COMAP No. 87 of 2025

RESERVED ON 1ST SEPTEMBER 2026

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF OCTOBER, 2026

PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MRS. JUSTICE K.S. HEMALEKHA

COMMERCIAL APPEAL NO. 87 OF 2025

BETWEEN:

1. M/S KMV PROJECTS
REGIONAL OFFICE SITUATED AT NO.302
3RD FLOOR, EAST PARK ROAD
KUMARA PARK (E)
BENGALURU - 560 020
REPRESENTED BY ITS VICE-PRESIDENT
MR. D. TARANATH DASARI

…APPELLANT

(BY SRI ZULFIKIR KUMAR SHAFI, ADVOCATE)

AND:

Digitally signed by VEERENDRA KUMAR K M
Location: High Court of Karnataka

1. STATE PROJECT DIRECTOR
RASHTRIYA MADHYAMIKA
SHIKSHA ABHIYAN
NEW PUBLIC ANNEX BUILDING
N.T. ROAD, K.R. ROAD
BENGALURU - 560 001

2. SRI K.N. KESHAVANARAYAN
FORMER JUDGE
HIGH COURT OF KARNATAKA
ARBITRATION AND CONCILIATION CENTRE -
BENGALURU (DOMESTIC AND INTERNATIONAL)
III FLOOR, EAST WING

"KHANIJA BHAVAN"
RACE COURSE ROAD
BENGALURU - 560 001

…RESPONDENTS

(BY SRI KIRAN V. RON, AAG A/W
SMT. NILOUFER AKBAR, AGA FOR R-1)

THIS COMMERCIAL APPEAL IS FILED UNDER SECTION 13 (1-A) OF COMMERCIAL COURT ACT, 2015 READ WITH SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996 PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 05.12.2024 IN COM.A.P. NO.99/2024 PASSED BY THE LXXXIV ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, (COMMERCIAL COURT) (CCH-85), AT BENGALURU AND ETC.

THIS COMMERCIAL APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE
and
HON'BLE MRS. JUSTICE K.S. HEMALEKHA

C.A.V. JUDGMENT

(PER: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE)

1. The appellant, M/s KMV Projects [**KMV**], has filed the present appeal under Section 13(1A) of the Commercial Courts Act, 2015 [**CC Act**] read with Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 [**A&C Act**], impugning a judgment dated 05.12.2024 [impugned order] passed by the learned LXXXIV Additional City Civil and Sessions Judge, Commercial Court,

Bengaluru (CCH-85) [**Commercial Court**] in Com.A.P.No.99/2024. The appellant had filed the said petition under Section 34 of the A&C Act seeking setting aside of an arbitral award dated 10.11.2023 [**impugned award**] rendered by the learned Sole Arbitrator [**Arbitral Tribunal**]. The learned Commercial Court found no ground to interfere with the impugned award and accordingly dismissed the petition.

2. Respondent No.1, the State Project Director, Rashtriya Madhyamika Shikshana Abhiyana [**SPD**], was the respondent before the Arbitral Tribunal and KMV was the claimant. In terms of the impugned award, the Arbitral Tribunal partly allowed KMV's claims and directed the SPD to pay a total sum of ₹61,61,668/- (Rupees sixty-one lakhs sixty-one thousand six hundred and sixty-eight only) together with future interest at 9% per annum from the date of the award till payment, comprising ₹38,51,050/- towards unproductive overhead charges [Claim No.6(a)]; and ₹23,10,618/- towards loss of expected profit [Claim No.7], as against the claim of ₹38,51,028/-. The learned Arbitral Tribunal further awarded ₹2,00,000/- towards costs [Claim No.11], as against the claim of ₹12,00,000/-.

3. The impugned award herein is also the subject matter of COMAP No.61/2025, one of a batch of nine appeals (COMAP Nos.53/2025 to 61/2025) filed by the SPD. Whilst SPD challenged the impugned award to the extent of the claims awarded in favour of KMV, the present appeal is confined to the impugned award to the extent it rejects KMV's Claim for Payment of the Price Adjustment/Escalation Bill [Claim No.1].

PREFATORY FACTS

4. Rashtriya Madhyamika Shikshana Abhiyana [**RMSA**] is a centrally sponsored scheme launched in the year 2009-10 by the Ministry of Human Resource Development, Government of India, for enhancing access to, and the quality of, secondary education. The Government of Karnataka [**GoK**] implemented the scheme through the SPD and took up 2,024 civil works under 77 packages during 2009-10 and 2013-14. The said civil works involved construction of new school buildings, Adarsha Vidyalayas [**model schools**] and girls' hostels, and strengthening and upgradation of existing schools at an aggregate cost of ₹1,645.70 crores. The scheme has since been integrated with Samagra Shikshana Karnataka in 2018-19.

5. On 24.09.2012, tenders were invited on a package basis through the e-procurement portal in respect of works spread over thirty districts of the State, for a total of 52 packages. KMV emerged the successful bidder in respect of nine packages comprising 406 scattered work sites. The present dispute pertains to Package B-7 - Construction of New School Buildings for Upgradation and Additional Rooms for Strengthening of Existing Government High Schools at various places in Bidar District [**the subject package**]. After KMV was declared as the lowest bidder (L1), the parties entered into negotiations, held on 20.12.2012, 21.01.2013 and 13.02.2013, pursuant to which KMV reduced its quoted rates.

6. By Letter of Acceptance dated 18.03.2013 bearing No. RMSA/CW/UP-ST/BIDAR/2012-13/34 (Ex.C4), SPD accepted KMV's revised offer for a contract price of ₹2,417.83 lakhs for the subject package and called upon KMV to furnish the requisite security deposit.

7. The parties executed a Construction Agreement [**the Agreement**] dated 15.05.2013 (Ex.C5). Clause 4 of the Agreement stipulates that the Letter of Acceptance, the Contract Data, the

Conditions of Contract, and the Special Conditions of Contract, among other documents, formed an integral part of the Agreement.

8. The notice to proceed with the work was issued on 17.05.2013 and the stipulated period of completion was sixteen months therefrom. During execution, additional quantities and Extra Item Rate List [**EIRL**] items were required to be executed. Upon approval of the competent authority, the parties entered into a Supplementary Agreement dated 17.03.2017 for ₹332.42 lakhs.

9. There was delay in execution of the works and they were not completed within the stipulated period. KMV attributed the delay, *inter alia*, to (i) delay in handing over sites; (ii) delay in supply of drawings; (iii) delay in approval of work slips and EIRL items; (iv) delay in release of payments; (v) non-availability of water and power; and (vi) scarcity of sand and materials on account of the ban on mining. KMV invoked the price adjustment clause of the Conditions of Contract and raised its claim towards price adjustment; none of the said bills were paid. SPD, on the other hand, contended that no price adjustment clause was applicable to the Agreement in respect of the subject works.

10. In the meantime, under Government Order No. ED 49 MCD 2016 dated 16.11.2016, the GoK, while granting administrative approval to a revised project cost, directed (i) an audit by the Karnataka Institute of Public Auditors [**KIPA**] into the causes of and responsibility for the delay; and (ii) an enquiry into the issue of price adjustment by a committee headed by an officer of the rank of Additional Chief Secretary. The committee reported that the price adjustment clause incorporated in the tender documents for the RMSA civil works of 2009-10 and 2010-11 was not duly approved and was not binding on the GoK.

11. The said Government Order was impugned by three other contractors, namely, M/s Jampana Constructions Pvt. Ltd., M/s NCC Ltd., and M/s KBR Infratech Pvt. Ltd., in W.P. Nos.38613/2018, 35594/2018 and 34990/2018 respectively. By orders dated 25.02.2019, a learned Single Judge of this Court quashed the Government Order dated 16.11.2016 and restrained the State from acting upon KIPA's reports and suggestions, observing that the question whether the price adjustment clause was incorporated with approval or inserted unauthorisedly is a disputed question of fact, and relegated the petitioners to arbitration. A Division Bench of this Court disposed of the intra-

court appeals on 20.10.2020, observing that the parties would be governed by the terms of the contract entered into by them in respect of the various packages awarded by the State.

12. By its letter dated 12.03.2019, KMV set out the causes of delay and its claims. KMV invoked the dispute resolution mechanism under Clause 23 of the Conditions of Contract read with Clause 4 of the Special Conditions of Contract. Subsequently, by legal notice dated 08.05.2019 (Ex.C75), it invoked the arbitration agreement, attributing breach of contract to the SPD.

13. SPD responded by reply dated 11.06.2019 (Ex.C76), contending, inter alia, that the reference to arbitration was premature in view of the pendency of the intra-court writ appeals.

14. KMV filed an application under Section 11 of the A&C Act, being C.M.P.No.254/2019, seeking appointment of an Arbitrator. This Court allowed the same by an order dated 05.11.2020 and appointed a Sole Arbitrator to adjudicate the disputes between the parties.

15. The GoK issued Government Order No. EP 89 YYK 2020, dated 30.09.2020, accepting the recommendations of the Technical Advisory Committee and superseding the KIPA report. It ordered

that (i) for the purpose of computing extension of time and penalty, each work site in a package be treated as a separate unit; (ii) the administration be held responsible for delays caused by factors beyond the contractor's control; and (iii) price adjustment be allowed in respect of the 25 packages whose tender conditions contained the price adjustment clause. Admittedly, the sums due to KMV were released only thereafter and were received in full before 29.03.2021. By an order dated 13.01.2021, an extension of time was granted to KMV without penalty.

ARBITRAL PROCEEDINGS

16. KMV filed its Statement of Claim before the Arbitral Tribunal claiming an amount of ₹46,60,34,334/- (Rupees forty-six crores sixty lakhs thirty-four thousand three hundred and thirty-four only) under eleven heads, together with interest at 24% per annum from the date of the claim petition till payment, and costs. The summary of claims as set out in the statement of claims is reproduced below:

Claims	**Particulars**	**Claim Amount (Amt. in Rs.)**
Claim No.1	Payment of Price Adjustment/Escalation Bill	2,33,19,736
Claim No.2	Payment of equitable enhanced rates executed beyond tender completion period.	1,15,04,148
Claim No.3	Payment of equitable enhanced rates executed beyond Tender Completion Period for extra Items.	

Claim No.4	Payment of equitable enhanced rates executed beyond Tender Completion Period for quantities more than 125%	
Claim No.5	Payment towards idle labour charges	7,23,46,508
Claim No.6(a)	Payment of unproductive overhead charges.	38,51,028
Claim No.6(b)	Payment of additional overhead charges.	72,86,168
Claim No.7	Payment towards loss of expected profit on the balance work as on original tender completion date.	38,51,028
Claim No.8(a)	Loss of expected profit due to non-receipt of profit by tender completion period.	1,99,35,144
Claim No.8(b)	Loss of expected profit due to non-receipt of profit by actual completion period.	2,66,88,176
Claim No.9	Payment towards interest on claim amount calculated upto 31.12.2020 at the rate of 24%.	24,13,04,467
Claim No.10	Payment towards additional Bank Guarantee charges beyond original agreement period	9,10,194
Claim No.11	Payment of Rs. 12,00,000/- (Rupees Twelve Lakhs Only) towards Cost of Litigation.	12,00,000
Total		46,60,34,334

17. It was KMV's case that after it was declared the successful bidder, it had reduced its rates by factoring in the price escalation clause and the economies of scale. KMV claimed that the SPD did not hand over the sites within the stipulated period despite various requests and delayed approval of drawings, work slips, and EIRL items, thereby preventing KMV from completing the contract on time and prolonging execution of the works. KMV alleged that the SPD also withheld amounts due to it, which compelled KMV to refer the disputes to arbitration.

18. SPD disputed that the price adjustment clause was applicable to the Agreement in respect of the subject works. The tender documents required the price variation clause to be treated

as deleted. Therefore, SPD was not bound by it. SPD further contended that the delay, if any, had been suitably compensated by extension of time granted without imposition of penalty, and that the claims, aggregating ₹46,60,34,334/-, were fictitious, unsubstantiated and beyond the scope of arbitration.

19. On the basis of the pleadings between the parties, the Arbitral Tribunal framed the following issues.

> "1. Whether Claimant proves that non completion of the works under the contract within the stipulated period was for the reasons solely attributable to Respondent, resulting in breach of contract by Respondent, as such, the delay in completion of the works was solely attributable to Respondent?
>
> 2. Whether for the reasons set out in SOC which were beyond the control of Claimant, he was prevented from completing the entire scope of work within the scheduled contract period?
>
> 3. Whether Respondent proves that the delay in completion of the works under the contract within the original period stipulated under the contract was solely attributable to Claimant?
>
> 4. Whether Respondent proves that as the requirements of Clause 38.4 of Conditions of Contract have not been complied with by Claimant, none of the claims put-forth in SOC is tenable?
>
> 5. Whether the Claimant is entitled for payment of amounts claimed under various heads as put-forth under claim Nos.1 to 8 of SOC?
>
> 6. Whether the Claimant is entitled for payment towards past interest on the amounts claimed up

> to 31-12-2021 at 24% PA as claimed under claim No.9 of SOC?
>
> 7. Whether Claimant is entitled for current and future interest at 24% PA on the amount claimed?
>
> 8. Whether Claimant is entitled for cost of this arbitral proceeding?
>
> 9. To what order and award the parties are entitled to?"

20. After examining the evidence and materials placed on record, the Arbitral Tribunal found that the delay in completion of works within the stipulated period was solely attributable to the SPD. The Arbitral Tribunal further rejected the SPD's contention that non-compliance with Clause 38.4 of the Conditions of Contract rendered the claims not tenable. However, the Arbitral Tribunal rejected KMV's claim for price adjustment on the ground that (i) the Agreement did not contain the Price Variation Clause; and (ii) that KMV failed to prove that the amount claimed was payable.

21. The Arbitral Tribunal partly allowed Claim Nos.6(a), 7 and 11. The Arbitral Tribunal also awarded future interest and costs but rejected the remaining claims, being Claim Nos.1 to 5, 6(b), 8(a), 8(b), 9 and 10, in their entirety.

22. The dispositive part of the impugned award is set out below:

> "The claims of Claimant as put forth in Statement of Claim are allowed in part as under:
>
> (1) Claim No.6(a) is allowed in a sum of Rs.38,51,050/-;
>
> (2) Claim No.7 is allowed in part in a sum of Rs.23,10,618/- only as against the claim of Rs.38,51,028/-;
>
> (3) Respondent is directed to pay to Claimant a total sum of Rs.61,61,668/- as per Sl.No.(1) and (2) above together with future interest at the rate of 9% per annum from the date of this Award till the date of payment;
>
> (4) Claim No.11 is allowed in part in a sum of Rs.2,00,000/- only as against claim of Rs.12,00,000/-. Respondent is directed to pay to Claimant this amount within a period of 3 months from the date of this award failing which the said amount shall carry interest at the rate of 9% per annum from the date of award till the date of payment;
>
> (5) Claim Nos.1 to 5, 6(b), 8(a), 8(b), 9 and 10 are rejected in their entirety;
>
> (6) Claimant shall pay requisite stamp duty on this award payable as per the Karnataka Stamp Act. With the pronouncement and publication of the Award, this Arbitral Proceeding stands terminated as per Section 32(1) of the Act."

23. KMV filed an application under Section 33 of the A&C Act on 15.12.2023, *inter alia*, praying for an additional award in respect of Claim No.1. KMV stated that, by inadvertent error, it had filed old and obsolete tender documents which had ceased to exist. It

claimed that, by oversight, it had failed to produce and prove the revised tender document. The Arbitral Tribunal held that the same did not constitute a clerical error which could be rectified under Section 33 of the A&C Act and accordingly, rejected the application by an order dated 05.03.2024.

24. KMV assailed the impugned award before the learned Commercial Court by filing an application to set aside the impugned award (Com.A.P.No.99/2024) under Section 34 of the A&C Act. By the impugned order dated 05.12.2024, the learned Commercial Court found no ground to set aside the impugned award and dismissed Com.A.P.No.99/2024, giving rise to the present appeal.

REASONS AND CONCLUSIONS

25. We note, at the outset, that KMV confined its challenge to the impugned award to the denial of its claim for price adjustment/escalation. The learned Arbitral Tribunal rejected the said claim on the ground that price adjustment clause did not form part of the contract between the parties and, in any event, KMV had failed to place evidence to establish the amounts claimed. The learned Commercial Court found no grounds to interfere with the

learned Arbitral Tribunal's decision to reject the claim for want of necessary evidence.

26. The learned counsel for KMV earnestly contended that the SPD did not dispute the quantum of the claim; thus, KMV had no occasion to establish the said measure. He contended that the principal dispute in Claim No. 1 was essentially confined to whether the price adjustment clause was part of the contract between the parties or was specifically excluded. The SPD's case was that the tender document expressly stated that the price adjustment clause would not apply and, therefore, any claim under the said clause was not maintainable.

27. While addressing the question, it is relevant to refer to the averments made by KMV in its statement of claims. KMV claimed that, at the stage of negotiations, it had brought to the SPD's attention that the sites were located in remote villages and were scattered. Thus, the cost of transporting material, mobilising labourers, and other establishment charges would be substantially higher than if the works were carried out at a single location. KMV claimed that, notwithstanding this, it had offered discounted rates during the negotiations, after factoring in the provision relating to price escalation and economies of scale, which would enable KMV

to perform its work within the negotiated amount. It averred that there was delay in execution of the works on several grounds, including (a) delay in supply of agreement copies and signing of conditions of contract; (b) delay in handing over of site; (c) delay in performance of pooja; (d) delay in supply of drawings; (e) non-availability of water and power sources; (f) scarcity of sand; (g) increase in quantities; (h) delay in payment; (i) delay in approval of work slips/EIRL; (j) increase in cost of material due to shortage; (k) posting of technical staff; (l) loss of working season; and (m) extension of BGs.

28. KMV claimed that all the impediments stated above were beyond its control and that several were caused by acts of omission and commission on the part of the SPD, for which KMV was entitled to compensation. In the aforesaid background, KMV claimed that it was entitled to the claims as set out in a tabular statement, which is set out hereinbefore.

29. Apart from the aforesaid statement, the Statement of Claims contained no averment as to how the Claim No.1 for a sum of ₹2,33,19,736/- was computed.

30. We may, at this stage, refer to Clause 39 of the Conditions as contract, which is set out below:

"39. Price Adjustment:

39.1 Contract price shall be adjusted for increase or decrease in rates and prices of labour, materials, fuels and lubricants in accordance with the following principles and procedures and as per formulae given in the Contract Data.

(a)The price Adjustment shall apply for the work done from the date of commencement up to the end of original period of completion or extensions granted by the Employer and shall not apply to work carried out beyond the stipulated period of completion for reasons attributable to the Contractor;

(b) Price Adjustment shall be admissible from the date of opening of tenders (original or extended).

(c) The price adjustment shall be determined during each quarter from the formulae given in Contract Data.

(d) Following expressions and meanings are assigned to the work done during the quarter.

R = Total value of work done during the quarter. It will exclude value for works executed under variations for which price adjustment (if any) will be worked out separately based on the terms mutually agreed.

39.2 To the extent that full compensation for any rise or fall in costs to the contractor is not covered by the provisions of this or other Clauses in the Contract, the unit rates included in the contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs."

31. As is evident from the above, in terms of Clause 40.1 (c), the price adjustment is required to be determined on the basis of the formulae as set out in the 'Contract Data' (which is one of the documents forming part of the contract). Separate formulae are provided for adjustment for the labour component, adjustment for the cement component, adjustment for the steel component, adjustment for the fuel and lubricant component, adjustment for plant and machinery spare components and adjustment for other materials.

32. The tender documents contained a notation to the effect that the Price Adjustment / Variation Clause Sl.No.39 may be treated as deleted. Hence, the Price Adjustment /Variation is not applicable to this Tender.

33. KMV contends that the Arbitral Tribunal erred in proceeding on the basis of a notation in the tender documents that expressly deleted the price adjustment/price variation clause.

34. The learned counsel for KMV contended that the Arbitral Tribunal erred in not permitting KMV to produce the relevant tender documents that formed part of the agreement signed between the parties. The said note did not exist in the said documents.

35. KMV's claim for a sum of ₹2,33,19,736/- as Price Adjustment/escalation was premised on the basis that the contract between the parties included a Price Adjustment Clause, in terms of which the price of the contract was required to be adjusted by applying formulae as set out in a document named Contract Data, which formed a part of the contract between the parties.

36. The question of whether the price adjustment/escalation clause existed as part of the agreement between the parties is a contentious issue.

37. According to the SPD the said clause was deleted in the tender documents and therefore the claim for price adjustment on the basis of formulae as set out in Contract Data, was not sustainable. KMV claimed the contrary. It claimed that in the post-tender negotiations, it had agreed to a certain reduction in the value on the basis that it would be entitled to price variation and therefore, the documents signed between the parties did not include the note deleting the said clause. However, admittedly, the relevant documents produced by KMV clearly indicate that they included a note expressly stating that the price adjustment/variation clause was deleted.

38. The Arbitral Tribunal, on the basis of the document (Ex.C1), as produced by KMV, found that the agreement between the parties included the notation, whereby the price adjustment/variation clause was deleted. Accordingly, the Arbitral Tribunal concluded that there was no price variation clause. The relevant extract of the impugned award is set out below:

> "190. Thus, apparently, as could be seen from Clause 39 of Conditions of Contract which is part of Ex.C1 and deemed to be part of Agreement, it deals with Price Adjustment for increase or decrease in rates and prices of Labour, Materials, Fuels and Lubricants. As per Clause 39.1 Price Adjustment has to be worked out as per the Formulae given in the Contract Data. Contract Data which is part of Ex.C1, sets out Price Adjustment Formulae. However, there is a Note at the end of Price Adjustment Formulae in the Contract Data which reads as under:
>
> ***"NOTE: The Price Adjustment / Variation Clause Sl.No.40 may be treated as deleted. Hence, the Price Adjustment /Variation is not applicable to this Tender. The Contractors/ Bidders are requested to study the tender in detail and quote their rates".***
>
> 191. In the light of the NOTE contained in Contract Data which specifically states that the Price Adjustment /Variation Clause at Sl.No.40 be treated as deleted and further stating that the Price Adjustment / Variation is not applicable to this Tender, there is force in the contention of Respondent that Price Adjustment clause is not part of the Agreement relating to this Package. As could be seen from the NOTE in Contract Data, it is clear that 'Price Adjustment' clause is not part of the agreement relating to this Package and the said clause had been treated as 'deleted'. From this it is further clear that at the earliest point of time itself

even at the stage of Invitation for Tenders, the Contractors/Bidders had been clearly informed that 'Price Adjustment/Variation Clause' is not applicable to the Package in question and the Bidders had been requested to keep this fact in mind while quoting their rates. Under these circumstances, it is not open to Claimant to contend that Price Adjustment / Variation Clause is part of the Contract relating to the Package in question.

192. No doubt, Ex.C2 and C3 were written by Claimant offering revised price after the negotiation meetings held on 21.01.2013 and on 13.02.2013 and they contain acknowledgments for having delivered the cover at the office of Respondent. As per the contents of Ex.C2, Claimant offered revised price based on the outcome of the negotiation meeting and considering the inclusion of Price Adjustment Clause. Even in Ex.C3, Claimant has stated that they are ready to execute the project considering the inclusion of Price Adjustment Clause at price of Rs.24,17,82,796/-. Of course, thereafter the Respondent issued LOA dated 18.03.2013 as per Ex.C4 for the contract price of Rs.2417.83 lakhs.

193. Of course, Respondent has not produced any evidence to show that on receipt of Ex.C2 and Ex.C3, any reply was sent. However, when at the earliest point of time itself even in the Invitation for Tenders which contained Contract Data in which it had been made clear by a specific NOTE that Price Adjustment / Variation clause is not applicable to the Package in question, there was no obligation on the part of Respondent to respond to the statement of Claimant with regard to Price Adjustment Clause. In the light of the specific Note in Contract Data, as noticed supra, the fact that Respondent did not respond to the statement made in Ex.C2 and C3 cannot be a circumstance to draw any adverse inference against Respondent. Claimant has not placed any evidence before this Tribunal to show that in the Negotiation Meetings held there were discussions regarding Price Adjustment Clause and that in the said meeting Respondent agreed to include the Price Adjustment Clause.

194. In paragraph 36 of his affidavit evidence, RW1 has clearly stated that Price Adjustment Clause stand deleted as mentioned in Clause 39 of Conditions of Contract and NOTE in Section 5 of Contract Data. In this regard, he has been cross-examined by the learned counsel for Claimant on 10.01.2023 wherein at paragraph 76 it is elicited from the witness as under:

> *"It is true that Respondent is required to follow standard procurement tender format. It is true that the work involved in this case falls under KW-4 format. It is not correct to suggest that the Respondent has no power to alter the terms of the general conditions of the contract. There may be document under which the Respondent was empowered to change the terms of general conditions of the contract. After verifying, if it available I can produce the same before this Tribunal on the subsequent dates of hearing. I agree that in KW-4 format, there is a clause regarding price adjustment. In the tender pertaining to this case (package B-7), the clause regarding price adjustment is deleted. It is true that in the tender document Ex.Cl the price adjustment clause is found at clause No.39. It is true that the letter of acceptance Ex.C3 is signed by the State Project Engineer. It is true that Ex.C5 Notice to Proceed with the work is signed by the State Project Engineer. It is true that the agreement Ex.C4 bears the signature of State Project Engineer also".*

195. Thus, even in the cross examination, RW1 has asserted that in the tender pertaining to the package in question clause regarding Price Adjustment' has been deleted. May be as elicited from RW1, the standard format as per KW4, would have price adjustment clause and Respondent is required to follow standard tender format i.e., KW4. RW1, has denied the suggestion that Respondent, has no power to alter the terms of standard format. There is nothing on record to indicate that the terms of standard format cannot be altered under any circumstances. The conditions of Contract which is part of Ex.C1 no doubt contains price adjustment

> clause under clause 39 as per the standard format. However, the Contract Data which is also part of Ex.C1 and which has priority over the Conditions of Contract, has expressly provided that in relation to the works under the package in question "Price Adjustment/Variation Clause be treated as deleted and therefore, the said clause is not applicable to this package. In the light of the specific "Note" in the Contract Data" regarding deletion and non-applicability of Price Adjustment clause in relation to the package in question, unless it is established by cogent and acceptable evidence that the said 'Note' in Contract Data was subsequently either dropped or not acted upon by the parties, Claimant is bound by the terms of contract in this regard. Claimant has not produced any evidence to show that the said 'Note' in Contract Data was subsequently given up by Respondent or to show that Respondent, agreed to provide benefit of Price Adjustment.
>
> ** ** **
>
> 206. In view of the above discussions, this Tribunal holds that Price Adjustment clause had been treated as deleted and therefore, the said clause is not part of the contract in relation to the package in question and Claimant is bound by the same. Therefore, Claimant has no right to seek payment of any amount from Respondent towards Price Adjustment."

39. It is KMV's contention that it erroneously failed to produce the relevant documents (the revised tender document, sought to be produced as Ex.C.79) in which the note deleting the price variation clause had been dropped.

40. Admittedly, KMV failed to establish that the price variation clause was part of the agreement between the parties. KMV having

failed to produce the documents which it now seeks to rely on, the Arbitral Tribunal's decision in this regard cannot be faulted.

41. Concededly, the Arbitral Tribunal's conclusion was based on the contract documents as proved by KMV. And those documents clearly indicated that the price variation clause was deleted. It is also relevant to note that the question of whether the note deleting the price variation clause had in fact been dropped during negotiations was stoutly contested by SPD. SPD also led evidence establishing that the price variation clause had been deleted.

42. Given the limited scope of examination under Section 34 of the A&C Act, we cannot accept that the Arbitral Tribunal's conclusion warrants any interference in these proceedings.

43. It is material to note that the Arbitral Tribunal also found that KMV had not produced any evidence to establish the amounts payable towards price adjustment in respect of various components of cost – labour, cement, steel, fuel and lubricants, and Plant and Machinery, Spares and other materials.

44. Thus, even if it was accepted that the agreement included a price variation clause, as claimed by KMV, no amount could be awarded in the absence of KMV establishing the quantum of the amount claimed to support the claim. The relevant extract of the impugned award regarding the said finding is set out below:

> "208. As could be seen from clause 39 of Conditions of Contract, benefit of price adjustment for increase or decrease in rates and prices are permitted only in relation to components such as labour, materials such as cement, steel, fuel and lubricants, plant and machinery spares and the mode of arriving at the price adjustment is as per the formulae stipulated under contract data in respect of each of the components.
>
> 209. In the light of the formulae specified in the Contract Data, in order to establish the amount payable towards price adjustment in relation to permissible components, Claimant is required to place evidence showing details of the quantum of work carried out, and evidence showing the average consumer price index for industrial workers published by the Labour Bureau, Ministry of Labour, Government of India for quarter preceding the date of opening the tender as also for the quarter under consideration in relation to labour component; All India Average Wholesale Price Index for cement for the quarter preceding the date of opening the tender as also for the quarter under consideration published by Office of Economic Adviser, Ministry of Commerce and Industry, Government of India, in relation to Cement component; All India Average Wholesale Price Index for Steel (Rebar) for quarter preceding the date of opening the tender as also for the quarter under consideration published by Office of Economic Adviser, Ministry of Commerce and Industry, Government of India in relation to steel component; The Official Retail Price of High Speed Diesel at the

> IOC/HPCL/BPL or Consumer Pump at Bangalore on the day 30 days prior to the opening of the bids and for the 15th day of the middle calendar month of quarter under consideration in relation to fuel and lubricant component; All India Average Wholesale Price Index for construction machinery and parts for the quarters preceding the date of opening of bids and for the quarter under consideration as published by the Office of Economic Adviser, Ministry of Commerce and Industry, Government of India in relation to plant and machinery spares components and for other materials All India Average Wholesale Price Index for all commodities for the quarters preceding opening of the bids and the quarter under consideration as published by Office of Economic Adviser, Ministry of Commerce and Industry, Government of India.
>
> 210. However, Claimant has not produced either a calculation sheet indicating all the relevant factors for deriving the amounts payable for each of the permitted components supported by required documents or produced any documentary evidence to substantiate the total claim of Rs.2,33,19,736/- towards price adjustment. Claimant has also not placed any evidence to show as to how he has arrived at the said figure towards price adjustment claim. In the absence of any evidence to establish the escalation in prices of the various permitted components, even if it is assumed for the purpose of argument that priced adjustment clause is part of the contract in relation to Package in question, Claimant is not entitled for the amount claimed under claim No.1."

45. We cannot accept that the Arbitral Tribunal's findings in regard to Claim No. 1 suffer from any patent illegality that vitiates the impugned award. To succeed in its claim for damages, KMV was required not only to establish its entitlement to such compensation, but also the measure of such damages.

46. In our view, the Commercial Court rightly declined to interfere with the impugned award insofar as it rejected KMV's Claim No.1.

47. The present appeal is unmerited and is accordingly, dismissed.

Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE

Sd/-
(K.S. HEMALEKHA)
JUDGE

KMV