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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment reserved on: 09.04.2026***
Judgment pronounced on: 29.05.2026

\+ O.M.P. (COMM) 535/2025, I.A. 31139/2025 (Stay), I.A. 31141/2025 (Delay of 16 days in Re-filing the petition) & I.A. 31142/2025 (Seeking permission to file Long and detailed list of dates)

BHARAT HEAVY ELECTRICAL LIMITED .....Petitioner
Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Shyam D. Nandan, Mr. Rohit Bohra and Ms. Nandana Menon, Advocates.

versus

ANAND ENGINEERING LIMITED .....Respondent
Through: Mr. P. Chidambaram & Mr. Gaurab Banerji, Senior Advocates with Mr. Aman Vachher, Mr. Ashutosh Dubey, Mr. Dhiraj, Mr. Upendra Prasad, Mr. Brij Mohan, Ms. Abhiti Vachher and Mr. Akshat Vachher, Advocates.

CORAM:
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

HARISH VAIDYANATHAN SHANKAR, J.

1. The present Petition, has been filed under Section 34 of the **Arbitration and Conciliation Act, 1996**[1], seeking the setting aside of the **Arbitral Award dated 26.07.2025**[2], rendered by a three-member Arbitral Tribunal in the Arbitral proceeding titled *"Bharat Heavy*

[1] Act
[2] Impugned Award

Electricals Limited and Bajaj Infrastructure Development Company Limited (BIDCO) now known as Anand Engineering Limited". The learned Arbitral Tribunal comprised of Hon'ble Justice D.K. Jain, as the Presiding Arbitrator, along with Hon'ble Justice Deepak Verma and Hon'ble Justice Badar Durrez Ahmed, as Co-Arbitrators.

2. By way of the Impugned Award, various claims and counter-claims came to be adjudicated upon, some having been allowed while others were rejected, ultimately culminating in a net monetary award in favour of the Respondent, along with costs quantified at Rs. 1,00,00,000/-.

BRIEF FACTS:

3. The present Petition has been preferred by **Bharat Heavy Electricals Limited**[3], a Public Sector Undertaking of the Government of India. The Petitioner is engaged, *inter alia*, in the business of design, engineering, manufacture, construction, testing, commissioning and servicing of a wide range of products catering to the core industrial sectors, including power generation and transmission.

4. The Respondent, **Anand Engineering Limited (erstwhile 'Bajaj Infrastructure Development Company Limited')**[4], is an Engineering, Procurement and Construction Management Company primarily engaged in the execution of Infrastructure Projects in the Power Sector.

Background of Project and Contractual Chain

5. **The Lalitpur Power Generation Company Limited**[5] was undertaking the development of a **Super Thermal Power Project**[6] at

[3] Petitioner
[4] Respondent
[5] LPGCL
[6] STPP

Lalitpur, Uttar Pradesh. For execution of the said Project, LPGCL opted for the International Competitive Bidding, dividing the project into two Packages, *namely*, **Boiler Turbine Generator Works/Package**[7] and **Balance of Plants Works/Package**[8].

6. LPGCL, based on the offers received from various bidders, selected one, **M/s Carberry Infrastructure PTE Ltd.**[9], as the successful bidder and awarded the BOP Package to it. CIPL, in turn, for execution of the BOP Package, assigned procurement, civil construction and erection works to the Respondent.

7. The Respondent, in order to execute the said BOP Package, issued a **Notice Inviting Tenders published on 05.12.2011**[10] for design, engineering, manufacture, procurement, supply, transportation to Lalitpur project site for **275 MVA Generator Transformer**[11], **105 MVA Interconnecting Transformer**[12] and two types of Reactors, *i.e.*, **80 MVAR Reactor**[13] and **110 MVAR Reactor**[14]. The Petitioner emerged as the successful bidder pursuant to the said Tender process.

8. Consequently, the Respondent issued two **Letters of Award, *namely*, Supply LOA and Services LOA, both dated 29.08.2012**[15].

9. The contract value under the Supply LOA was Rs.1,76,97,23,526/- (exclusive of the taxes and duties), and under the Services LOA was Rs. 3,82,50,000/- (inclusive of service tax).

Scope of Work and Original Contractual Structure

10. Pursuant to the LsOA, the scope of work of the Petitioner was structured into multiple lots. As per the two Original LsOA, each lot

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[7] BTG Package
[8] BOP Package
[9] CIPL
[10] NIT
[11] GT
[12] IT
[13] 80R
[14] 110R
[15] LsOA

had different quantities of products. Further, each lot had a distinct timeline for ex-works, supply and commissioning of the products.

11. The scope of work as per the two Original LsOA is represented *vide* Table-I produced herein below. Further, the initial timeline, as per the said LsOA, for each activity of the said lots, represented in Table-I, is represented *vide* Table-II produced hereinafter.

Table-I

Lots	**GTs**	**ICTs**	**80R**	**110R**
1	4	7	4	4
2	3	-	-	-
3	3	-	-	-

Table-II

Activity	**Lot-1**	**Lot-2**	**Lot-3**
Ex-works	17 Months	20 Months	23 Months
Receipt at Lalitpur site	18 Months	21 Months	24 Months
Commissioning	22 Months	25 Months	28 Months

12. The Supply LOA, specifically Clause 6.2 thereof, further provides that the aforementioned timeline has to be reckoned from the '*Effective Date*'. Further, Clause 20 of both the LsOA, where were identically worded, provides for the effective date of the start of the contract, *i.e.*, Zero Date, as to be the date of award of the LsOA. Therefore, the effective date for the start of the Contract was 29.08.2012.

13. Thereafter, pursuant to the award of LsOA, three distinct Agreements, being the Supply Contract Agreement, Erection Contract Agreement and a Wrap-up Contract Agreement, all of them dated 26.12.2012, were entered into between the parties.

14. The crux and effect of the Wrap-up contract, admittedly, was that any default in the Supply Contract Agreement would be treated as

a default in the Erection Contract Agreement and vice versa. It is the case of the Petitioner that both the Agreements, *i.e.*, the Supply Contract Agreement and Erection Contract Agreement, by their nature and content, were meant to work synergistically and seamlessly. Therefore, for the sake of convenience and clarity, except wherever required otherwise, the **Supply Contract Agreement and Erection Contract Agreement**[16] would be collectively referred to as the "*Contract*".

15. The Petitioner entered into a technical consultancy Agreement with USA-based **Global PT Corporation**[17], as per the requirement of the Respondent. The LsOA prescribed that the Petitioner was to procure the complete detailed design for manufacturing the GTs, ICTs and 80Rs. Further, the GPT was to vet the design of 110R.

16. The said GPT, as per the technical requirements of the project, was to provide support to the Petitioner by deputing experts for manufacturing supervision upto testing. Technical support and expert advice were also to be received from the GPT during erection and commissioning as well. Also, the GPT was to inspect the First GT and the 80R and 110R and rate them at every critical stage of manufacturing and testing.

17. The project itself qualified as a Power Project under the Mega Power Policy of the Government of India, and therefore, the equipments and parts imported for installation and use in the said project were exempted from import and excise duty.

18. Under Clause 4.0 of the Supply LOA, the Respondent was obligated to facilitate issuance of the requisite Certificates to the Petitioner to avail the zero-duty facility, including the **Project**

[16] Contract
[17] GPT

Authority Certificate[18] and the **Central Electricity Authority's Mega Power Certificate**[19]. As per the aforesaid Clause, the said Certificates were to be provided to the Petitioner within 6 months from the date of the Supply LOA, *i.e.*, 29.08.2012. Therefore, the various Certificates, *inter alia*, the PAC and CEA, were to be issued to the Petitioner on or before 01.03.2013, as per the said Clause.

Amendments to the LsOA and Change in Scope of Work

19. Further, it is not in dispute that various amendments were made to the LsOA from time to time, resulting in a change in the scope of work, including a change in quantities and configuration of equipments, which were communicated by way of various Letters addressed to the Petitioners. The information, with respect to all the relevant amendments to the LsOA vis-à-vis the scope of work, and thereafter changes in scope of work otherwise, are represented in a consolidated table produced herein below, being Table-III, for the sake of clarity.

Table-III

<table>
<tr><th>Original LOA/ Amendment/ Letters</th><th>Date</th><th>Part of Work</th><th>Lot 1</th><th>Lot 2</th><th colspan="2">Lot 3</th><th>Total</th></tr>
<tr><td rowspan="4">Original LOA</td><td rowspan="4">29.08.2012</td><td>GT</td><td>4</td><td>3</td><td colspan="2">3</td><td>10</td></tr>
<tr><td>ICT</td><td>7</td><td>-</td><td colspan="2">-</td><td>7</td></tr>
<tr><td>80R</td><td>4</td><td>-</td><td colspan="2">-</td><td>4</td></tr>
<tr><td>110R</td><td>4</td><td>-</td><td colspan="2">-</td><td>4</td></tr>
<tr><td>1st Amendment</td><td>10.10.2012</td><td colspan="6">Only Conditions for Insurance included in the LsOA, no change in scope of work.</td></tr>
<tr><td rowspan="5">2nd Amendment</td><td rowspan="5">26.06.2013</td><td>GT</td><td>4</td><td>3</td><td colspan="2">3</td><td>10</td></tr>
<tr><td>ICT</td><td>7</td><td>-</td><td colspan="2">-</td><td>7</td></tr>
<tr><td>80R</td><td>-</td><td>-</td><td colspan="2">-</td><td>-</td></tr>
<tr><td colspan="6">80R removed from the scope of work.</td></tr>
<tr><td>110R</td><td>4</td><td>6</td><td colspan="2">-</td><td>10</td></tr>
<tr><td colspan="2">Addition of Lot-4, vide the 3rd Amendment</td><td></td><td>Lot 1</td><td>Lot 2</td><td>Lot 3</td><td>Lot 4</td><td>Total</td></tr>
</table>

[18] PAC
[19] CEA

3rd Amendment	30.10.2013	GT	4	3	3	-	**10**
		ICT	7	-	-	-	**7**
		110 R	4	6	-	3	**13**
4th Amendment	01.07.2015	GT	4	3	3	-	**10**
		ICT	8	-	-	-	**8**
		110 R	4	6	-	3	**13**
Communication by Letter	13.11.2015	GT	4	3	3	-	**10**
		ICT	8	-	-	-	**8**
		110 R	1	2	-	3	**6**
Communication by Letter	29.04.2016	GT	4	3	3	-	**10**
		ICT	7	-	-	-	**7**
		110 R	1	2	-	3	**6**

PAC/CEA Timeline and Subsequent Commencement of Supply

20. On 18.10.12, the Petitioner received a sum of 8.84 crores under the Supply LOA and Rs. 0.18 crores under the Services LOA, as an advance payment upon the submission of requisite bank guarantees and other documents.

21. Further, on 15.11.2012, the Petitioner requested the Respondent to issue the PAC. The Respondent, in order to seek exemption from Excise duty, filed a Bank Guarantee and an undertaking with the Central Excise Department on 22.03.2013.

22. Consequently, the Respondent provided the PAC for exemption from customs and excise duty only on 10.12.2013, while, as stated herein-above, the said Certificates were to be provided by the Respondent to the Petitioner, on or before 01.03.2013. Pursuant to this, the Petitioner applied for the Import License for import at *NIL* customs duty and the same was issued to the Petitioner by the Director General of Foreign Trade on 05.03.2014.

23. Subsequently, the Petitioner commenced the supply and dispatched the First GT to the project site on 11.12.2014. Thereafter, certain units were commissioned in time for synchronisation of the

LPGCL to the Power Grid. On 09.06.2015, the first unit of the LPGCL was synchronised with the Power Grid through 3 GTs and 3 ICTs.

Revision of Timelines and Grant of Extensions

24. The timelines for completion of the contractual works came to be revised from time to time during the subsistence of the contract. The record reflects that extensions were granted on multiple occasions, having regard to the evolving scope of work, changes in quantities and scheduling requirements, as well as requests made on that behalf. These revisions materially altered the original completion schedule.

25. For the sake of clarity, the chronology of the original timelines and subsequent extensions is set out herein after. It is important to emphasise that these successive extensions and revisions to timelines form a significant aspect of the dispute between the parties.

Table-IV

Original Timeline/ Extension	**Date**	**Lot 1**	**Lot 2**	**Lot 3**	**Lot 4**
Original LOA	**29.08.2012**	22 months	25 months	28 months	-
3rd Amendment to LOA	**30.10.2013**	22 months	25 months	28 months	31 months
1st Extension	**05.04.2015**	47 months	47 months	47 months	47 months
2nd Extension	**04.08.2016**	52 months	52 months	52 months	52 months
3rd Extension	**23.08.2016**	58 months	58 months	58 months	58 months
4th Extension	**01.09.2016**	31.12.2016	31.12.2016	31.12.2016	31.12.2016
5th Extension	**29.01.2017**	31.03.2017	31.03.2017	31.03.2017	31.03.2017
6th Extension	**24.05.2018**	31.01.2019	31.01.2019	31.01.2019	31.01.2019

Developments Leading to Reduction in Reactor Scope

26. It is not in dispute that delays had arisen in the execution of the project. This led to the parties having a high-level discussion on 08.10.2015 with LPGCL regarding the revised priority of supply of

transformers and reactors. During the meeting, it is the case of the Petitioner that it confirmed that the Petitioner will be able to deliver GTs 7, 8 and 9, ICT 8 and one 110R by March 2016. However, the Respondent desired the Petitioner to keep ICT 8 on hold and instead supply 6 nos. Of 110R before the end of the year 2015.

27. *Vide* a letter dated 13.10.2015, the Respondent communicated to the Petitioner to put on hold ICT 8 and sought Reactors to be provided during 2015-2016.

28. However, *vide* further communication dated 03.11.2015, the Respondent conveyed to the Petitioner that it required all the 13 nos. of 110R to be commissioned by March 2016.

29. Thereafter, another letter dated 13.11.2015 was issued by the Respondent reiterating the contents of the letter dated 03.11.2015. The Respondent, *vide* this communication, reduced the order quantities of 110R by 7 nos. from 13 to 6, with an added rider that the said quantity would further be reduced to 3, in case the Petitioner is unable to deliver 3 nos. of 110R by March 2016 and another 3 by May 2016.

30. The Respondent, *vide* communication dated 22.03.2016, put on hold the supply of 110R 4, 5 and 6. Further, on 29.04.2016, the Respondent deleted ICT 8 from the scope of work.

31. The aforesaid hold, on the supply of 110R 4, 5 and 6, was lifted after approximately five months, *vide* communication dated 18.08.2016.

32. The Petitioner, in order to ensure the supply of the said 3 nos. of 110R, being 110R 4, 5 and 6, which were previously on hold, addressed a communication dated 16.09.2016 to the Respondent, requesting an extension of time upto 31.07.2017 for the supply of the said 3 nos. of 110R.

33. The said communication was replied to by the Respondent *vide* Letter dated 14.10.2016, whereby the Respondent rejected the Petitioner's request for extension of time upto 31.07.2017. The Respondent, by way of the same communication, stated that they are in urgent requirement of the said 3 nos. of 110R, and therefore granted provisional extension for supply of the same upto 31.12.2016

Correspondence Regarding Payments, Performance and Initiation of Risk-Cost Procurement

34. Between February, 2017 and 2019, the Petitioner repeatedly called upon the Respondent to release outstanding dues amounting to approximately Rs. 35 crores while asserting that substantial supplies under the contract had already been completed and commissioned.

35. During this period, meetings were held and correspondence was exchanged between the parties concerning reconciliation of outstanding amounts, dispatch of the remaining 110R reactors and continuation of supplies.

36. *Vide* communication dated 07.05.2018, the Respondent informed the Petitioner that 7 nos. 110R reactors had been procured from Alstom (now GE T&D) under Risk-Cost Procurement at a value of Rs. 47.85 crores. The Petitioner thereafter asserted that manufacture of the remaining 3 nos. of 110 R had been adversely affected owing to non-payment of outstanding dues.

Disputes and the Arbitral Proceedings

37. In view of the disputes, with respect to non-payment of the balance, the Petitioner, in consonance with the dispute resolution clause, being Clause 7.1 of the Contract, invoked the dispute resolution clause, which contemplates resolution of disputes by way of amicable settlement/talks between the parties, before the invocation of

the Arbitration. However, no amicable resolution could be arrived at between the parties.

38. In view of the same, the Petitioners invoked the Arbitration Clause, being Clause 7.2 of the Contract, by addressing a Legal Notice under Section 21 of the Act to the Respondent, and thereby the aforementioned Arbitral Tribunal was appointed.

39. Before the learned Arbitral Tribunal, the Petitioner raised multiple claims arising out of the contractual relationship between the parties. Broadly, the disputes pertained to (i) recovery of alleged outstanding dues under the Contracts; (ii) claims arising from reduction in scope of work, including costs relating to work-in-progress, inventory, and materials procured for manufacture of 110 MVAR reactors; and (iii) issues relating to entitlement and consequences flowing from the Mega Power Policy benefits, including obligations linked to procurement of PAC/CEA certificates and the resultant import of goods at concessional duty.

40. The Respondent, in turn, filed its Statement of Defence along with several Counter-Claims seeking, *inter alia*, recovery of Liquidated Damages for delay, damages on account of risk–cost procurement of reactors from third parties, and other ancillary claims arising out of the alleged breach of contractual obligations by the Petitioner.

41. It is also a matter of record that during the pendency of the arbitral proceedings, the Respondent undertook further procurement of certain reactors from a third party, *i.e.*, Alstom T&D (now GE T&D), and sought to incorporate the financial implications thereof as part of its Counter-Claims, particularly Counter-Claim No. 4.

42. The learned Arbitral Tribunal, upon completion of pleadings, framing of issues, and recording of oral as well as documentary

evidence, proceeded to adjudicate the disputes between the parties. The proceedings involved extensive consideration of contractual clauses, correspondence exchanged between the parties, expert evidence, and project timelines.

43. Upon culmination of the arbitral proceedings, the learned Arbitral Tribunal rendered the Impugned Award dated 26.07.2025, whereby various claims and counter-claims were adjudicated. By virtue of the said Award, Claim No. 1 was partly allowed and Claim No. 4 was allowed in favour of the Petitioner, whereas Counter-Claim Nos. 1, 2, 3, 4 and 7 were allowed, and Counter-Claim Nos. 6, 9, 10, 11 and 14 were partly allowed in favour of the Respondent.

44. The net effect of the Impugned Award was that a sum of Rs. 17,08,58,125/- came to be awarded in favour of the Respondent, along with costs quantified at Rs. 1,00,00,000/-.

45. Aggrieved thereby, the Petitioner has preferred the present Petition under Section 34 of the Act, specifically Section 34(2)(b)(ii) of the Act, impugning the Award to the extent adverse to it.

CONTENTIONS ON BEHALF OF THE PETITIONER:

46. Learned senior counsel appearing on behalf of the Petitioner, would assail the Impugned Award, to the limited extent as discussed in ensuing discussion and would submit that the same is liable to be set aside under Section 34(2)(b)(ii) of the Act, being contrary to the fundamental policy of Indian law and vitiated by findings which are *ex facie* perverse, unsupported by evidence, and rendered in disregard of settled legal principles governing arbitral adjudication.

Challenge *qua* Claim No. 2

47. At the outset, learned senior counsel for the Petitioner would fairly submit that although the rejection of Claim No. 2 has been

challenged in the present Petition, the said Claim was not pressed before the learned Arbitral Tribunal on account of lack of evidence and consequently, the challenge to the Impugned Award *qua* Claim No. 2 is not pressed before this Court as well.

<u>Challenge *qua* Counter-Claim No.1</u>

48. Learned senior counsel for the Petitioner would thereafter assail the Impugned Award insofar as it allows **Counter-Claim No. 1**[20] in favour of the Respondent, towards Liquidated Damages amounting to Rs. 23,88,40,000/- along with interest thereupon. Learned senior counsel would submit that the award of CC-1 is vitiated on multiple grounds, which are discussed herein after.

<u>Delay not attributable to the Petitioner</u>

49. Learned senior counsel for the Petitioner would submit that no delay, much less a culpable delay, was attributable to the Petitioner in execution of the contractual works since the equipments in question stood supplied, erected and commissioned within the mutually extended timelines.

50. Learned senior counsel would further contend that the learned Arbitral Tribunal itself recorded a categorical finding that time was not of the essence of the contract and therefore the very substratum for levy of Liquidated Damages stood eroded. It would therefore be submitted that the award of Liquidated damages becomes internally inconsistent and legally unsustainable.

51. Learned senior counsel would draw the attention of this Court to Paragraph No. 12.8 of the Impugned Award, to substantiate the aforesaid contention and the relevant portion of which reads as under:

[20] CC-1

"12.8. ……As noted above, it is well settled that the principle of time being of the essence in a contract is not immutable but is subject to the parties' conduct and mutual agreement in the course of the execution of the contract. The Tribunal is of the view that having granted repeated extensions, the Respondent's argument that the time was of the essence of the contract lacks substance and is accordingly rejected."

(emphasis supplied)

Delay in Issuance of PAC/CEA attributable to the Respondent

52. Learned senior counsel for the Petitioner would submit that under the contractual arrangement, the obligation to procure and furnish PAC/CEA Certificates and allied documents, necessary for availing customs/excise exemptions, rested squarely upon the Respondent. In this regard, the attention of this Court would be drawn to Clause 4 of the Supply LOA, the relevant portion of which reads as under:

"**4.0 Contract Price:**
Contract price for the complete scope of supply covered under this LOA shall be Rs. 176,97,23,526/-, (One hundred Seventy Six crore Ninety Seven lakh Twenty Three Thousand Five hundred Twenty Six only) as per the Price schedule attached annexure-A
The prices for supply of goods as mentioned above are considered for Power Project to be qualified under Mega Power Policy of the Government of India and therefore entitled for exemptions of Import duty (i.e., BCD, CVD, AD and Cess thereon) and excise duty. All necessary documentation such as Project Authority Certificate (PAC), Mega Power Certificate required for availing the Mega Power benefits shall be made available by the Project Owner to supplier within six months from the date of this LoA."

53. Learned senior counsel would contend that the repeated amendments to the scope of work delayed finalisation of design, engineering and import planning, resulting in substantial delay in issuance of the requisite certification. It would be contended that a period of almost 16 months, out of 28 months of the initial Contract period, was consumed in obtaining the aforesaid certifications, thereby seeking to substantiate that the delay was occasioned by the Respondent.

54. Learned senior counsel would further submit that although the learned Arbitral Tribunal acknowledged delay on the part of the Respondent in issuance of PAC/CEA Certificates, it nevertheless proceeded to hold the Petitioner responsible by introducing an entirely new line of reasoning, *namely*, that the Petitioner could have procured certificates in phases.

55. It would therefore be urged that the said finding rests upon a hypothesis evolved *suo motu* by the learned Arbitral Tribunal, *dehors* the pleadings and evidence, which is impermissible in an arbitral proceeding, warranting interference under Section 34(2)(b)(ii) of the Act, being against the basic notions of justice, including Principles of Natural Justice. In this regard, reliance is placed upon Paragraph Nos. 12.38 and 12.39 of the Impugned Award, which are reproduced herein under for ready reference:

> "**12.38.** At this juncture, the argument of the Claimant that it was unable to provide the list of equipment due to frequent amendment to the LOAs deserves to be considered. Although there is no dispute that the LOAs were being constantly amended by the Respondent, but the Tribunal is of the view that in order to mitigate the delay in imports and consequent delay in supplies, the Claimant could have made an effort of procuring the PAC for the remaining materials in part i.e., the Claimant ought to have taken PAC and CEAs for 10 GT, 7 lCTs and could have got PAC and CEAs for 13, 110 MVAr Reactors at a later date especially when the quantity of GT and lCTs was finalized and remained unchanged in the amendments. However, the Claimant chose not to do so.
>
> **12.39.** Be that as it may, the evidence on record establishes that the PAC was ultimately issued by Respondent on 10.12.2013, the CEA Certificate was obtained on 06.01.2014 and the Import License was issued only on 05.03.2014 and, thus, there was substantial delay in the issuance of the relevant certificates in the present case. However, the Claimant has failed to establish that the manufacture of the contractual items could not at all begin without the imported parts, for which it wanted to avail of exemption from payment of Excise and Customs Duty."
>
> *(emphasis supplied)*

56. Learned senior counsel would further contend that the only case advanced by the Respondent before the learned Arbitral Tribunal, with respect to delay in providing the relevant certifications, was founded upon Clause 5 (VI) of the Supply LOA. The relevant portion of the said clause is reproduced herein under for ready reference:

> **"Clause 5 (VI) Benefits/Exemptions to Suppliers:**
>
> The prices for supply goods as mentioned at Clause no. 4.0 of this LOA are considered for Power Project to be qualified under "Mega Power Policy" of the Government of India and accordingly, attract nil Customs duties (Le. CD, CVD, ACD and SAD) on Import of raw material components & bought out Items, and nil excise duty, education cess and higher education cess on directly dispatchable components/goods. Necessary documentation such as project authority certificate (PAC), Mega Power Certificate required for availing the Mega Power benefits will be given to supplier prior to dispatches.
>
> <u>In case the necessary documents including Project Authority Certificate/Essentiality Certificate / Mega Power Certificate are not made available or there is a delay in furnishing of these documents the material shall be cleared from Customs and Excise as the case may be, on payment of duties and the total implications arising therefrom (actual) shall be to the Purchaser's account and in that event the Supplier is required to furnish the following documents</u>: -
>
> Disclaimer Certificate duly sealed and signed by Authorized Signatory (in duplicate) on Supplier's letterhead stating that the excise duty and/or custom duty as charged on Invoice No, [Number of Invoice) dated (dd/mm/yyyy) for supplies of (description of goods) have been paid and neither refund nor any exemption against such supplied goods from Central Excise or any other department has been taken/availed" …
>
> *(emphasis supplied)*

57. Learned senior counsel, in this regard, would submit that the learned Arbitral Tribunal erroneously placed reliance on the aforesaid plea of the Respondent and Clause 5(VI) of the Supply LOA to arrive at the finding that the Petitioner ought to have proceeded with the import of the materials after paying the customs duty, and sought reimbursement in terms of the aforesaid Clause.

58. Learned senior counsel would submit that the learned Tribunal had erred in relying upon the said Clause since its invocation could have been occasioned only upon a clear indication from the Respondent that the requisite certificates would not be furnished within time. The relevant paragraph, being Paragraph No. 12.40, which records the aforesaid finding of the learned Arbitral Tribunal, reads as follows:

> "12.40. In the final analysis, having regard to Clause 5 Sub-Clause VI of the LOA, which specifically provides that the Claimant on its accord could pay the Excise and Customs Duties and get the same reimbursed Respondent and the fact that the Claimant has failed to demonstrate that it could not commence the manufacturing process without availing the Customs and Excise exemptions, the Tribunal is of the view that the Claimant has failed to. establish and prove any causal link between the delay in obtaining exemptions and the commencement of manufacturing process and, therefore, the delay in supply of the contracted equipments is attributable to the Claimant."

59. In the aforesaid backdrop, learned senior counsel would submit that the aforestated finding of the learned Arbitral Tribunal, attributing delay to the Petitioner, despite concluding that the Respondent failed to furnish requisite certifications in a timely manner, is perverse, contrary to the contractual framework and unsupported by the evidentiary record.

No Actual Loss demonstrated by the Respondent

60. Learned senior counsel for the Petitioner would submit that no documentary evidence was led by the Respondent to establish any actual loss suffered on account of the alleged delay, without which the grant of Liquidated Damages is liable to be set aside, since it goes against established principles of law, being devoid of any proof or evidence.

61. Learned senior counsel would contend that the Respondent could not have suffered any losses since commercial operation of the project itself depended upon commissioning of the 765KV transmission lines, which, according to the response dated 13.11.2019 of Power Grid Corporation of India Limited, to an RTI application dated 27.09.2019, indicates that they were commissioned only on 01.10.2016 and 11.04.2017 respectively.

62. In this regard, learned counsel would further draw the attention of this Court to the communication dated 13.11.2015, whereby, while amending the purchase order, the Respondent stated that "*...the 765kV transmission system which is likely to be ready by March 2016 and all efforts are being made for the same...*".

63. Learned senior counsel would, in this backdrop, submit that in the absence of operational transmission infrastructure, no evacuation of power could have taken place, and consequently no revenue loss could have arisen. It would be submitted that the very premise of Liquidated Damages, therefore, stood negated.

64. Learned senior counsel would further assail the reliance placed by the learned Arbitral Tribunal upon the letters dated 01.04.2014, 31.07.2015 and 12.11.2015 issued by the LPGCL to the Respondent, allegedly imposing Liquidated Damages upon the Respondent on account of delay, to conclude that the Respondent suffered loss, at the instance of the Petitioner's delay in fulfilling the contract on time.

65. Learned senior counsel would contend that the aforesaid finding is erroneous since the aforesaid communications were themselves doubtful in origin since both the entities, LPGCL and the Respondent, were part of the same group of companies and shared the same registered address and also, since the said Liquidated Damages, allegedly levied by the LPGCL upon the Respondent, were

unsupported by any proof of actual deduction, remittance or financial debit by the Respondent in favour of the LPGCL.

66. Learned senior counsel would therefore contend that the award of Liquidated Damages is mechanical and contrary to settled principles of law. To substantiate the aforesaid contention, he would draw the attention of this Court to the cross-examination of RW-1 Mr. Sunil Kumar, who was the then Chief Financial Officer of the Respondent. The cross-examination was to prove that the aforesaid three letters were false and fabricated and were written and signed by an unknown person, without any designation. The relevant questions and answers thereto, of cross-examination of RW-1, are reproduced herein under:

> "Q.17. Whose signature does this document bear?
>
> Ans. I do not know.
>
> Q.18. Do you know the official designation of the person who has signed this document at the time it was issued?
>
> Ans. I do not know.
>
> Q.20. I put it to you that the document Ex. D-2 is a forged and fabricated document. What do you have to say?
>
> Ans. I do not agree. (Vol.) It was communicated to BIDCO.
>
> Q.20. Did BIDCO ever communicate with BHEL about the urgent requirement of 110 MVAR Reactors prior to 01.04.2014? If so, can you show any such communication on record?
>
> Ans. The delivery schedule of 110 MVAR Reactors were defined in the LOAS and its amendment and it was to be supplied accordingly. Hence, BIDCO was not required to make any such communication with BHEL. Q.21. Did BIDCO ever communicate with BHEL about the urgent requirement of 110 MVAR Reactors after 01.04.2014? If so, can you show any such communication on record?
>
> Ans. Yes. BIDCO did communicate with BHEL in respect of Reactors, as BHEL was failing to supply the same on the due dates. It is matter of record though I am not able to find it right now.
>
> Q.22. I put it to you that LPGCL has not withheld Rs. 50 Crores from payments due to BIDCO for this project. What do you have to say?

Ans. I disagree.

***

Q.38. Who signed this letter?

Ans. I am not aware."

Delay in approval of Drawings, incorrectly fastened upon the Petitioner

67. Learned senior counsel would submit that the allegation concerning non-submission of drawings, duly vetted by GPT, has been agitated by the Respondent for the first time in arbitral proceedings and was never pursued with any degree of seriousness during execution of the contract. He would submit that had the issue truly constituted a critical bottleneck, the Respondent would have raised contemporaneous defaults, issued notices, invoked contractual remedies, or linked milestones to such alleged omissions. The absence of any such consistent protest, according to learned Senior Counsel, clearly demonstrates that the issue had no practical bearing on the progress of the works.

68. Learned senior counsel would therefore contend that the learned Arbitral Tribunal has erroneously attached significance to the alleged delay in submission and approval of drawings, which is unsupported either by the material on record or by the actual conduct of the parties during the subsistence of the contract.

69. Learned senior counsel would submit that once the supply chain itself stood impacted by the delayed issuance of PAC and allied documents, any alleged deficiency relating to drawings became, at best, incidental and could not be elevated to a primary cause of delay.

70. Learned senior counsel would, therefore, urge that, repeated amendments to the scope of work, occasioned by the Respondent,

required corresponding revisions in drawings, technical particulars, and engineering documentation.

71. Learned senior counsel would submit that, in these circumstances, to hold the Petitioner singularly responsible for the alleged delay in drawings, while ignoring the cascading effect of repeated contractual amendments, is erroneous, contrary to the record and perverse, being unsupported by pleadings.

Waiver/Abandonment of Right to Levy Liquidated Damages

72. Learned senior counsel would therefore urge that the conduct of the Respondent clearly evidences waiver, acquiescence, or abandonment of any alleged contractual right to levy Liquidated Damages and the finding of the learned Arbitral Tribunal is contrary to settled commercial principles, and therefore against the public policy of India.

Challenge *qua* Counter-Claim Nos. 3 and 4

73. Learned senior counsel for the Petitioner would thereafter assail the Impugned Award insofar as it relates to **Counter-Claim No. 3**[21] and **Counter Claim No. 4**[22], on the grounds, *inter alia*, that they were *ex facie* barred by limitation, proceeded on assumptions contrary to the contractual framework and unsupported by evidence, and therefore warranted interference under Section 34(2)(b)(ii) of the Act. The grounds, as raised by the Petitioner while challenging CC-3 and CC-4 are discussed in the ensuing paragraphs.

CC-3 and CC-4 were ex facie barred by the Limitation

[21] CC-3
[22] CC-4

74. Learned senior counsel would submit that the learned Arbitral Tribunal has erroneously treated the cause of action for CC-3 and CC-4 as arising from a continuing breach.

75. According to the learned senior counsel, the cause of action for CC-3 crystallised on 13.11.2015, when the Respondent de-scoped 7 nos. of 110R and thereafter when the Respondent issued Letter of Award dated 17.11.2015 to Alstom for procurement of the aforesaid 7 nos. of 110R. In this light, learned senior counsel would submit that any claim for differential cost, if at all maintainable, crystallised, at best, on 17.11.2015.

76. Learned senior counsel for the Petitioner would submit that once the 7 nos. of 110R stood de-scoped and entrusted to another vendor, the Petitioner's obligations in respect thereof ceased and the subsequent extension of timelines *qua* remaining portions of the contract could not postpone limitation for a claim already accrued.

77. Learned senior counsel would further submit that CC-4 also suffers from the same infirmity. It would be urged that the 3 nos. of 110R allegedly procured later from Alstom were part of the same commercial arrangement and described as a "moral commitment" under the Letter of Award dated 17.11.2015 issued to Alstom. It was only a Purchase Order, with respect to the 3 nos. of 110R, which came to be issued to GE T&D ("erstwhile Alstom") on a later date, being 11.10.2020. Therefore, the cause of action, as for CC-4, also stood crystallised on 17.11.2015.

78. Learned senior counsel for the Petitioner would therefore submit that the limitation is founded on public policy and commercial certainty. By entertaining and allowing stale claims through an erroneous theory of continuing cause of action, the learned Arbitral Tribunal has disregarded settled principles of law. It would thus be

submitted that the findings in respect of CC-3 and CC-4 are liable to be set aside under Section 34(2)(b)(ii) of the Act, for being against the basic notions of justice.

Risk Cost Purchase could not be invoked without Contractual Termination

79. Learned senior counsel for the Petitioner would submit that the invocation of risk cost procurement was contrary to the contractual scheme since it unequivocally mandates that termination, preceded by issuance of one month notice, is an essential precondition before the Respondent herein could get the balance of work executed through a third party and recover the cost thereof from the supplier, *i.e.*, the Petitioner herein.

In support of the aforesaid contention, learned senior counsel would invite the attention of this Court to Clause 26 of the Supply LOA, which reads as under:

> "**26.0 Termination**:
> Purchaser/Owner shall be entitled to terminate the Contract/LOA, consequent to the following events/conditions:
> 1. In the event, the Supplier fails to start the work and/or falls to follow/ adhere the project schedule at any time during continuance or pendency of works, provided by the Purchaser and continues to do so after one (1) month notice to this effect the Purchaser/Owner shall be entitled to terminate the contract without assigning any reason to the Supplier.
> 2. In case the Supplier falls to perform the contract work and/or complete the contract work at any time during its continuance or pendency to the entire satisfaction of the Purchaser, the Purchaser shall be entitled to terminate the contract after giving one (1) month notice to the Supplier to this effect, the Purchaser shall be entitled to recover the damages/claims from the supplier.
> 3. Without prejudice to any other term and conditions contained in this LOA the Purchaser in event of any of the aforesaid conditions, shall be entitled to get the balance work completed by another party and recover the cost thereof from the Supplier. However, in such a case the terms related to warranty/ guarantee, LD with respect to the work completed by the supplier shall subsist/survive this LOA.

In all the above events/conditions the decision of the Purchaser shall be final and binding on the Supplier and the supplier shall not be entitled for any claim against the Purchaser/Owner."

(emphasis supplied)

80. Learned senior counsel would submit that, in the present case, neither was any notice issued to the Petitioner nor was the Contract terminated, in accordance with Clause 26 of the Supply LOA. It would be urged that the unilateral de-scoping of certain quantities by the Respondent cannot, by any stretch, be equated with termination of the Contract and, to the contrary, the Respondent continued to seek performance from the Petitioner, including supply of the remaining 3 nos. of 110R, which itself militates against any suggestion of termination, if any. In this regard, reliance would be placed upon the findings in the Minority Award, specifically Paragraph Nos. 31 and 32 of the Impugned Award, which read as under:

> "31. Hence, in the context of the provisions of clauses 26.1 and 26.2, the right to terminate the Contract thereunder did not accrue to BIOCO. In fact, there was no termination of the Contract by BIOCO. The descoping of 7 reactors by virtue of BIOCO's letter dated 13.11.2015 cannot be regarded as termination of the Contract, In fact, the subject of the said letter dated 13.11.2015 itself, describes the letter as *"Amendment: Supply 8 Erection of Transformers and Reactor for Lalitpur STTP Project"*
> 32. When there was no notice as required under Clauses 26.1 and 26.2 there could be no valid termination and, in fact, there was none. An amendment to the Contract cannot be construed as a termination. Despite the descoping the Contract was alive in respect of the remaining reactors etc."

81. Learned senior counsel would, in the aforesaid circumstances, submit that the finding returned in the Majority Award, being contrary to the express terms of the Contract and the settled principles governing contractual interpretation, falls foul of the fundamental policy of Indian law and is, therefore, liable to be set aside under Section 34(2)(b)(ii) of the Act.

No urgency established for the Supply of 110R

82. Learned senior counsel for the Petitioner would submit that the Respondent's plea of urgent requirement of reactors, purportedly justifying procurement of 110R from a third party, stands belied by the contemporaneous project record, inasmuch as the relevant infrastructure itself was not commissioned during the alleged period of urgency since 765 kV Transmission Line-I was commissioned only on 01.10.2016 and Line-II on 11.04.2017, as acknowledged by the Power Grid Corporation of India in its response under the RTI Act.

83. In these circumstances, it would be submitted that the plea of urgency is untenable and an afterthought to justify unilateral procurement. The acceptance of such a plea in the Impugned Award would therefore, in his opinion, be contrary to the record and the contractual framework, and thus, contrary to the fundamental notions of justice and morality, warranting interference under Section 34(2)(b)(ii) of the Act.

Alternate Procurement from Alstom Initiated Prematurely

84. Learned senior counsel for the Petitioner would contend that the initiation of alternate procurement by the Respondent was not only contractually impermissible but also pre-mature, being undertaken before the expiry of the extended timelines.

85. Learned senior counsel would, in this regard, draw the attention of this Court to the **Limited Tender Enquiry dated 12.10.2015**[23], issued by the Respondent for alternate procurement even prior to expiry of the timelines available to the Petitioner for completion of the Project. It would be submitted that pursuant thereto, Alstom submitted its final bid to the Respondent on 30.10.2015.

[23] LTE

86. Learned senior counsel would then draw the attention of this Court to the communication dated 03.11.2015 to submit that, even subsequent to issuance of the said LTE and submission of bids thereto, the Respondent continued calling upon the Petitioner to urgently supply all 13 nos. of 110R. The relevant extract relied upon reads as under:

> "…..We would hence request you to take all necessary action to supply all the reactors by February 2016 and request you to confirm the same. Please provide the schedule of supply of all 13 reactors on return basis so as to reach Lalitpur by February 2016."

87. Learned senior counsel would further submit that, on 13.11.2015, the Respondent communicated to the Petitioner about descoping of 7 nos. of 110R and immediately thereafter, a LOA dated 17.11.2015 was issued upon Alstom for supply of 7 nos. of 110R, with a rider that Alstom was under the "moral commitment" to supply 3 nos. of 110R, therefore, in effect, contract of all the remaining 10 nos. of 110R was granted to Alstom.

88. Learned senior counsel would contend that such conduct is demonstrative of a pre-conceived intention to substitute the Petitioner, rather than to secure performance in accordance with the contractual framework, even before the extended timelines were to end.

89. It would, therefore, be contended that the learned Arbitral Tribunal failed to appreciate this fundamental infirmity and erroneously proceeded on the premise that the Respondent was justified in undertaking alternate procurement and recovering differential cost. Such a finding, in his opinion, was contrary to settled contractual principles and the fundamental policy of Indian law, and therefore rendered the Impugned Award, to that extent, liable to be set aside under Section 34(2)(b)(ii) of the Act.

Second Risk Cost proceeding initiated after the invocation of the Arbitral Clause of the Contract

90. Learned senior counsel for the Petitioner would contend that the second set of Risk Cost proceedings initiated by the Respondent is wholly untenable, having been undertaken after invocation of the arbitral proceedings, and thus contrary to both the contractual scheme and settled principles of justice.

91. Learned senior counsel would submit that the Respondent issued a Purchase Order to GE T&D (earlier Alstom) only on 11.10.2020 for procurement of the remaining three (3) 110R, *i.e.*, after invocation of arbitration, and long after the alleged urgency had ceased to exist.

92. It is further contended that there is no material on record to establish actual supply, commissioning, or payment in respect of the said procurement, thereby undermining the very foundation of the claim.

93. In these circumstances, it would be urged by the learned senior counsel that the learned Arbitral Tribunal has erred in sustaining such a claim, which is based on post-dispute conduct and unsupported by evidence, thereby rendering the impugned findings vulnerable to interference under Section 34(2)(b)(ii) of the Act.

Challenge *qua*Counter-Claim Nos. 6, 10, 11 and 12

94. Learned senior counsel for the Petitioner would submit that the counter-claims partly allowed by the learned Arbitral Tribunal under the heads of incomplete work, leakage rectification, punch point attendances and alleged gas formation losses, being Counter-Claim Nos. 6, 10, 11 and 12, are wholly unsustainable in law and on facts.

95. Learned senior counsel would contend that the learned Arbitral Tribunal has granted amounts under these heads in the absence of

foundational evidence establishing either actual expenditure or contractual liability attributable to the Petitioner.

96. It would be urged that no primary documentary evidence, such as invoices, vouchers, work orders, or contemporaneous records evidencing execution of such works or incurring of expenditure, was placed on record by the Respondent. It would also be contended that the quantification of these claims is entirely arbitrary, with no discernible methodology or evidentiary basis reflected in the Impugned Award.

97. In these circumstances, learned counsel submits that the findings of the learned Arbitral Tribunal in respect of Counter-Claim Nos. 6, 10, 11 and 12 are based on conjecture and surmise, and suffer from patent illegality. The same, being contrary to the fundamental principles governing proof of damages and contractual liability, warrants interference under Section 34(2)(b)(ii) of the Act.

CONTENTIONS ON BEHALF OF THE RESPONDENT:

98. Learned senior counsel appearing on behalf of the Respondent would, at the outset, submit that the present Petition is nothing but an attempt to re-agitate the merits of the dispute under the limited supervisory jurisdiction of Section 34 of the Act. It would be contended that the Impugned Award is a reasoned and well-considered Award, rendered upon a detailed appreciation of extensive oral and documentary evidence, contractual terms and therefore does not warrant interference under Section 34(2)(b)(ii) of the Act.

Counter-Claim Nos. 6, 10, 11 and 12

99. Learned senior counsel appearing on behalf of the Respondent would, at this juncture, fairly submit that the Respondent does not oppose the challenge laid by the Petitioner insofar as Counter-Claim

Nos. 6, 10, 11 and 12 are concerned and confines its opposition only to Counter-Claim Nos. 1, 3 and 4.

<u>Counter-Claim No. 1</u>

100. Learned senior counsel would submit that the challenge mounted to Counter-Claim No. 1 is wholly misconceived and proceeds on a selective reading of the Impugned Award. It would be contended that the learned Arbitral Tribunal has undertaken a comprehensive examination of the contractual framework, the conduct of the parties, and the evidentiary record, and has returned a clear and reasoned finding that the delay in execution of the project was attributable to the Petitioner. The various grounds urged, substantiating the aforesaid contention, are delineated herein below.

<u>Delay squarely attributable to the Petitioner</u>

101. Learned senior counsel for the Respondent would urge that the learned Arbitral Tribunal has examined the chronology of events in considerable detail and has recorded that the delays were not isolated or incidental, but systematic and attributable to the Petitioner's own lack of preparedness and coordination with GPT, which directly contributed to the disruption of the project timelines. It would be contended that these findings constitute a reasonable and plausible view, being based on evidence and contractual obligations, which are immune from interference under Section 34 of the Act.

<u>Effect of "time not being of the essence</u>"

102. Learned senior counsel for the Respondent would submit that the Petitioner's reliance on the finding that time was not of the essence is wholly misplaced and selectively presented.

103. Learned senior counsel would urge that the contractual framework expressly provides for the levy of Liquidated Damages as

a pre-estimated compensation for delay, and the learned Arbitral Tribunal has correctly held that such entitlement survives even where extensions of time are granted. The grant of extensions, whether administrative or necessitated, cannot be construed as a waiver.

PAC/CEA: No causal delay attributable to the Respondent

104. Learned senior counsel would contend that the learned Arbitral Tribunal has found that the Petitioner itself failed to furnish the requisite technical inputs, drawings and documents in a timely manner, which were necessary for processing PAC/CEA Certificates. The delay in obtaining the said Certificates was, therefore, not an independent cause, but a consequence of the Petitioner's own default.

105. Learned senior counsel for the Respondent would further submit that the learned Arbitral Tribunal has rightly held that there is an absence of any causal nexus between delay in certification and commencement of manufacturing, and that, in terms of Clause 5(VI) of the Supply LOA, the Petitioner had the contractual liberty to proceed with imports upon payment of duties, subject to reimbursement, which the Petitioner consciously chose not to undertake.

106. In this backdrop, learned senior counsel would submit that the finding attributing delay to the Petitioner is not only plausible but is the only conclusion that reasonably emerges from the evidences on record. Such a finding cannot be disturbed merely because the Petitioner proposes an alternate narrative.

Liquidated Damages: No requirement of strict proof of loss

107. Learned senior counsel for the Respondent would submit that the Contract expressly provides for Liquidated damages as a genuine pre-estimate of loss agreed between the parties. Once a delay stands

attributable to the Petitioner, the Respondent was contractually entitled to enforce such a clause without the necessity of strict proof of actual loss.

108. Learned senior counsel would further contend that, in any event, the Respondent had placed material on record demonstrating financial consequences arising from the delay, including exposure to liquidated damages being imposed upon the Respondent by the project owner, *i.e.*, LPGCL, which was taken into consideration.

109. Learned senior counsel would thus contend that the Petitioner's argument of absence of actual loss is misconceived and contrary to settled principles governing liquidated damages. Also, these findings cannot be reopened in proceedings under Section 34 of the Act.

<u>Delay by the Petitioner of Drawings and Design</u>

110. Learned senior counsel for the Respondent would submit that the contractual framework between the parties expressly contemplated the involvement of GPT as a technical consultant for design, supervision, and execution support.

111. Learned senior counsel for the Respondent would submit that the Petitioner failed to place on record the aforesaid agreement with GPT and further failed to produce any cogent material to substantiate the existence or scope of such arrangement. This omission, it would be contended, goes to the root of the Petitioner's case insofar as the justification for delay in submission of drawings is concerned.

112. Learned senior counsel would further submit that the Respondent had, on multiple occasions, called upon the Petitioner to furnish credentials, scope of work, and supporting documentation pertaining to GPT, and had clearly indicated that approvals relating to drawings and schedules would be contingent upon the same. Despite

such repeated communications, the Petitioner failed to comply with the said requirement.

113. Learned senior counsel for the Respondent would further contend that the material on record, before the learned Arbitral Tribunal, reflects inconsistencies in the identity of the technical entity itself, with correspondence being addressed to an entity, being GPT Corporation Ukraine, distinct from that stipulated in the contract, being GPT Corporation, USA. Such circumstances, it would be contended, further undermine the Petitioner's assertion of a valid and operative technical consultancy framework.

114. In this backdrop, learned senior counsel would submit that the learned Arbitral Tribunal has, upon a detailed appreciation of pleadings and evidence, rightly concluded that the Respondent had not waived the requirement of furnishing the technical agreement or related documentation and that the delay in submission of drawings was squarely attributable to the Petitioner.

115. Learned senior counsel would therefore submit that the aforesaid findings are findings of fact, premised on documentary evidence and contractual interpretation, and represent a plausible view taken by the learned Arbitral Tribunal. The same, therefore, does not warrant interference under Section 34 of the Act.

No Waiver/Abandonment of Right to Levy Liquidated Damages

116. Learned senior counsel for the Respondent would submit that the extensions of time granted by the Respondent were in the nature of commercial indulgence, intended to facilitate completion of the project and mitigate further delay, and cannot, by any stretch, be construed as a relinquishment or abandonment of the Respondent's contractual rights. The Contract, it would be urged, expressly

contemplates the levy of Liquidated Damages for delay in Clause 7 of the LsOA, and nowhere provides that the grant of extension would operate as a waiver of such entitlement.

117. Learned senior counsel would further submit that the learned Arbitral Tribunal has, upon a correct appreciation of the contractual terms and the conduct of the parties, held that the Respondent's right to levy Liquidated Damages stood preserved notwithstanding the grant of extensions. It would be contended that any contrary interpretation would defeat the very purpose of incorporating a Liquidated Damages clause in commercial contracts, particularly in infrastructure projects where timely performance is critical.

118. Learned senior counsel would thus submit that the said finding, being a plausible and legally sustainable view, more specifically being based on the terms of the Contract, does not warrant interference under Section 34 of the Act.

<u>Counter-Claim Nos. 3 and 4</u>

119. Learned senior counsel appearing on behalf of the Respondent would next address submissions in support of CC-3 and CC-4, submitting that the same proceeds on a fundamental mischaracterisation of both the contractual framework and the findings returned by the learned Arbitral Tribunal.

120. It would be contended that the learned Arbitral Tribunal adjudicated these Counter-claims upon a detailed appreciation of the contractual stipulations, contemporaneous correspondence and the conduct of the parties. The conclusions so arrived at are, at the very least, a plausible view and therefore do not warrant interference under Section 34 of the Act.

<u>CC-3 and CC-4 were not barred by the Limitation</u>

121. Learned senior counsel would controvert the Petitioner's plea of limitation and submit that the learned Arbitral Tribunal has correctly appreciated the nature of the cause of action in respect of CC-3 and CC-4. Learned senior counsel would contend that the Petitioner's attempt to fix the cause of action at the stage of de-scoping or issuance of LOA to a third party, *i.e.*, Alstom, is legally untenable and ignores the settled principle that claims for risk and cost crystallise only upon actual incurrence and ascertainment of differential cost.

122. Learned senior counsel would submit that the learned Arbitral Tribunal has therefore rightly held that the cause of action for CC-3 and CC-4 was continuing in nature, and the consequential loss stood crystallised only upon execution of the alternate procurement.

123. Learned senior counsel would, therefore, contend that the finding returned by the learned Arbitral Tribunal treating the CC-3 and CC-4 as within the Limitation is a plausible and legally sustainable view, which does not call for interference under Section 34 of the Act.

<u>Risk and Cost Procurement: Not dependent upon Formal Termination</u>

124. Learned senior counsel would, in this regard, submit that the Petitioner seeks to read the contractual provisions in an unduly rigid and literal manner. The learned Arbitral Tribunal has rightly held that persistent delay by the Petitioner entitled the Respondent to take corrective measures to mitigate further loss, without termination of the Contract.

125. Learned senior counsel would submit that termination is not the sole mechanism available to an employer and the Contract ought to be construed in a commercially sensible manner to enable performance

and completion of the project, rather than to await formal termination at the cost of further delay and escalation.

126. Learned senior counsel would further submit that the learned Arbitral Tribunal has, therefore, correctly rejected the Petitioner's reliance on Clause 26 of Supply LOA by holding that the absence of formal termination does not denude the Respondent of its right to recover additional cost incurred due to the Petitioner's breach, particularly where the contract had to remain subsisting to seek performance of the remaining 3 nos. of 110R.

127. It would therefore be urged that the interpretation adopted by the learned Majority Tribunal is a purposive and commercially sound construction of the contract, and cannot be supplanted by a hyper-technical reading in proceedings under Section 34 of the Act.

Urgency and Necessity of Procurement Duly Established

128. Learned senior counsel would contend that the learned Arbitral Tribunal has rightly appreciated that the project was part of a larger integrated infrastructure scheme, and the timely availability of critical equipment, such as the reactor, was essential for ensuring overall project readiness.

129. Learned senior counsel would submit that the Petitioner's attempt to correlate urgency exclusively with the commissioning of the transmission lines is therefore wholly misconceived. It would be contended that a delay in procurement of critical equipment, beyond the agreed contractual timelines, constitutes a breach in itself. Such a delay cannot be justified by reference to the status of third-party infrastructure.

130. Learned senior counsel would therefore submit that under the contractual framework, governing the parties herein, any such delay is

liable to be remedied through the stipulated consequences, including levy of Liquidated Damages and recourse to risk cost procurement, irrespective of the commissioning of transmission lines, which were dependent upon an arrangement of the Respondent with a third-party to which the Petitioner has no privity.

131. Learned counsel for the Respondent would thus submit that the finding of the learned Arbitral Tribunal that procurement was necessitated by project requirement and delay attributable to the Petitioner is a factual, commercially and contractually sound conclusion, not amenable to interference under Section 34(2)(b)(ii) of the Act.

Risk-Cost Procurement not Pre-mature or Mala fide

132. Learned senior counsel for the Respondent would submit that the learned Arbitral Tribunal has examined the sequence of events, including issuance of LTE, de-scoping and placement of orders to Alstom, and has rightly concluded that such steps were necessitated by the Petitioner's continued default and inability to perform within the stipulated and extended timelines.

133. Learned senior counsel would submit that once the learned Arbitral Tribunal has already reasonably established that there was in fact a delay attributable to the Petitioner, and that there was no requirement of termination of the Contract, the invocation of the Risk Cost Procurement clause was a reasonable mitigation measure, and the same cannot be characterised as premature or unlawful merely because the Petitioner disputes the timing thereof.

No merit in the challenge to the second procurement of 3 nos. 110R

134. Learned senior counsel would contend that the rights of parties arising out of breach do not stand frozen upon invocation of

Arbitration, and the Respondent was entitled to take necessary steps to complete the project and mitigate losses. Invocation of Arbitration cannot be construed as any stay on the completion of the project.

135. Learned senior counsel would submit that, in essence, the Petitioner seeks to suggest that the Respondent ought to have stalled the execution of the Project merely because certain disputes had arisen *inter se* the parties. Such a proposition, it would be contended, is fundamentally flawed, as it would require the Respondent to expose itself to breach of its independent contractual obligation with LPGCL.

136. Learned senior counsel for the Respondent would thus contend that the Respondent, being bound to ensure timely completion of the project, was, both contractually and commercially, justified in proceeding with alternate arrangements to mitigate delay, prevent further losses and avoid cascading defaults.

Proof of Expenditure and Loss Sufficiently Established

137. Learned senior counsel would submit that the learned Arbitral Tribunal has considered the material on record and has awarded damages only upon being satisfied that the expenditure incurred was attributable to the Petitioner's failure, and since the Respondent was under the obligation to complete the Project, the Risk Cost procurement was correctly invoked by the Respondent.

138. Learned senior counsel would submit that whether procurement was belated or unsupported by evidence is a pure question of appreciation of facts, which was correctly undertaken by the Learned Arbitral Tribunal and cannot be interfered with by this Court in exercise of its jurisdiction under Section 34 of the Act.

ANALYSIS:

139. This Court has heard the learned counsel appearing on behalf of the parties at length and, with their able assistance, carefully perused the paper-book and other material documents placed on record, including the record of the learned Arbitral Tribunal, as well as the written submissions filed by the respective parties.

140. At the outset, it is apposite to note that this Court is conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the Act. The contours of judicial intervention in such proceedings have been authoritatively delineated and settled by a consistent and evolving line of precedents of the Hon'ble Supreme Court.

141. In this regard, a three-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier decisions, in ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd.***[24], while dealing with the grounds of conflict with the public policy of India and perversity, grounds which have also been urged in the present case, made certain pertinent observations, which are reproduced hereunder:

> "***Relevant legal principles governing a challenge to an arbitral award***
>
> **30.** Before we delve into the issue/sub-issues culled out above, it would be useful to have a look at the relevant legal principles governing a challenge to an arbitral award. Recourse to a court against an arbitral award may be made through an application for setting aside such award in accordance with sub-sections (2), (2-A) and (3) of Section 34 of the 1996 Act. Sub-section (2) of Section 34 has two clauses, (*a*) and (*b*). Clause (*a*) has five sub-clauses which are not relevant to the issues raised before us. Insofar as clause (*b*) is concerned, it has two sub-clauses, namely, (*i*) and (*ii*). Sub-clause (*i*) of clause (*b*) is not relevant to the controversy in hand. Sub-clause (*ii*) of clause (*b*) provides that if the Court finds that the arbitral award is in conflict with the public policy of India, it may set aside the award.
>
> ***Public policy***

[24] (2025) 2 SCC 417

31. "Public policy" is a concept not statutorily defined, though it has been used in statutes, rules, notification, etc. since long, and is also a part of common law. Section 23 of the Contract Act, 1872 uses the expression by stating that the consideration or object of an agreement is lawful, unless, inter alia, opposed to public policy. That is, a contract which is opposed to public policy is void.

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35. In ***Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644**, a three-Judge Bench of this Court observed that the doctrine of public policy is somewhat open—textured and flexible. By citing earlier decisions, it was observed that there are two conflicting positions which are referred to as the "narrow view" and the "broad view". According to the narrow view, courts cannot create new heads of public policy whereas the broad view countenances judicial law making in these areas. In the field of private international law, it was pointed out, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. However, it was clarified, a distinction is to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. It was observed that the application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. It was held that contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required.

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37. What is clear from above is that for an award to be against public policy of India a mere infraction of the municipal laws of India is not enough. There must be, inter alia, infraction of fundamental policy of Indian law including a law meant to serve public interest or public good.

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40. In ***ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263, paras 35, 38 & 39**, which also related to the period prior to the 2015 Amendment of Section 34(2)(*b*)(*ii*), a three-Judge Bench of this Court, after considering the decision in***ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705**, without exhaustively enumerating the purport of the expression "fundamental policy of Indian law", observed that it would include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. The Court thereafter illustratively referred to three fundamental juristic principles, namely:

(*a*) that in every determination that affects the rights of a citizen or leads to any civil consequences, the court or authority or quasi-judicial body must adopt a judicial approach, that is, it must act bona fide and deal with the subject in a fair, reasonable and objective manner and not actuated by any extraneous consideration;
(*b*) that while determining the rights and obligations of parties the court or Tribunal or authority must act in accordance with the principles of natural justice and must apply its mind to the attendant facts and circumstances while taking a view one way or the other; and
(*c*) that its decision must not be perverse or so irrational that no reasonable person would have arrived at the same.
41. In ***Associate Builders* v. *DDA*, (2015) 3 SCC 49**, a two-Judge Bench of this Court, held that *audi alteram partem* principle is undoubtedly a fundamental juristic principle in Indian law and is enshrined in Sections 18 and 34(2)(*a*)(*iii*) of the 1996 Act. In addition to the earlier recognised principles forming fundamental policy of Indian law, it was held that disregarding:
(*a*) orders of superior courts in India; and
(*b*) the binding effect of the judgment of a superior court would also be regarded as being contrary to the fundamental policy of Indian law.
Further, elaborating upon the third juristic principle (i.e. qua perversity), as laid down in ***ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263**, it was observed that where:
(*i*) a finding is based on no evidence; or
(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse [***Associate Builders case*, (2015) 3 SCC 49, para 31**].
To this a caveat was added by observing that when a court applies the "public policy test" to an arbitration award, it does not act as a court of appeal and, consequently, errors of fact cannot be corrected; and a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score. Thus, once it is found that the arbitrator's approach is not arbitrary or capricious, it is to be taken as the last word on facts.

The 2015 Amendment in Sections 34 and 48

42. The aforementioned judicial pronouncements were all prior to the 2015 Amendment. Notably, prior to the 2015 Amendment the expression "in contravention with the fundamental policy of

Indian law" was not used by the legislature in either Section 34(2)(*b*)(*ii*) or Section 48(2)(*b*). The pre-amended Section 34(2)(*b*)(*ii*) and its Explanation read:

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44. By the 2015 Amendment, in place of the old Explanation to Section 34(2)(*b*)(*ii*), *Explanations 1 and 2* were added to remove any doubt as to when an arbitral award is in conflict with the public policy of India.

45. At this stage, it would be pertinent to note that we are dealing with a case where the application under Section 34 of the 1996 Act was filed after the 2015 Amendment, therefore the newly substituted/added Explanations would apply [***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**].

46. The 2015 Amendment adds two Explanations to each of the two sections, namely, Section 34(2)(*b*)(*ii*) and Section 48(2)(*b*), in place of the earlier Explanation. The significance of the newly inserted *Explanation 1* in both the sections is two-fold. First, it does away with the use of words : (*a*) "*without prejudice to the generality of sub-clause (ii)*" in the opening part of the pre-amended Explanation to Section 34(2)(b)(ii); and (b) "*without prejudice to the generality of clause (b) of this section*" in the opening part of the pre-amended Explanation to Section 48(2)(*b*); secondly, it limits the expanse of public policy of India to the three specified categories by using the words "*only if*". Whereas, *Explanation 2* lays down the standard for adjudging whether there is a contravention with the fundamental policy of Indian law by providing that a review on merits of the dispute shall not be done. This limits the scope of the enquiry on an application under either Section 34(2)(*b*)(*ii*) or Section 48(2)(*b*) of the 1996 Act.

47. The 2015 Amendment by inserting sub-section (2-A) in Section 34, carves out an additional ground for annulment of an arbitral award arising out of arbitrations other than international commercial arbitrations. Sub-section (2-A) provides that the Court may also set aside an award if that is vitiated by patent illegality appearing on the face of the award. This power of the Court is, however, circumscribed by the proviso, which states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

48. *Explanation 1* to Section 34(2)(*b*)(*ii*), specifies that an arbitral award is in conflict with the public policy of India, *only if*:

(*i*) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(*ii*) it is in contravention with the fundamental policy of Indian law; or

(*iii*) it is in conflict with the most basic notions of morality or justice.

49. In the instant case, there is no allegation that the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81. Therefore, we shall confine our exercise in assessing as to whether the arbitral award is in contravention with the fundamental policy of Indian law, and/or whether it conflicts with the most basic notions of morality or justice. Additionally, in the light of the provisions of sub-section (2-A) of Section 34, we shall examine whether there is any patent illegality on the face of the award.

50. Before undertaking the aforesaid exercise, it would be apposite to consider as to how the expressions:

(*a*) "in contravention with the fundamental policy of Indian law";

(*b*) "in conflict with the most basic notions of morality or justice"; and

(*c*) "patent illegality" have been construed.

In contravention with the fundamental policy of Indian law

51. As discussed above, till the 2015 Amendment the expression "in contravention with the fundamental policy of Indian law" was not found in the 1996 Act. Yet, in ***Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644**, in the context of enforcement of a foreign award, while construing the phrase "contrary to the public policy", this Court held that for a foreign award to be contrary to public policy mere contravention of law would not be enough rather it should be contrary to:

(*a*) the fundamental policy of Indian law; and/or

(*b*) the interest of India; and/or

(*c*) justice or morality.

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55. The legal position which emerges from the aforesaid discussion is that after "the 2015 Amendments" in Section 34(2)(*b*)(*ii*) and Section 48(2)(*b*) of the 1996 Act, the phrase "in conflict with the public policy of India" must be accorded a restricted meaning in terms of *Explanation 1*. The expression "in contravention with the fundamental policy of Indian law" by use of the word "fundamental" before the phrase "policy of Indian law" makes the expression narrower in its application than the phrase "in contravention with the policy of Indian law", which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country.

56. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that:

(*a*) violation of the principles of natural justice;

(*b*) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (*c*) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law.

However, while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(*b*)(*ii*).

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Patent illegality

65. Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by the 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

66. In ***ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705**, while dealing with the phrase "public policy of India" as used in Section 34, this Court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.

67. In ***Associate Builders* v. *DDA*, (2015) 3 SCC 49**, this Court held that an award would be patently illegal, if it is contrary to:

(*a*) substantive provisions of law of India;

(*b*) provisions of the 1996 Act; and

(*c*) terms of the contract [See also three-Judge Bench decision of this Court in ***State of Chhattisgarh* v. *SAL Udyog (P) Ltd.*, (2022) 2 SCC 275**].

The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(*a*) of the 1996 Act. Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

68. In ***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131** this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that "patent illegality appearing on the face of the award" refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to "public policy" or "public interest", cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality [See ***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**]. Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award [See ***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**].

Perversity as a ground of challenge

69. Perversity as a ground for setting aside an arbitral award was recognised in***ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263**. Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.

70. In***Associate Builders* v. *DDA*, (2015) 3 SCC 49** certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:

(*i*) a finding is based on no evidence; or

(*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(*iii*) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.

71. In ***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**, which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse [See ***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131**].

72. The tests laid down in ***Associate Builders* v. *DDA*, (2015) 3 SCC 49** to determine perversity were followed in ***SsangyongEngg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131** and later approved by a three-Judge Bench of this

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Court in ***Patel Engg. Ltd.* v. *North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167**.

73. In a recent three-Judge Bench decision of this Court in ***DMRC Ltd.* v. *Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357**, the ground of patent illegality/perversity was delineated in the following terms: (SCC p. 376, para 39)

"*39*. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."

Scope of interference with an arbitral award

74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorised as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.

75. In ***Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1**, paras 27-43, a three-Judge Bench of this Court held that courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.

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Scope of interference with the interpretation/construction of a contract accorded in an arbitral award

84. An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal. However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere [See: ***SAIL* v. *Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63; *Pure Helium India (P) Ltd.* v. *ONGC*, (2003) 8 SCC 593; *McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181; *MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163**]. But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference [*South* ***East Asia Marine Engg. & Constructions Ltd.* v. *Oil India Ltd.*, (2020) 5 SCC 164**].

Whether unexpressed term can be read into a contract as an implied condition

85. Ordinarily, terms of the contract are to be understood in the way the parties wanted and intended them to be. In agreements of arbitration, where party autonomy is the *grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions used [***BALCO* v. *Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126**].

86. However, reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by the parties thereto. An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. Rather, it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract [***Adani Power (Mundra) Ltd.* v. *Gujarat ERC*, (2019) 19 SCC 9**].

87. But before an implied condition, not expressly found in the contract, is read into a contract, by invoking the business efficacy doctrine, it must satisfy the following five conditions:

(*a*) it must be reasonable and equitable;

(*b*) it must be necessary to give business efficacy to the contract, that is, a term will not be implied if the contract is effective without it;

(*c*) it must be obvious that "it goes without saying";

(*d*) it must be capable of clear expression;

(*e*) it must not contradict any terms of the contract [***Nabha Power Ltd.* v. *Punjab SPCL*, (2018) 11 SCC 508**, followed in ***Adani Power case*, (2019) 19 SCC 9**]."

(emphasis supplied)

Challenge to Claim No.2

142. This Court notes, at the outset, the fair and categorical submission advanced by learned senior counsel appearing on behalf of the Petitioner that, insofar as Claim No. 2 is concerned, the same was not pressed before the learned Arbitral Tribunal on account of lack of supporting evidence.

143. Learned senior counsel has further submitted that, in view of the aforesaid position, the Petitioner does not seek to press the challenge to the Impugned Award *qua* Claim No. 2 even in the present proceedings under Section 34 of the Act.

144. In view of the aforesaid, it is evident that no *lis* survives for consideration before this Court insofar as Claim No. 2 is concerned. This Court is therefore not called upon to examine either the correctness of the findings returned by the learned Arbitral Tribunal or the merits of the claim itself.

145. Accordingly, the Impugned Award, to the extent it pertains to Claim No. 2, is left undisturbed and stands upheld.

Challenge to Counter-Claim No.1

Effect of "Time not being of the essence"

146. The Petitioner has assailed the Impugned Award, insofar as it relates to CC-1, principally on the ground that the learned Arbitral Tribunal itself recorded a finding that time was not of the essence of the Contract and, therefore, the very substratum for the levy of Liquidated Damages stood eroded. This contention, though *prima facie* attractive, does not withstand closer scrutiny in the factual or legal context of the present case.

147. A perusal of the Impugned Award, particularly Paragraph No. 12.8 thereof, indicates that the learned Arbitral Tribunal, upon

consideration of the conduct of the parties and the repeated extensions granted during the subsistence of the Contract, concluded that time could not be regarded as being of the essence in the strict contractual sense. However, significantly, the learned Arbitral Tribunal did not treat this finding as determinative of the Respondent’s entitlement to liquidated damages for delay. The relevant finding of the learned Arbitral Tribunal, being Paragraph No. 12.8 of the Impugned Award, is reproduced herein under:

> “**12.8** Having regard to the fact that the Respondent has repeatedly granted extensions to the Claimant, to ensure completion of the Project, these extensions fundamentally undermine the Respondent's assertion that time was of the essence of the Contract. By providing multiple extensions, the Respondent effectively acknowledged and accepted the delays, thereby, departing from the strict enforcement of timelines, and indicating that the Parties' actions collectively redefined the contractual terms concerning the Project timelines. As noted above, it is well settled that the principle of time being of the essence in a contract is not immutable but is subject to the parties' conduct and mutual agreement in the course of the execution of the contract. The Tribunal is of the view that having granted repeated extensions, the Respondent's argument that the time was of the essence of the contract lacks substance and is accordingly rejected.”

148. What emerges from the aforesaid is that the learned Arbitral tribunal merely diluted the rigidity of the original timelines on account of the conduct of the parties; it did not efface the obligation of timely performance nor absolve the consequences of delay. The learned Arbitral Tribunal thereafter proceeded to independently examine the question of delay, its extent, and its attribution. Upon a detailed appreciation of the evidentiary record, it returned a categorical finding that the delay was attributable to the Petitioner. Consequent thereto, it upheld the Respondent’s entitlement to Liquidated Damages in terms of Clause 7 of the LsOA. For the sake of clarity, Clause 7 of the LsOA reads as under:

"**7.0 Liquidated Damages:**
Works/ facilities will be deemed to have been completed and would be taken over only when all components, and parts required for completion of the complete GT, ICT and Reactor Package as a whole, Essential Spare Parts, Tools & Tackles, respective O&M Manuals, complete "As-built" drawings and Test Certificates are also delivered to the satisfaction of the purchaser. If any of the above are not delivered in full and in time, the works/ facilities will be considered as delayed and LD shall become applicable.
7.1 LD for Delay:
In case of delayed completion of works/ facilities as per schedule mentioned at clause no. 6.1 above, the Contractor shall pay LD for delay @ 0.5% of Lot wise contract price per week or part thereof of the delay subject to maximum of 10% of Lot wise contract price."

149. It is a settled principle of contractual law that the expression *"time not being of the essence"* does not render delay inconsequential, nor does it preclude a party from claiming damages arising from such delay. The effect of such a finding is merely to relax the right of strict enforcement of timelines as a condition precedent to termination; it does not obliterate the right to seek compensation for delayed performance.

150. This principle assumes even greater significance in commercial infrastructure contracts, where delay in performance has cascading operational and financial consequences. In ***Construction & Design Services v. Delhi Development Authority***[25], the Hon'ble Supreme Court has authoritatively held that the grant of extension of time, by itself, does not amount to waiver of the right to recover damages, particularly where the contract expressly provides for levy of Liquidated Damages. Such a contractual stipulation continues to operate unless there is a clear and unequivocal waiver. The relevant paragraph of the said judgement, being Paragraph No. 14, is reproduced herein under for ready reference:

[25] (2015) 14 SCC 263

"14. There is no dispute that the appellant failed to execute the work of construction of sewerage pumping station within the stipulated or extended time. The said pumping station certainly was of public utility to maintain and preserve clean environment, absence absence of which could result in environmental degradation by stagnation of water in low lying areas. Delay also resulted in loss of interest on blocked capital as rightly observed in para 7 of the impugned judgment of the High Court. **In these circumstances, loss could be assumed, even without proof and burden was on the appellant who committed breach to show that no loss was caused by delay or that the amount stipulated as damages for breach of contract was in the nature of penalty. Even if technically the time was not of essence, it could not be presumed that delay was of no consequence.** Thus, even if there is no specific evidence of loss suffered by the respondent-plaintiff, the observations in the order of the Division Bench that the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital are not without any basis."

(emphasis supplied)

151. The aforesaid observations apply with equal force to the facts of the present case, where the Contract pertained to a large-scale infrastructure project involving coordinated supply, erection and commissioning obligations, the timely execution whereof was critical to the overall project schedule.

152. Further, in the present case, the Contract expressly provides for Liquidated Damages under Clause 7 of the LsOA, which is in the nature of a genuine pre-estimate of loss. The learned Arbitral Tribunal has interpreted and applied the said clause in conjunction with its finding on attribution of delay. This approach is not only consistent with the contractual framework but is also in consonance with settled legal principles governing commercial contracts, particularly in infrastructure projects where timely performance is of critical importance.

153. The Petitioner has failed to demonstrate that the aforesaid interpretation is either contrary to the terms of the Contract, or in conflict with the fundamental policy of Indian law, or so irrational as

to shock the conscience of this Court. The view taken by the learned Arbitral Tribunal is, at the very least, a plausible and legally tenable view based on the material before it.

154. In such circumstances, no ground for interference under Section 34(2)(b)(ii) of the Act is made out. The challenge to the Impugned Award on this count is, accordingly, rejected.

PAC/CEA Certificates: Absence of Causal Nexus

155. The principal submission advanced on behalf of the Petitioner is that the delay in execution of the contractual works was occasioned by the Respondent's failure to procure and furnish the PAC and CEA Certificates within the stipulated time, which were necessary for availing customs and excise duty exemptions. This contention has been specifically considered and dealt with by the learned Arbitral Tribunal in Paragraph Nos. 12.32 to 12.40 of the Impugned Award. The operative findings, as contained in Paragraph Nos. 12.38 to 12.40 are reproduced herein below for ready reference:

> "**12.38.** At this juncture, the argument of the Claimant that it was unable to provide the list of equipment due to frequent amendment to the LOAs deserves to be considered. Although there is no dispute that the LOAs were being constantly amended by the Respondent, but the Tribunal is of the view that in order to mitigate the delay in imports and consequent delay in supplies, the Claimant could have made an effort of procuring the PAC for the remaining materials in part i.e., the Claimant ought to have taken PAC and CEAs for 10 GT, 7 lCTs and could have got PAC and CEAs for 13, 110 MVAr Reactors at a later date especially when the quantity of GT and lCTs was finalized and remained unchanged in the amendments. However, the Claimant chose not to do so.
>
> **12.39.** Be that as it may, the evidence on record establishes that the PAC was ultimately issued by Respondent on 10.12.2013, the CEA Certificate was obtained on 06.01.2014 and the Import License was issued only on 05.03.2014 and, thus, there was substantial delay in the issuance of the relevant certificates in the present case. However, the Claimant has failed to establish that the manufacture of the contractual items could not at all begin without the imported parts, for which it wanted to avail of exemption from payment of Excise and Customs Duty.

> **12.40.** In the final analysis, having regard to Clause 5 Sub-Clause VI of the LOA, which specifically provides that the Claimant on its accord could pay the Excise and Customs Duties and get the same reimbursed Respondent and the fact that the Claimant has failed to demonstrate that it could not commence the manufacturing process without availing the Customs and Excise exemptions, the Tribunal is of the view that the Claimant has failed to. establish and prove any causal link between the delay in obtaining exemptions and the commencement of manufacturing process and, therefore, the delay in supply of the contracted equipments is attributable to the Claimant."
>
> (emphasis supplied)

156. A careful reading of the said findings demonstrates that the learned Arbitral Tribunal has not brushed aside the Petitioner's case, rather it has undertaken a nuanced evaluation of both the factual matrix and the contractual framework governing the parties. The learned Arbitral Tribunal has acknowledged that there was, in fact, a delay in the issuance of PAC and CEA Certificates. However, it has proceeded to examine whether such delay bore a proximate and causative nexus with the Petitioner's inability to perform its contractual obligations.

157. The learned Arbitral Tribunal has, upon appreciation of the material on record, returned a clear and categorical finding that the Petitioner failed to establish any causal nexus between the delay in issuance of PAC/CEA Certificates and the delay in commencement of manufacturing or supply of contractual equipment. This distinction between the existence of delay and its legal consequence is both significant and well-founded, for it is trite that delay on the part of one contracting party does not, by itself, exonerate the other, unless it is demonstrated that such delay directly impeded performance.

158. In arriving at the aforesaid conclusion, the learned Arbitral Tribunal has placed reliance on Clause 5(VI) of the Supply LOA, which expressly contemplates a contractual mechanism enabling the

Petitioner to proceed with procurement upon payment of applicable duties, with a corresponding right of reimbursement. The learned Arbitral Tribunal has, thus, construed the contractual scheme to mean that procurement of PAC/CEA Certificates was not an absolute condition precedent to commencement of performance, but rather a facilitative mechanism intended to confer fiscal benefit.

159. The Petitioner's submission that it was commercially imprudent to proceed without exemptions has also been considered by the learned Arbitral Tribunal and rejected, inasmuch as no material was placed to show that such a course of action was contractually prohibited or commercially unviable to the extent of halting performance altogether. The learned Arbitral Tribunal's approach, therefore, reflects a balanced appreciation of both contractual rights and commercial realities.

160. It is also evident that the learned Arbitral Tribunal has confined its analysis to the terms of the Contract and the evidentiary record, without importing any extraneous considerations. The finding that no causal nexus exists between delay in issuance of PAC/CEA Certificates and delay in performance is, thus, a reasoned finding grounded in evidence and contractual interpretation.

161. The challenge mounted by the Petitioner, in substance, seeks a re-appreciation of the evidentiary material and a substitution of its preferred interpretation of Clause 5(VI) of the Supply LOA in place of that adopted by the learned Arbitral Tribunal. Such an exercise is clearly impermissible within the limited scope of interference under Section 34(2)(b)(ii) of the Act, which does not permit this Court to act as a court of appeal over arbitral findings.

162. In view of the aforesaid, this Court finds no infirmity in the approach or conclusion of the learned Arbitral Tribunal on this aspect.

The finding that delay in issuance of PAC/CEA Certificates did not constitute the proximate cause of delay in performance is a plausible and legally sustainable view, not warranting interference under Section 34(2)(b)(ii) of the Act.

Delay Expert, Delay Analysis and Appreciation of Evidence

163. The Petitioner has assailed the Impugned Award on the ground that the learned Arbitral Tribunal disregarded that the Respondent failed to prove the expert report on delay relied upon by them and instead the learned Arbitral Tribunal evolved its own theory of delay attribution. This submission, upon a careful and holistic reading of the Award, does not merit acceptance.

164. It is a settled principle that an Arbitral Tribunal is the final arbiter of facts and evidence. The Tribunal is not bound by expert opinion and is fully competent to evaluate, accept, reject, or depart from such opinion, provided its conclusions are supported by reasons discernible from the record. Expert evidence, by its very nature, is advisory and cannot supplant the Tribunal's independent assessment of the evidentiary material.

165. A perusal of the Impugned Award, particularly Paragraph Nos. 12.21 to 12.57, including the analytical discussion contained in Paragraph Nos. 12.21, 12.27, 12.28, 12.35, 12.37, 12.54 and 12.57 demonstrate that the learned Arbitral Tribunal has undertaken a comprehensive and independent evaluation of the entire evidentiary record. The learned Arbitral Tribunal has analysed the sequence of events, contractual stipulations, contemporaneous correspondence, and the conduct of the parties, before arriving at its conclusions on delay attribution. The relevant paragraphs of the Impugned Award are reproduced herein under for ready reference:

"**12.21** The Tribunal shall now proceed to determine the individual breaches allegedly committed by the Parties and their implication on the Claims/ Counter Claims preferred by the Parties. The Claimant has divided the alleged breaches committed by the Respondent into three categories while the Respondent has divided the alleged breaches committed by the Claimant into six categories. Since the submissions of the Parties on delays are interconnected, the Tribunal proceeds to discuss the same in the following broad categories:

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12.27 In light of the above, certain undisputed facts that deserve to be taken into consideration are that: (i) the Claimant has not placed on record the technical agreement that it claims to have entered into with GPT; (ii) Clause 3 of the LOA unequivocally stipulates that the Claimant has entered into an agreement with GPT; (iii) that in spite of repeated assurances to the Respondent, the Claimant has failed to produce the technical agreement purportedly entered into with GPT; and (iv) the drawings ultimately submitted by the Claimant were without GPT logo and signature with the caveat that the Claimant would submit the drawings/ documents prepared by GPT at a later date.

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12.35 A bare reading of the above provisions indicates that: (i) LPGCL i.e., the owner of the Project was under an obligation to provide the PAC and CEA Certificate to the Claimant within 6 months from the date of the LoA; (ii) in case there was delay in furnishing of the required documents by LPGCL, the Claimant could clear the required materials from the Customs and Excise authorities on its own cost; and (iii) in case the Claimant had incurred any costs in clearing the required materials, the same was to be reimbursed by LPGCL on producing the required documents as enumerated in the provision. Nevertheless, *vide* letter dated 17.09.2012, the Respondent had assured the Claimant that it will procure from LPGCL all the necessary documents to be submitted by the Claimant before the Customs and Excise authorities.

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12.37 The Ld. Counsel further submitted that after the PAC and CEA Certificate were issued on 06.01.2014, a meeting was held on 18.02.2014 wherein it was agreed that the entire equipment shall be delivered by 31.01.2015, therefore, even if there was delay in grant of PAC, it had no link with the delay in deliveries. In any case there was no reason for the Claimant to remain passive. It had two options; i.e., to obtain PAC for materials in parts or to import the material on payment of Duty and charge the same to the Respondent as stipulated in Clause 5(Vl) of the LoA, which indemnifies the Claimant from additional liability owing to payment of extra Excise and Customs Duties, for want of the requisite Certificates.

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12.54 At this juncture, it would be essential to analyse the conduct of the Claimant in withholding the delivery of the Reactors on the grounds of pending payments by the Respondent. Clause 12 of the LOAs, which deals with terms of payment, stipulates that: (i) 10% of the contract price is paid as an initial advance; (ii) 75% of the Order Price Is payable on dispatch of the ICTs, GTs and the Reactors; (iii) on receipt of the equipment on site and subject to physical verification, 15% of the contract price becomes payable; (iv) on issuance of PAC and submission of final approved documents and O&M Manuals 5% becomes due and payable; (v) 5% becomes payable on the completion of all associated work and issuance of FAC a further 5% is due and payable. Hence, it is evident from the above that the LOAs encapsulated provisions for terms of payment that needed to be adhered to in order to release payments. Thus, it is abundantly clear that the Claimant was not entitled to claim 100% payment without fulfilling the requirements as provided for in Clause 12 of the LOAs.

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12.57 In view of the analysis above, the Tribunal holds that the Claimant is responsible for the delay in Supply, Erection, Testing and Commissioning of the subject equipment."

166. The aforesaid extracts unmistakably reveal that the learned Arbitral Tribunal's conclusions are not founded upon conjecture or a mechanical rejection of expert evidence, but upon a structured and reasoned appreciation of the material on record. The learned Arbitral Tribunal has, *inter alia*, taken into account the Petitioner's failure to place on record the technical agreement with GPT, its non-compliance with contractual requirements relating to drawings, the contractual framework governing PAC/CEA procurement, and the Petitioner's conduct in relation to performance and payment obligations.

167. The Petitioner's grievance, in essence, invites this Court to undertake a re-appreciation of the evidence and to substitute its own view on delay attribution in place of that arrived at by the learned Arbitral Tribunal. Such an exercise is wholly impermissible within the limited scope of interference under Section 34(2)(b)(ii) of the Act, which does not permit this Court to sit in appeal over arbitral findings of fact.

168. This Court finds that the delay analysis undertaken by the learned Arbitral Tribunal is reasoned, supported by the material on record, and reflective of a plausible view and therefore does not render the Award vulnerable to challenge under Section 34 of the Act.

169. In view of the foregoing, no ground is made out to interfere with the findings of the learned Arbitral Tribunal on delay analysis. The challenge on this aspect is, accordingly, rejected.

Delay Attributable to the Petitioner: A Finding of Fact

170. A perusal of the Impugned Award, particularly the discussion contained in Paragraph Nos. 12.30 to 12.57, the relevant portions whereof stand noticed hereinabove, demonstrates that the learned Arbitral Tribunal has undertaken a detailed, structured and sequential examination of the chronology of events, the contractual obligations of the parties, and their conduct during execution of the project. The learned Arbitral Tribunal has analysed contemporaneous correspondence, contractual stipulations and performance milestones to ascertain the true cause of delay. Upon such comprehensive evaluation, a clear and reasoned finding has been returned that the delay in execution of the project is attributable to the Petitioner.

171. The learned Arbitral Tribunal has, *inter alia*, taken note of delays in submission and approval of drawings, lack of timely finalisation of designs, and deficiencies in coordination with the GPT, which have a cascading effect on downstream activities such as procurement, manufacturing and supply. These findings are not based on conjecture, but emanate from the material placed on record. The learned Arbitral Tribunal has also examined the question of causation and has recorded reasons as to why the delay cannot be attributed to factors beyond the Petitioner's control.

172. In the considered view of this Court, the aforesaid determination constitutes a pure finding of fact rendered upon due appreciation of evidence. The Petitioner has failed to demonstrate that such a finding is vitiated by perversity, in the sense of being based on no evidence, or that any material evidence has been ignored, or that the conclusion is so irrational that no reasonable person could have arrived at it. The challenge, in substance, is an invitation to this Court to re-appreciate the evidence and substitute the Petitioner's preferred narrative in place of that accepted by the learned Arbitral Tribunal, an exercise which lies beyond the permissible scope of interference under Section 34 of the Act.

Liquidated Damages: No Requirement of Strict Proof of Loss

173. The Petitioner has assailed the Impugned Award on the ground that the learned Arbitral Tribunal has awarded Liquidated Damages in the absence of proof of actual loss. This contention does not merit acceptance, either qua the understanding of the contractual stipulations or in light of the findings returned in the Impugned Award.

174. A perusal of the Impugned Award reveals that the learned Arbitral Tribunal has not proceeded on any abstract or presumptive basis, but has specifically examined the enforceability of the Liquidated Damages clause within the framework of the Contract and in the backdrop of the established delay attributable to the Petitioner. The learned Arbitral Tribunal has treated the levy of Liquidated Damages not as a matter of discretion, but as a contractual consequence flowing from breach, in terms of Clause 7 of the LsOA.

175. The material discussion and findings in this regard are mentioned in Paragraph Nos. 14.1, 14.8 to 14.11 of the Impugned Award, which read as follows:

> "**14.1** Time now to focus on the Respondent's Claim for Liquidated Damages (LD). For this purpose, it would be apposite to take note of the relevant provision providing for LD. Clause 7 of the LOAs reads as follows:
>
> > "**7.0 Liquidated Damages:**
> > Works/ facilities will be deemed to have been completed and would be taken over only when all components, and parts required for completion of the complete GT, ICT and Reactor Package as a whole, Essential Spare Parts, Tools & Tackles, respective O&M Manuals, complete "As-built" drawings and Test Certificates are also delivered to the satisfaction of the purchaser. If any of the above are not delivered in full and in time, the works/ facilities will be considered as delayed and LD shall become applicable.
> > **7.1 LD for Delay:**
> > In case of delayed completion of works/ facilities as per schedule mentioned at clause no. 6.1 above, the Contractor shall pay LD for delay @ 0.5% of Lot wise contract price per week or part thereof of the delay subject to maximum of 10% of Lot wise contract price"
>
> ***
>
> **14.8** The next issue, which, warrants careful consideration is the question whether the Respondent has been able to prove that it has suffered loss owing to the delay in completion of the Project. In this regard, the Respondent has pressed into service three letters dated 01.04.2014, 31.07.2015 and 12.11.2015to aver that LPGCL has imposed LD on it owing to the delays attributable to the Claimant. In the letter dated 01.04.2014, addressed by LPGCL to the Respondent, LPGCL, while stating that the delivery of equipment has been delayed beyond acceptable limits, LPGCL had informed the Respondent that it was withholding a sum of ₹50.00 Crores out of the Package awarded to it, to be adjusted towards Liquidated Damages, which is being calculated at actual upon execution of the Contract. Similarly, in the letter dated 31.07.2015, LPGCL had intimated the Respondent that they had withheld release of 10% of the Package, aggregating to ₹23.85 Crores, to be adjusted against the Liquidated Damages at the time of closure of the Contract.
>
> **14.9** Thus, in the above context, the Tribunal is of the view that the Respondent has been able to establish that owing to the delays by the Claimant in meeting the supply requirements, as per the timelines committed by it, as referred to in the aforenoted communications, the Respondent is justified in imposing the Liquidated Damages as per the Contractual stipulations. The

Tribunal has no reason to doubt the genuineness of the letters dated 01.04.2014, 31.07.2015 and 12.11.2015 placed on record by the Respondent, more so, when in its Affidavit of admission/ denial of the documents filed by the Respondent, the Claimant has simply"denied" the said documents, without indicating the reasons for such denial.

14.10 In this regard, it would also be apposite to refer to the Claimant's letter dated 17.10.2016, which shows that the commitment of the Claimant to supply additional 3 Reactors was based on high level discussions between the representatives of LPGCL,' the Claimant and the Respondent. However, the schedule for supply, as indicated in the said letter, was still not adhered to, with the result that LPGCL while conveying its anguish in the delay in the execution of the Project, had notified the Respondent that it was withholding the aforenoted amount towards the Liquidated Damages, which, the Respondent will be liable to pay to them due to such delays.

14.11 Resultantly, in view of the afore-mentioned discussion, the Tribunal holds that the Respondent is entitled to levy Liquidated Damages on the Claimant, amounting to ₹23,84,40,000/- for the delayed supply and erection of the equipment, as stipulated in the Contract. Counter Claim No.1 is allowed accordingly."

176. It is thus evident that the learned Arbitral Tribunal has proceeded on a two-fold basis. *First*, that delay in performance stood established and was attributable to the Petitioner and *second*, that the Contract itself envisaged a pre-agreed mechanism for computation of damages in the event of such delay. The learned Arbitral Tribunal has, therefore, enforced the Liquidated Damages clause as a manifestation of the parties' agreed allocation of risk, rather than requiring strict proof of actual loss.

177. The contention of the Petitioner, if accepted, would render the Liquidated Damages clause nugatory and defeat the commercial intent underlying such stipulations, particularly in infrastructure contracts where delay has cascading consequences and actual loss may be inherently difficult to quantify with precision.

178. It is well settled that where parties have agreed to a genuine pre-estimate of damages, the same is enforceable without proof of actual

loss, unless it is demonstrated that the stipulation is by way of penalty. In ***ONGC v. Saw Pipes Ltd.***[26], the Hon'ble Supreme Court has held that a Liquidated Damages clause, if reasonable and not *in terrorem*, can be enforced even in the absence of strict proof of loss. The relevant paragraphs thereof are reproduced herein under:

> "**64.** It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Contract Act and the ratio laid down in ***Fateh Chand* v. *Balkishan Dass*, (1964) 1 SCR 515**, SCR at p. 526 wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to
> prove actual loss suffered by him.…
> **68.** From the aforesaid discussions, it can be held that:
> (*1*) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.
> (*2*) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable

[26] (2003) 5 SCC 705

or is by way of penalty, party who has committed the breach is required to
pay such compensation and that is what is provided in Section 73 of the Contract Act.
(*3*) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.
(*4*) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

(emphasis supplied)

179. The aforesaid principle has been reiterated by the Hon'ble Supreme Court in ***Construction & Design Services*** *(supra)*, wherein it was held that when breach and resultant loss are established in a commercial contract, the burden shifts upon the party committing the breach to demonstrate that the stipulated damages are penal in nature or that no loss was likely to occur. In this regard, Paragraph No. 15 of the said Judgement assumes importance, which reads as under:

"**15.** Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed."

(emphasis supplied)

180. This Court is, therefore, of the considered view that the approach adopted by the learned Arbitral Tribunal is consistent with

the contractual framework and settled principles of law. The challenge mounted by the Petitioner, in substance, seeks a re-evaluation of the sufficiency of evidence relating to loss, which lies beyond the limited scope of interference under Section 34(2)(b)(ii) of the Act.

181. The finding of the learned Arbitral Tribunal upholding the levy of Liquidated Damages is, thus, a plausible and legally sustainable view, not warranting interference.

<u>Delay in Design and Drawing: A Material Factor</u>

182. The learned Arbitral Tribunal has undertaken an independent, structured and detailed examination of the issue pertaining to delay in submission, finalisation and approval of drawings, including the process of third-party vetting, and has identified the same as a material and contributing factor in the overall delay in execution of the contractual works.

183. It is apposite to note that, under the contractual framework, the Petitioner's scope of work expressly encompassed design, engineering, and mandatory vetting by a designated third-party technical consultant, prior to manufacture and supply of the equipment. The requirement of submission of complete and compliant drawings for approval was, therefore, not merely procedural in nature, but constituted a foundational precondition for the commencement of downstream activities. This position stands unequivocally reflected in Clause 3 of the LsOA, which reads as follows:

> "BHEL has confirmed to the purchaser that it has entered Into technical consultancy agreement with Global PT Corporation, USA hereinafter referred as "GPT or Supplier's Technical Consultant" and shall procure from GPT the complete detailed design for the manufacturing of 275 MVA GT, 105MVA ICT and 80 MVAR Reactor and ensure vetting of design for 110 MVAR reactor from GPT. Also, GPT shall also provide support to BHEL by deputing their experts for manufacturing supervision upto testing. During erection and commissioning BHEL would obtain technical support

and expert advice as may be required from M/ s. Global PT for smooth commissioning."

184. The learned Arbitral Tribunal has, in this regard, undertaken a detailed scrutiny of contemporaneous correspondence and has recorded a categorical finding that the Petitioner failed to adhere to the stipulated timelines in furnishing complete, coordinated and contract-compliant drawings. The delay in securing approvals, including through the third-party vetting mechanism, has thus been traced by the learned Arbitral Tribunal to deficiencies in the Petitioner's own performance, and not to any extraneous or supervening cause. The discussion in this regard finds elaborate treatment in Paragraph Nos. 12.22 to 12.31 of the Impugned Award.

185. The contention of the Petitioner that repeated amendments to the LsOA necessitated revisions in drawings and thereby contributed to delay has also been specifically considered by the learned Arbitral Tribunal. However, the learned Arbitral Tribunal has, upon appreciation of the material on record, concluded that such amendments did not absolve the Petitioner of its obligation to ensure the timely and coordinated submission of drawings, nor did they justify the prolonged delay in complying with the contractual requirements.

186. A significant aspect which weighed with the learned Arbitral Tribunal, and which merits particular emphasis, is the Petitioner's failure to place on record the technical consultancy agreement with GPT, despite the same forming an integral component of the contractual framework. The learned Arbitral Tribunal has further taken note of the inconsistent stand adopted by the Petitioner, including its inability to substantiate the existence and scope of the GPT arrangement, as well as the fact that correspondence was

addressed to an entity distinct from that contemplated under the Contract. The learned Arbitral Tribunal has, on the basis of contemporaneous material, rejected the plea of waiver and has held that the obligation relating to GPT remained operative throughout. The findings extracted herein below clearly demonstrate that the delay in submission of drawings was attributable to the Petitioner's own non-compliance with these contractual requirements. The relevant portion of the Impugned Award in this regard is as follows:

> "**12.24** At this point, it is equally important to note that the Claimant has not put on record the technical consultancy agreement with GPT. Surprisingly, even in its Pleadings, the Claimant has not provided any cogent material to prove its technical agreement with GPT that it allegedly had entered into at the time of entering into the LOAs. It is pertinent to understand the role of GPT in the context of the issue revolving around the drawings. GPT was to provide support to the Claimant by deputing experts for manufacturing supervision upto testing and also providing technical support and expert advice during the erection and commissioning as well.
>
> **12.25** The Claimant has also averred that the Respondent is estopped from raising any objection at this juncture regarding breach of the Contract since it never objected to the said drawings as and when they were submitted for approval and neither did the Respondent put the manufacturing process at halt for want of vetting of drawings by GPT. An incisive analysis of the Pleadings and Evidence on record indicates that during the first meeting on 07.09.2012, the Claimant agreed to furnish credentials, scope of work of GPT for design consultancy by 08.11.2012. Subsequently, on 05.11.2012, during a meeting between the Parties, the Claimant confirmed that the order for the design of 275 MV A GT and 105 MV A lCT to GPT shall be placed on 07.11.2012. Similarly, during the meeting held between the Parties on 16.11.2012, the Respondent informed the Claimant that in the absence of the credentials about GPT it shall not approve/comment on MDL and Ll schedule and that the Claimant must furnish all design documents of GTP. Consequently, on 23.11.2012, the Respondent sent an email to the Claimant requesting it to furnish the credentials, scope of work of GPT for design consultancy and provide an unpriced copy of order placed on GTP, USA by 19.11.2012. The above communications between the Parties ultimately culminated in the letter dated 27.11.2012 addressed by the Claimant to the Respondent wherein the Claimant informed the Respondent as follows:

> "As per our arrangement with M/s GPT, we upload the requirements of design for Transformer with relevant parameters to their ftp server.There is no formal P.O. to be placed as it is as per our agreement with GPT ... Also, regarding point No.1 of MoM dated 16.11.2012 ... we hereby agree. the option No.2 i.e., "BHEL will submit documents/ drawings without GPT logo and signature and BHEL will also submit the original drawings/ documents prepared by GPT for BIDCO information. BIDCO will keep the drawings/ documents prepared by GPT as a reference/information."

12.26 Notably, vide the above email, the Claimant also forwarded its correspondence with one "GPT Corporation Ukraine" although the LOA categorically had stipulated "GPT Corporation USA". However, the fact remains that until 17.07.2014, the drawings were not submitted by the Claimant.

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12.30 On a conjoint reading of the Pleadings and Evidence on record, it becomes manifest that the Parties having specifically postulated about the technical consultancy agreement in Clause 3 of the LOAs, the onus was on the Claimant to establish that the Respondent had waived off the above-postulated requirement It is undisputed that the Claimant vide its letter dated 27.11.2012 opted for the second option whereby it was expected to submit the documents/ drawings without GPT logo and would subsequently submit the original drawings/ documents prepared by GPT. Such being the case, the Tribunal does not find any evidence brought on record, which may even remotely suggest that the Respondent had waived off this requirement completely. Moreso, when the Respondent had repeatedly sent requests to the Claimant to furnish the drawings, which the Claimant had failed to furnish. Moreover, the Claimant's decision not to bring the technical agreement on record is a significant failure. The caveat that the GPT drawings would be submitted at a later date does not absolve the Claimant of its obligation in any manner.

12.31 It is well settled that when the intention of the parties is expressed in an unambiguous manner and is clear from the language they have employed in the Agreement, there is no scope for drawing upon hypothetical considerations or supposed intention of the parties, In the instant case, a plain reading of the LOAs illustrates that the Parties did accord significance to the Technical Agreement stated to have been entered into by the Claimant with GPT and the concerned undertaking provided by the Claimant therein and therefore, the Tribunal cannot construe the intention of the Parties in a different manner. Resultantly, Accordingly, the Tribunal is of the firm view that the Respondent has not waived off the requirement of furnishing of the Technical Agreement and the related details concerning GPT and thus, the delays caused in the submission of drawings are attributable to the Claimant."

187. In the considered view of this Court, the aforesaid findings of the learned Arbitral Tribunal constitute a pure determination of fact, arrived at upon a comprehensive appreciation of contractual stipulations, sequencing of obligations, and contemporaneous evidence. The Petitioner has failed to demonstrate that the said findings are based on no evidence, or that relevant material has been ignored, or that the conclusions drawn are so irrational or implausible as to warrant interference within the narrow confines of Section 34(2)(b)(ii) of the Act.

188. On the contrary, the reasoning of the learned Arbitral Tribunal reflects a coherent and logical nexus between the contractual obligations relating to design and drawing, the conduct of the parties, and the resultant delay in execution. The identification of delay in design and drawing as a material contributing factor is, therefore, a plausible and well-reasoned view emanating from the record.

189. It is trite that where an arbitral finding is based on a possible and reasonable interpretation of the material on record, this Court, in exercise of jurisdiction under Section 34 of the Act, cannot substitute its own view merely because another view may also be possible. The challenge mounted by the Petitioner on this aspect, in essence, seeks a re-appreciation of evidence, which is impermissible. The challenge to the Impugned Award on this ground does not merit acceptance.

No Waiver of Right to Levy Liquidated Damages

190. The Petitioner has contended that, by granting repeated extensions of time, the Respondent had waived its right to levy Liquidated Damages. This contention stands expressly considered and rejected by the learned Arbitral Tribunal upon a careful analysis of the contractual framework as well as the conduct of the parties.

191. It must be noted that a waiver, in law, is not to be readily inferred. It must be clear, conscious, and unequivocal, and must evince an intentional relinquishment of a known right. The mere grant of extensions of time, particularly in commercial contracts, cannot, by itself, be construed as an abandonment of contractual remedies, unless supported by an express or necessarily implied waiver.

192. The learned Arbitral Tribunal has dealt with this issue in detail in Paragraph Nos. 12.9 to 12.15 of the Impugned Award. A perusal of the said discussion reveals that the learned Arbitral Tribunal has not only examined the legal position but has also scrutinised the relevant contractual provisions, including Clause 25.1 of the GCC, which mandates that any waiver must be in writing. The learned Arbitral Tribunal has recorded a categorical finding that no such written waiver exists on record and, therefore, the plea of waiver is unsustainable. The relevant paragraphs of the same read as under:

> "**12.9** At this stage, it would also be appropriate to address the question of the practical ramifications of the aforementioned conclusion that time was not of the essence of the Contract, pressed into service on behalf of the Claimant. In other words, the question for consideration is whether, having granted repeated extensions for the completion of the Project, the Respondent has waived its right to levy liquidated damages, as urged on behalf of the Claimant. In support of its proposition that once it is proved that the time is not the essence of the contract, then the necessary corollary is that the Respondent has waived its right to impose LD, reliance is placed on the decisions of the Hon'ble Supreme Court in the case of Welspun Speciality Solutions Ltd. v. Oil and Natural Gas Corp. (supra).
>
> **12.10** Per contra, the submission of the Respondent is that the Eo'Ts were granted only for the purpose of getting the Project completed and the Respondent has not waived its right to levy the LD for the delay in the execution of the Contract in its entirety. In support, the Respondent relies on Clause 25.1 of the GeC to assert that any waiver in the contractual stipulations has to be necessarily in writing and, therefore, the Respondent having not provided any kind of waiver in writing, has not waived its right to levy LD.
>
> ****

12.14 A bare reading of the above provision in the GCC indicates that the Parties have specifically stipulated that it is only through a written communication that one party can waive its rights under the Contract. In the present case, there has been no written communication by the Respondent in this behalf nor is there any document brought on record by the Claimant, which may even remotely suggest that the Respondent had waived its right to levy LD.

12.15 The analysis of the Respondent's EoT letters and Clause 25.1 of the GCC, when scrutinised through the lens of established legal principles, leads to the conclusion that the Respondent had preserved its right to impose LD throughout extending the Project timelines. At the cost of repetition, it may be noted that each extension letter issued by the Respondent explicitly reserved its rights flowing from the Contract, which obviously, includes the right to levy LD, thereby negating the plea of implied waiver. Hence, the repeated and explicit reservation of Claim for LD in these communications undermines any argument suggesting a waiver."

193. Significantly, the learned Arbitral Tribunal has also taken note of the Extension of Time communications issued by the Respondent and has found that such extensions consistently contained an express reservation of rights. These reservations, as noted by the learned Arbitral Tribunal, expressly preserved the Respondent's entitlement to enforce contractual remedies, including the levy of Liquidated Damages. The existence of such express reservations, in fact, negates any inference of implied waiver.

194. The learned Arbitral Tribunal has thus correctly drawn a distinction between the grant of extension as a matter of commercial necessity to ensure completion of the project and the relinquishment of a contractual right. In the absence of any express waiver or conduct so unequivocal as to establish abandonment, no such inference can be drawn.

195. The Petitioner has not been able to place any material on record to demonstrate that the Respondent, at any point, intended to forgo its right to levy Liquidated Damages. There is neither any written

communication nor any course of conduct that meets the threshold required in law to establish waiver. On the contrary, the contractual scheme, read with the contemporaneous record, indicates a consistent preservation of such rights.

196. The acceptance of the Petitioner's submission would, in effect, lead to an untenable position in commercial law, where every extension granted to facilitate performance would operate as a waiver of contractual remedies. Such a proposition would undermine the very purpose of incorporating Liquidated Damages clauses in infrastructure contracts and would be contrary to settled commercial principles.

197. In the considered view of this Court, the finding returned by the learned Arbitral Tribunal that there was no waiver of the Respondent's right to levy Liquidated Damages is based on a correct appreciation of the contractual provisions, supported by evidence, and aligned with settled legal principles. The said finding constitutes a plausible and reasoned determination and does not warrant interference under Section 34(2)(b)(ii) of the Act.

Conclusion vis-à-vis Counter Claim No. 1

198. Upon a cumulative consideration of the findings returned by the learned Arbitral Tribunal, this Court is satisfied that the determination in respect of Counter-Claim No. 1 is founded upon a comprehensive and structured appreciation of the contractual framework, contemporaneous material, and the conduct of the parties during execution of the project. The learned Arbitral Tribunal has meticulously analysed the issue of delay attribution, examined the competing contentions, and rendered reasoned findings on all material aspects, including delay in drawings and design, absence of causal

nexus *qua* PAC/CEA Certificates, applicability of Liquidated Damages, and the plea of waiver.

199. The challenge mounted by the Petitioner, when examined in substance, is nothing but an attempt to re-agitate questions of fact and to invite this Court to substitute its own view in place of that taken by the learned Arbitral Tribunal. Such an exercise is plainly impermissible within the limited jurisdiction under Section 34 of the Act. It is well settled that where the view taken by the learned Arbitral Tribunal is a plausible one, based on evidence and a reasonable interpretation of contractual terms, the same is immune from interference.

200. This Court does not find that the Impugned Award, insofar as it relates to Counter-Claim No. 1, suffers from perversity or that it is in conflict with the fundamental policy of Indian law or the basic notions of justice. The reasoning of the learned Arbitral Tribunal is neither arbitrary nor capricious, rather it is anchored in the material on record and supported by cogent and intelligible reasons.

201. In view of the foregoing, this Court finds no ground to interfere with the Impugned Award insofar as it pertains to Counter-Claim No.1. The challenge laid by the Petitioner on this aspect is, accordingly, rejected. The same is upheld.

Challenge to Counter Claim Nos. 3 and 4

Counter Claim Nos. 3 & 4 not barred by Limitation: A Factual Finding

202. The principal contention urged by the Petitioner is that the cause of action for the risk cost claims stood crystallised on 13.11.2015, *i.e.*, the date of alleged de-scoping, or at the latest on 17.11.2015, when the LOA came to be issued in favour of Alstom for

substituted performance. Proceeding on this premise, it is contended that CC- 3 and CC-4 are barred by limitation under Article 55 of the Limitation Act, 1963.

203. This Court is unable to accede to the aforesaid submission. A perusal of the Impugned Award demonstrates that the learned Arbitral Tribunal has examined the issue of limitation in the specific context of risk-cost claims with considerable depth and, upon an exhaustive appreciation of the contractual framework, the sequence of events, and the nature of the alleged breach. The discussion contained in the Impugned Award reflects that the learned Arbitral Tribunal has not mechanically accepted the Respondent's position, but has analysed the point at which the alleged loss became ascertainable, the effect of successive extensions of time, and the continued subsistence of obligations under the Contract. The relevant discussion on the issue of limitation is contained in Paragraph Nos. 12.16 to 12.20 of the Impugned Award; relevant extracts whereof are reproduced herein below:

> "**12.16** One of the Preliminary Objections' raised by the Claimant is that most of the Counter Claims preferred by the Respondent, in particular, Counter Claims No.1 and 3 are barred by limitation and, therefore, deserve to be rejected on this short ground alone. The Claimant asserts that the Respondent has nowhere in the Pleadings stated as to when the cause of action for the said Claims arose.
> **12.17** The basic contention of the Claimant is that as per the Respondent's own admission, the cause of action to impose Liquidated Damages accrued on 05.04.2015 but the Counter Claims were filed only on 09.01.2021, rendering them time barred and that even if the limitation is to be reckoned not on the date of filing of the Counter Claims but on 25.07.2019, when the Respondent admittedly raised its Claim with regard to Liquidated Damages for the first time, the same is barred by limitation. In so far as Counter Claim No.3 is concerned, according to the Claimant, the cause of action accrued on 13.11.2015 when 07 number of 110 MVAR Reactors were descoped and on 17.11.2015 when Letter of Award in respect of the Reactors was issued in favour of Alstom but the alleged cost of Alstom deal was intimated by the Respondent only vide letter dated 07.05.2018, whereby instead of

making any Claim qua the additional cost of procuring the Reactors,
the Claimant was simply informed that the PO value shall be reduced
to the said effect. Therefore, it is the date of institution of the Counter
Claim which is to be considered for calculation of limitation, and if deemed so, the Counter Claim is time barred, argues the Claimant.

****

12.20 The Tribunal is of the view that the bar of limitation would not apply to the Counter Claims for the following reasons:
(i). As per Clause 7.0 of LoA, the works / facilities would have been deemed completed and taken over only when all components and parts required for completion of the package as a whole, along with spare parts and complete as-built drawings and test certificates were delivered to the satisfaction of the purchaser. Admittedly, there was dispute between the Parties about the supply of complete package and the dispute was alive till the Counter Claims were filed. Admittedly, spare parts for the equipment were supplied and the drawings have still not been supplied by the Claimant.
(ii) As per Clause 11.1.1 of the GCC, Liquidated Damages are to be paid for delay in achieving provisional performance acceptance for each and every week or part thereof which elapses after the guaranteed completion date for the unit.
(iii) As per Clause 9.4, extension of time for completion could be granted and as per Clause 14 of the GCC, the guaranteed completion date could be changed. It is not in dispute that on not less than four occasions EoT was granted, the last one being on 24.05.2018 when the guaranteed completion date was amended to 31.03.2019. So, cause of action to levy Liquidated Damages and also to claim the differential cost of the Reactors purchased from Alstom which arose for the first time on expiry of the original guaranteed completion date continued till the extension thereof, i.e. 31.03.2019. It is altogether a different issue that even on 31.03.2019 the Contract was not closed. Therefore, the cause of action to file Counter Claims was subsisting on 31.03.2019. Consequently, even if we compute limitation as on the date of the filing of the Counter Claims, the same are within limitation."

204. A careful reading of the aforesaid findings reveals that the learned Arbitral Tribunal has approached the issue of limitation in the backdrop of the subsisting contractual relationship between the parties and not as an isolated event confined to November 2015. The Tribunal has specifically taken note of Clause 7.0 of the LoA, in terms whereof the contractual works/facilities could be deemed complete only upon

delivery of all components, spare parts, as-built drawings and test certificates to the satisfaction of the purchaser. The learned Tribunal has further recorded that *"the dispute was alive till the Counter Claims were filed"* and that *"even on 31.03.2019 the Contract was not closed."*. These findings assume significance inasmuch as they indicate that the obligations under the Contract continued to subsist and the disputes between the parties remained unresolved well beyond the alleged date of de-scoping.

205. The learned Arbitral Tribunal has also taken into account the undisputed fact that extensions of time were granted on multiple occasions and that the final extension was granted on 24.05.2018, whereby the guaranteed completion date stood extended till 31.03.2019. It is in this context that the learned Arbitral Tribunal concluded that *"the cause of action to levy Liquidated Damages and also to claim the differential cost of the Reactors purchased from Alstom… continued till the extension thereof, i.e. 31.03.2019."* The learned Arbitral Tribunal has thus proceeded on the basis that the cause of action in respect of the risk-cost claims was not exhausted upon the issuance of the substitute LOA, but continued during the subsistence of the contractual relationship and the extended completion period.

206. The Petitioner's attempt to anchor limitation to the date of de-scoping or issuance of LOA to a third party is, in effect, an artificial truncation of the cause of action. Such an approach disregards the fundamental distinction between breach and resultant loss. In commercial contracts of this nature, the mere act of substitution does not *ipso facto* result in loss; the loss emerges only when the substitute procurement is affected and the financial differential becomes ascertainable.

207. This Court is also unable to accept the submission that the learned Arbitral Tribunal has disregarded Article 55 of the Limitation Act. On the contrary, the learned Arbitral Tribunal has interpreted the accrual of cause of action in the factual context of continuing contractual obligations and continuing consequences of breach. Such an interpretation, founded upon the contractual terms and factual matrix of the case, clearly falls within the domain of arbitral adjudication.

208. It is well settled that the question as to when a cause of action accrues, particularly in commercial disputes involving continuing obligations and consequential losses, is often a mixed question of fact and law, substantially dependent upon the contractual framework and evidentiary record. The learned Arbitral Tribunal, being the final adjudicator of facts, has returned a reasoned finding on this aspect upon appreciation of the material placed before it.

209. No material has been placed before this Court to demonstrate that the learned Arbitral Tribunal has ignored relevant evidence, relied upon extraneous considerations, or adopted a view which no reasonable person could have taken. The challenge mounted by the Petitioner, in essence, seeks substitution of one possible interpretation with another, which is impermissible within the limited scope of interference under Section 34 of the Act.

210. In the context of the aforesaid discussion, this Court finds that the conclusion of the learned Arbitral Tribunal that CC-3 and CC-4 are within limitation constitutes a plausible and legally sustainable view emanating from the contractual terms and the factual record. The said finding does not suffer from perversity or contravention of the fundamental policy of Indian law so as to warrant interference under Section 34(2)(b)(ii) of the Act.

__Risk-Cost Procurement: Whether dependent upon Formal Termination__

211. The next limb of challenge advanced by the Petitioner is founded upon Clause 26 of the Supply LOA, it being contended that recourse to risk-cost procurement was impermissible in the absence of a formal termination of the Contract preceded by the issuance of the stipulated notice. According to the Petitioner, termination constitutes a condition precedent for the invocation of any right to procure the balance work through an alternate agency and recover the differential cost therefrom.

212. This Court is unable to accept the aforesaid submission. A careful reading of the Impugned Award demonstrates that the learned Arbitral Tribunal has undertaken an extensive and nuanced analysis of Clause 26 of the Supply LoA and the contractual scheme governing termination, substitute performance and risk-cost recovery. The learned Arbitral Tribunal has not adopted either a rigidly literal or hyper-technical interpretation of the clause. Instead, it has construed the contractual framework in a purposive and commercially sensible manner, keeping in view the nature of the project, the obligations undertaken by the parties, the serious delays attributable to the Petitioner, and the practical necessity of ensuring the timely completion of the works.

213. The learned Arbitral Tribunal has, as a matter of fact, found that the Petitioner had persistently failed to adhere to the agreed timelines despite repeated extensions and communications from the Respondent. The findings returned in Paragraph Nos. 19.7 to 19.10 of the Impugned Award clearly establish that the Respondent was constrained to take corrective measures only after the Petitioner repeatedly expressed its inability to supply the requisite Reactors

within the project schedule. The learned Arbitral Tribunal has specifically recorded that the de-scoping of seven Reactors was *"not because these were no more required, but because of the Claimant's persistent failure to adhere to the schedule despite repeated reminders."*

214. The discussion and findings rendered by the learned Arbitral Tribunal on the issue as to whether the invocation of Clause 26(3) of the Supply LOA was dependent upon formal termination of the Contract are contained in Paragraph Nos. 19.11 to 19.16 of the Impugned Award. The relevant extracts thereof are reproduced herein below:

> "**19.11** Time now to consider the contention of the Claimant that risk and cost option could not be availed by the Respondent without terminating the Contract.
>
> ****
>
> **19.14** For proper appreciation of the contentions, Clause 26 of the LoA has to be analyzed. It reads sunder:
>
> > "**26.0 – Termination**
> >
> > Purchaser/ Owner shall be entitled to terminate the Contract/LOA, consequent to the following events/ conditions:
> >
> > 1. In the event, the Supplier fails to start the work and/ or fails to follow/ adhere the project schedule at any time during continuance or pendency of works, provided by the Purchaser and continues to do so after one (1) month notice to this effect the Purchaser/Owner shall be entitled to terminate the contract without assigning any reason to the Supplier.
> >
> > 2. In case the Supplier fails to perform the contract work and/ or complete the contract work at any time during its continuance or pendency to the entire satisfaction of the Purchaser, the Purchaser shall be entitled to terminate the contract after giving one (1) month notice to the Supplier to this effect, the
> >
> > Purchaser shall be entitled to recover the damages/claims from the supplier.
> >
> > 3. Without prejudice to any other term and conditions contained in this LOA the Purchaser in event of any of the aforesaid conditions, shall be entitled to get the balance work completed by another party and recover the cost thereof from the Supplier. However, in such a case the

terms related to warranty/ guarantee, LD with respect to the work completed by the supplier shall subsist/ survive this LOA"

19.15 It is evident that Sub-clause (1) of Clause 26 speaks about the Contractor not adhering to the schedule, while Sub-clause (2) is attracted when the Contractor fails to perform to the entire satisfaction of the Owner. Sub-clause (3) starts with the phrase "without prejudice to any other terms and conditions contained in this LoA". The Tribunal is of the opinion that this phrase does not qualify as non-obstante clause as is being attempted to be projected by the Respondent. This phrase ought not be confused with "notwithstanding" anything contained elsewhere in the contract". Both the phrases serve distinct functions. The phrase "notwithstanding" indicates that the provision it introduces will override any other terms in the Contract. It establishes supremacy of the specific Clause over others. It means in

spite of' or 'despite' other provisions. In plain English, 'without prejudice to' essentially means 'without affecting'. Therefore, the phrase "without prejudice to any other terms and conditions contained in LoA" signifies 'that the Clause it introduces is complementary and does not affect the validity or operation of other provisions in the Contract. It ensures that the Clause co-exists with other terms without altering or diminishing them. Therefore, Sub-clause (3) ought not be considered overriding other provisions of the Contract. Even otherwise, the words "purchaser in the event of the aforesaid conditions" are in continuity with the words" without prejudice to any other terms and conditions contained in LOA". Consequently, if we read the entire phrase, it would be clear that the enumerated conditions must occur before the owner can invoke the risk and purchase clause.

As previously discussed, these conditions can be summarised as follows:

i) The supplier's failure to adhere to the project schedule, followed by continued default despite a one month notice.

ii) The supplier's failure to perform or complete the contract work to the purchaser's satisfaction, despite one month notice.

19.16 It is noteworthy that while Sub-clause (1) and Sub-clause (2) of Clause 26 provide for termination of the contract if the conditions laid down therein are met. However, Sub-clause (3) does not require contract termination as a pre-requisite for its invocation. Instead, it states that *"without prejudice to any other term and conditions contained in this LOA, the purchaser in the event of any of the aforesaid conditions, shall be entitled to get the balance work completed by another party and recover the cost thereof from the supplier."* This phraseology emphasises that the occurrence of the specified conditions rather than contract termination is the critical trigger for invoking Sub-clause (3). Once these conditions occur, the purchaser has the discretion to terminate the Contract under Sub clause (1) and Sub-clause (2). However, Sub-clause (3) provides an additional remedy that allows the purchaser to have the

> remaining work completed by another party and recover the cost from the supplier without necessarily terminating the Contract. If Sub-clause (3) were intended to apply only in the event of termination of the Contract, it would have been redundant as clause 15 of GCC already contains a separate clause, addressing the consequences of termination of contract for any reason, including the purchaser's right to procure the material or complete the work through alternative source and recover costs from supplier. It need not be reiterated that the phrase "without Prejudice" underscores the Parties' intention that Sub-clause (3) operates independently of termination. It is designed to take effect upon the occurrence of the specified conditions as noted above.
> Therefore, the assertion of the Claimant that termination of the Contract was a condition pre-requisite for invoking Sub-clause (3) of Clause 26 has no merit."

215. Viewed in this backdrop, the Respondent's decision not to terminate the entire Contract, but instead to de-scope a portion of the work and procure the balance through an alternate source, was clearly guided by commercial prudence and mitigation of loss. In fact, the learned Arbitral Tribunal has expressly recorded in Paragraph 19.13 of the Impugned Award that despite several breaches on the part of the Petitioner, the Respondent consciously chose not to terminate the Contract *"as a measure of business prudence"*, since termination of the entire Contract would have jeopardised completion of the main project package and exposed the Respondent to further liabilities and penalties.

216. The construction suggested by the Petitioner would therefore lead to manifestly impracticable consequences. It would compel an employer either to indefinitely await performance by a defaulting contractor, despite looming project deadlines and cascading liabilities, or to resort to wholesale termination of the Contract even where substantial portions of the work remained capable of performance. Such an interpretation would not only defeat business efficacy but

would also run contrary to settled principles of commercial construction of contracts.

217. The learned Arbitral Tribunal has harmonised Clause 26 with the broader contractual scheme, the doctrine of mitigation of damages, and the practical realities surrounding execution of the project. The finding that absence of formal termination does not extinguish the Respondent's contractual right to recover additional expenditure incurred on account of the Petitioner's default is thus a reasoned, balanced and commercially sound conclusion arising squarely from the contractual terms themselves.

218. It also bears emphasis that the interpretation of contractual clauses falls preeminently within the domain of the learned Arbitral Tribunal. Once the interpretation adopted by the Tribunal is a possible and plausible one arising from the terms of the Contract, this Court, while exercising jurisdiction under Section 34 of the Act, cannot substitute its own interpretation merely because another view may also be possible.

219. In the backdrop of the aforesaid discussion, this Court finds that the conclusion arrived at by the learned Arbitral Tribunal, namely that invocation of risk-cost procurement under Clause 26(3) was not contingent upon formal termination of the Contract, constitutes a plausible, reasoned and commercially sensible interpretation of the contractual framework. The said finding neither suffers from perversity nor discloses any patent illegality warranting interference under Section 34 of the Act.

Urgency and Necessity of Procurement from Third Party

220. The Petitioner has sought to contend that there existed no urgency warranting procurement of Reactors from third parties,

particularly by placing reliance upon the commissioning timeline of the transmission lines and by contending that the Respondent could have awaited supply from the Petitioner itself. According to the Petitioner, since certain transmission infrastructure was yet to be commissioned, there was no immediate necessity to procure the Reactors from alternate sources at a higher cost.

221. This Court finds no merit in the aforesaid submission. A perusal of the Impugned Award demonstrates that the learned Arbitral Tribunal has extensively dealt with the issue of urgency, necessity and mitigation while adjudicating CC-3 and CC-4. The learned Arbitral Tribunal has examined the contemporaneous correspondence exchanged between the parties, the project timelines, the repeated delays attributable to the Petitioner, and the cascading commercial consequences likely to ensue in the event of further delay.

222. In Paragraph Nos. 19.19 and 19.20 of the Impugned Award, the learned Arbitral Tribunal has specifically considered the necessity of alternate procurement and the circumstances in which the Respondent was compelled to procure Reactors from Alstom. The relevant extracts thereof are reproduced herein below:

> "**19.19.** In this context, the letter dated 13.10.2015 is significant whereby the Respondent explicitly requested the Claimant to ensure the supply of 9 Reactors by March 2016. This communication serves as notice to the Claimant to adhere to the scheduled delivery date, which, even with an extension, was set to expire in March 2016. In response, the Claimant in its letter dated 17.10.2015 stated that it could supply only 3 Reactors by March 2016. It went on to make a conditional offer to supply an additional three Reactors by April 2016 and another three by June 2016, provided that GT9 was postponed to June 2016. These exchanges satisfy the requirement of Sub-clause (3) of Clause 26, as the Claimant, despite being called upon to meet the scheduled delivery date, clearly indicated its inability to do so. Under these circumstances, the Respondent had no choice but to reduce the quantity to match what the Claimant was capable of supplying. Given that the Project was to be completed in a

> timely manner and there was little to no likelihood of the Claimant delivering more than what was confirmed in the letter dated 17.10.2015, the Respondent was not expected to wait any longer. Therefore, the decision to trim the quantity was not intended as a penalty, but was a necessary step compelled by the situation created by the Claimant. In these circumstances, not much significance ought to be attached to the fact that the Respondent had issued a limited tender enquiry even before formally reducing the quantity to be supplied by the Claimant. It is important to note, as indicated in the letter dated 13.11. 2015, that prior to the letter dated 13.10.2015, a meeting had already taken place in which the Claimant had expressed its inability to deliver theReactors in time. Against this backdrop, the limited tender enquiry was a necessary mitigation measure. Crucially the letter of award to Alstom India was issued only after the Respondent had formally reduced the quantity allocated to the Claimant.
>
> **19.20.** The Tribunal is convinced that there is an intrinsic link between the power to descope 7 Reactors and the Respondent's legal right to mitigate its losses. The circumstances, that led to the Respondent mitigating losses have been elaborated upon in the foregoing paragraphs. In essence, the Respondent was forced to procure the Reactors from a third party since LPGCL had imposed Liquidated Damages on the Respondent and had threatened to impose further Liquidated Damages on the Respondent on account of the delay in delivery of the Reactors in the event of failure of the Claimant to deliver the Reactors on time."

223. The aforesaid findings unmistakably demonstrate that the learned Arbitral Tribunal has returned a categorical finding that the Respondent was constrained to procure the Reactors from alternate sources owing to the Petitioner's admitted inability to adhere to the project schedule. The learned Arbitral Tribunal has specifically noted that despite repeated communications and reminders, the Petitioner unequivocally indicated its inability to supply more than three Reactors within the stipulated timeline. The learned Arbitral Tribunal has thus found that the Respondent *"was not expected to wait any longer"* and that the issuance of a limited tender enquiry constituted *"a necessary mitigation measure."*

224. The contention of the Petitioner that urgency ought to have been assessed solely with reference to the commissioning of transmission

lines has also been specifically dealt with and rejected by the learned Arbitral Tribunal. In Paragraph Nos. 19.6 and 19.9 of the Impugned Award, the learned Arbitral Tribunal has categorically held that the delay in supply of Reactors had a direct bearing upon the overall project schedule and that the de-scoping was necessitated by the Petitioner's inability to timely deliver critical equipment. The relevant extracts are reproduced herein below:

> "**19.6** The Tribunal is of the view that every act of descoping does not fall in the purview of change order. A change order is usually issued to modify the scope of work as per project requirements. However, if the deletion/removal of work from the scope of Contract is ordered due to a breach - such as failure to adhere to the project schedule, it is more akin to a consequence of default rather than a standard change order. Such an order can be treated as change order only if the Contract explicitly states that it is to be treated so. Otherwise, a descoping
> triggered by a breach would not qualify as a change order. It would rather be an exercise of contractual right due to non-performance.
>
> ****
>
> **19.9** Needless to say, that precisely in the light of these facts, the Respondent removed 7 Reactors from the scope of supply with the warning that this number would be further reduced to 3 in case the Claimant failed to confirm supply of 3 Reactors by March and another 3 by May 2016. Therefore, the reduction in the scope was not due to diminished requirement but because of the fact that the Reactors were urgently needed, yet the Claimant was not in a position to deliver the same in a timely manner. It is crucial that the Claimant failed to respond to the letter dated 13.11.2015, implying tacit agreement with the Respondent's assertions. By not objecting, the Claimant effectively consented to the reduction in the quantity. There was no contemporaneous assertion by the Claimant that it was ready and willing to supply all the 13 Reactors. It is only vide letter dated 21.05.2018 (Annexure D 23) that the Claimant for the first time wrote that it was ready to supply all the Reactors, but the decision to reduce the quantity was taken by the Respondent unilaterally. Such a belated assertion carries no sanctity."

225. The aforesaid findings clearly indicate that the learned Arbitral Tribunal appreciated the project as an integrated and interdependent commercial undertaking, wherein the timely availability of each critical component was essential for coordinated commissioning and

project completion. The learned Arbitral Tribunal has specifically found that the Reactors *"were urgently needed"* and that the reduction in scope was *"not due to diminished requirement"* but solely because the Petitioner was unable to deliver them within the required timelines.

226. Further, the learned Arbitral Tribunal has rightly analysed the issue in the context of the Respondent's obligation to mitigate losses under Section 73 of the Indian Contract Act, 1872. In Paragraph Nos. 19.21 and 19.22, the learned Arbitral Tribunal has observed as under:

> "**19.21** In fact, Section 73 of the Contract Act casts a duty on the party seeking damages to mitigate its loss. The duty to mitigate losses is encapsulated in the Explanation to Section 73, which states that "in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. Thus, the Respondent was required to take steps to mitigate the losses it suffered owing to the delays caused by the Claimant, thereby entitling it to procure the Reactors from a third party. The LOA dated 17.11.2015 placed by the Respondent upon Alstom is indeed a measure of mitigation adopted by the Respondent whereby the Respondent decided to procure 7 Reactors from a third party for an amount of ₹48,02,00,197/ -, by paying an additional amount of ₹4.89 Crores. All the seven reactors were supplied by Alstom between 16.02.2016 and 18.04.2016.
>
> 19.22 The Tribunal finds that the evidence on record shows a direct causal link between the Claimant's breach and the necessity of procuring Reactors from Alstom, which was essential to prevent further losses. The additional cost incurred by the Respondent in procuring the 7 Reactors is thus attributable to the Claimant. The Tribunal finds the Claim to be fair and reasonable, as it accounts for only the mitigation costs necessitated by the Claimant's non-performance."
>
> ****
>
> **19.24.** In view of the foregoing discussion, the Tribunal holds that the Respondent was within its rights under the Contract to purchase 7 Reactors from Alstom India, which the Claimant was required to supply as per the Contract, but was not able to meet the Respondent's requirements. Therefore, the Respondent is entitled to recover from the Claimant the price differential of ₹ 14.89 Crores, which amount has otherwise not been disputed by the Claimant. The Counter Claim is allowed, accordingly."

227. The learned Arbitral Tribunal has thus expressly linked the alternate procurement with the Respondent's statutory and contractual duty to mitigate losses arising from the Petitioner's breach. The learned Arbitral Tribunal has found a "direct causal link" between the Petitioner's default and the necessity of procurement from Alstom. It has further recorded that the additional expenditure incurred constituted only mitigation costs necessitated by the Petitioner's non-performance.

228. This Court finds no infirmity in the aforesaid reasoning. The contractual obligations undertaken by the Petitioner cannot be diluted by relying upon factors *dehors* the Contract or by selectively referring to external milestones such as the commissioning of transmission infrastructure. The Petitioner's obligation was to supply the Reactors within the agreed timelines. The status of transmission lines, which admittedly did not fall within the Petitioner's scope of work, cannot be invoked to justify persistent delays or to compel the Respondent to indefinitely postpone procurement of critical equipment.

229. This Court finds that the findings returned by the learned Arbitral Tribunal on the urgency and necessity of procurement from alternate sources are based upon contemporaneous material, contractual obligations and commercial realities emerging from the record. The said findings constitute a plausible and reasoned view and do not suffer from perversity, patent illegality or violation of the fundamental policy of Indian law warranting interference under Section 34 of the Act.

<u>Risk-Cost Procurement: Whether pre-mature and mala fide</u>

230. The Petitioner has further contended that the Respondent initiated alternate procurement prematurely, even during the

subsistence of extended timelines, and that such conduct itself evidences *mala fides* and a pre-determined intent to exclude the Petitioner from continuing the Contract. According to the Petitioner, the issuance of the LTE on 12.10.2015, prior to formal de-scoping on 13.11.2015, demonstrates that the Respondent had already decided to procure the Reactors from a third party, irrespective of the Petitioner's performance.

231. A careful perusal of the Impugned Award demonstrates that the learned Arbitral Tribunal has meticulously examined the entire sequence of events leading to the alternate procurement and has returned detailed findings based upon contemporaneous correspondence exchanged between the parties, the Petitioner's admitted inability to adhere to the contractual schedule, and the commercial exigencies facing the Respondent.

232. In this regard, the findings contained in Paragraph Nos. 19.18 and 19.19 of the Impugned Award assume considerable significance. The relevant portions thereof are reproduced herein below:

> "**19.18** … Therefore, Sub-clause (1) of Clause 26 was attracted, which, as discussed above, did not require any formal notice. Still, a communication or directive asking the Claimant to supply the Reactors within the timeframe, which was already beyond the schedule.
>
> **19.19** In this context, the letter dated 13.10.2015 is significant whereby the Respondent explicitly requested the Claimant to ensure the supply of 9 Reactors by March 2016. This communication serves as notice to the Claimant to adhere to the scheduled delivery date, which, even with an extension, was set to expire in March 2016. In response, the Claimant in its letter dated 17.10.2015 stated that it could supply only 3 Reactors by March 2016. It went on to make a conditional offer to supply an additional three Reactors by April 2016 and another three by June 2016, provided that GT9 was postponed to June 2016. These exchanges satisfy the requirement of Sub-clause (3) of Clause 26, as the Claimant, despite being called upon to meet the scheduled delivery date, clearly indicated its inability to do so. Under these circumstances, the Respondent had no choice but to reduce the quantity to match what the Claimant was capable of supplying.

Given that the Project was to be completed in a timely manner and there was little to no likelihood of the Claimant delivering more than what was confirmed in the letter dated 17.10.2015, the Respondent was not expected to wait any longer. Therefore, the decision to trim the quantity was not intended as a penalty, but was a necessary step compelled by the situation created by the Claimant. In these circumstances, not much significance ought to be attached to the fact that the Respondent had issued a limited tender enquiry even before formally reducing the quantity to be supplied by the Claimant. It is important to note, as indicated in the letter dated 13.11.2015, that prior to the letter dated 13.10.2015, a meeting had already taken place in which the Claimant had expressed its inability to deliver the Reactors in time. Against this backdrop, the limited tender enquiry was a necessary mitigation measure. Crucially the letter of award to Alstom India was issued only after the Respondent had formally reduced the quantity allocated to the Claimant"

233. The aforesaid findings clearly demonstrate that the learned Arbitral Tribunal has not viewed the issuance of the LTE in isolation. Rather, the learned Arbitral Tribunal has examined the same in the backdrop of repeated delays, prior meetings between the parties, and the Petitioner's own admission regarding its inability to timely supply the Reactors. The learned Arbitral Tribunal has specifically recorded that even prior to issuance of the LTE, the Petitioner had already conveyed its inability to meet the required schedule.

234. The learned Arbitral Tribunal has also returned a categorical finding that the Respondent could not have been expected to indefinitely await performance by the Petitioner when the project itself was time-sensitive and exposed the Respondent to serious commercial consequences. In Paragraph No. 19.20, the learned Arbitral Tribunal has specifically recorded that LPGCL had already imposed Liquidated Damages and had threatened further imposition of Liquidated Damages in the event of continued delay. The relevant portion of the aforesaid paragraph reads as under:

"**19.20** … In essence, the Respondent was forced to procure the Reactors from a third party since LPGCL had imposed Liquidated

Damages on the Respondent and had threatened to impose further Liquidated Damages on the Respondent on account of the delay in delivery of the Reactors in the event of failure of the Claimant to deliver the Reactors on time."

235. The learned Arbitral Tribunal has thus appreciated the Respondent's conduct as a commercially necessary response to the Petitioner's persistent default and not as an arbitrary or premeditated attempt to exclude the Petitioner from the Contract. The finding that the alternate procurement constituted a mitigation measure is further reinforced by Paragraph Nos. 19.21 and 19.22 of the Impugned Award, wherein the learned Arbitral Tribunal expressly invoked the principle embodied in Section 73 of the Indian Contract Act, 1872, and held that the Respondent was duty-bound to take reasonable steps to mitigate the losses occasioned by the Petitioner's breach.

236. The allegation of mala fides, in the present case, is entirely unsupported by the record. The learned Arbitral Tribunal, upon appreciation of contemporaneous material and contractual correspondence, has found no evidence whatsoever of arbitrary conduct, bad faith, or ulterior motive on the part of the Respondent. On the contrary, the findings consistently indicate that the Respondent's actions were dictated by project exigencies, contractual obligations and the pressing necessity of ensuring timely completion of the project. No ground for interference under Section 34 of the Act is therefore made out.

Challenge to Second Risk-Cost Procurement vis-à-vis CC-4 after initiation of Arbitration

237. The Petitioner has assailed Counter-Claim No. 4, *inter alia*, on the ground that procurement of the remaining three (03) 110R was undertaken after invocation of arbitration and, therefore, any consequential risk-cost claim is legally impermissible. According to

the Petitioner, once disputes had crystallised and arbitral proceedings had commenced, the Respondent could not have proceeded with substitute procurement and thereafter saddled the Petitioner with the differential cost thereof.

238. This contention, though emphatically urged, does not merit acceptance. A perusal of the Impugned Award demonstrates that the learned Arbitral Tribunal has specifically examined this aspect while adjudicating CC-4 and has returned a categorical finding that the subsequent procurement was necessitated solely on account of the Petitioner’s continued refusal to supply the remaining 3 nos. Of 110R in accordance with the contractual terms.

239. In this regard, the discussion contained in Paragraph Nos. 19.34 to 19.36 of the Impugned Award assumes significance. The relevant extracts thereof are reproduced herein below:

> “**19.34** This brings us to the argument of the Claimant that in fact the Respondent never insisted on supply of Reactors till 2019 because till then there was no 'need and that the action of purchasing Reactors from third party a higher cost of ₹6.71 Crores per Reactor when the Claimant was willing to supply the same at the contractual price of 3.93 crores per Reactor smacks of malafides.
>
> **19.35** The Tribunal does not find substance in the argument. Till the invocation of Arbitration, it is the Claimant who remained adamant in its stand not to supply unless payment in advance was made. Therefore, it does not lie in its mouth to claim that till 2019 the Reactors were not required. No doubt that the contractual price was less than what was paid to the third party, it cannot be said that the action of the Respondent suffered from malafides. The Claimant was not willing to supply as per the terms of the Contract. Therefore, it was not a case that the Claimant was willing to supply but the Respondent mischievously purchased the Reactors from a third party. The situation created by distinct and unequivocal refusal by the Contractor to supply unless its conditions were agreed to was serious enough for the Respondent to decide to make purchase from third party.
>
> **19.36** It is not disputed that the landed cost of the Reactors supplied by the Claimant was ₹4.91 Crores per Reactor against which the landed cost of supply made by GET&D was Crores per Reactor. However, the action of the Respondent is to be judged not

by the price difference but in the light of the circumstances created by the Claimant. So, it is not the Respondent but the Claimant who has to bear the cost. In that view of the matter, the difference would work out to be ₹6.91 Crores per Reactor. Multiplied by 3, the amount which the Respondent is entitled to recover from the Claimant is Crores. The Counter Claim is allowed accordingly."

240. The aforesaid findings clearly establish that the learned Arbitral Tribunal has not treated the mere invocation of arbitration as an embargo on contractual performance or commercial decision-making. On the contrary, the learned Arbitral Tribunal has appreciated that despite the pendency of disputes, the Respondent continued to remain contractually obligated to ensure completion of the project and could not indefinitely postpone procurement of critical equipment merely because arbitral proceedings had commenced.

241. It is well settled that commencement of arbitral proceedings does not suspend the underlying contract unless the contract itself stands terminated or a competent forum restrains further performance. Arbitration is fundamentally a mechanism for adjudication of disputes and does not, by itself, operate as a stay on performance of contractual obligations or commercially necessary measures undertaken in mitigation of losses.

242. The learned Arbitral Tribunal has specifically recorded that it was the Petitioner itself which had adopted an unequivocal stand that supply would not be affected unless advance payment and clearance of alleged outstanding dues were first made. The learned Arbitral Tribunal has, therefore, rightly concluded that the Respondent's decision to procure the remaining Reactors from a third party was not voluntary or *mala fide*, but was necessitated by the situation created by the Petitioner's own refusal to perform in accordance with the Contract.

243. The submission of the Petitioner, if accepted, would lead to manifestly untenable and commercially unworkable consequences. It would imply that immediately upon invocation of arbitration, the Respondent was required to halt execution of the project, indefinitely defer procurement of essential equipment, and expose itself to continuing delays, liabilities and third-party claims, notwithstanding the Petitioner's refusal to perform. Such an interpretation would fundamentally undermine the commercial purpose of the Contract.

244. The findings recorded in Paragraph Nos. 19.34 to 19.36 of the Impugned Award thus constitute a reasoned and plausible view founded upon contractual interpretation, contemporaneous correspondence and commercial realities. The challenge raised by the Petitioner, in essence, seeks a re-appreciation of factual findings and contractual construction undertaken by the learned Arbitral Tribunal, which is impermissible within the limited scope of interference under Section 34 of the Act.

Sufficiency of Evidence and Quantification of Loss

245. The Petitioner has further contended that the Respondent failed to establish actual expenditure or loss in support of Counter-Claim Nos. 3 and 4, and that the Impugned Award, to that extent, is unsustainable. According to the Petitioner, there was no strict proof of payment, actual financial outflow, or legally admissible evidence establishing the exact differential loss allegedly incurred by the Respondent. This Court finds no merit in the said submission.

246. A perusal of the Impugned Award demonstrates that the learned Arbitral Tribunal has not proceeded on mere assertions or unsubstantiated pleadings, but has undertaken a detailed examination of the contemporaneous material placed on record in support of the

alternate procurement undertaken by the Respondent and the consequential differential cost incurred thereby. The learned Arbitral Tribunal has examined the contractual background, the necessity for substitute procurement, the procurement process itself, and the nexus between the expenditure incurred and the Petitioner's breach, before allowing the claims.

247. In this regard, the discussion contained in Paragraph Nos. 19.21 to 19.24 of the Impugned Award assume significance. The learned Arbitral Tribunal has specifically recorded that the procurement from Alstom was undertaken as a mitigation measure necessitated by the Petitioner's inability to meet the project requirements and that the additional expenditure incurred was directly attributable to such default.

248. Equally significant is Paragraph No. 19.23 of the Impugned Award, wherein the learned Arbitral Tribunal has specifically noticed that the Petitioner did not meaningfully challenge the amounts incurred by the Respondent during cross-examination and had, instead, confined its challenge primarily to the issue of de-scoping.

249. The Petitioner has further contended that the Respondent failed to establish actual expenditure or loss in support of Counter-Claim Nos. 3 and 4, and that the Impugned Award, to that extent, is unsustainable. This Court finds no merit in the said submission. The relevant paragraphs in support of the foregoing discussion, being Paragraph Nos. 19.21 and 19.22 have been reproduced herein before, while Paragraph No. 19.23 is reproduced herein under for ready reference:

> "**19.23** Pertinently, the Claimant did not cross-examine the Respondent's Witness with respect to the amounts paid by the Respondent to Alstom, but has primarily focused on the aspect of descoping of the Reactor. The relevant extract from the cross-

examination of RW-1, which sheds light on this issue, is as follows:

> "Q.34: Despite issuing LTE for 10 Reactors, why did you confine the LOA granted to ALSTOM to 7 Reactors?
> Ans: 10 Nos. Reactors were mentioned in the limited tender enquiry while the LOA was placed for 7 Reactors as mutually agreed between BIDCO and ALSTOM, for meeting the project site requirement of synchronization by March 31,2016.
>
> ****
>
> Q. 52 When were the 7 Reactors allegedly supplied by ALSTOM erected and commissioned?
> Ans: By March, 2016."

250. The aforesaid findings clearly establish that the learned Arbitral Tribunal was satisfied, upon appreciation of documentary and oral evidence, that the Respondent had in fact undertaken substitute procurement and incurred additional expenditure on account thereof. Significantly, the Petitioner did not seriously dispute either the procurement itself or the actual amounts paid thereunder during the evidentiary stage. In such circumstances, it does not lie in the mouth of the Petitioner to contend, at the stage of challenge under Section 34, that the claims lacked evidentiary foundation altogether.

251. The Petitioner's challenge, in essence, invites this Court to undertake a fresh scrutiny of the evidentiary record and to reassess whether the proof adduced before the learned Arbitral Tribunal was sufficient or adequate. Such an exercise is wholly impermissible within the limited confines of Section 34 of the Act, particularly in the absence of any allegation that the findings are based on no evidence or that vital material has been ignored.

252. It is also pertinent to note that claims arising out of risk-cost procurement in commercial contracts cannot be tested with the rigidity of strict proof applicable to a conventional civil trial. In complex infrastructure and EPC contracts, damages arising from substitute procurement are necessarily assessed on the basis of contractual

documents, procurement records, correspondence, comparative costing and surrounding commercial circumstances. The law requires reasonable and credible substantiation of loss, not mathematical exactitude or proof beyond all conceivable doubt.

253. The learned Arbitral Tribunal has, in fact, confined the award only to the actual differential expenditure incurred by the Respondent and has not granted any speculative or remote damages. The quantification undertaken by the learned Arbitral Tribunal is therefore rooted in the material available on record and bears a direct nexus with the breach established against the Petitioner.

254. In the present case, the findings returned by the learned Arbitral Tribunal demonstrate due application of mind, appreciation of evidence and a reasoned nexus between the breach, mitigation measures, and the expenditure incurred. No perversity or contravention of the fundamental policy of Indian law has been made out.

255. Accordingly, the challenge on the ground of absence of strict proof of expenditure or loss is rejected and does not warrant interference with the Impugned Award.

Conclusion vis-à-vis CC-3 and CC-4

256. In view of the foregoing discussion, this Court finds that each of the challenges mounted by the Petitioner to Counter-Claim Nos. 3 and 4 fail to meet the threshold envisaged under Section 34(2)(b)(ii) of the Act.

257. The learned Arbitral Tribunal has, upon a comprehensive appreciation of the contractual framework, contemporaneous correspondence, oral testimony and documentary material, returned detailed and reasoned findings on all aspects arising for consideration,

including limitation, permissibility of risk-cost procurement, urgency and necessity of alternate procurement, timing thereof, mitigation of losses, and quantification of damages.

258. The contention of the Petitioner that the claims were barred by limitation has been rightly rejected by the Tribunal upon holding that the cause of action subsisted during the extended contractual period and crystallised within the limitation period. Likewise, the Tribunal's interpretation that recourse to risk–cost procurement was not dependent upon formal termination, but could be invoked as a measure to mitigate loss in the face of persistent default, is a commercially sound and legally tenable construction of the contract.

259. The cumulative effect of the submissions advanced by the Petitioner is nothing but an invitation to this Court to re-appreciate evidence, re-interpret contractual clauses, and substitute the findings returned by the learned Arbitral Tribunal with another possible view. Such an exercise lies wholly beyond the permissible scope of interference under Section 34 of the Act.

260. In view of the foregoing detailed discussion on all the grounds contended by the Petitioner, this Court finds no element of perversity, irrationality, or contravention of the fundamental policy of Indian law in the findings returned by the learned Arbitral Tribunal insofar as Counter-Claim Nos. 3 and 4 are concerned.

261. Accordingly, the Impugned Award, to the extent it allows Counter-Claim Nos. 3 and 4, warrants no interference and is upheld.

Counter-Claims Nos. 6, 10, 11 and 12

262. This Court further takes note of the fair and candid submission advanced by learned senior counsel appearing on behalf of the Respondent that it does not seek to contest the challenge laid by the

Petitioner insofar as it pertains to Counter-Claim Nos. 6, 10, 11 and 12.

263. It has been specifically submitted that the Respondent confines its opposition in the present proceedings to Counter-Claim Nos. 1, 3 and 4, and does not seek to sustain the findings returned by the learned Arbitral Tribunal qua Counter-Claim Nos. 6, 10, 11 and 12.

264. In view of the aforesaid concession, no further adjudication is required insofar as the merits of Counter-Claim Nos. 6, 10, 11 and 12 are concerned. It is well settled that where a party, in proceedings under Section 34 of the Act, elects not to support a severable portion of the arbitral award, the Court is not required to independently undertake an examination of the correctness thereof, provided such portion is capable of being segregated from the remainder of the Award.

265. At this juncture, it becomes necessary to advert to the principle of severability of arbitral awards and the permissibility of partial setting aside under Section 34 of the Act. In this regard, reference may be made to the decision of the Hon'ble Supreme Court in ***Gayatri Balasamy vs. M/s ISG Novasoft Technologies Limited***[27]**,** wherein the doctrine of severability and the power of partial setting aside were elaborately considered. The relevant observations contained in Paragraph Nos. 33 to 35 thereof are reproduced herein below:

> "**33.** We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the court's jurisdiction when setting aside an award.
> **34.** To this extent, the doctrine of *omne majus continet in se minus*—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its

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entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the "valid" and "invalid" portions are legally and practically inseparable. In simpler words, the "valid" and "invalid" portions must not be inter-dependent or intrinsically intertwined. If they are, the award cannot be set aside in part."

266. In the considered view of this Court, the findings returned by the learned Arbitral Tribunal *qua* Counter-Claim Nos. 6, 10, 11 and 12 are clearly severable and independent of the findings rendered in respect of Counter-Claim Nos. 1, 3 and 4, which have been separately examined hereinabove. The adjudication pertaining to the aforesaid Counter-Claims neither forms the foundational basis of, nor is intrinsically intertwined with, the surviving portions of the Impugned Award.

267. In such circumstances, and particularly in light of the unequivocal stand adopted by the Respondent, this Court finds no impediment in partially setting aside the Impugned Award to the limited extent of Counter-Claim Nos. 6, 10, 11 and 12, while sustaining the remainder thereof.

268. Accordingly, the Impugned Award, insofar as it relates to Counter-Claim Nos. 6, 10, 11 and 12, is set aside.

DECISION:

269. In view of the foregoing detailed discussion and the findings returned hereinabove, the present Petition under Section 34 of the Act is partly allowed.

270. The findings returned by the learned Arbitral Tribunal in respect of Counter-Claim Nos. 1, 3 and 4 are found to be reasoned,

plausible and based upon a proper appreciation of the contractual framework, contemporaneous correspondence and evidentiary material on record. No ground warranting interference under Section 34(2)(b)(ii) of the Act is made out in respect of the said Counter-Claims. Accordingly, the challenge laid by the Petitioner to the Impugned Award, insofar as it pertains to Counter-Claim Nos. 1, 3 and 4, is rejected and, therefore, the Impugned Award, to the extent it allows Counter-Claim Nos. 1, 3 and 4, is upheld.

271. However, in view of the categorical and unequivocal stand adopted by the Respondent during the course of hearing, and for the reasons recorded hereinabove, the Impugned Award, insofar as it pertains to Counter-Claim Nos. 6, 10, 11 and 12, is set aside.

272. The remaining findings and directions contained in the Impugned Award, not specifically interfered with hereinabove, shall remain undisturbed and continue to bind the parties.

273. The present Petition, along with pending Application(s), if any, stands disposed of in the aforementioned terms.

274. There shall be no order as to costs.

HARISH VAIDYANATHAN SHANKAR, J.

MAY 29, 2026/DJ