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

Date of decision: 09.04.2026

\+ O.M.P. (COMM) 181/2024 & I.A. 9043/2024 (Ex.)

KRISHNA UDYOG .....Petitioner

Through: Mr. Kamlesh Ojha, Advocate.

versus

UNION OF INDIA .....Respondent

Through: Ms. Radhika Bishwajit Dubey, CGSC along with Ms. Gurleen Kaur Waraich, Mr. Kritarth Upadhyay, Mr. Vivek Sharma and Mr. Amulya Dev Mishra, Advocates.

CORAM:
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGMENT (ORAL)

HARISH VAIDYANATHAN SHANKAR, J.

1. The present Petition has been instituted under Section 34 of the **Arbitration and Conciliation Act, 1996**[1], assailing the **Award dated 14.11.2023**[2]. By way of the Impugned Award, a three-member Arbitral Tribunal dismissed the claims preferred by the Petitioner herein.

I. On preliminary objection concerning the delay

2. At the outset, the learned Central Government Standing Counsel appearing on behalf of the Respondent raises a preliminary objection to the maintainability of the present Petition on the ground

[1] A&C Act
[2] Impugned Award

that it is barred by limitation.

3. This Court proposes to consider and decide the said preliminary objection at the first instance.

4. At this juncture, this Court finds it apposite to reproduce the bare provision of Section 34 of the A&C Act, as the same is necessary for the proper adjudication of the present case:

> "**34. Application for setting aside arbitral award. -**
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> ***(3)*** An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
>
> …."

5. A plain reading of Section 34(3) of the A&C Act makes it abundantly clear that the period prescribed therein is mandatory and inflexible. An application for setting aside an arbitral award must be filed within three months from the date of receipt of the award, extendable by a further period of thirty days, but not thereafter. The law in this regard has been succinctly reiterated by the Hon'ble Supreme Court in ***Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.***[3], which reads as follows:

> "**10.** Sections 34(2) and (2-A) then sets out the grounds on which an arbitral award may be set aside. Section 34(3), which again is material for decision of the question raised in this appeal, reads as follows:
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> > **"34. (3)** An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33,

[3] 2021 SCC Online SC 80

> from the date on which that request had been disposed of by the Arbitral Tribunal:
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."
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> **11.** A reading of Section 34(1) would make it clear that an application made to set aside an award has to be in accordance with both sub-sections (2) and (3). This would mean that such application would not only have to be within the limitation period prescribed by sub-section (3), but would then have to set out grounds under sub-sections (2) and/or (2-A) for setting aside such award. What follows from this is that the application itself must be within time, and if not within a period of three months, must be accompanied with an application for condonation of delay, provided it is within a further period of 30 days, this Court having made it clear that Section 5 of the Limitation Act, 1963 does not apply and that any delay beyond 120 days cannot be condoned — see ***State of H.P.* v. *Himachal Techno Engineers*** at para 5."
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> ***(emphasis added)***

6. Section 34(3) of the A&C Act prescribes a strict and peremptory period of limitation for filing a petition for setting aside an arbitral award. The provision mandates that such a petition must be filed within a period of three months from the date on which the party making the application received the arbitral award. The proviso thereto, however, vests a limited discretion in the Court to entertain the petition within a further period of thirty days, provided sufficient cause is shown for the delay, *albeit* with an express legislative embargo that no application may be entertained beyond the said extended period. Thus, the statutory scheme makes it abundantly clear that while a marginal delay beyond the initial three-month period is condonable, the outer limit of three months and thirty days is absolute and admits of no further extension.

7. In the backdrop of the aforesaid statutory position, and adverting to the facts of the present case, it is a matter of record and

indeed undisputed between the parties that the arbitral award was finally published on 24.12.2023. Even if reckoned from the said date, the prescribed period of three months under Section 34(3) of the A&C Act would expire on or about 24.03.2024. The record further reflects that the present Petition was instituted on 09.04.2024, which is evidently beyond the initial period of limitation; however, it squarely falls within the further grace period of thirty days contemplated under the proviso thereto, the outer limit whereof would expire on or about 23.04.2024.

8. Though this Court notices that no formal application seeking condonation of delay has been preferred along with the Petition, it cannot be lost sight that the statutory timelines engrafted under Section 34 are stringent, yet structured to permit a narrowly circumscribed window for condonation. In such circumstances, where the Petition is instituted within the aggregate period of three months and thirty days, the absence of a formal application for condonation would not, *ipso facto*, denude the Court of its jurisdiction to entertain the Petition, particularly when the delay is marginal and falls squarely within the statutorily permissible bracket. The legislative intent underlying the proviso is not to defeat substantive rights on hyper-technical grounds, but to balance finality with fairness within a rigid temporal framework.

9. Accordingly, this Court is of the considered view that since the present Petition has been filed within the outer limit of three months and thirty days as prescribed under Section 34(3) of the A&C Act, the same is amenable to consideration and does not merit rejection at the threshold on the ground of limitation.

II. On the merits of the Petition

10. The challenge to the Impugned Award, as set out in the present Petition, is founded upon two principal grounds.

11. First, the Petitioner assails the very constitution of the Arbitral Tribunal by invoking Section 12(5) of the A&C Act, contending that the Award stands vitiated in law owing to the unilateral appointment of the Tribunal by the Respondent. Secondly, the Petitioner impugns the Award on the ground that the imposition of **Liquidated Damages**[4] by the Respondent, subsequently upheld by the learned Arbitral Tribunal in the Impugned Award, is contrary to the settled legal position embodied in Sections 73 and 74 of the **Indian Contract Act, 1872**[5].

12. At this stage, it is apposite to note that this Court remains conscious of the limited scope of its jurisdiction while examining an objection petition under Section 34 of the A&C Act. There is a consistent and evolving line of precedents whereby the Hon'ble Supreme Court has authoritatively delineated and settled the contours of judicial intervention in such proceedings.

13. In this regard, a three-Judge Bench of the Hon'ble Supreme Court, after an exhaustive consideration of a catena of earlier judgments, in ***OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd.***[6], while dealing with the grounds of conflict with the public policy of India and patent illegality, 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***

[4] LD
[5] Contract Act
[6] (2025) 2 SCC 417

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

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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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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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 [***Ssangyong Engg. & 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 ***Ssangyong Engg. & 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 ***Ssangyong Engg. & 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 ***Ssangyong Engg. & 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 ***Ssangyong Engg. & 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 ***Ssangyong Engg. & 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 ***Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131** and later approved by a three-Judge Bench of this 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."
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> ***Scope of interference with an arbitral award***
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> **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.
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> **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."

14. This Court would now proceed to examine the contentions of the Petitioner on the anvil of the limited and circumscribed jurisdiction available under Section 34 of the A&C Act, and in the light of the principles authoritatively laid down by the Hon'ble Supreme Court in ***OPG Power Generation*** *(supra)*.

(a) ***Unilateral appointment***

15. On the first limb concerning the unilateral appointment of the Arbitrators, it is the specific case of the Petitioner that the Respondent - being a party to the dispute and, in effect, an interested litigant - proceeded to constitute the Arbitral Tribunal comprising its own retired officials, without any meaningful participation of the Petitioner

in the appointment process. Such a course of action, it is urged, strikes at the root of the arbitral process, inasmuch as it compromises the foundational requirement of neutrality, independence, and impartiality of the learned Arbitral Tribunal.

16. The factual matrix of the present petition would indicate that the disputes between the parties arose out of a tender dated 08.06.2021 and subsequent contractual arrangements entered into with the Respondent-Authorities. Upon invocation of arbitration, the tribunal comprising Shri J. N. Lal Das (Retd. IRSE) as the Presiding Arbitrator, along with Shri Dinesh Kumar (Retd. PRCEE) and Shri Hare Krushna Sahu (Retd. FA & CAO) as Co-Arbitrators, came to be constituted by the Respondent.

17. The Petitioner contends that such a constitution was neither preceded by any consensual procedure nor in consonance with the principles of party autonomy as embodied under the A&C Act. It is further urged that the appointment of arbitrators, all of whom were erstwhile employees of the Respondent organization, gives rise to justifiable doubts as to their independence and impartiality, thereby rendering the entire arbitral process legally unsustainable.

18. In this backdrop, reliance has been placed by the learned counsel for the Petitioner on the authoritative pronouncement of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***.[7], wherein the Apex Court, after a consideration of the statutory scheme and prior precedents, has held that a party interested in the outcome of the dispute cannot unilaterally appoint the arbitrator(s).

19. The issue of unilateral appointment of arbitrators has repeatedly

engaged the attention of the High Courts as well as the Hon'ble Supreme Court, particularly in the wake of the 2015 amendment to the A&C Act and the evolving jurisprudence on the subject.

20. Recently, the Constitution Bench of the Hon'ble Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)***[8], while examining the validity of unilateral appointments and affirming the principles enunciated in ***Perkins*** (*supra*), has authoritatively clarified that a clause enabling unilateral appointment of an arbitrator by an interested party gives rise to justifiable doubts as to the independence and impartiality of the arbitral tribunal. In such circumstances, the same would be legally untenable, being contrary to the mandate of fairness and equality embedded in Article 14 of the Constitution of India.

21. However, the aforesaid principle applies only in cases where the element of unilateralism subsists in the constitution of the tribunal. Where the appointment procedure reflects participation, mutual consent, and a valid waiver in terms of the statutory framework contemplated under the proviso to Section 12(5) of the A&C Act, the mischief sought to be addressed in the aforesaid judgments would not arise. The relevant paragraphs of ***Central Organisation for Railway Electrification*** *(supra)* are reproduced herein below:

> "**63.** Although the Arbitration Act recognises the autonomy of parties to decide on all aspects of arbitration, it also lays down a procedural framework to regulate the composition of the Arbitral Tribunal and conduct of arbitral proceedings. The incorporation of Section 12(5) is a recognition of the well-established principle that quasi-judicial proceedings should be conducted consistent with the principles of natural justice. Section 18 serves as a guide for Arbitral Tribunals to follow the principles of equality and fairness during the conduct of arbitral proceedings. Thus, the Arbitration

[7] (2020) 20 SCC 760
[8] (2025) 4 SCC 641

Act requires the Arbitral Tribunals to act judicially in determining disputes between parties. [***Engg. Mazdoor Sabha* v. *Hind Cycles Ltd.*, 1962 SCC OnLine SC 134, para 5; *Dewan Singh* v. *Champat Singh*, (1969) 3 SCC 447, para 9**]

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74. Under Sections 12(1) and 12(5), the Arbitration Act recognises certain mandatory standards of independent and impartial tribunals. The parties have to challenge the independence or impartiality of the arbitrator or arbitrators in terms of Section 12(3) before the same Arbitral Tribunal under Section 13. [***Chennai Metro Rail Ltd.* v. *Transtonnelstroy Afcons (JV)*, (2024) 6 SCC 211, para 33**] If the tribunal rejects the challenge, it has to continue with the arbitral proceedings and make an award. Such an award can always be challenged under Section 34. However, considerable time and expenses are incurred by the parties by the time the award is set aside by the courts. Equal participation of parties at the stage of the appointment of arbitrators can thus obviate later challenges to arbitrators.

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116. Section 12(5) automatically disqualifies any person whose relationship with the parties or counsel or subject-matter of the dispute falls under any of the categories mentioned under the Seventh Schedule. The categories listed in the Seventh Schedule in essence denote situations where an arbitrator might have a pecuniary, proprietary, or cause-based interest in the arbitration. For instance, employees of either of the parties are barred from acting as an arbitrator because they have an immediate financial and cause-based interest in the arbitration. If such an employee is appointed as an arbitrator, they would be sitting as a Judge in their cause because they have a pecuniary interest in the outcome of the case.

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120. The categories mentioned under the Seventh Schedule are such that it is difficult to distinguish the interests of an arbitrator from those of a party to which an arbitrator is connected. In such cases, the issue is whether the outcome of the arbitration will realistically affect the arbitrator's interests. The law prioritises the objective criterion of independence over the subjective criterion of impartiality. Once it is established that an arbitrator falls under any of the categories mentioned in the Seventh Schedule, they are automatically disqualified without any investigation into whether or not there is any real likelihood of bias. Since the ineligibility envisaged under Section 12(5) goes to the root of the appointment, an application may be filed under Section 14(2) of the Arbitration Act to the Court to decide on the termination of the arbitrator's mandate. [***HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471, para 12**]

121. An objection to the bias of an adjudicator can be waived.

[***Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 808, para 30**] A waiver is an intentional relinquishment of a right by a party or an agreement not to assert a right. [***State of Punjab* v. *Davinder Pal Singh Bhullar*, (2011) 14 SCC 770, para 41**] The Arbitration Act allows parties to waive the application of Section 12(5) by an express agreement after the disputes have arisen. However, the waiver is subject to two factors. First, the parties can only waive the applicability of Section 12(5) after the dispute has arisen. This allows parties to determine whether they will be required or necessitated to draw upon the services of specific individuals as arbitrators to decide upon specific issues. To this effect, Explanation 3 to the Seventh Schedule recognises that certain kinds of arbitration such as maritime or commodities arbitration may require the parties to draw upon a small, specialised pool. The second requirement of the proviso to Section 12(5) is that parties must consciously abandon their existing legal right through an express agreement. Thus, the Arbitration Act reinforces the autonomy of parties by allowing them to override the limitations of independence and impartiality by an express agreement in that regard.

122. The proviso to Section 12(5) is a reflection of the common law doctrine of necessity. The *nemo judex* rule is subject to the doctrine of necessity and yields to it. [***Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 398, para 101; *Swadeshi Cotton Mills* v. *Union of India*, (1981) 1 SCC 664**] The doctrine of necessity allows an adjudicator who may be disqualified because of their interest in the matter to continue to adjudicate because of the necessity of the circumstances. [***Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613, para 105**] The proviso to Section 12(5) allows parties to exercise their autonomy to determine if there is a necessity to waive the applicability of the ineligibility prescribed under Section 12(5). Thus, common law principles and doctrines are adjusted to subserve the fundamental principles of arbitration by giving priority to the autonomy of parties.

123. In ***Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, (2019) 5 SCC 755**, this Court held that the proviso to Section 12(5) requires an express agreement in writing, that is, an agreement made in words as opposed to an agreement that can be inferred by conduct. It was explained that such an agreement must be made by both parties with full knowledge of the fact that although a particular person is ineligible to be appointed as an arbitrator, the parties still have full faith and confidence in them to continue as an arbitrator. [***Bharat Broadband Network*, (2019) 5 SCC 755, p. 771, para 20**. This Court observed: "*20. …* It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in

him to continue as such."] The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the *nemo judex* rule. This balances the autonomy of parties and the principles of an independent and impartial Arbitral Tribunal.

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129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals.

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169. In the present reference, we have upheld the decisions of this Court in ***TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377** and ***Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760** which dealt with situations dealing with sole arbitrators. Thus, ***TRF Ltd.* v. *Energo Engg. Projects Ltd.*, (2017) 8 SCC 377** and ***Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760** have held the field for years now. However, we have disagreed with ***Voestalpine Schienen GmbH* v. *DMRC Ltd.*, (2017) 4 SCC 665** and ***Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712** which dealt with the appointment of a three-member Arbitral Tribunal. We are aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to three-member tribunals.

J. *Conclusion*

170. In view of the above discussion, we conclude that:

170.1. The principle of equal treatment of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators;

170.2. The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs;

170.3. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

170.4. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in ***Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712** is unequal and prejudiced in favour of the Railways;

170.5. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

170.6. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the *nemo judex* rule; and

170.7. The law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction applies to three-member tribunals."

(emphasis supplied)

22. Turning to the factual matrix of the present case, this Court takes note of the correspondence exchanged between the parties, particularly the letters dated 08.02.2023 and 28.04.2023, which have a direct bearing on the issue concerning the constitution of the learned Arbitral Tribunal.

23. The letter dated 08.02.2023, issued by the Petitioner in response to the Respondent's communication dated 31.01.2023, was accompanied by an agreement evidencing a waiver under Section 12(5) of the A&C Act. A careful perusal of the said letter reveals that the Petitioner expressly acknowledged and accepted the condition relating to the waiver of the applicability of Section 12(5) of the A&C

Act. The contents of the communication clearly demonstrate that the Petitioner, being fully conscious of the legal implications of such waiver, conveyed its unequivocal consent to waive the applicability of Section 12(5) of the A&C Act and to proceed in accordance with the appointment mechanism proposed by the Respondent.

24. This position is further reinforced by the subsequent communication dated 28.04.2023 issued by the Petitioner, wherein, in terms of the applicable contractual framework, the Petitioner selected two arbitrators from a panel of four retired Railway officers forwarded by the Respondent. The said sequence of correspondence, when read holistically, evidences a mutual and informed participation of both parties in the process of constitution of the learned Arbitral Tribunal. The relevant portion of the Petitioner's letters dated 08.02.2023 and 28.04.2023 reads as follows:

i) *Letter Dated 08.02.2023*:

"…

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Subject: - Acceptance of Waiver of u/s 12(5) under the process of Appointment of Arbitrator under Clause 2900 of IRS Conditions of Contract for Adjudication the dispute (s) Regarding the Railways' Claim for imposition of Risk Purchase (RP) amount for Rs.61,23,790/- against P.O. No. 08215078206307 dt. 22.12.2021 & 08215380201008 dt. 18.02.22 For Supply of 30X1.5 Signaling Cable placed by, Northern Railway/Delhi.

Ref. No.:- Your Letter No. ARB/ P-08/LD/M/s Krishna Udyog/2022 Dated 31.02.2023

Respected sir,

"We have received your letter No. ARB/ P-08/LD/M/s Krishna Udyog/2022 monitoring of Arbitration Cases Dated 31.01.2023 against our legal notice dated 18.01.2023 for appointment of Arbitrator under the above mentioned Risk Purchase Dispute, mentioned with acceptance of waive off the applicability of Section 12 (5) of arbitration & Conciliation Act.

Further, we hereby enclosing our acceptance with annexure as mentioned in your above said Letter.

Kindly appoint the Arbitrator for justice against not applicability of Risk Purchase & release the deducted amount with Interest as per MSME Act. under the Said P.O.

*****

……."

(emphasis supplied)

ii) *Letter Dated 28.04.2023*:

"….

*****

Sub: Appointment of Sole Arbitrator against P.O No. 08215078206307 dated 22.12.2021 & P.O No. 08215380201008 dated 18.02.202.

Ref: Letter No. ARB/P-08/LD/M/s Krishna Uydog/2023 dated 05.04.2023.

"This has refer to caption subject and cited reference regarding appointment of Arbitrator in terms of Railway Board's letter No. 2018/TF/Civil/Arbitration Policy dated 12.12.2018 and clause 2905 a(i) of IRS Conditions of Contract.

We hereby suggest the following two person out of four retired Railway Officers panel, which has been approved by Hon'ble General Manager/N Rly

1. Sh. Pradeep Kumar, Retd. PCMM/NR
2. Sh. Dinesh Kumar, Retd. PCEE/RCF/KXH

Hope you would find the above in order and appoint the Arbitrator accordingly."

(emphasis supplied)

25. A perusal of the aforesaid communications clearly demonstrates that the Petitioner had, with full awareness and deliberation, consciously and unequivocally agreed to the procedure governing the constitution of the learned Arbitral Tribunal, including the waiver of the statutory ineligibility contemplated under Section 12(5) of the A&C Act. The proviso to Section 12(5) expressly permits such a waiver, provided it is effected through an express agreement in writing

after the disputes have arisen.

26. In the present case, the Petitioner's letter dated 08.02.2023 satisfies this statutory requirement, as it constitutes a clear and unambiguous written waiver of the applicability of Section 12(5) of the A&C Act. This position stands further fortified by the Petitioner's subsequent conduct, particularly its active participation in the process of nominating and forwarding a panel of arbitrators, from which the Respondent proceeded to make its selection in terms of the contractual framework.

27. In light of the foregoing, this Court is of the considered opinion that the Petitioner, having expressly consented to the agreed procedure and participated in its implementation, cannot now be permitted to resile from its earlier position and assail the constitution of the learned Arbitral Tribunal on the ground of unilateral appointment or alleged lack of independence. The challenge to the Impugned Award on this count is, therefore, devoid of merit and does not warrant acceptance.

(b) Imposition of liquidated damages (LD)

28. Turning to the second plank of challenge, the Petitioner contends that the imposition of LD by the Respondent, as upheld by the learned Arbitral Tribunal, is contrary to the mandate of Sections 73 and 74 of the Contract Act.

29. It is the case of the Petitioner that, in the absence of any quantification or proof of actual loss, the levy and recovery of LD is impermissible in law. On this basis, it is urged that the Impugned Award, insofar as it sustains such recovery, is liable to be set aside.

30. This Court has carefully examined the Impugned Arbitral Award, particularly the findings returned on the issue of imposition of

LD, which constituted the first issue for determination before the learned Arbitral Tribunal. The relevant discussion and conclusions of the Tribunal on this aspect are reproduced hereunder:

> "**4.1 Deliberations by the AT:**
>
> **4.1.1 Issue No.1: Whether imposition of LD was justified and valid**
>
> **i.** LD has been imposed on the PO No.8215078206307 dated 22.12.2022 under Rate Contract No.08215078/01/KRISHNNP-08/2021 dated 20/12/21 for Rs.61,23,790/- for delay of supplies beyond 15.06.2022.
>
> **ii.** Both Parties agree that the Contract has provision for Liquidated Damages in Para 4.0 of the Special Conditions of the Contract. It reads as follows:
>
> "***4.0 LIQUIDATED DAMAGES***
>
> *4.1 In case of failure on the part of the supplier to arrange supplies as per the delivery schedule/instalments fixed in advance, save force majeure conditions and delays attributable to purchaser, the purchaser reserves the right to levy liquidated damages which shall be as per Para 702(a) of IRS Conditions of Contract for delayed quantity which have remained unsupplied for that period.*
>
> *4.2 Recovery of Liquidated Damage (LD) shall be levied @ 112 % of the price of the store per week or part of the week during which the delivery is accepted and the upper limit for recovery of LD in supply contract is 10% (ten percent) of the value of the contract, irrespective of delays, unless otherwise provided, specifically in the contract".*
>
> **iii.** Since the above Special Condition of Contract derives its mandate from Para 702(a) of IRS Conditions of Contract, it would be appropriate to go through the provisions as well:
>
> "***0702 Failure and Termination:*** *If the Contractor fails to deliver the stores or any instalment thereof within the period fixed for such delivery in the contract or as extended or at any time repudiates the contract before the expiry of such period, the Purchaser may, without prejudice to his other rights:-*
>
> *(a) Recover from the Contractor as agreed liquidated damages and not by way of penalty, a sum equivalent to 2 percent of the price of any stores (including elements of taxes, duties, freight, etc) which the Contractor has failed to deliver within the period fixed for delivery in the contract or as extended for each month or part a month which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, ... "*
>
> **iv.** IRS Conditions of Contract govern all stores supply contracts in Indian Railways. It is clear from the above extracts that the Special Conditions of the Contract has provision for Liquidated

Damages as mandated by Para 702(a) the IRS Conditions of Contract. Para 702(a) mandates that "*wherever the Contractor has failed to deliver within the period fixed for delivery or as extended*" liquidated damages (LD) will be recovered.

v. In other words, there is no ambiguity in the mutually agreed Contract Conditions with regard to

1. whether LD can be applied, and if so,
2. when LD will be imposed and
3. at what rates.

The IRS Condition envisages that LD is attracted when the *'Contractor fails to deliver within the period fixed for delivery or as extended .... '*. In other words, the condition stipulates that LD will be attracted after expiry of original delivery period or extended delivery period.

vi. In the present case, the delivery period was extended up to 15.06.2022 vide MA-3 (Modification Advice) dated 19.01.2022. By MA-6 dated 17.06.2022 the delivery period was extended it up to 15.09.2022 with imposition of LD. However, MA-6 clarifies in the Note below that *"..... the above extension of delivery date is subject to recovery of an amount equal to full liquidated Damages for* ***delay in supply of stores after the expiry of the Contract Delivery period notwithstanding grant of extension****"*. In other words, the MA clarified that the Contract Delivery Date remained 15.06.2022 and any supply thereafter will attract full LD. The date 15.09.2022 is time given to complete the supply with LD, and if the supplier fails to complete within this date, the Purchaser can resort to other rights it has under the Contract, such as terminating the Contract (*para-3 of Note*).

vii. The Respondent has argued that these are the agreed provisions of the Contract and therefore, both sides have to adhere to these.

viii. Claimant's argument against LD: The Claimant had accepted the provisions of the tender and accordingly quoted his rates and subsequently accepted the condition in the Contract and continued performing under the contract. However, Claimant's argument, is that LD provisions in the contract are not applicable, because the DPs was extended, and by extending the DPs without LO, the Respondent had repudiated the principle of 'time being essence of contract' and when 'time is not the essence of contract' LD is not applicable. Thus, Claimant's argument stands on two pillars viz.

a) When 'time is not the essence of contract' LD is not applicable.
b) In the present contract by extending the DPs, the Respondent has changed the nature of the contract where 'time is not the essence'.

ix. Source/basis of Claimant's above argument: There is nothing in IRS Conditions of Contract or elsewhere in the Contract to

validate this line of argument. However, the Ld. Counsel of the Claimant argued referring to two judgements, one from High Court of Delhi (OMP (*COMM) 266/2023, IA13723/2023, IA 1372/2023, IA 13725/2023, IA 13726/2023 in the matter of Vivek Khanna vs OYO Apartments Investments LLP*) and more importantly, a judgment of the Hon'ble Supreme Court (*in Civil Appeal No.6834 of 2021 arising out of SLP (C) No.19203 of 2012 in ONGC vs Remi Metals Gujarat*) to establish their argument. The Claimant has enclosed copies of the judgments.

x. Supreme Court judgment in appeal case (in Civil Appeal No. 6834 of 2021 arising out of SLP (C) No.19203 of 2012 in ONGC vs Remi Metals Gujarat): The Ld. Counsel for the Claimant spent considerable time explaining his logic and arguments based on this judgment. It would be worthwhile to discuss the judgment since the Claimant has based its justification against LD mainly on the Judgment in the above case. The brief details of the judgements are as follows:

a) There was a contract between ONGC and Remi Metals Gujarat for supply of seamless steel casing pipes within a fixed 'delivery date'. The contract had provision for imposition of LD in case of delay in delivery. The contract did not have provision for extension of delivery period. Its provision simply had the delivery period and beyond that delivery period LD on the delayed supply was provided, which however, could be waived. ONGC twice extended the delivery period without LD (after waiving the LD) but, further extensions of delivery periods were with LD (without waiving the LD). Accordingly, LD was imposed by ONGC as per pre-estimated rate given in the Contract. Remi Metals Gujarat challenged the imposition of LD in an Arbitration. The Arbitral Tribunal gave its Award against ONGC. Aggrieved by the Award, ONGC challenged it in the District Court, which upheld the Award of the Tribunal but made changes to the Cost of Arbitration. Aggrieved by the judgment of the District Court, both the parties approached High Court. The Hon'ble High Court reversed the decision of the district Court and held that the Arbitral Tribunal as well as the District Court committed grave errors in arriving at the conclusion that ONGC had to prove the loss suffered before imposing LD. This time the Remi Metals Gujarat approached the Hon'ble Supreme Court with an SLP against the judgment of the High Court.

b) Hon'ble Supreme Court went into the subject at great lengths in examining the issues involved in the case, including discussion on the provisions in Indian Contract Act (Section-74) for 'Compensation for breach of contract where penalty stipulated for, and the Apex Court also referred to their own judgement in **ONGC vs Saw Pipes** case where they had

upheld imposition of LD.

c) However, finally Hon'ble Supreme Court upheld the Award given by the Arbitral Tribunal with the following rulings:

1. *"The Arbitral Tribunal's interpretation of contractual clauses having extension procedures and imposition of liquidated damages, are good indicators that 'time was not the essence of the contract'.*
2. *The Arbitral Tribunal's view to impose damages on actual loss basis could be sustained in view of the waiver of liquidated damages* ***and absence of precise language which allows for reimposition of liquidated damages****. Such impositior, is in line with the 2nd para of Section 55 of the Indian Contract Act.*
3. *The Arbitral Tribunal was correct in distinguishing the dictum of this Court in* ***ONGC vs Saw Pipes*** *which validated imposition of liquidated damages in a similar contract.*
4. *.. ..... (not quoted as not related to present case)*
5. *.. ..... (not quoted as not related to present case)"*

xi. The above operative part of the judgment has the following important points:

a) The Apex Court agrees with the Arbitral Tribunal's interpretation of the contractual clauses in the ONGC Contract, which made the Tribunal to conclude that in that contract 'time was not the essence of the contract' since ONGC waived its right to impose LD while giving extensions and then reimposed the same in subsequent extensions.

b) The Apex Court also agreed with the Arbitral Tribunal making a distinction between their decision in ONGC vs Saw Pipes case where they had upheld imposition of LD in a similar case, and not in the ONGC vs Remi Metals case as ONGC waived its right to impose LD.

c) The Apex Court further agreed with the Tribunal's decision to impose damages on actual calculation of damages to ONGC in view of 'waiver of LD' by ONGC in the first extensions.

xii. Thus, the Hon'ble Supreme Court only agreed with the Arbitral Tribunal's interpretation of the ONGC contract for imposition of damages on 'actual evaluation' basis rather than on the pre-estimated rate stated in the contract, since ONGC allowed - 'waiver' of LD twice before reimposing the same in subsequent extensions. Even though the Apex Court in a similar case (ONGC vs Saw Pipes) upheld the imposition of LD at pre-estimated rate, since there was no waiver of LD, rather the ONGC exercised it, they agreed with the Tribunal. In the case of ONGC vs Remi Metals, since there was 'waiver of LD' at the very beginning followed by re-imposition in subsequent extensions, the Apex Court agreed with the Tribunal's decision for no 'pre-fixed LD' but damages on 'evaluation basis'.

xiii. In other words, the decision of the Hon'ble Supreme Court in the ONGC vs Remi Metals is not an universal dictum relating to imposition of LD. It is only an approval of the interpretation as per the wisdom of the Arbitral Tribunal for denial of 'pre-fixed LD' but imposition of damages on actual basis, because of the way the contract was executed (first by extensions by waiving LD and then imposing the LO). AT looked at the various observations of the Hon'ble Court before they came to the last operative part of their judgement. The following are the gist of their observations:

a) **Firstly**, the Apex Court discussed and emphasised the principles of Indian Contract Act with regard to 'liquidated damages' (para-26 of the judgment) as follows:

" ..... Under Indian Contract Law, such liquidated damages are recognised, subject to the same being reasonable. Section 7 4 of Indian Contract Act provides that:

74. Compensation for breach of contract where penalty stipulated for - *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, or if the contract contains any other stipulation by way of penalty, the patty complaining the breach is entitled whether or not actual damage or 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, or, as the case may be, the penalty stipulated for .... "*

b) **Secondly**, while agreeing with the Tribunal's conclusion that in the Contract execution (ONGC vs Remi Metals) time was not the essence, the Apex Court recorded (para-29) some basic principles, viz.

i. The general rule is that **promisor is bound to complete the obligation by the date for completion** stated in the contract.

ii. However, the **promisee is not entitled to liquidated damages, if by his act of omission or commission he prevented the promisor** from completing the work by the completion date.

iii. **These general principles may be amended** by the express terms of contract

c) **Thirdly**, the Apex Court observed (para-30) that "***whether time is of essence in a contract, has to be culled out from the reading of the entire contract, as well as the surrounding circumstances***. Merely having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely

reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same".

d) **Fourthly**, **and this seems to be the most important to the present** Tribunal, the Apex Court observed (para 32) that in ONGC vs Saw Pipes they had upheld ONGC's right to impose LD which derives its strength from Section-73 and Section-74 of the Indian Contract Act, which envisages that **"when a contract has been broken, if a sum is named in the contract as the amount to be paid in the 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**". However, while in ONGC vs Saw Pipes, the purchaser had extended the 'time of supply' subject to recovery of 'prefixed LD', this pattern of decision was not followed in the ONGC vs Remi Metals case (they had extended time by waiving LD twice and then imposed LD), and the Tribunal distinguished the ONGC vs Remi Metals case from the **ONGC vs Saw Pipes on the ground of 'waiver' of LD and decided that damages can be imposed on assessment of actual loss and not by pre-estimated rate of damages**.

e) **Finally**, the Apex Court talked about (para-33) the 'waiver' of LD specifically as the distinguishing feature between ONGC vs Remi Metals and ONGC vs Saw Pipes. In the ONGC vs Remi Metals, the LD was waived twice before giving extension with pre-estimated damages. Here the Hon'ble Court agreed with the Tribunal that once LD were waived in the first extensions, subsequent extensions cannot be coupled with LD. Therefore, when ONGC waived the LD initially, they can not be reimposed unless such imposition was clearly accepted by the parties. The Hon'ble Court stated that this interpretation of the Tribunal can not be faulted with as being perverse.

xiv. On the basis of the above discussion on the judgement of the Apex Court, AT examined whether the present contract under the AT (Northern Railway vs Krishna Udyog) in its execution, was similar to **ONGC vs Saw Pipes or ONGC vs Remi Metals**, so that the observations/rulings of the Hon'ble SC in the above judgment can be applied.

xv. AT notes that there are two important differences between the **ONGC contracts** (Saw Pipes and Remi Metals) and the present contract (Krishna Udyog). These differences are the following:

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xvi. To elaborate further, AT notes that while ONGC contract does

not permit extension of DP without LD, present contract under consideration (i.e. between Northern Railway and Krishna Udyog) permits extension of DP and once further extension is not granted, LD starts for the period beyond the last extended date, and once LD is imposed, there is no provision to waive the same. On the other hand, in the ONGC contracts, DP is fixed and any extension given is with LD only. However, the competent authority has the power to waive LD. As a result, while in ONGC vs Saw Pipes case, LD was imposed, not waived and therefore, the Apex Court upheld ONGC's right to recover LD, but, in the case of ONGC vs Remi Metals, since LD was waived twice before being re-imposed by ONGC, the Apex Court agreed with the interpretation of the Arbitral Tribunal that once LD has been waived, it could not have been re-imposed. Therefore, the damages were evaluated by the Tribunal on actual basis (they imposed damages to the tune of US $ 4,40, 61 0.42) and not on pre-estimated basis (US$ 8,07,804.03 and Rs.1,05,367 recovered) as the terms of LD stipulated.

xvii. The present AT notes that there is nothing in the above deliberations to suggest that the Hon'ble Court stipulated in their judgement relied upon by the Claimant (ONGC vs Remi Metals), that once extension of time is granted for DP (on any ground) imposition of LD is prohibited.

xviii. Therefore, AT does not find merit in the claim of the Ld. Counsel for the Claimant on the basis of their interpretation of the Hon'ble Supreme Court's judgment in ONGC vs Remi Metals case.

xix. The Ld. Counsel for the Claimant also referred to Para-20 of the other Judgement that they referred to (High Court of Delhi (OMP (COMM) 266/2023, IA 13723/2023, IA 1372/2023, IA 13725/2023, IA 13726/2023 in the matter of Vivek Khanna vs OYO Apartments Investments LLP). In this case, the Hon'ble Court observes in Para-20 that sums ascertained as LD in the contract is not in the nature of penalty, but is a pre-estimate of loss estimated by the parties likely to be suffered by a party in the event of breach of contract by the other party. Loss must be incurred by a party in order to claim the same. LD are not payable merely as a penalty for breach of contract, if no loss is suffered .....

xx. Relying upon the above judgment, the Ld. Counsel for the Claimant stated that LD can not be imposed as a penalty, and loss needs to be proved to have been actually incurred. AT does not find much ground for drawing any inference from the above judgment, firstly because the Section 702 of the IRS Conditions of Contract, specifically states in respect of LD to be "recovered from the Contractor as agreed liquidated damages and not by way of penalty ..... " whereas there is no clarity in the Lease Agreement between Vivek Khanna and OYO Apartment about

the recovery of LD/Penalty in case of termination of Lease before the expiration of the lock in period, and secondly, after deliberation of the observations and decisions of the Hon'ble Supreme Court, in this judgment, there is little left to be further deliberated or debated on the issue of applicability of LD in supply contract.

xxi. The Ld. Counsel for the Respondent referred to three judgments to uphold the correctness of the LD imposition by them. These cases are the following ones:

i. Calcutta High Court judgment in Bhudar Chandra Goswami vs CRS Betts on 261h May 2015

ii. Supreme Court judgment in Mahabir Prasad Rugnta vs Durga Datt on 31st January 1961

iii. Delhi High Court judgment in Haryana Telecom Ltd vs UOI-11 May 2006.

xxii. The Ld. Counsel for the Respondent emphasised, on the basis of extracts from the above three judgments that the purchaser is entitled to compensation in case of breach of contract by the supplier, and when a pre-estimated damage/loss is provided in the Contract, the same becomes enforceable. He relied upon sections 55 and 73 of the Indian Contract Act to support Imposition of LD at the 'pre-fixed' rate reflected in the contract and recovery there from the bills of the Claimant at the material time.

4.1.2 Conclusion of AT in respect of Claim No.1: In the light of the above deliberations, AT concludes that imposition of LD by the Respondent in this case as per the terms of the Contract, the intention was clear and the language was unambiguous and time, as defined in the Contract Condition (Clause 700 of IRS Conditions of Contract), remained the 'essence of contract'. Therefore, the action of the Respondent in imposition and recovery of LD is valid and does not suffer from any deficiency, either contractual or procedural.

….."

31. A bare perusal of the above-extracted portion of the Impugned Award makes it evident that the learned Arbitral Tribunal has duly considered the factual matrix, the contractual framework, and the evidence adduced by the parties in support of their respective contentions, and thereafter arrived at a reasoned conclusion rejecting the claim of the Petitioner herein/ Claimant herein. The reasoning underlying such a conclusion, though not exhaustively set out herein,

may be summarised as follows:

(a) The learned Arbitral Tribunal noted that the contract expressly incorporates provisions for LD under the Special Conditions, which derive their authority from Paragraph 702(a) of the IRS Conditions of Contract. These provisions clearly stipulate that LD becomes applicable in the event of failure by the supplier to deliver within the prescribed or extended delivery period. The rate at which LD is to be levied, as well as the maximum permissible limit, are also specifically defined, thereby leaving no scope for ambiguity or discretionary interpretation.

(b) The learned Tribunal observed that the delivery period, which was initially extended up to 15.06.2022, was subsequently extended further up to 15.09.2022 with an express stipulation for imposition of LD. Importantly, the extension document clarified that LD would be recoverable for any delay beyond 15.06.2022, notwithstanding the grant of further time for completion. Thus, the contractual framework clearly identified delay beyond the original or extended timeline as the triggering factor for LD.

(c) The learned Tribunal held that the manner in which extensions were granted did not dilute the fundamental nature of the contract. Instead, the structure of the extensions, particularly those granted with LD, preserved the sanctity of the original delivery obligations. The grant of additional time was merely a concession to facilitate completion, subject to consequences, and did not indicate that timely performance had ceased to be essential.

(d) The Claimant therein/ Petitioner herein contended that once the delivery period was extended, time ceased to be the essence of the contract, and consequently, LD could not be imposed. However, the learned Tribunal found no support for this proposition within the contractual terms. It was held that mere extension of time does not negate the applicability of LD, especially in the absence of any express waiver. Accordingly, the Claimant's argument was rejected as being contrary to the contractual framework.

(e) The learned Tribunal distinguished the present case from the decision in ***O.N.G.C. Ltd. vs. Remi Metals Gujarat Ltd.***[9], where LD had initially been waived and subsequently reimposed, leading the Hon'ble Supreme Court to disallow recovery of pre-estimated damages. In contrast, in the present case, there was no waiver of LD at any stage, and all extensions were consistently granted subject to LD. Therefore, the factual and contractual matrix being materially different, the ratio of the said judgment was held to be inapplicable.

(f) The learned Tribunal found that the present case was more closely aligned with the principles laid down in ***ONGC v. Saw Pipes Ltd.***[10], wherein the Hon'ble Supreme Court upheld the enforceability of pre-estimated damages in the absence of any waiver. Since the contract in the present case clearly provided for LD and the same was consistently enforced, the Respondent was entitled to recover LD without the necessity of proving actual loss.

[9] C.A. No. 6834/2021
[10] (2003) 5 SCC 705

(g) The learned Tribunal rejected the Claimant's contention that LD could not be imposed without proof of actual loss. It was observed that the IRS Conditions of Contract explicitly characterize LD as agreed compensation and not as a penalty. In such circumstances, once the parties have mutually agreed upon a pre-estimated measure of damages, proof of actual loss is not a prerequisite for recovery.

(h) The Respondent relied on various judicial precedents to substantiate the enforceability of LD clauses, emphasizing that pre-estimated damages agreed between the parties are legally binding. As per the learned Tribunal, these authorities also reinforce the principle that, in the event of breach, the aggrieved party is entitled to reasonable compensation under Sections 55, 73, and 74 of the Contract Act, particularly where such compensation has been contractually predetermined.

(i) In culmination of its analysis, the learned Tribunal concluded that the contractual terms governing LD were clear, unambiguous, and binding on the parties. There was no waiver of LD at any stage, and the extensions granted did not alter the essence of the contract. Consequently, the imposition and recovery of LD by the Respondent were held to be valid, lawful, and in strict conformity with both the contractual provisions and the applicable legal framework.

32. It is thus evident that the learned Arbitral Tribunal has not proceeded in a cursory or mechanical manner; rather, it has undertaken a comprehensive and reasoned evaluation of the contractual stipulations, the sequence of modification advices, and the conduct of the parties in the performance of the contract. The finding

that the imposition of LD was in accordance with the agreed terms, and that time continued to remain the essence of the contract, emerges as a plausible and well-reasoned view based on the material available on record.

33. In this context, it is apposite to bear in mind the limited scope of interference under Section 34 of the A&C Act. It is well settled that this Court does not sit in appeal over the findings of an Arbitral Tribunal and cannot reappreciate evidence or substitute its own interpretation merely because another view is possible. Interference is warranted only where the Award is vitiated by patent illegality, perversity, or is in conflict with the fundamental policy of Indian law.

34. In the present case, no such infirmity is discernible; nor has the learned counsel for the Petitioner been able to demonstrate any such ground. Accordingly, this Court is of the considered opinion that the view taken by the learned Arbitral Tribunal is a reasonable and plausible one, based on a correct appreciation of the contractual provisions and the governing legal principles.

35. In view of the foregoing discussion, this Court finds no merit in the challenge raised in the present Petition to the Impugned Award dated 14.11.2023. The said Award does not suffer from any illegality or perversity warranting interference under Section 34 of the A&C Act and is, accordingly, upheld.

36. The present Petition, along with pending application(s), is accordingly dismissed in the aforesaid terms.

37. No Order as to costs.

HARISH VAIDYANATHAN SHANKAR, J.

APRIL 09, 2026/nd/kr