



2025:DHC:2711



\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Pronounced on: 17.04.2025

+

FAO(OS) (COMM) 164/2023

IL&FS PARADIP REFINERY WATER LIMITED Appellant

versus

INDIAN OIL CORPORATION

..... Respondent

+

FAO(OS) (COMM) 165/2023

IL&FS PARADIP REFINERY WATER LIMITED Appellant

versus

INDIAN OIL CORPORATION

..... Respondent

For the Appellant : Mr. T. Srinivasa Murthy, Mr. Piyush Joshi,
Ms. Sumiti Yadava, Ms. Meghna Sengupta,
Ms. Trushita Srivastava and Ms. Manasvi
Kumar, Advocates.

For the Respondent : Mr. I.S. Alag, Sr. Adv. with Mr. Rajat Navet
and Mr. Kushagra Pandit, Advocates.

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****JUDGMENT****TARA VITASTA GANJU, J.:****TABLE OF CONTENTS**

Preface.....	2
Brief facts.....	3
Impugned Judgment.....	5
Contentions of the Appellant.....	9
Contentions of the Respondent.....	13
Analysis and Findings.....	18
Conclusion.....	40



PREFACE

1. The present appeals are filed under Section 37 (1)(c) of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as “Arbitration Act”], read with Section 13 Commercial Courts Act, 2015, against a common judgement passed by the learned Single Judge, pronounced on 03.05.2023 and released on 12.05.2023 in two petitions filed under Section 34 of Arbitration Act in O.M.P. (COMM) No. 110/2018 captioned Indian Oil Corporation Ltd v. IL&FS Paradip Refineries Water Ltd and O.M.P. (COMM) No. 111/2018 captioned IL&FS Paradip Refinery Water Limited v. Indian Oil Corporation Limited [hereinafter referred to as “Impugned Judgement”].

2. By the Impugned Judgement, the learned Single Judge decided the petitions filed by the parties, both challenging an Arbitral Award dated 08.10.2017, (as modified by Order dated 12.11.2017) [hereinafter referred to as “Arbitral Award”] as delivered by the Arbitral Tribunal [hereinafter referred to as “Arbitral Tribunal”]. The learned Single Judge partially set aside the Arbitral Award.

3. The challenge in the present Appeals is by IL&FS Paradip Refinery Water Limited alone. The Appellant has bifurcated the reliefs they seek in two separate appeals. In F.A.O.(OS)(COMM) No. 164/2023, the Appellant seeks the grant of its Claim No.4, which has not been allowed either by the Arbitral Tribunal or the learned Single Judge and also to set aside the Arbitral Award on the Counter Claim of the Respondent in the sum of Rs.2 crores along with interest therein, as allowed by both Arbitral Tribunal and the learned Single Judge.



3.1 In addition, the challenge in F.A.O. (OS) (COMM) No. 165/2023 by the Appellant is to restore the Arbitral Award on Claim No.2 and 3, which have been set aside by the learned Single Judge.

BRIEF FACTS

4. Briefly, the disputes in the present appeals arise out of a Build-Own-Operate-Transfer Basis Agreement dated 29.01.2010 executed by the Respondent with the Appellant [hereinafter referred to as “BOOT Agreement”] for transportation of water from Mahanadi River at Cuttack to Paradip for Respondent's Paradip Refinery Project. Under the terms of the BOOT Agreement, the Appellant was entrusted with the construction and development of five facilities:

- (i) A water intake structure;
- (ii) Installation of 93 KM (approx.) water pipeline;
- (iii) Construction of a water reservoir at the refinery;
- (iv) Development of a water treatment plant; and
- (v) Construction of three treated water sumps.

4.1 The BOOT Agreement stipulated a completion period of 26 months from the Letter of Acceptance dated 25.09.2009, making the intended Commercial Operation Date [hereinafter referred to as “COD”] as 26.09.2011. However, the actual COD was achieved on 01.06.2014 after a 30-month delay.

4.2 Under the BOOT Agreement, the Appellant was responsible for the project's design, engineering, financing, procurement, construction, operation, and maintenance. The payment was to be made through equated monthly installments (EMIs) after successful project completion. The



Request for Proposal indicated that the Respondent had secured preliminary approvals from various authorities, including the Water Resources Department (WRD) of Odisha, any additional permissions were to be obtained by the Appellant in conjunction with the Respondent. Upon project completion, disputes arose leading to claims by the Appellant. After attempted mutual consultation through a communication dated 18.01.2016, the matter proceeded to arbitration.

5. As stated above, the present appeals seek the grant of Claims No.2, 3 and 4 of the Appellant, and to set aside the three Counter-Claims awarded to the Respondent. The Claims/Counter-Claims under challenge have been extracted herein below for ease of reference:

Claim 2: Balance payment for the extra work done in respect of laying of Cuttack City pipe line amounting to Rs.32,62,62,322/-.

Claim 3: Interest Claim for the additional finances arranged for carrying out extra work for laying the Cuttack City pipe line amounting to Rs.12,47,62,438/-.

Claim 4: Claim for interest occasioned due to extended construction period amounting to Rs.143,83,00,000/-

Counter-Claim No.1: For a sum of Rs.3,93,38,124/- towards excess amount paid/being paid by the Respondent-Corporation on account of de-scoping of work;

Counter-Claim No.2: And/or in the alternative for refund of excess amount @ Rs.1,31,127/- per month being paid by the Respondent to the Claimant from June 2014 till the date of passing of the Award, with further directions that subsequent thereto, the monthly EMI to be paid by the Respondent to the Claimant shall be reduced by an amount of Rs.1,31,127-08 per



month.

Counter-Claim No.3: Interest @ 18% on the excess amount(s) paid from June 2004 till the passing of Award, to be calculated from the date of payment till date of refund.

IMPUGNED JUDGEMENT

6. The learned Single Judge decided the challenge made by both the parties by a single judgment – the Impugned Judgment. On the aspect of Claim No.2, the Respondent challenged the Arbitral Award of Rs.7.93 crores granted to the Appellant for de-scoped work in the Cuttack City pipeline project. The Respondent argued that this Arbitral Award contradicted a settlement recorded in the Minutes of Meeting dated 12.02.2015 [hereinafter referred to as “MoM”], where disputes regarding de-scoped work were stated to be resolved. It was contended that payment was subsequently received without protest, as evidenced by the Appellant's letter dated 10.11.2015. The Respondent asserted that the Arbitral Tribunal erred in awarding the claim based on an ad-hoc calculation, lacking evidentiary support or a reasoned basis.

6.1 In response, the Appellant contended that the settlement under the MoM pertained only to additional work and not the de-scoped work. The Appellant also argued that the Arbitral Tribunal has the discretion to adopt “*honest guesswork*” for determining damages or claims in the absence of precise evidence, provided such discretion is exercised reasonably.

6.2 The learned Single Judge found that the MoM clearly reflected a settlement of all disputes which would include the de-scoped work. It was held that the Arbitral Tribunal’s interpretation of the document as excluding



de-scoped work was perverse and unsupported by evidence. The learned Single Judge also observed that while arbitral tribunals have some latitude to award damages based on broad estimates, however, such decisions must be rooted in evidence and sound reasoning. The Arbitral Tribunal's approach of awarding an amount equal to 2/3rds of the difference between the claimed and offered amounts without adequate justification was deemed arbitrary and unjustified. Thus, the Arbitral Award *qua* Claim No.2 was set aside by the learned Single Judge.

7. The Arbitral Tribunal awarded Rs.12.48 crores in favour of the Appellant towards its Claim No. 3 which pertained to interest for arranging additional finances to undertake the extra work. The Appellant contended that it had incurred additional costs, including interest on funds required for this work. The Arbitral Tribunal partially accepted this claim, awarding 60% of the amount sought to the Appellant. The Respondent contended that the settlement recorded in the MoM had resolved all claims for additional work, as acknowledged by the Arbitral Tribunal itself in relation to Claim No. 2. The Respondent further argued that when the parties could not agree on an interest rate for instalment payments, it was decided that the Respondent would make a lump sum payment instead, which the Appellant accepted without a reservation. Therefore, no further interest could be claimed by the Appellant.

7.1 Conversely, the Appellant maintained that the settlement under the MoM did not include any interest component. It argued that under the contract, payments were to be made in instalments, but the Respondent unilaterally opted to make a lump sum payment. The Appellant asserted that



2025:DHC:2711



accepting the lump sum payment did not preclude its entitlement to interest on the delayed payments.

7.2 The learned Single Judge observed that the Arbitral Tribunal itself had found the MoM to reflect that it was the final settlement of claims for extra work. This left no scope for awarding interest separately, as the settlement terms did not include interest explicitly. Additionally, the learned Single Judge noted that the Appellant had accepted the lump sum payment without reserving any right to claim interest later. The learned Single Judge also held that awarding interest on an advance lump sum payment contradicted the established principles of law and finance. Accordingly, the learned Single Judge set aside the Arbitral Award under Claim No. 3, concluding that it was unsustainable.

8. The Appellant also challenged the Arbitral Tribunal's rejection of Claim No. 4, which sought interest on the costs incurred due to delays caused by time overruns in the project. The Arbitral Tribunal dismissed this claim, holding that the delays resulted from force majeure events as defined under Clauses 15.1.3 and 15.3 of the BOOT Agreement, which would preclude either party from claiming costs arising from such events. The Appellant argued that the Respondent never formally invoked the force majeure clauses and contended that the delays were due to the Respondent's actions. The Appellant further submitted that sufficient evidence was presented to demonstrate the Respondent's responsibility for the delays.

8.1 Per contra, the Respondent relied on its letter dated 26.08.2011, which notified the Appellant of the applicability of a force majeure event under



2025:DHC:2711



Clause 15.3(c) of the BOOT Agreement, specifying that each party must bear its own costs during such period.

8.2 The learned Single Judge noted that Clause 15.1.3(iv) of the BOOT Agreement defines political force majeure events to include orders from competent authorities that materially impact project execution. The Arbitral Tribunal had found that the withdrawal of permissions by the Odisha government, conditions imposed for re-approval, and a High Court order staying work constituted political force majeure events. These findings were supported by evidence, including letters from the Appellant acknowledging the force majeure situation. Thus, the learned Single Judge held that the Arbitral Tribunal's conclusion, was consistent with the terms of the force majeure provisions in the BOOT Agreement and the evidence presented, and required no interference. The Appellant's challenge to the rejection of Claim No. 4 was therefore dismissed by the learned Single Judge.

9. On the aspect of the Counter-Claims, the Respondent asserted that the scope of the Project was reduced from laying two pipelines to one, following a directive from the Water Resource Department of Odisha. This change impacted the scope of work, necessitating a reduction in the EMIs paid by the Respondent.

9.1 The Arbitral Tribunal reviewed the Counter-Claim and found that while the Respondent was justified in seeking an EMI reduction due to the reduced scope of work, the data and calculations provided were overstated and inadequately supported. Taking a balanced approach, the Arbitral Tribunal made a "best judgment" estimate and awarded Rs.2 crores plus



interest to the Respondent. The Arbitral Tribunal reasoned that this amount was fair given the evidence available.

9.2 The Appellant challenged the Arbitral Award, asserting that it was granted on an ad hoc basis and lacked adequate evidence. However, the learned Single Judge rejected this challenge, noting that the Arbitral Tribunal had evidence to rely upon and had exercised reasonable judgment within its mandate. As such, the learned Single Judge upheld the Arbitral Tribunal's decision, affirming that the Arbitral Award was based on a reasonable estimation, and that the Respondent was entitled to a sum of Rs.2 crores adjustment with interest from the date of the Counter-Claim.

10. As stated above, the challenge in the two appeals by the Appellant is seeking:

- (i) To restore the Arbitral Award in its finding on Claim Nos. 2 and 3, which was set aside by the learned Single Judge;
- (ii) For the grant of Claim No.4, which has not been allowed by either the Arbitral Tribunal or by the learned Single Judge; and
- (iii) To set aside the Arbitral Award on the Counter-Claims of the Respondent.

CONTENTIONS OF THE APPELLANT

CLAIM NO.2

11. Learned Counsel for the Appellant contended that the payment of Rs.32.62 crores was for the additional work on the Cuttack City pipeline. The Arbitral Tribunal awarded Rs.7.93 crores after analysing evidence, rejecting the Respondent's assertion of a full and final settlement on the



amount payable as per the MoM. The Arbitral Tribunal concluded that no comprehensive agreement on the additional work's scope or payment had been reached and applied a reasonable methodology to quantify the amount. The Appellant contends that the Impugned Judgement went beyond its limited jurisdiction under Section 34 of the Arbitration Act as set by the judgement in *Associate Builders v. DDA*¹ by re-evaluating the evidence and relying solely on MoM, and a letter dated 10.11.2015, without considering other materials evaluated by the Arbitral Tribunal. In addition, the Appellant contends that the Arbitral Tribunal's methodology in estimating damages was consistent with jurisprudence that allows tribunals to make reasonable inferences when precise data is unavailable. In *Mohd. Salamatullah & Ors. v. State of A.P.*², the Supreme Court recognized the need for tribunals to rely on rough but just calculations where exactitude is unattainable. It is thus contended that the Impugned Judgment, so far that it sets aside Claim No.2, suffers from an infirmity.

CLAIM NO. 3

12. The Appellant sought Rs.12.48 crores as interest on additional financing costs incurred for the extra work. The Arbitral Tribunal awarded Rs.7.49 crores, recognizing that financing costs were recoverable under the BOOT Agreement. The Appellant contests that the learned Single Judge misinterpreted this Arbitral Award, considering it as interest on a lump-sum payment from the Respondent rather than as financing costs. It was contended that the Arbitral Tribunal and the learned Single Judge wrongly

¹ (2015) 3 SCC 49

² AIR 1977 SC 1481



found that a full and final settlement was reached between the parties when in fact it was not. The learned Single Judge proceeded on the basis that Arbitral Tribunal awarded interest on a lump-sum payment when, firstly, there was no agreement covering the interest component, and secondly, the claim of interest flowed from the terms of the contract which guaranteed a rate of return to the Appellant. Thus, the finding is not in accordance with law.

CLAIM NO. 4

13. This claim pertained to award of interest in the sum of Rs.143.83 crores which accrued during construction, on account of project delays. The Arbitral Tribunal rejected this claim, citing the force majeure clause in the BOOT Agreement, which precludes cost claims arising from force majeure events. The Appellant argues that the Respondent never invoked the force majeure clause, and its rejection of the Appellant's attempt to invoke the clause subsequently, precluded reliance on such clause. The Appellant asserts that the Arbitral Tribunal's reliance on the force majeure clause, in the absence of its invocation by the Respondent, violates the contractual requirement for strict compliance with invocation procedures. Reliance is placed on the judgment in *Energy Watchdog v. CERC & Ors.*³, wherein the Supreme Court held that when a contract explicitly provides a force majeure clause, the parties must adhere to its invocation procedure, failing which relief under the clause is unavailable. Similarly, in *NTPC Ltd. v. Voith Hydro Joint Venture*⁴ it was emphasized that parties must formally invoke

³ (2017) 14 SCC 80

⁴ 2019 SCC OnLine Del 9014



2025:DHC:2711



force majeure clauses, and any subsequent reliance without such invocation is legally impermissible. The Appellant contends that the Arbitral Tribunal's disregard of these principles constitutes patent illegality.

13.1 The Appellant further contended that even if the reason for the extended period of construction was due to a force majeure event that was provided for under Article 15.3(c) of the BOOT Agreement, the Respondent had to invoke the force majeure clause to claim its benefit. However, it was contended that neither the Arbitral Tribunal nor the learned Single Judge considered the fact that the force majeure clause was not invoked by the Respondent. It was averred that the terms of the BOOT Agreement were binding and the Arbitral Tribunal and the learned Single Judge could not have given them a go by. Thus, it is contended that these findings being contrary to law are patently illegal.

14. Additionally, it was contended that the Arbitral Tribunal's finding that interest fell under individual costs, excluded by Article 15.3(c) of the BOOT Agreement is flawed. The Appellant asserts that interest during construction is part of the total project cost and not an individual expense, and only individual expenses are exempt by force majeure. This interpretation aligns with *Halliburton Offshore Services Inc. v. Vedanta Ltd. & Anr.*⁵, which mandated a narrow interpretation of force majeure clauses and emphasized the importance of compelling parties to adhere to contractual obligations.

COUNTER-CLAIM(S)

15. It was averred by the Appellant that the Arbitral Tribunal allowed this

⁵ 2020 SCC OnLine Del 2068



claim in the sum of Rs.2 crores, finding merit in the Respondent's argument for reduced maintenance costs due to the non-laying of a second pipeline. However, the Arbitral Tribunal also found the Respondent's cost estimates unsubstantiated and acknowledged additional costs incurred by the Appellant for laying a single pipeline over a riverbed. The Appellant contends that these contradictory findings undermine the partial award to the Respondent. The learned Single Judge upheld the Arbitral Tribunal's findings without addressing these inconsistencies, and as such the Impugned Judgment cannot be sustained.

15.1 In support of its contentions, the Appellant has relied upon the judgments of the Supreme Court in *Associate Builders* case, *Energy Watchdog case* and judgments passed by this Court including *NTPC Ltd. case*⁶ and *Halliburton Offshore Services Inc.* case.

CONTENTIONS OF THE RESPONDENT

CLAIM NO. 2

16. Learned Senior Counsel for the Respondent has contended that Claim No. 2 was stated to be the balance payment for extra work executed by the Appellant, while Claim No. 3 was towards interest for arranging additional finances for such additional work, however the Respondent had contended before the Arbitral Tribunal, that the issue of extra work was settled between the parties in a sum of Rs.81,16,16,376/- by mutual discussion and agreement. It was contended that a sum of Rs.60,39,35,869/- was paid by the Respondent after the following deductions:



2025:DHC:2711



Total value against additional cost	Rs. 81,16,16,376/-
Deduction for de-scoping work	Rs. 13,61,55,655/-
Deduction for unadjusted quantity of pipes	Rs. 7,15,24,852/-
Total	Rs. 60,39,35,869/-

16.1 The Respondent relied on the MoM in terms of which, after deliberations, the parties had agreed to this payment. It was further stated that thereafter, the Respondent obtained approval of the competent authority on 07.11.2015 and the payment of Rs. 60,39,35,869/- was made as a one-time payment to the Appellant which was duly accepted by the Appellant in terms of its communication dated 10.11.2015.

16.2 It was contended that this payment was made only after the Appellant consented and approved that there was clear and unequivocal agreement qua the same. Although, the Appellant averred that the payment was accepted under coercion or duress, this contention was rejected by the Arbitral Tribunal and the Arbitral Tribunal has given a finding at paragraphs 3.33 3.35, that the plea of duress and undue influence is rejected. This finding has become final as the same was not assailed by the Appellant and since this finding of duress or coercion was not challenged by the Appellant, there was no basis for the Arbitral Tribunal to award the payment of Rs.7.93 crores to the Appellant under this claim. Thus, it is contended that the learned Single Judge has correctly set aside this claim awarded to the Appellant.

⁶ (2019) SCC OnLine 90143



CLAIM NO. 3

17. So far as concerns Claim No. 3, it is the contention of the Respondent that once the parties had reached a final settlement and all amounts in terms of such settlement were paid by the Respondent as a one-time payment, which was accepted unconditionally, no additional payment towards interest could be made.

17.1 It is contended that while the parties were negotiating the settlement, there was no discussion on negotiation on interest payment. The only extra payment that was to be made was of taxes. It is additionally stated that even when the one-time settlement was accepted by the Appellant by signing of the 'service entry sheet', the Arbitral Tribunal ignored the admitted documents and has gone on to award interest on an *ad hoc* basis at 60% of the amount claimed by the Appellant. The learned Single Judge for the Respondent thus has rightly held that there was no action to carve out an exception and award interest. The Respondent has laid emphasis on the fact that the settlement was a lumpsum payment and instead of reduction in the EMIs, were otherwise being paid to the Appellant.

18. Thus, it is contended that the learned Single Judge rightly set aside Claim Nos. 2 and 3 of the Appellant and no interference in the Impugned Judgment is warranted.

CLAIM NO. 4

19. The rejection of Claim No.4, amounting to Rs.143.83 crores for interest costs arising from an extended construction period was correctly decided by the Arbitral Tribunal and upheld by the learned Single Judge.



Clause 15.3 of the BOOT Agreement, which governs force majeure events specifically states that upon the occurrence of a force majeure event after financial closure and before the commercial operation date, each party shall bear its respective costs without requiring the other party to reimburse costs arising from such events.

19.1 It was contended that the Appellant, by its own admission in a letter dated 03.08.2011, identified the delay as a political force majeure event under Clause 15.1.3(iv) of the BOOT Agreement. In response, the Respondent clarified through its letter dated 26.08.2011, that the event fell within Clause 15.3(c), precluding any cost claims by either party. The Arbitral Tribunal relied on this correspondence, as well as the terms of the BOOT Agreement to conclude that the delay was covered by a force majeure event, making Appellant ineligible for compensation. In addition, the Arbitral Tribunal noted that the Appellant failed to provide substantial evidence attributing the delay to the Respondent. This finding was upheld by the learned Single Judge, and it was also observed that the Appellant had not raised any challenge on the reason for the delay as was determined by the Arbitral Tribunal. Thus, the Arbitral Tribunal correctly dismissed Claim No. 4 of the Appellant, which was upheld by the learned Single Judge.

20. In addition, it is averred that the only submission sought to be made by the Appellant with regard to Claim No. 4 before this Court is that the Respondent never invoked the force majeure clause. The Respondent refuted the Appellant's argument that the force majeure clause was not invoked and contended that there is no contractual stipulation requiring the invocation of Clause 15.3 for it to apply. The Respondent distinguished the present case



from *NTPC Ltd* case, where the contract explicitly required a party to notify the other in writing to claim force majeure. Emphasis was laid on Clause 15.3 of the BOOT Agreement to contend that the said clause automatically applies to force majeure events during the relevant period and explicitly stipulates that costs must be borne by the respective parties.

COUNTER-CLAIM(S)

21. The Respondent argues that its Counter-Claims, were based on a reduction in the project's scope due to the laying of a single pipeline instead of two. The Respondent claimed Rs.3.93 crores, asserting that the reduced scope led to a corresponding savings in maintenance and operational costs, warranting a proportional reduction in each equated monthly installments (EMIs) to be paid to the Appellant by Rs.1,31,127/-. The Arbitral Tribunal partially allowed the Counter-Claim and awarded Rs.2 crores instead of Rs. 3.93 crores.

21.1 In this regard, the Respondent avers that the learned Single Judge correctly found no fault with findings of the Arbitral Tribunal as there was evidence before it for quantification of the claim to make a best judgment analysis. The Court in exercise of its limited powers under Section 34 of the Arbitration Act will not interfere with such a finding unless they are demonstrably perverse or in violation of public policy. It was contended that the learned Single Judge upheld the Arbitral Award giving a finding that the Arbitral Tribunal has made a best judgment analysis and that the Court would not interfere with the same. Thus, this finding of the Arbitral Tribunal and the learned Single Judge is liable to be upheld.



ANALYSIS AND FINDINGS

22. As stated above, the challenge in both these Appeals is by the Appellant and no appeal under the provisions of Section 37 of the Arbitration Act has been filed by the Respondent.

CLAIM NOS. 2 AND 3

23. With a view to examine the challenge of the parties and for ease of reference, this Court has created a tabular analysis of the claims/counter-claims in issue. Claims No.2 and 3 were dealt in the following manner:

S.No.	Claim	Arbitral Tribunal	Single Judge
1.	Claim No.2 The payment for extra work done for laying of Cuttack City pipeline – a sum of Rs.32.62 crores was sought for by the Appellant.	The Award of Rs.7.93 crores for de-scoped work with simple interest at the rate of 12% per annum from 01.01.2016 onwards till payment.	The award on this claim was set aside.
2.	Claim No.3 Interest for additional finances arranged for carrying out extra work of Cuttack City pipeline of Rs.12,47,62,438/-.	The Award of Rs.7.49 crores with simple interest at the rate of 12% per annum from 01.01.2016 onwards till payment.	The award on this claim was set aside.

23.1 The Appellant has contended that by the Impugned Judgment, the learned Single Judge exceeded his jurisdiction under Section 34 of the Arbitration Act. The Arbitral Tribunal had after examining the evidence awarded a sum of Rs.7.93 crores, which was only a partial award, however, the learned Single Judge re-evaluated the evidence to set aside the Arbitral Award. Thus, the Impugned Judgement cannot be sustained with respect to Claim No.2.

24. The Arbitral Award of Rs.7.49 crores by the Arbitral Tribunal to the



Appellant was set aside by the learned Single Judge based on the fact that a comprehensive settlement had been reached between the parties and no additional sum could be awarded to the Appellant.

24.1 The Appellant has claimed that the learned Single Judge has wrongly interpreted the amounts awarded to the Appellant. It is contended by the Appellant that the costs of extra work would naturally include interest payable to the banks/lenders for additional amounts borrowed to meet the expenditure of the extra work (Claim No. 3). Thus, the Appellant would be entitled to the interest cost for arranging these finances as well.

24.2 The Respondent, on the other hand, has contended that the amount of Rs.60.39 crores was a total amount negotiated and paid to the Appellant. The Respondent also contended that this amount of Rs.60.39 crores was paid to the Appellant as a one-time lumpsum payment and not in instalments to defray all expenses and costs of the Appellant.

24.3 The learned Single Judge found that once a settlement had been reached amongst the parties, the question of making additional payment to the Appellant did not arise.

25. The record reflects that the claim of de-scoped work and the claim for interest on additional finances hinges on the settlement reached between the Appellant and the Respondent on 12.02.2015, the MoM. The learned Single Judge analyzed the MoM as well as the subsequent communications entered into between the parties including the communication dated 07.11.2015 sent by the Respondent to the Appellant and its acknowledgment by the Appellant, by a letter dated 10.11.2015. The learned Single Judge found that



the Arbitral Tribunal had wrongly rejected the contention of the Respondent that the MoM did not record a final settlement of all claims between the parties. It is apposite to extract the relevant part of the Impugned Judgment which sets out the discussion thereon:

*“22. On the issue of whether the respondent was estopped from raising its claim for de-scoped work, and whether there was a full and **final settlement of the said issue between the parties and as recorded in the Minutes of Meeting dated 12.02.2015, it** would be necessary to first quote the said Minutes of Meeting **dated 12.02.2015** on this aspect. The relevant extract from the Minutes of Meeting is as under:-*

*“2. Descoping work between Ch. 0 to 7 Km **During the meeting on dtd 10th/11th Dec' 14, detailed estimation/calculation was shown to M/s. IPRWL and it was explained that total deduction should be Rs. 21.88Cr. (excluding tax & duties) with return of unused pipe. M/s. IPRWL did not agree and expressed various rate considered for de-scoping by IOCL is on higher side.***

M/s. IPRWL has expressed that they had to incur higher cost towards encasing of 1300 mm/dia pipeline below railway line w.r.t. pushing cost which is not claimed in the additional work and hence cost of pushing of only 1100mm Dia pipe to be deducted instead of both. After review of the matter, above point was found reasonable and hence IOCL has agreed to consider cost of pushing of 1100mm Dia pipe out of two below the railway line for which an amount of Rs. 36.22 Lakh would be reduced from de-scoping work

*M/s. IPRWL further informed that cost deduction for cleaning flushing and cleaning of debris item under item under miscellaneous work for parallel line which was in original alignment is unjustified. **They informed that cleaning, flushing job could have been carried out during the flushing of whole system at a time without any extra cost.** Similarly no extra cost would have been involved for debris removal as two pipe lines were to be put in the same trench. **Total resources mobilization for cleaning of debris for the area would have been the same. They requested not to add these items in the deduction part. After review of the matter, above point was found reasonable and hence IOCL has agreed to reduce the amount of Rs. 7,21,884/-on account of Cleaning, flushing and cleaning of debris item under miscellaneous work from descoping work.***

*During the detailed deliberation in **the meeting on 12th Feb 15, M/s. IPRWL informed that the rate considered for recovery of morrum & sand against SI No. 1 of relaying of road is on higher side.** It was*



also informed that the rate paid to the contractor for similar works in other locations is much less as morrum & sand was readily available in nearby areas. Therefore, CPWD SOR item no. 16.74.1 may be considered for morrum. M/s. IPRWL mentioned that during making payment for sand filling item IOCL has considered average rate paid to the various sub-contractors of M/s. IPRWL which is coming to Rs. 267/m³. But during deduction, IOCL has considered the rate of same sand filing item as Rs. 749.30/m³. They requested IOCL to consider same rate for both payment to IPRWL and deduction as well. IOCL reviewed the matter as above and it was felt that point raised by M/s. IPRWL is logical. The item rate for morrum as requested by M/s. IPRWL is nearly similar item and could be considered. Hence it was agreed by IOCL to consider the rate of Rs155.85/m² for 225mm thick in place of Rs. 904.42/m³ for morrum and Rs267/m³ for sand filling."

23. A reading of the above extracts would clearly show that various aspects of the de-scoping work were discussed between the parties. The initial part states that the petitioner was claiming a total deduction of Rs.21.88 crores, which was not agreed to by the respondent. The parties thereafter discussed various objections of the respondent and an amicable settlement was arrived at between the parties on these aspects. The same is also evident from the subsequent portion of the Minutes of Meeting, which is reproduced hereinunder:-

"After making all modification, following values are extorted from the detailed calculation sheet which is enclosed here with.

A. Total value against additional Cost: 81,16,16,376/-

B. Deduction for de-scoping work :Rs. 13,61,55,655/-.

C. Deduction for unadjusted quantity of pipe on reconciliation : Rs. 7,15,24,852/-.

D. Net amount payable to M/s. IPRWL (A-B-C) : Rs. 60,39,35,869/-.

Moreover, M/s. IPRWL has to return 3535 mtr. of 1100 dia pipe and 230 mtr 1300 dia pipe. If any, shortfall during handover/takeover, then same quantity will be recovered @ 29519.13 mtr separately.

All above, calculations were made without considering any tax component. However, IPRWL will submit further documents to IOCL for considering tax implication their additional cost before finalizing additional EMI.

xxxxxx

xxxxxx

xxxxxx

Summary sheet for extra work in Cuttack city area as per the negotiation on 12.02.2015



SI. No.	Brief Particulars of the work undertaken	Order of magnitude cost indicated while taking in-principle approval for extra job	Amount claimed by M/s IPRWL	Amount Worked out by IOCL	Revised amount mutually agreed	Remark
1.	Additional work	75,00,00,000	91,46,02,093	81,16,16,376	81,16,16,76	Total Amt. is inclusive of piling work, laying work & addl. Piling work
2.	Deduction for de-scoping work	11,68,00,000	0	21,88,13,477	13,61,55,655	
3.	Net amount of additional work	₹63.32 Cr (Say 63.50 Cr.)	91,46,02,093	59,28,02,899	67,54,60,721	
4.	Deduction for unadjusted quantity of pipe on re-conciliation				7,15,24,852	
	Total (excluding Tax)	63,32,00,000	91,46,02,093	59,28,02,899	60,39,35,869	**

24. The above extracts of the Minutes of Meeting dated 12.02.2015 leaves no iota of doubt that the parties have agreed and settled on their inter se disputes on the issue of the effect of the de-scoping of work.”

[Emphasis is ours]

26. This Court has examined the MoM which took place on 12.02.2015 between the Appellant and the Respondent. The MoM set out a discussion between the parties with respect to the additional work of “pushing of 1100 mm dia pipe out of two below the railway line”, for which an amount of Rs.36.22 lakhs would be reduced from the value of the de-scoping work. It further records the fact that the Respondent agreed to reduce an amount of



Rs.7,21,884/- on account of cleaning, flushing and clearing of debris of de-scoped work. It further sets out that the Appellant and the Respondent discussed the issue *qua* the rate of sand filling item, and after discussions, the Respondent agreed to consider a revised rate for “*morrum and for sand filling*”. The discussions which were held between the representatives of the Appellant and the Respondent as recorded in the MoM are detailed and under three heads, i.e.,

- (i) Additional work between Ch. 0 to 7 km;
- (ii) Descoped work between Ch. 0 to 7 km; and
- (iii) Reconciliation of pipe.

26.1 The MoM also sets out that there were previous meetings held on 10/11.12.2014 and 5/6.01.2015 and that the MoM dated 12.02.2015 was a culmination of these discussions. The minutes of meeting dated 10/11.12.2014 have not been filed before this Court but were filed before the learned Single Judge. These minutes also contain the same three headings i.e., (i) Additional work between Ch. 0 to 7 km; (ii) Descoping work between Ch. 0 to 7 km; and (iii) Reconciliation of pipe. It, however, records the fact that the Appellant had informed the Respondent that they would discuss these issues with their superiors and revert. The relevant extract of minutes of meeting dated 10/11.12.2014 is below:

“After detailed discussion M/s IPRWL informed that they will like to put up the issue as stated above to their higher authorities and shall revert by 26.12.2024.”

Thus, clearly the parties were in discussions over several months.

26.2 The MoM also include a summary sheet for the extra work as per the



negotiations of 12.02.2015. The summary sheet contains a detailed calculation and several issues of the de-scoped work including pipe alignment, methodology, piling job, above ground pipeline work, sand filling for pipeline, etc. [hereinafter referred to as “Summary Sheet”]. The summary of the extra work is tabulated, which sets out that the amount as claimed by the Appellant was Rs.91,46,02,093/- while the amount worked out by the Respondent was Rs.59,28,02,899/-. It also sets out that the mutually agreed revised amount was Rs.60,39,35,869/-. The Summary Sheet table also contains a remark that the total amount is inclusive of piling work, laying work and additional piling work and that the Appellant has to return certain pipes as well. The tabular Summary Sheet table is extracted below:

“Summary Sheet for extra work in Cuttack city area as per the negotiation on 12.02.2015

Sl. No.	Brief Particulars of the work undertaken	Order of magnitude cost indicated while taking in-principle approval for extra job	Amount claimed by M/s IPRWL	Amount Worked out by IOCL	Revised amount mutually agreed	Remark
1.	Additional work	75,00,00,000	91,46,02,093	81,16,16,376	81,16,16,76	Total Amt. is inclusive of piling work, laying work & addl. Piling work
2.	Deduction for descoping work	11,68,00,000	0	21,88,13,477	13,61,55,655	
3.	Net amount of additional work	₹63.32 Cr (Sa 63.50 Cr.)	91,46,02,093	59,28,02,899	67,54,60,721	



4.	Deduction for unadjusted quantity of pipe on reconciliation				7,15,24,852	
	Total (excluding Tax)	63,32,00,000	91,46,02,093	59,28,02,899	60,39,35,869	**

27. The MoM was also followed by another meeting/negotiation held on 01.07.2015. These minutes were however for finalization *qua* the payment of additional EMI on account of the de-scoped work. In these minutes, the Appellant has stated that it has capitalized the cost of the project and already submitted financial closure documents for the first phase and the second phase. The Appellant has also informed the Respondent that they agree that although the Internal Rate of Return (IRR) is more than 15% but they have agreed to the same being capped at 14.40%. The Respondent, however, stated that they would have to apply for a reduction in interest rate to 12%. The Appellant then informed the Respondent that they would revert on the same. The minutes of meeting of 01.07.2015 evidencing this discussion is extracted below:

“A discussion/negotiation session was organized with M/s IPRWL on 01.07.2015 for finalization of basis of calculation for additional EMI due to change in alignment/methodology for laying of pipeline in Cuttack city Area.

1. IPRWL informed that they have capitalized the project at a cost of Rs. 625 Cr.

2. IPRWL have already submitted Financial Closure documents at Paradip site. Further, IPRWL has agreed to provide the funding documents for 1st phase (Boot 4) as well 2nd phase (additional job) of funding.



3. IPRWL informed that their IRR is more than 15% but they agree to same cost of capital to 14.40% calculated based on EMI quote to capitalized cost of Rs.625 Cr.

4. IOCL informed to consider reduction in interest rate of 12% based on similar work on BOOT basis at Paradip.

5. IPRWL informed that they will have to place for reduction in interest rate to 12% vis a vis the current capital recovery rate of 14.40% to senior management for decision and informed that it would revert on the same.”

[Emphasis is ours]

28. This is followed by the communication dated 07.11.2015 by the Respondent to the Appellant which sets out that a one-time down payment of Rs.60.39 crores has been approved instead of payment by additional EMIs, and that this payment can be released after re-conciliation of material.

29. In response, on 10.11.2015, a letter was addressed by the Appellant to the Respondent requesting for the release of the sanctioned amount. The subject line of the letter stated that it is for release of payment towards ‘*additional cost due*’ and thanks the Respondent for the approval for the one time down payment of Rs.60.35 crores towards the ‘**additional cost due to change in alignment for laying pipeline in Cuttack city**’. It also requests for release of the amounts sanctioned for the additional costs, which is pending for long. The relevant extract of letter dated 10.11.2015 is below:

“Dear Sir,

Sub: TRANSPORTATION OF WATER FROM MAHANADI RIVER AT CUTTACK TO PARADIP FOR PARADIP REFINERY PROJECT ON BOOT BASIS - Release of payment towards 'additional cost' due to change in alignment for laying pipeline in Cuttack city-reg.

Ref 1. FoA dated 25/09/2009 and BOOT Agreement dated 29/01/2010

2. Your letter ref. PDRP/ BOOT - IV/Gen. Corr./ 2015-16/1 dated



07/11/2015

We thank you for confirmation on approval of one time down payment of Rs.60.39 Cr towards the 'Additional cost' due to change in alignment for laying pipeline in Cuttack city.

As regards hand over of pipe, we would like to draw your kind attention to a discussion at Intake Site in May 2015, during visit of ED (1/C), EIP (CG) and your goodselves, wherein on a specific query, we were advised not to shift the pipes to Paradip as IOCL would dispose/resell the pipes in as is where is basis at the existing locations near Intake premises and transport of same to Paradip is not called for.

Under the circumstances, we request you to release the sanctioned amount on the Additional costs which is pending for quite some time now. However, the pipe details and documents sought by you shall be sent in a couple of days' time for formalizing the handover of pipes.

[Emphasis is ours]

30. The learned Single Judge disagreed with the findings of the Arbitral Tribunal that the MoM did not record a final settlement of the claims between the parties. It was held by the learned Single Judge that in paragraph 3.23 of the Arbitral Award, a finding is recorded that the amount of Rs. 60.39 crores have been arrived at after joint calculations, cannot be accepted while in the later part of the Arbitral Award, in paragraph 3.26 to 3.30, a contrary finding has been given by the Arbitral Tribunal that the Appellant accepted the modified calculations and the only issue raised was regarding the interest.

30.1 The Arbitral Tribunal has held that what has been agreed in the MoM, was with regard to the quantum of additional costs, which was accepted by the Appellant. It was held that the Claimant (Appellant) unequivocally accepted the offer of the Respondent and waived its right to claim any



further amount on this account including in respect of the costs of Rs. 81.16 crores. The Arbitral Award further goes on to hold that with regard to the de-scoping, this cannot be said to be the quantum proposed by the Respondent. The Arbitral Award has further held that accepting the payment of Rs. 60.93 crores does not tantamount to an acceptance that nothing further was due and that the letter dated 10.11.2015 cannot be considered to be a relinquishment of the claims of the Appellant. This finding was set aside by the learned Single Judge.

31. The Appellant has assailed the finding of the learned Single Judge and has contended that the Arbitral Tribunal proceeded in its analysis on a wholistic appreciation of all facts and documents while the learned Single Judge made a decision based only on the MoM and the letter dated 10.11.2015. The Appellant has also stated that there was no settlement on the issue of Rs. 81.16 crores or the quantum of de-scoped work or the issue of interest on additional financing. It is further stated that even if this is to be considered as settlement, the same is vitiated for being under economic duress. The Respondent, on the other hand, has relied upon the MoM and its Summary Sheet and the communications thereafter including letter dated 10.11.2015. The Respondent has further contended that the service entry sheet was signed by the Appellant on 17.12.2015 affirming confirmation of payment of the above said amount, less Rs.4,63,38,085/- , to be deducted on the return of unused pipes. The Respondent has stated that the plea of partial settlement raised by the Appellant before this Court was not raised before the learned Single Judge in its Petition under Section 34 of the Arbitration Act where the only plea raised was of acceptance under economic duress.



32. An examination of the documents, more specifically the Summary Sheet, reflects the calculation that has been explained by the Respondent. The initial amount claimed by the Appellant was Rs. 91.46 crores (approximately) while the amount mutually agreed was Rs. 81.16 crores. The Respondent worked out a deduction for de-scoping work at Rs. 21.88 crores (approximately) but the revised amount mutually agreed was Rs. 13.61 crores (approximately). Thus, the amount as claimed was mutually agreed to be revised as Rs. 67,54,60,721/- and after deduction on pipe reconciliation of Rs. 7,15,24,852/-, the value of the mutually agreed amount was Rs. 60,39,35,869/- (subject to hand over of the pipes).

32.1 The MoM also discusses detailed calculations in relation to the de-scoping, additional work, as well as reconciliation of the quantity of pipe and states that after “detailed deliberation calculations” the deduction sheet was modified. The tabular chart reflecting the detailed calculation and deductions is set out below:

Sl. No.	Description	Deduction Amt		
		Original Value	Revised Value	Remarks
1.	225 mm thick Morrum (Annexure – 1 of deduction sheet Sl. no-1, Relaying of Road)	51,05,982.25	39,10,510.28	Rate Changed Rs.904.42/m ² to Rs. 155.85/m ²
2.	225 mm thick sand filling (Annexure-1 of deduction sheet, Sl no-1, Relaying of Road)	42,30,238.71	15,07,371.86	Rate Changed Rs.749.30/m ² to Rs.267/ m ²
3.	225 mm thick Morrum (Annexure-1 of deduction sheet, Sl no-1, Relaying of Road)	51,05,982.25	39,10,510.28	Rate Changed Rs.904.42/m ² to Rs.155.85/ m ²
4.	Pushing of pipe below Railway line (Annexure-1 of	70,72,500	34,50,000	Rs.36,22,500/- reduced below by



	deduction sheet, Sl no-Z)			line
5.	De-scoping laying works of 1100 dia pipe (Annexure-1 of deduction sheet, Sl no-4)	12,41,49,406	4,85,36,019	Qty modified as per single line diagram and material cost shown separately in Sl no-8
6.	De-scoping laying works of 100 dia pipe (Annexure-1 of deduction sheet, Sl no-5)	2,13,98,827	2,37,04,088	Qty modified as per single line diagram
7.	Miscellaneous work	60,57,184	54,43,800	[9,04,62,299/- ...handwritten...] Rs.7,21,8841 reduced
8.	Deduction for unadjusted pipe quantify on reconciliation.	—	7,15,24,851	
	Total	17,31,20,120	16,19,87,150	

33. A review of the Arbitral Award shows that the Arbitral Tribunal has given a categorical finding that there was no duress or coercion in paragraph 3.35 of the Arbitral Award. However, the Arbitral Tribunal goes on to hold that the said amount was only towards extra work done and not towards the de-scoped work. The communications prior to and subsequently entered between the parties which are adverted to above, including the acceptance/thank you letter of 10.11.2015 which in its subject line itself states that it is for the release of payment towards additional costs due to change in alignment, also set out that the payment is towards the various claims that are due towards the change in alignment – which is the de-scoped work.

34. Even, so far as concerns Claim No. 3, the fact that there were various discussions between the parties on pending disputes during the period from 2014 onwards which culminated in the MoM and the acceptance of payment



2025:DHC:2711



on 10.11.2015 by the Appellant, shows that this claim was also an afterthought. The Appellant has not sent any communication *qua* additional financing costs during this period or raised an issue *qua* the same. The Respondent has also contended that it was at the request of the Appellant that the payment was made to the Appellant as one-time lumpsum amount and not as it would have been otherwise done, in equated instalments, since all claims were to be settled in terms of the MoM. This is reflected in the communication sent by the Respondent to the Appellant on 07.11.2015 as well, when it has been held that a one-time down payment has been approved by the competent authority for payment to be made to the Appellant instead of a payment in monthly equated instalments.

35. The record reflects that prior to MoM, there were several meetings *inter se* the parties, which included detailed discussions on 10.12.2014 and 11.12.2014. The minutes of both these meetings form part of the record. These minutes also reflect that they are for negotiation/finalisation in view of the changes in the Project on account of the de-scoped work. The meetings of 10.12.2014 and 11.12.2014 was followed by a meeting of 05.01.2015 and 06.01.2015 (which are not available on record), however what is available are the minutes of the meeting held on 12.02.2015 (MoM) and the subsequent meeting on 01.07.2015.

36. Even the MoM coupled with the annexed Summary Sheet of these minutes reflect the same. It is not the case of the Appellant that the Appellant was not aware of these minutes or the Summary Sheet, yet between February, 2015 and November, 2015, there is no protest lodged by the Appellant against the calculations or otherwise. Thus, the contentions of



the Appellant seem to be nothing but an afterthought. The learned Single Judge had set aside these findings of the Arbitral Tribunal as being patently illegal and contrary to the documents filed. We are, therefore, in agreement with the findings of the learned Single Judge.

CLAIM NO. 4

37. A tabular analysis of the claim No.4 is reproduced below:

S.No.	Claim	Arbitral Tribunal	Single Judge
1.	Claim No.4 Claim for interest occasioned due to extended construction period amounting to Rs.143,83,00,000/-.	Claim for interest occasioned due to extended construction period amounting to Rs.143,83,00,000/- was found unsustainable and was thus rejected.	The finding of the learned Arbitral Tribunal was not interfered.

38. The Appellant's contention qua Claim No. 4 for interest during construction period in the sum of Rs. 143.83 crores was rejected both by the Arbitral Tribunal and by the learned Single Judge. The rejection was based on an interpretation of the force majeure clause in the BOOT Agreement. The Arbitral Tribunal found that the force majeure clause exempted political force majeure events which finding was upheld by the learned Single Judge. Clause 15.1 which defines force majeure event and Clause 15.3 which sets out the effect of a force majeure event which occurs after financial closure and before the completion stage, were reproduced and discussed in the Impugned Judgment by the learned Single Judge.

39. It has been contended by the Appellant that neither the Arbitral Tribunal nor the learned Single Judge considered the fact that there was no invocation of force majeure clause by the Respondent and that the plea of



force majeure was taken ex-post facto without any basis. It was further averred that disallowing of its claim due to the existence of the force majeure clause, on the basis of Clause 15.1.3 of the BOOT Agreement was incorrect since the invocation of this clause was a *sine qua non* for Article 15 of the BOOT Agreement.

40. The record reflects that the Appellant had by letter dated 03.08.2011 has itself stated that a political force majeure event falling under Clause 15.1.3(iv) of the Agreement has occurred. The relevant extract of this letter is below:

“Scope Complex, Core-2,
2nd Floor, Room No. 239,
7 Institutional Area
Lodhi Road, New Delhi - 110003.

Kind Attention: MR. S K Ambastha, DGM (PJ- PDRP)

Subject: Transportation of water from Mahanadi River at Cuttack to Paradip for Paradip Refinery Project of BOOT basis - **Force Majeure event at Intake facilities of the project - Reg. [in supersession of letter No. IPRWL/IOCL/078 dated 2nd August, 2011.]**

Ref: i. Contract No. PJ/CC/WC-BOOT/PDRP/2008-2009/156/43 of 2009-2010.
ii. **Order of Hon'ble High Court of Orissa W.P.(C) No. 20283/2011 issued on July 29th July 2011.**
iii. **Email from Mr. N.K.M Mishra to Mr. R.R. Kamat dated July 30, 2011.**
iv. Email from Mr. V. Prabhakar Rao addressed to Mr. S.K. Ambastha dated 30.07.2011.

Dear Sir,

We refer to **the Hon'ble Orissa High Court's order mentioned above granting an interim stay on the construction activities at Hadia Patha area (intake site of the project) at Cuttack.** The Hon'ble Court has directed the parties to the case to submit a report before August 12, 2011. In this regard we place on record the following:



1. **The order dated July 29,2011 impedes us from undertaking/ continuing any sort of construction works at the Intake site at Cuttack** and thereby restraining the performance obligations of the BOOT contractor. Pursuant to being aware of the order, we have stopped all activities at the Intake Site.

2. **The order by the Hon'ble Orissa High Court is a political force majeure event falling under the Clause 15.1.3(iv) of the BOOT Agreement which is reproduced below:**

"Any judgment or order of competent jurisdictions of statutory authority in India or any order, rule, promulgation, ordinance of any State government, Central Government of statutory bodies against the BOOT Contractor in any proceedings for reasons other than failure of BOOT Contractor to comply with any applicable law or applicable permits or on account of breach thereof, or any contract, or enforcement of agreement or exercise of any of its right under the agreement of IOCL."

3. **In terms of the Clause 15.2 of the BOOT Agreement this notice of the Force Majeure Event is notified by the BOOT contractor to IOCL. The BOOT contractor is the affected party.**

4. The stoppage of work is not due to any reason attributable to the BOOT Contractor **and is beyond the reasonable control of the BOOT Contractor and solely due to Force Majeure.** In addition to the enforced stoppage of the construction work at the site it also causes:

a. An escalation in Project cost in terms of loss in mobilized manpower, machinery and increased Interest during construction.

b. Loss of time and financial expenditure to demobilization of manpower, material and machinery at the Intake site.

c. Additional time and cost to be incurred to mobilize the resources to resume work, pursuant to any further Orders passed by the Hon'ble High Court.

d. Time overrun to the extent of the Force Majeure delay including the additional time incurred for demobilizing and re-mobilizing the resources.

5. The actual extent of loss in terms of time and cost to be incurred by the BOOT Contractor will be capable of being fully assessed only on the resolution of the above force majeure event.



6. Hence, we request IOCL to take on record this notice of Force Majeure event and resolve this issue at the earliest and absolve the BOOT contractor of any implications arising out of the above stated force majeure event.

7. As stated above. **pursuant to the order of the Hon'ble High Court the work at intake has been stopped and the work would be resumed soon after we receive through IOCL, the order of the High Court vacating the stay.**

Thanking you,
Yours sincerely,
For IL &FS Paradip Refinery Water Limited
Sd/-... ”

[Emphasis supplied]

41. The Respondent in reply to this letter on 26.08.2011 clarified that in accordance with Clause 15.3(c) of the BOOT Agreement, the parties have to bear their respective costs. The relevant extract of the letter dated 26.08.2011 sent by the Respondent to the Appellant is set out below:

“In case the referred event is considered as “Force Majeure”, IPRWL is requested to take note of that the said event occurred after Financial Closure & before Commercial Operation Date (COD). At this stage the effect of the Force Majeure event shall be dealt in accordance with Clause 15.3(c) of Conditions of Contract of BOOT Agreement (RFP. Volume-III) i.e., the parties shall bear their respective costs and no party shall be required to pay to the other party any costs arising out of such Force Majeure Event.”

[Emphasis supplied]

42. The contention of the Appellant is that there was no stipulation in the BOOT Agreement for invocation of such clause. The Appellant has relied on notification dated 19.02.2020 issued by the Ministry of Finance in this regard which states that there must be specific information of the invocation of the force majeure clause before any benefit is taken. Given the date of this notification, it is clear that the same was issued just after the announcement of Covid-19 Pandemic. The BOOT Agreement and disputes *inter se* the



parties were much prior to the Covid-19 Pandemic and reliance on this notification by the Appellant is misplaced.

42.1 The judgment in the *NTPC* case and the *Energy Watchdog* case are also not applicable to the facts in the present case. The Court in *NTPC* case was dealing with a contract that clearly stipulated that any party seeking to invoke the Force Majeure clause must give notice thereof, which was not done by the party involved therein. Whereas, the Court in *Energy Watchdog* case discussed the nature of such event and whether it would fall under the ambit of the Force Majeure, and especially within the contours of the term “*change in law*”.

42.2 The Arbitral Tribunal based on its examination of the Clauses of the Contract as well as on the evidence found that this claim was not merited. The learned Single Judge did not interfere with this finding. In view of our discussion, we find no reason to interdict with the concurrent findings of the Arbitral Tribunal and the learned Single Judge.

COUNTER CLAIM NOS. 1 TO 3

43. The Respondent had made three counter claims:

- (i) Rs.3,93,38,124/- towards excess amount paid to the Appellant;
- (ii) In the alternate for refund of excess amount at the rate of Rs.1,31,127/- per month which is being paid by the Respondent from June, 2014 onwards till the date of passing of the Arbitral Award; and
- (iii) Interest @ 18% on the excess amount paid from June, 2014 till the passing of the Arbitral Award.



43.1 The Arbitral Tribunal after examining the contentions of the parties, awarded a sum of Rs. 2 crores to the Respondent. The learned Single Judge examined the Arbitral Award and found that it was based on a reasonable estimate and a best judgment analysis of the claim of the Respondent, and upheld the award of Rs. 2 crores to the Respondent. Interest on this award of Rs. 2 crores was also granted from the date of filing of the Counter-Claim i.e., 01.10.2016 till the date of the Arbitral Award. The learned Single Judge also examined upheld this finding of the Arbitral Tribunal. The following extract is relevant:

“79. The relevant finding of the learned Arbitral Tribunal on the counter-claim is reproduced hereinbelow:

“13.8 It is only legitimate that when a part of the work has not been executed and the cost of that work has been included in the total cost and the EMIs were calculated accordingly, the excess amount attributable to the non-executed item shall be reduced from the EMIs. In fact, the Claimant does not dispute the power to reduce the EMI amount so as to address an issue that had already arisen during the contract period.

13.9 The next question is about the quantum of reduction i.e. whether the Respondent is justified in calculating the monthly maintenance cost in the manner in which it did and fixing the amount deducible at Rs.1,31,127/- per month.

13.10 It seems to us, on a perusal of the data/calculations given by the Respondent in the light of objections raised by the Claimant, the maintenance cost of pipeline arrived at by the Respondent is on the higher side. No endeavour has been made to substantiate the relevancy of some of the components set out in para 8 and the appropriate percentages to be applied. Further, the contention of the Claimant that it had to incur additional maintenance cost for laying single pipeline over the river bed for a stretch of 3 KM instead of laying the same underground as originally contemplated has some merit.

13.11 Taking an overall picture and on due consideration of the respective contentions, the Arbitral Tribunal is of the view that it is reasonable to award an amount of Rs.2 Crores to the Respondent



(Counterclaimant) on this account. *The said amount of Rs.2 crores plus interest as specified below can be deducted from the monthly EMIs payable in future. **The Arbitral Tribunal is inclined to award interest on the said amount of Rs. 2 Crores only from the date of filing Counter-claim i.e. from 01.10.2016 till the date of this Award in view** of the long silence on the part of the Respondent to pursue the claim after a certain stage, may be, under the bonafide impression that the one-time down payment offered would take care of everything.”*

80. A reading of the above would show that the learned Arbitral Tribunal has first held that due to the change of scope of work, the petitioner would be entitled to a reduction of the EMI. No fault can be found in the said finding of the learned Arbitral Tribunal. The learned Arbitral Tribunal thereafter considered the quantification of the claim of the petitioner and found that claim made by the petitioner was on the higher side and the petitioner had failed to substantiate the relevance of some of the components of its claims. **Though, the learned Arbitral Tribunal does not spell out these components, it had certain evidence before it for the quantification of the claim. As held hereinabove, if there is some evidence before the learned Arbitral Tribunal to make a best judgment analysis, this Court in exercise of its limited powers under Section 34 of the Act will not interfere with the same.**

81. Accordingly, I find no merit in the challenge of the respondent to the award of the counter-claim in favour of the petitioner.”

[Emphasis supplied]

44. The Appellant has contended that on the one hand the Arbitral Tribunal observed that a part of the work has not been executed and the cost attributed to non-executed items shall be reduced, and recorded that the Counter-Claims by the Respondent are on higher side and no endeavour has been made to substantiate the components forming the Counter-Claims and on the other hand, the Arbitral Tribunal proceeded to state that it is reasonable to award an amount of Rs. 2 crores to the Respondent. Thus, it is contended that this is a contradictory stand which has been upheld by the



learned Single Judge.

44.1 The Respondent in response has stated that the Counter-Claims were raised based on the fact that due to laying of a single pipeline instead of two pipelines for a length of 7 kms., there was a reduction of the scope of work which would reduce running/maintenance expenditure for the tenure of the BOOT Agreement and thus, the payment to be made to the Appellant would have to be reduced. The Respondent had claimed that this amount was Rs.3,93,38,000/-, however the Arbitral Tribunal had awarded Rs. 2 crores.

45. We are unable to agree with this finding of the learned Single Judge. Given the fact that the entire case of the Respondent has been that the parties have entered into an amicable resolution of their disputes through the MoM and have taken steps on the basis of the settlement, any deduction that the Respondent claims should also have formed part of the negotiations. The table of claims which has been reproduced in paragraph 26.2 above does set out a column for deduction of de-scoping work. It also refers to a deduction of Rs. 11.68 crores as the indicated cost for the extra job which is then worked out by the Respondent as Rs. 21.88 crores (approximately) but revised to Rs. 13.61 crores. This amount was then deducted by the Respondent prior to making a one-time payment of Rs. 60,39,35,869/- to the Appellant. The final negotiations in the MoM were by the Respondent based on the deductions for the de-scoped work, including the return of the pipes. Once this final negotiations were concluded and binding on the Appellant, these were to bind the Respondent as well.

46. The Arbitral Tribunal based on a guestimation awarded certain



amounts to the Respondent which award was upheld by the learned Single Judge. Given the findings as set out above, for the Claim Nos. 2, 3 and 4, we are of the opinion that allowing all the Counter-Claims of the Respondent would be patently illegal.

47. In these circumstances, in the opinion of the Court, the Counter-Claims raised by the Respondent would not arise. The challenge of the Appellant to the extent of allowing the Counter-Claim is accepted.

48. The scope of interference in an Arbitral Award under Sections 34 and 37 of the Arbitration Act is limited. Amongst the grounds provided in the Arbitration Act for interference with Arbitral Award is patent illegality, which is limited to situations where the findings of the Sole Arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. [See: *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*⁷ and *MMTC Limited v. Vedanta Limited*⁸].

48.1 From an examination above and to the extent that the Award is not in consonance with the contract between the parties and the documents as available on record, the Award would be patently illegal and is thus set aside in terms of the discussion above.

CONCLUSION

49. Accordingly, the Appeals are partially allowed. Claim Nos. 2, 3 and 4

⁷ 2021 SCC OnLine SC 508

⁸ (2019) 4 SCC 163



2025:DHC:2711



which have been disallowed by the learned Single Judge are sustained while the Counter-Claims of the Respondent are disallowed.

50. The Appeals are disposed of in the foregoing terms.

TARA VITASTA GANJU, J.

VIBHU BAKHRU, J.

APRIL 17, 2025/ ha