only after the written notes of arguments are filed by the parties. However, just as judges, the methods adopted by arbitrators as to how they proceed about writing judgments/awards vary from person to person and all adjudicators cannot be painted with the same brush.
- 100.** It is to be noted that in the instant case, after the commencement of arguments in the arbitral proceeding, detailed notes of the nature of arguments were recorded in the minutes. Hence, it cannot be said beyond reasonable doubt that the Presiding Arbitrator was not armed with sufficient material to commence the preparation of the award either after it was reserved on January 18, 2020 or after the petitioner submitted its written notes on February 28, 2020. It often happens that an adjudicator starts preparing the broad outlines of his/her judgment/award even prior to written notes of arguments being filed by the parties. After all, the written notes of arguments are supposed to be merely the reflection of oral arguments already advanced by the parties and ideally cannot add to the same. Such notes are only to aid the adjudicator in order to ensure that no points raised by the parties are omitted.
- 101.** Thus, it cannot be automatically assumed that in all cases an Arbitrator mandatorily has to wait for the last written notes of arguments of the parties to be filed before even commencing the preparation of the proposed award, particularly if all the relevant materials were before him, including the oral

arguments advanced by the parties as reflected in the minutes of the dates of hearing.

102. However, this Court would be failing in its duty if a disturbing aspect of the matter is not considered. There is a palpable confusion of the first person in the first three paragraphs of the majority award. In the first and second paragraphs, the first person is used to qualify Mr. Pradip Kumar Dutta, Senior Advocate, one of the co-Arbitrators. The relevant extracts therefrom are:

- (a) *“the same was referred to the arbitration before myself, Pradip Kumar Dutta, Senior Advocate and Mr. Ajoy Krishna Chatterjee, Senior Advocate.*
- (b) *We, the Joint Arbitrators, i.e. myself, Pradip Kumar Dutta, Senior Advocate and Mr. Ajoy Krishna Chatterjee, Senior Advocate, appointed Mr. Prodosh Kumar Mullick, Senior Advocate as Third Arbitrator”.*

103. Not only is the term “myself” used twice to qualify Mr. Pradip Kumar Dutta, one of the co-Arbitrators, but the courteous omission of the prefix “Mr.” for himself while it is used for the other co-Arbitrator and the Third Arbitrator, unerringly indicates that it was Mr. Pradip Kumar Dutta, co-Arbitrator, who authored the award.

104. However, a marked contradiction is noted immediately thereafter. In the third paragraph of the majority award, it is stated that by virtue of the retirement of the said Third Arbitrator, the Joint Arbitrators had appointed “me, Bhaskar Sen, Senior Advocate” as the Third Arbitrator in his place and stead.

- 105.** Such linguistic confusion is suspect, as it creates a doubt in the mind of any reasonable person as to whether the award was actually authored by one of the co-arbitrators, Mr. Pradip Kumar Dutta, but subsequently given the colour of being written by the subsequently appointed Presiding Arbitrator Mr. Bhaskar Sen, Senior Advocate. There is no clue in the rest of the majority award as to who authored the same.
- 106.** However, going by the principle laid down by the Hon'ble Supreme Court in *Chaturbhai M. Patel (supra)*⁴, however suspicious may be the circumstances and strange the coincidences and however grave the doubt, suspicion alone can never take the place of proof.
- 107.** To arrive at a finding of fraud/corruption, the court must be free of all doubts whatsoever as to such fact being established.
- 108.** In any event, whoever actually authored the majority award, fact remains that the Presiding Arbitrator put his signature to the same. An insinuation has been made by the petitioner on such count as well, contending that the signatures of the Presiding Arbitrator in the award and the covering letter thereto are different. However, from a plain visual glance, it cannot be said beyond doubt that the two are of different persons.
- 109.** Balancing the above factors, thus, this Court comes to the conclusion that although there is slight discrepancy in the majority award, it might as well be attributable to grammatical error in transcription and it cannot be said beyond reasonable doubt that the Arbitrator merely signed a dotted-line

⁴ *Union of India v. Chaturbhai M. Patel and Co., reported at (1976) 1 SCC 747*

award and had not gone through/prepared the same himself. Thus, this issue is decided against the petitioner, by observing that the impugned award cannot be said to be tainted by fraud and/or corruption.

(ii) Whether the majority award, being violative of Section 31(2) of the 1996 Act, ought to be set aside

110. To decide this issue, sub-sections (1) and (2) of Section 31 of the 1996 Act are to be considered, which are set out below:

Section 31. Form and contents of arbitral award.

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

111. Sub-section (1) makes it clear, by use of the mandatory language “shall be”, that an arbitral award has to be signed by all the members of the Arbitral Tribunal. An exception to the said proposition is, however, carved out in sub-section (2) which relaxes such mandatory condition only if the reason for any omitted signature is stated.

112. The language in which sub-section (2) is framed leaves no manner of doubt that the reason has to be for the omission of the signature.

113. In *Dakshin Haryana (supra)*⁵, the Hon’ble Supreme Court observed that Section 31(1) is couched in mandatory terms. If the Arbitral Tribunal

⁵ ***Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies*, reported at (2021) 7 SCC 657**

comprises of more than one Arbitrator, the award is made when the Arbitrators acting together finally express their decision in writing and is authenticated by their signatures. An award takes legal effect only after it is signed by the Arbitrators, which gives it authentication, and that there can be no finality of the award except after it is signed, since signing of the award gives legal effect and validity to it.

114. The Hon'ble Supreme Court held that the statute makes it obligatory for each of the members of the Tribunal to sign the award to make it a valid award and that the usage of the term "shall" makes it a mandatory requirement and not merely a ministerial act or an empty formality which can be dispensed with.

115. It was further held that sub-section (1) of Section 31, read with sub-section (4), make it clear that the Act contemplates a single date on which the arbitral award is passed, that is, the date on which the signed copy of the award is delivered to the parties.

116. It is relevant to quote Paragraph Nos.32, 33 and 34 of the said judgment in this context:

" 32. In an Arbitral Tribunal comprising of a panel of three members, if one of the members gives a dissenting opinion, it must be delivered contemporaneously on the same date as the final award, and not on a subsequent date, as the Tribunal becomes functus officio upon the passing of the final award. The period for rendering the award and dissenting opinion must be within the period prescribed by Section 29-A of the Act.

33. *In the treatise on International Commercial Arbitration authored by Fouchard, Gaillard and Goldman, it has been opined that:*

“1403. A dissenting opinion can only be issued when the majority has already made the decision which constitutes the award. Until then, any document issued by the minority arbitrator can only be treated as part of the deliberations. However, once the majority decision has been reached, it is preferable for the author of the dissenting opinion to communicate a draft to the other arbitrators so as to enable them to discuss the arguments put forward in it. The award made by the majority could then be issued after the dissenting opinion, or at least, after the draft of the dissenting opinion...” [Fouchard, Gaillard, Goldman, International Commercial Arbitration, Eds. Emmanuel Gaillard, John Savage, p. 786 (Kluwer Law International).]

34. *There is only one date recognised by law i.e. the date on which a signed copy of the final award is received by the parties, from which the period of limitation for filing objections would start ticking. There can be no finality in the award, except after it is signed, because signing of the award gives legal effect and finality to the award.”*

117. Again, in *ISC Projects Private Ltd. (supra)*⁶ a learned Single Judge of the Delhi High Court reiterated the proposition laid down in *Dakshin Haryana Bijli Vitran Nigam Limited (supra)*⁷. It was further observed, by quoting from different authorities, that the right to provide a dissenting or separate opinion is an essential concomitant of the arbitrator’s adjudicative function and the Tribunal’s related obligation to make a reasoned order. Indeed, the

⁶ *ISC Projects Private Ltd. v. Steel Authority of India Limited, reported at 2025 SCC OnLine Del 1133*

⁷ *Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies, reported at (2021) 7 SCC 657*

right of an arbitrator to deliver a dissenting opinion is properly considered as an element of his/her adjudicative mandate, particularly in circumstances where a reasoned award is required. A dissenting opinion, it was held, serves an important role in the deliberative process, and can provide a valuable check on arbitrary or indefensible decision making. The very concept of a reasoned award by a multi-member Tribunal permits a statement of different reasons, which was held to be an essential aspect of the process by which the parties have an opportunity to both present their case and hear the reasons for the Tribunal's decision. The Delhi High Court highlighted the necessity of relevant, germane or adequate reasons for the missing signature, if the Third Arbitrator did not sign the majority award. If the reasons show that all the three Arbitrators have not had the opportunity to participate in the decision-making process fully and equally, such reasons would not be acceptable to justify the missing signature.

118. It was rightly held that a minority view can be formulated only after the majority view is known and the reasons for the missing signature have to be found to be satisfactory and that party autonomy and adjudication by a consensually appointed Tribunal, are intertwined.

119. In *Abu Hamid Zahiea Ala (supra)*⁸, it was reiterated by this Court that the majority may pass an award but it must be after discussion with the other Arbitrators. Conference between the Arbitrators at each stage and mutual assistance between each other was held to be essential, as was unanimous

⁸ ***Abu Hamid Zahiea Ala v. Golam Sarwar*, reported at 1916 SCC OnLine Cal 183**

participation by the Arbitrators in consulting and deliberating upon the award to be made.

120.In the present case, the dissenting Arbitrator categorically mentioned in his award that he was only informed on the date when the majority award was passed that the other two Arbitrators had allowed the claims of the claimant. He observed that, not being able to agree to such conclusion, he decided to write his separate award.

121. In the immediately preceding sentence, the dissenting Arbitrator also pointed out that he took up the matter for consideration only upon receipt of the notes of arguments filed by the parties.

122. Thus, since the claimant/respondent contends that there was nothing to assume that the Presiding Arbitrator only started to write his award after receiving the written notes or arguments by the claimant/respondent on June 10, 2020, almost immediately prior to his second bout of his hospitalization, within two days after discharge from which the award was published, it is also evident that if the dissenting Arbitrator started preparing his award after the date on which the respondent filed its written submissions, that is, June 10, 2020, there was no overlap between the periods when the Presiding Arbitrator and the dissenting Arbitrator started preparing their respective awards. Hence, the scope of any deliberation or discussion regarding the then-proposed award between the Presiding Arbitrator and other concurring co-arbitrator on the one hand. and the dissenting Arbitrator on the other, can be ruled out.

- 123.** Deliberation between the co-arbitrators in a multi-member Arbitral Tribunal is an essential ingredient of party autonomy, since the parties agree upon and submit to adjudication by all the members and not by any one or some of them. Such basic tenet goes for a toss if one of the Arbitrators is kept out of the loop by the others while preparing the award.
- 124.** Although a dissenting Arbitrator has a right to dissent, such dissent has to be an informed decision and not a *post facto* adjudication after the majority award is finalized, delivered and only then handed over to him, without prior consultation.
- 125.** If the dissenting Arbitrator was taken in the loop and was a part of the discussion and deliberation for the purpose of preparing the award, he might as well have convinced the other two Arbitrators or at least one of them to see things his way, thus changing the entire outcome of the adjudication.
- 126.** Hence, a *post facto* handing out of the majority award to the Dissenting Arbitrator hits at the very root of the validity of the award and is squarely violative of Section 31(1) of the 1996 Act.
- 127.** The respondent argues that the *post facto* dissent of the third Arbitrator ratifies in a sense the lack of specific reason for omission of his signature in the majority award. However, such argument is absurd, since Section 31(2) categorically stipulates that the reason for the omission has to be recorded in the majority award, in which the omission occurs.
- 128.** As discussed above, it has been consistently held by the Hon'ble Supreme Court and different High Courts that the date of the award, even in case

dissenting awards are passed by a multi-member Arbitral Tribunal, is a single date and the Arbitrators become *functus officio* thereafter. In the present case, the majority award was passed more than a week prior to the minority award. Thus, the *post facto* dissent of the third Arbitrator could not be read as a reason of omission of his signature in the majority award. On the date when the majority award was delivered, which is “The” award for all practical purposes, all the three Arbitrators became *functus officio*. As on the said date, not a single line of reason, let alone sufficient, was given in the majority award for the omission of the signature of the dissenting Arbitrator. As per the dissenting Arbitrator, not even a copy of the draft award was given to him before the majority award was delivered.

129.Hence, the impugned award is not only squarely violative of Section 31, sub-sections (1) and (2) of the 1996 Act but also contravenes the fundamental principle of party autonomy and hits at the root of the award itself.

130.Thus, the impugned award is liable to be set aside on such ground alone within the contemplation of Section 34(2-A) of the 1996 Act, being patently illegal.

131.Although the award could be set aside on such ground alone, we choose not to do so because of the following reason:

Although Section 19 of the 1996 Act sets the arbitrator free from the procedural formalities of the Code of Civil Procedure, it does not preclude even the arbitrator from following the cardinal principles embodied in the Code; less so in case of a Section 34 proceeding, to which Section 19 is directly not applicable. Thus, this Court chooses to adopt the underlying

principle of Order XIV Rule 2 of the Code and adjudicate on all the other issues as well for the sake of completion.

MERITS:

(i) Whether the award is contrary to the express terms of the contract, entailing interference under Section 34 of the 1996 Act

132. Clause 14.0 of the agreement between the parties is captioned “GUARANTEE”. Clause 14.1 stipulates that the guarantee shall be for “a period of Eighteen (18) months from the date of successful commissioning or Twenty Four (24) months the from date of last dispatch of machinery, whichever is early”.

133. It is borne out by the records that the Bleed cum Condensing Steam Turbine Generator Set (TG Set) was delivered by the respondent/petitioner to the claimant/respondent on December 28, 2006 and the claimant/respondent, Neo Metaliks, commenced trial run on the self-same date.

134. The claimant/respondent, by a written communication dated July 27, 2009, rejected the TG Set on the ground that by reason of its defects, parts of the TG Set had to be repeatedly sent for repairs, which did not allow due commissioning of the TG Set or stabilized operation of CPP, that the turbine suffers from inherent defects and that the supply, erection and commissioning of a TG Set and its turbine capable of stable and continuous operation was the essential condition of the contract which has been breached in the circumstances as stated therein. It was further stated that

inasmuch as the turbine was incapable of suitable repairs and must therefore be replaced, the claimant/respondent was obliged to treat the petitioner's breach of the fundamental condition of the contract as a breach of warranty of at least a turbine. The claimant/respondent accordingly sought refund of the value of the turbine and put the petitioner on notice that it will also be claiming the defence of the new turbine, which the claimant/respondent must essentially purchase to salvage the rest of the TG Set.

135. The petitioner takes the plea that such rejection came much after the expiry of the guarantee period. In terms of Clause 14.1, it is argued, the guarantee would be for a period of 18 months from the date of successful commissioning or 24 months from the date of last dispatch of machinery, whichever is early. Even going by the said Clause, 24 months from the last dispatch, that is from December 28, 2006, expired on December 28, 2008, whereas the rejection came on July 27, 2009.

136. The petitioner contends that the Tribunal failed to take into consideration the second limb of the Guarantee Clause and proceeded only on the premise of the first limb, stipulating the guarantee period to be 18 months from the date of successful commissioning. Hence, in any event, since the date of delivery of the turbine is admitted, the guarantee expired on December 28, 2008 even if the second limb is taken into account and thereafter there could not be any claim on account of breach of the same.

137. On the other hand, the claimant/respondent stresses upon the expression "successful commissioning" and argues that for successful commissioning,

the TG Set had to run at the guaranteed rated capacity at least for a continuous period of 18 months, which contention was accepted by the Tribunal in the majority award.

138. The term “successful commissioning” has not been defined separately in the contract and has to be gathered from the other provisions thereof than Clause 14.1. Clause 1.4 of Schedule-I of the contract defines scope of commissioning as flushing, calibration of instrument, testing and calibration of protection relays, meters, trial run, reliability run, safe handover for commercial operation and performance testing of the equipment supplied. As per the materials on record, the floor test was done and the machine was put into operation upon its delivery. Even as per the claimant/respondent, the machine operated during several intermittent periods at a stretch before it was rejected. Hence, there cannot not be any doubt that the machine had been commissioned upon being delivered on December 28, 2006, upon which the claimant/respondent had commenced operation of the same.

139. The question which arises is whether the interpretation lent to Clause 14.1 by the Tribunal, in particular the term “successful commissioning”, is in consonance with the view of a prudent person or is absurd.

140. In *Ssaynong Engg. (supra)*⁹, the Hon’ble Supreme Court observed that in the guise of misinterpretation of the contract and consequent errors of jurisdiction, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the said misinterpretation “which would include going beyond the terms of the

⁹ *Ssaynong Engg. & Construction Co. Ltd. v. NHAI, reported at (2019) 15 SCC 131*

contract” could be said to have been fairly comprehended as “disputes within the arbitration agreement or which were referred to the decision of the arbitrators as understood by the authorities.” If an arbitrator is alleged to have wondered outside the contract and dealt with the matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of patent illegality. It was further cautioned that to bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and must refer only to matters which are beyond the arbitration agreement or the reference.

141.In *Associate Builders (supra)*¹⁰, the Hon’ble Supreme Court, relying on *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, reported at (2011) 10 SCC 573, observed that if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction but if he wonders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. It was further held that extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award.

142.However, in *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, reported at (2022) 2 SCC 275, while considering *Ssaynong Engg. (supra)*¹¹ and *Associate Builders*

¹⁰ ***Associate Builders v. DDA*, reported at (2015) 3 SCC 49**

¹¹ ***Ssaynong Engg. & Construction Co. Ltd. v. NHAI*, reported at (2019) 15 SCC 131**

(*supra*)¹², the Hon'ble Supreme Court also took into consideration *Delhi Airport Metro Express (P) Ltd. v. DMRC*, reported at (2022) 1 SCC 131, where it was held that patent illegality should be illegality which goes to the root of the matter. In such context, it was further elaborated that the permissible ground for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wondering outside the contract and dealing with matters not allotted to them.

143. In *SAL Udyog (supra)*¹³, it was further observed that if the express terms and conditions of the agreement governing the parties were given a complete go-by, it would amount to patent illegality that is manifest on the face of the arbitral award. Failure on the part of the arbitrator to decide in accordance with the terms of the contract governing the parties, it was held, would certainly attract the “patent illegality” ground, as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an award. The said patent illegality, it was observed, is not only apparent on the face of the award, but goes to the very root of the matter and deserves interference.

¹² *Associate Builders v. DDA*, reported at (2015) 3 SCC 49

¹³ *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, reported at (2022) 2 SCC 275

144.In the subsequent judgment of *Indian Railways Catering & Tourism Corpn. Ltd. v. Brandavan Food Products*, reported at 2025 SCC OnLine SC 2369, the Hon'ble Supreme Court was pleased to hold that the arbitrator erred in assuming that he was only interpreting the terms and conditions of the contract and was, therefore, at liberty to place a contrary construction on the express language used therein. It was found that the arbitrator practically rewrote the contract between the parties which was held to be not only against the public policy of India but also made it patently illegal, being in contravention of Section 28(3) of the 1996 Act which mandatorily required the arbitrator, while deciding and making the award, to take into account the terms of the contract and the trade usages applicable to the transaction.

145.This Court, in *AB Enterprises v. Union of India*, reported at 2024 SCC OnLine Cal 9268, observed that taking resort to external aids where there was no ambiguity in the clause of the contract is itself patently illegal, which vitiates the impugned award and that it is an entrenched principle of Indian law that the Courts cannot rewrite the contract between the parties. The said concept was held to be an integral part of the fundamental policy of Indian law and that violating the same tantamounts to contravention of the policy of Indian law, being in conflict with the most basic notions of justice, bringing such contravention within the fold of Section 34(2)(b)(ii), including its Explanations. Taking resort to Section 28(3) of the 1996 Act, it was held that since the terms of the contract between the parties in the said case were unambiguous, contravention of the same by the Arbitral Tribunal

tantamounted to a patent illegality within the contemplation of Section 34(2)(b) of the 1996 Act, as reiterated in *SAL Udyog (supra)*¹⁴.

146. Again, in *Union of India, Acting through the General Manager v. Jay Bharat Construction*, reported at 2024 SCC OnLine Cal 8389, it was reiterated by this Court that since comity and consensus between the parties is at the very source of the authority of the arbitrator, the Tribunal was bound by the terms of the contract between the parties and, having acted contrary to the specific terms of the agreement, the learned Tribunal acted with patent illegality which was found in the said case to be shocking to the conscience of the Court and in conflict with the public policy of India. The Court observed that primacy of the terms of the contract is a cardinal part of the policy of India, as also embodied in Section 28(3) of the 1996 Act and that, pitted against each other, the policies of primacy of contract and least judicial intervention have to play out in respect of each other in the factual context and circumstances of each case.

147. This Court, in the unreported judgment of *Mintech Global Private Limited v. Kesoram Industris Limited – Cement Division* [EC 335 of 2023], this Court relied on *Ssaynong Engg. (supra)*¹⁵ and held that the Arbitral Tribunal cannot deviate from the terms of the contract, which proposition is premised on Section 28(3) of the 1996 Act.

148. A Division Bench of the Delhi High Court, in the unreported judgment of *Union of India v. Reliance Industries Limited & Ors.* [FAO(OS)(COMM)]

¹⁴ *State of Chhattisgarh v. SAL Udyog (P) Ltd.*, reported at (2022) 2 SCC 275

¹⁵ *Ssaynong Engg. & Construction Co. Ltd. v. NHAI*, reported at (2019) 15 SCC 131

201/2023], placed reliance on *SAL Udyog (supra)*¹⁶ and reiterated that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construed the term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of the contract, it was held, is primarily for an arbitrator to decide, unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

149.In *DMRC Ltd. (supra)*¹⁷, the Hon'ble Supreme Court, sitting in a 3-Judge Bench, while taking into consideration *Ssaynong Engg. (supra)*¹⁸ and *Associate Builders (supra)*¹⁹, was pleased to hold that the interpretation of contract cannot be unreasonable, such that no person of ordinary prudence would make it. The contract, it was held, which is a culmination of the party's agency, should be given free effect and if the interpretation of the terms of the contract as adopted by the Tribunal was not even a possible view, the award is perverse.

150.Thus, the law, as laid down by the Hon'ble Supreme Court and different High Courts of the country, boils down to the test of a reasonable and fair-minded person of ordinary prudence, which is the touchstone on which the interpretation by the Arbitral Tribunal of the terms of the contract between

¹⁶ *State of Chhattisgarh v. SAL Udyog (P) Ltd., reported at (2022) 2 SCC 275*

¹⁷ *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd., reported at 2024 SCC OnLine SC 522*

¹⁸ *Ssaynong Engg. & Construction Co. Ltd. v. NHAI, reported at (2019) 15 SCC 131*

¹⁹ *Associate Builders v. DDA, reported at (2015) 3 SCC 49*

the parties is to be examined. The court is also to look into whether the interpretation lent to the clauses of the contract is one of the possible views.

151. Going by the above tests, Clause 14.1, in its first part, clearly fixes the starting point of the guarantee to be the successful commissioning of the TG Set.

152. The interpretation sought to be given to the said term by the claimant/respondent is that the machine has to perform continuously at the rated capacity for a continuous period of at least 18 months for the commissioning to qualify as “successful”.

153. However, such interpretation is, to say the least, absurd. The term “commissioning”, seen in the light of Clause 1.4 of Schedule-1 of the contract, is a one-time affair. Once the equipment is put into active service, even if for a brief period, it has to be construed that it has been successfully commissioned. “Commissioning”, contrary to the interpretation of the Tribunal, cannot be a continuous act. Even otherwise, if successful commissioning is to mean the continuous trouble-free functioning of the machine for 18 months, the Guarantee Clause itself would be rendered nugatory, as it would be perpetually stillborn. In such a case, the act of commissioning, which is meant to be the starting point of the guarantee period, would be co-extensive with the guarantee period itself. Clause 14.1 stipulates that the guarantee period itself, and not the act of successful commissioning, would be for 18 months. Successful commissioning is only the starting point of the guarantee and the tenure of the guarantee period itself would be 18 months therefrom. Once commissioned, the guarantee

period starts running and cannot be arrested subsequently, even if the machine undergoes malfunction or requires repair. In fact, the concept of guarantee period is precisely that if during such period the equipment in question malfunctions due to some manufacturing or inherent defect, the consumer can invoke the guarantee.

154. If the interpretation sought to be lent by the Tribunal or the claimant/respondent is to be accepted, the guarantee period would forever be a non-starter, since on every occasion when the machine malfunctions or undergoes repair during a continuous period running period of 18 months, the guarantee period would start afresh and it would give rise to a new guarantee together. Such an interpretation would be against the very grain of the concept of guarantee, particularly as embodied in Clause 14.1 of the contract between the present parties.

155. The Tribunal, thus, got confused between the starting point of guarantee, which is the date of successful commissioning of the TG Set, with the guarantee period itself, which would be 18 months from such starting point. Hence, the interpretation given to the Guarantee Clause by the Tribunal is absurd and shocking to the conscience, not befitting a reasonable person of ordinary prudence and/or a fair-minded person. The said interpretation is not even one of the possible interpretations which could be given to the Guarantee Clause, hence taking such interpretation beyond the purview of the contract itself. Such interpretation being contrary to the contract, the terms of which are unambiguous, the error comes within the contemplation of Section 28(3) of the 1996 Act which stipulates that while deciding and

making an award, arbitral tribunal shall, in all cases, take into account the terms of the contract and the trade usages applicable to the transaction.

156.The Arbitral Tribunal, in the instant case, merely paid lip-service to the contract, in the process interpreting the unambiguous Guarantee Clause, being Clause 14.1, beyond recognition by construing it in such a manner that is palpably contrary to the clause itself.

157.Another patent illegality committed by the Tribunal was in overlooking the second limb of the Guarantee Clause altogether. The period of guarantee as contemplated in Clause 14.1 is not restricted to the period of 18 months from the date of the successful commissioning but additionally, takes within its fold the period of 24 months from the date of last dispatch of machinery, which is categorically borne out by the records to be December 28, 2006. Notably, Clause 14.1 stipulates that the guarantee period would be 18 months from date of successful commissioning or 24 months from date of last dispatch “whichever is early”. Even if it were to be assumed that the machine was not successfully commissioned (which is not the case here), going by the second limb, the guarantee period would, in any event, terminate with the expiry of 24 months from December 28, 2006 (the date of last dispatch/delivery of the equipment), that is, on December 28, 2006. The guarantee was invoked, however, by a communication dated July 27, 2009, which is beyond the guarantee period. This aspect of the matter was not considered by the learned Tribunal at all, thereby committing patent perversity.

- 158.**Hence, the impugned award is tainted by perversity and patent illegality, bringing it within the ambit of Section 34(2-A) of the 1996 Act, since such patent illegality tantamounts to perversity which is not restricted to mere erroneous application of law and does not involve the reappreciation of evidence.
- 159.**Interpretation of the contract in a manner contrary to its plain meaning is violative of Section 28(3) of the 1996 Act, on which premise the ground of patent illegality is further bolstered.
- 160.**Accordingly, this issue is decided in favour of the petitioner. The award is, thus, also liable to be set aside on the ground of patent illegality and perversity due to Tribunal having interpreted the Guarantee Clause in the agreement between the parties, which is the plinth of the claimant's claims, in such a fashion which is patently contrary to the clause itself and beyond the threshold of the prudence of a reasonable person.
- 161.**Another facet of the matter is also to be considered. As held in *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another*, reported at (2018) 11 SCC 508 as well as *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, reported at (2016) 4 SCC 126, the test of 'business efficacy' and commercial prudence has to be applied to gather the context and circumstances of the intention of the parties while entering into the contract.
- 162.**It is obvious that when a guarantee is given by a vendor, it is supposed to start from a particular date which is specific and not infinitely elastic. The starting point has to be a fixed date and not a continuous period, constantly

in a state of flux. The Tribunal evidently confused between the tenure of the guarantee, that is 18 months from the date of successful commissioning, and the starting point thereof, that is, the date of successful commissioning itself. Such commencement date was erroneously stretched by the Tribunal to extend over the guarantee period itself, by coming to the conclusion that unless the machine worked trouble free and at the rated capacity for a continuous period of 18 months, it would not be construed to be successfully commissioned.

163. During arguments, learned senior counsel for the claimant/respondent also insinuates and that there was an implied condition that the goods are of merchantable quality.

164. Section 16(2) of the 1930 Act provides an exception to the general proposition that there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale. The said exception is where goods are bought by description for a seller who deals in goods of that description, in which case there is an implied condition that the good shall be of a merchantable quality. However, the proviso to Clause (2) of Section 16 stipulates that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. Hence, as the TG Set in the instant case was installed, floor tested and pressed into operation and admittedly functioned for several intermittent periods in the hands of the claimant/respondent, it cannot be said with the buyer did not examine the goods.

165.As per Clause (4) of Section 16 of the 1930 Act, an express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith.

166.The implied condition sought to be invoked by the claimant/respondent herein, to the effect that the machine had to run continuously at the rated capacity for 18 months for successful commissioning to happen, is patently inconsistent with and contrary to the express warrantee/condition as embodied in Clause 14.1 of the agreement between the parties. Thus, the express warranty overrides such so-called implied warranty sought to be pressed into service by the claimant/respondent.

167.Hence, this issue is also decided in favour of the petitioner by holding that the impugned award is patently illegal and ought to be set aside under Section 34(2-A) of the 1996 Act.

(ii) Whether the award of claims on extinction of price and extra expenditure on electricity and high-speed diesel are contrary to law and evidence

163. The learned Tribunal proceeded to award the claim on extinction of price of the TG Set-in-question as well as grant damages on account of extra expenditure on electricity and high-speed diesel.

164. Section 59(1) of the 1930 Act provides that where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the

buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

165. Sub-section (2) of Section 59 carves out an exception to the effect that the fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

166. The case made out herein by the claimant/respondent is on the premise of breach of warranty. Thus, the learned Arbitral Tribunal committed a patent illegality in contravening in Section 59(1) of the 1930 Act by awarding the claims both under the head of damages, by way of electricity and diesel charges, as well as extinction of price. Grant of the one ought to have excluded the other, since it is not further damage but the same claim of damages which was made by the claimant/respondent in conjunction with extinction of price. The two cannot run together as per law.

167. Even otherwise, in view of the finding arrived at by this Court under the previous issue, the very premise of the award of damages goes. Since the guarantee was not invoked within its tenure as per Clause 14.1, the claimant/respondent-Neo Metaliks is debarred from claiming damages and/or extinction of price at all on the strength of such warranty clause.

168. Even otherwise, there are several glaring errors committed by the Tribunal. For instance, CW1, the claimant's witness, when confronted in his cross-

examination with the claimant's documents to substantiate the claims of damages, consistently and repeatedly denied having any knowledge of such documents since, according to him, the same related to commercial matters on which he could not comment. CW1 Mr. Kesharvanee maintained such consistent stand throughout his cross-examination.

- 169.** There was also a gross discrepancy between the invoice price of the turbine and the breakup on the basis of which the extinction of price was claimed by the claimant. The invoice-mentioned price of the turbine was much less than the amount awarded in lieu of extinction of price.
- 170.** The Tribunal proceeded on the perverse premise that there was no cross-examination of the CW1 on the relevant points. Contrary thereto, there were a string of counter suggestions put to him on such count, as evident from the minutes of the Tribunal's proceedings.
- 171.** Even otherwise, the claimant/respondent largely depended on its internal documents to try and substantiate its claims. The reliance of the Tribunal on the same was perverse, since the claims were awarded without any evidence worth the name.
- 172.** However, even without entering into such question at length, since it might border on reappreciation of evidence which this Court, sitting under Section 34 of the 1996 Act, cannot undertake as in a regular first appeal, the earlier ground of contravention of Section 59 of the 1930 Act would suffice to turn down such claims of the claimant/respondent. Also, it is reiterated that since the guarantee clause was not invoked within time, the claimants are not entitled to damages, due to foundational lacunae.

- 173.** In *State of West Bengal v. Bijon* [AP-COM 224 of 2009], it was held that if the award was passed without cogent material, the same is perverse, which violates the fundamental policy of Indian Law. Even in *DMRC Ltd. (supra)*²⁰, it was held that if vital evidence is ignored, the award is tainted by patent illegality, being perverse.
- 174.** Another facet of the matter is that the claimant/respondent did not specifically prove that it had made any effort during the relevant period to resort to the means which existed to remedy the inconvenience allegedly caused by the non-performance of the contract by the petitioner, thus, coming within the mischief of the Explanation to Section 73 of the Contract Act, 1872. It has been repeatedly held by Courts, including in *Mintech Global (supra)*, that the burden of proof is on the claimant to show that there was an effort on its part with regard to mitigation of loss.
- 175.** In the present case, no such proof came before the Tribunal from the end of the claimant/respondent; rather, the claimant/respondent also did not prove by cogent evidence that the electricity used by it by consumption from the DVC (Damodar Valley Corporation) during the period of operation of the concerned TG Set was more than that consumed after the installation of a new turbine from a different manufacturer. In the absence of such comparative proof, the Arbitral Tribunal had no means to assess the damages as claimed. Moreover, the purpose for which the high-speed diesel purchased by the claimant/respondent was utilised was not brought before

²⁰ ***DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd., reported at 2024 SCC OnLine SC 522***

the Arbitral Tribunal as well. The Tribunal proceeded merely on the basis of the electricity bills and the bills for purchase of diesel, without anything more to establish a connection between the same and the damages, if at all, actually suffered by the respondent.

176. High-speed diesel would be required in normal course of operation of the TG Set even if it never malfunctioned. Thus, the grant of claim on such count is not acceptable without any cogent proof as to how the said expenditure was relatable to breach of warranty.

177. Thus, the award is tainted by perversity and patent illegality on such count as well.

(iii) Whether the claimant/respondent (Neo Metaliks) was barred by estoppel from making its claims

178. There are several admitted facts which clinch this issue in favour of the petitioner.

179. First, on several occasions during the subsistence of the guarantee period, the claimant/respondent availed of the services of the petitioner's personnel for effecting repairs to the concerned TG Set upon making payments of repair charges. Such act on the part of the claimant/respondent tantamounts to waiver in respect of the plea that a defective TG Set was provided to the claimant. Since Neo Metaliks, the claimant, was entitled to free repair during the guarantee period but chose to pay the repair charges on every occasion when they availed of such services from the petitioner, that too without raising any demur throughout the guarantee period as to

there being any inherent or manufacturing defect in the TG Set, the respondent is estopped from seeking damages or claiming extinction price on such ground.

- 180.** Secondly, despite the petitioner having furnished a Performance Bank Guarantee, the claimant/respondent did not invoke the same during its tenure, thus waiving any right in that regard.
- 181.** Thirdly, by not making the claim within the period stipulated in the guarantee clause, that is Clause 14.1, the claimant/respondent is debarred by the contract itself from making such claim *post facto*.
- 182.** Under similar circumstances, in *Mintech Global Private Limited (supra)*²¹, the Court held that estoppel operated against the claimant.
- 183.** Hence, this issue is decided in favour of the petitioner as well, holding that the petitioner was barred by estoppel from making the claims and that the impugned award is vitiated by perversity, having ignored positive evidence and overlooked vital evidence on the one hand while awarding claims of damages without any material basis.

(iv) Whether the counter claim of the petitioner ought to have been allowed

- 184.** The Arbitral Tribunal refused to allow the counter claim of balance consideration amount claimed by the petitioner solely on the ground that in

²¹ ***Mintech Global Private Limited v. Kesoram Industris Limited – Cement Division [EC 335 of 2023]***

view of the consideration money being refundable by way of extinction of price, there was no question of payment of the same.

185. However, such ground of refusal becomes academic in view of the findings of this Court on the above issues.

186. The petitioner proved its claim by evidence whereas the claimant/respondent failed to establish by cogent evidence that the balance amount of consideration to the tune of Rs. 38 lakh was ever paid by it to the petitioner. Moreover, the equipment is still in the possession of the respondent.

187. Hence, the Tribunal committed a patent illegality in refusing the petitioner's counter claim.

188. It is well-settled that a Court, sitting in jurisdiction under Section 34 of the 1996 Act, cannot modify an award. However, it is an equally settled position of law that if the claims can be segregated into separate and distinct components, one being unconnected with the other, the Section 34 Court can grant one while refuse the other. As the claim of the respondent is on a distinct and different footing than the counter claim of the petitioner, the Court's hands are not tied inasmuch as despite refusal of the claimant/respondent's claims, the separate counter claim of the petitioner for payment of the balance consideration amount for the disputed TG Set can be directed to be paid.

189. Accordingly, this Court holds that the petitioner is entitled to an amount of Rs. 38 lakh from the respondent on account of balance consideration money for the TG Set in question, along with interest.

- 190.** Although the dissenting Arbitrator's award cannot be considered to be an independent award, since it is the majority award which counts as the 'award' for all practical purposes, nevertheless, the decision of the dissenting Arbitrator can definitely act as a guiding light in adjudicating the rate of interest.
- 191.** Thus, this Court comes to the conclusion that the petitioner is entitled to interest on Rs. 38 lakh at the rate of 10% from the date on which the cause of action arose, in terms of Section 31 (7) (a) of the 1996 Act, that is, from July 27, 2009 till the date of the majority award. The award shall also carry an interest at the rate of 2% higher than the current rate of interest prevalent on the date of the award, from that date till payment, in consonance with Section 31 (7) (b) of the 1996 Act.

CONCLUSION

- 192.** Applying the tests laid down in *Ssaynong Engg. (supra)*²², which culled out and modified some of the tests laid down in *Associate Builders (supra)*²³, the impugned award is vitiated by patent illegality and perversity and in certain aspects, shocks the conscience of the court.
- 193.** Even otherwise, the same is an invalid award, being in stark contravention of Section 31, sub-sections (1) and (2), of the Arbitration and Conciliation Act, 1996.

²² ***Ssaynong Engg. & Construction Co. Ltd. v. NHAI, reported at (2019) 15 SCC 131***

²³ ***Associate Builders v. DDA, reported at (2015) 3 SCC 49***

- 194.** In view of the above, the impugned award cannot be sustained insofar as the claims of the claimant/respondent are concerned, whereas the counter claim of the respondent/petitioner is to be allowed.
- 195.** Hence, AP-COM/245/2024 is allowed on contest, thereby setting aside the impugned award dated July 22, 2020, as amended on February 22, 2021, insofar as the claims of the claimant/respondent are concerned. The claimant/respondent is hereby directed to pay to the respondent/petitioner an amount of Rs. 38 lakh by way of balance consideration amount, along with interest at the rate of 10% per annum from July 27, 2009 till the date of the amended award (that is, February 22, 2021), and further interest at the rate of 2% higher than the current rate of interest prevalent on the date of the amended award [as per Section 2(b) of the Interest Act, 1978] from the date of the amended award till the date of payment. Such payments shall be made by the claimant/respondent to the petitioner within 30 (thirty) days from date.
- 196.** GA/1/2024 is consequentially disposed of.
- 197.** In view of the award itself being set aside, EC/143/2021, which is an application for enforcement of the same, is rendered infructuous and is also disposed of accordingly.
- 198.** However, the respondent/petitioner shall be at liberty to seek enforcement of the monetary award granted hereinabove in its favour, if not satisfied in the meantime, after 30 (thirty) days from date.
- 199.** There will be no order as to costs.

200. Urgent certified copies of this order, if applied for, be supplied to the parties upon compliance of all formalities.

(Sabyasachi Bhattacharyya, J.)