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

% ***Judgment Reserved on: 26th May, 2026***
Judgment pronounced on: 15th July, 2026

\+ **O.M.P. (COMM) 316/2019, I.A. 10900/2019, I.A. 6428/2020, I.A.15118/2021, I.A. 15154/2021, I.A. 19429/2022, I.A. 30713/2024 & I.A. 30714/2024**

INDIAN OIL CORPORATION LIMITED .....Petitioner

Through: Mr. Rajeev Sharma, Senior Advocate with Mr. Himanshu Gulliya, Ms. Arunima Singh & Mr. Nishant Kandpal, Advocates.

versus

TOYO ENGINEERING CORPORATION & ANR. .....Respondents

Through: Mr. Sudipto Sarkar, Senior Advocate, Mr. Dayan Krishnan, Senior Advocate, Mr. Rajshekhar Rao, Senior Advocate, along with Mr. Susmit Pushkar, Mr. Sudip Mullick, Mr. Anchit Oswal and Mr. Gaurav Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') seeking setting aside of the award dated 11th March, 2019 passed by the Arbitral Tribunal ('Impugned Award').

2. Indian Oil Corporation Ltd. (respondent/counter-claimant in the arbitration proceedings) shall hereinafter be referred to as the petitioner, and the consortium of the respondent no.1/Toyo Engineering Corporation and the respondent no.2/Larsen & Toubro Ltd. (claimants in the arbitral proceedings) shall hereinafter be referred to as the respondent consortium.

FACTUAL BACKGROUND

3. The genesis of the present dispute lies in a contract between the parties in respect of the petitioner's Naphtha Cracker Project at Panipat, Haryana (hereinafter 'Panipat Naphtha Cracker Project' or 'PNCP'). The petitioner appointed Engineers India Limited (hereinafter 'EIL') as the Engineer-in-Charge/Project Management Consultant for PNCP.

4. PNCP was to be facilitated by the engagement of 17 contractors for Engineering, Procurement, Construction and Commissioning (hereinafter 'EPCC'). In response to the tender floated by EIL for one such EPCC contract, being EPCC-1, the respondents no.1 and 2 formed a consortium to jointly participate in the pre-qualification for the project and submitted their bid dated 24th August, 2005 for the project. Pursuant to detailed negotiations, the respondent consortium submitted its final offer *vide* letter dated 10th May, 2006.

5. The contract was awarded to the respondent consortium *vide* communication dated 15th May, 2006 followed by a Detailed Letter of Acceptance dated 19th May, 2006 (hereinafter 'DLOA'). As per Clause 1 of the DLOA, the lumpsum price was fixed at USD 78,006,057 + EURO 37,633,184 + YEN 13,870,977,342 + INR 16,640,792,020. As per Clause 5 of the DLOA, the

total time for mechanical completion (hereinafter 'MC') was 36 months plus 2 months grace period, from the effective date of the contract, *i.e.* 25th May, 2006.

6. Thereafter, the parties entered into a contract dated 25th May, 2006 (hereinafter 'Contract'). Clause 9.0.0.0 of the General Conditions of Contract (hereinafter 'GCC') provided for the resolution of disputes under the Contract to be resolved through arbitration.

7. During the execution of the Contract, disputes arose between the parties *inter alia* in relation to delays in completion of the works. Several communications were exchanged between the parties wherein the respondent consortium sought extension of time, while the petitioner maintained that such requests were premature as MC had not yet been achieved. Ultimately, the respondent consortium achieved MC on 28th February, 2010, following which the petitioner issued the Commissioning Certificate on 5th August, 2010.

8. *Vide* letter dated 2nd April, 2012, EIL informed the respondent consortium about the petitioner's decision to grant of extension of time for EPCC-1 up to 28th February, 2010, subject to a 10% price reduction on the contract value.

9. Aggrieved by various deductions of amounts made by the petitioner from the final bills of the respondent consortium, the respondent consortium invoked arbitration and nominated its arbitrator. In response thereto, the petitioner nominated its arbitrator. The two arbitrators thereafter appointed a Presiding Arbitrator, and the Arbitral Tribunal stood constituted on 19th December, 2014.

PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

10. The respondent consortium made the following claims in their Statement of Claim filed before the Arbitral Tribunal on 16th July, 2015:

i. Price Adjustment: Amounts recovered by the petitioner towards price adjustment on account of delay;

ii. PGTR/Excess Steam Consumption: Amounts recovered towards excess utility consumption beyond guaranteed figures during the performance guarantee test runs (hereinafter 'PGTR') of the plant, which were conducted to verify whether the consumption of high-pressure steam, cooling water and electrical power remained within the guaranteed consumption limits under the contract;

iii. Miscellaneous Recoveries: Various recoveries effected by the petitioner;

iv. Changes/Deviations: Amounts withheld from the Final Bill on account of changes/deviations during execution from the original requirements;

v. Interest at 18% p.a.; and

vi. Costs.

11. The amounts claimed by the respondent no.1 were as follows:

Dispute Item		JPY	US$	Euro	INR
a)	Price Adjustment	1,340,953,953	5,548,277		1,077,028,553
b)	PGTR	258,705,383	838,080		322,991,024
c)	Miscellaneous recoveries	245,359,266	1,393,728		206,832,042
d)	Changes/Deviations	286,825,162	2,946,057	652,981	871,187,900

e)	Interest for (a), (b), (c) and (d)	18% per annum from due date till realization
f)	Costs	

12. The amounts claimed by the respondent no.2 were as follows:

	Dispute Item	JPY	US$	Euro	INR
a)	Price Adjustment	-	-	-	914,274,847
b)	PGTR	-	-	-	-
c)	Miscellaneous recoveries	-	-	-	52,948,032
d)	Changes/Deviations	-	-	-	
e)	Interest for (a), (b), (c) and (d)	18% per annum from due date till realization			
f)	Costs				

13. The petitioner challenged the arbitrability of the claims raised by the respondent consortium and accordingly filed an application under Section 16 of the Act. The Arbitral Tribunal *vide* order dated 04th May, 2016, dismissed the said application, while holding that the jurisdictional objections shall be considered along with the merits.

14. The petitioner filed its Statement of Defence and Counterclaim on 31st July, 2015, making the following counterclaims:

i. 15% interest on the amounts recoverable towards price discount;
ii. Costs; and
iii. Interest upon (i) and (ii), if any.

15. On 6th November, 2017 the Arbitral Tribunal formulated the following issues for the adjudication of the dispute:

> ***"ISSUE NO.1:***
> ***JURISDICTION***
> *1. Whether the disputes between the Parties are arbitrable and whether the Arbitral Tribunal has jurisdiction to adjudicate on the same.*
>
> ***ISSUE NO.2:***
> ***DELAY AND PRICE ADJUSTMENTS***
> *2.1. Did the Claimants achieve mechanical completion.*
> *2.2 Was the said completion prolonged beyond the original agreed time/stipulated period.*
> *2.3 Were the Claimants ready to receive the steam in terms of the Schedule provided in or related to the Contract.*
> *2.4 If in fact completion was prolonged, were the Claimants entitled to an extension of time and was an extension of time granted and if so, for what period.*
> *2.5 Was there acceptance of delivery of the plant and if so on what terms, if any.*
> *2.6 Is Clause 4.4.0.0 relating to Price Adjustment, invalid and unenforceable.*
> *2.7 In any event, is the Respondent estopped or precluded from imposing the Price Adjustment provisions.*
> *2.8 If the Price Adjustment provisions are validly imposable and imposed, what is the quantum of the adjusted amount".*
>
> ***ISSUE NO.3:***
> ***PGTR - STEAM CONSUMPTION GUARANTEE***
> *3.1 Did the Respondent provide the contractual design conditions for carrying out PGTR.*
> *3.2 In any event, did the Claimant duly meet the guaranteed parameters for the steam consumption, and in the context of any agreed correction provisions.*

ISSUE NO.4:
BACK CHARGES
4. Is the Respondent entitled to impose/ in respect of "Back Charges" deductions in respect of each of the matters that deductions were made and in any event were the deductions reasonable.

ISSUE NO.5:
CHANGE ORDERS
5.1 What amount if any, are the Claimants entitled to in respect of the Change Orders.
5.2 Is the Respondent entitled to withhold payments in respect thereof.

ISSUE NO.6:
COUNTERCLAIM OF THE RESPONDENT
6.1. Is the Respondent entitled to its counterclaim.
6.2. If so, the quantum thereof.

ISSUE NO.7:
INTEREST AND COSTS
7.1 Is interest to be ordered in respect of any amount awarded and if so, the rate and period.
7.2. If costs are ordered, the quantum thereof."

16. The Arbitral Tribunal passed the Impugned Award dated 11th March, 2019, whereby claims (a) and (b), as set out in the table above, being the claims for Price Adjustment and Excess Steam Consumption respectively, were fully allowed, whereas claims (c) and (d), being the claims for Miscellaneous Recoveries and Changes/Deviations respectively, were partly allowed. In addition, the Tribunal also awarded interest and costs in favor of the respondent consortium. One of the members of the Arbitral Tribunal gave a partially dissenting award on the Issues No.1 and 2 above, while concurring with the ultimate findings arrived at by the majority members of the Arbitral Tribunal.

PROCEEDINGS BEFORE THIS COURT

17. *Vide* order dated 9th August, 2019, this Court granted a stay on the enforcement of the Impugned Award subject to the petitioner paying a sum of Rs. 125 crores to the respondents. By a subsequent order dated 23rd January, 2020, the amount of Rs. 125 crores was directed to be deposited with the Registry of this Court and the respondents were permitted to withdraw the said amount upon furnishing of a bank guarantee.

18. I.A. 1296/2020 was filed on behalf of the respondents for modification of the order dated 9th August, 2019 passed by this Court and further seeking a full deposit of the arbitral amount. The said application was dismissed *vide* judgement dated 6th March, 2020.

19. The orders dated 9th August, 2019 and 6th March, 2020 were challenged by the respondent consortium before the Supreme Court by way of Civil Appeal Nos. 4549-4550 of 2019. *Vide* order dated 2nd August 2021, the Supreme Court set aside the aforesaid orders passed by this Court and directed the petitioner to deposit Rs. 662 crores, *i.e.* 100% of the awarded amount, before this Court. The entire amount deposited by the petitioner has been released to the respondents upon the said respondents furnishing bank guarantees in terms of the orders passed by this Court on 10th August, 2020, 23rd September, 2020, and 22nd November, 2021. The said bank guarantees have been duly extended from time to time and continue to survive.

20. Oral submissions were heard between 10th March, 2025, and 22nd April, 2026. Post conclusion of oral submissions, the judgment was reserved on 26th

May, 2026, and written submissions on behalf of both parties were filed on 29th May, 2026. To be noted, in the oral as well as written submissions, the petitioner confined its challenge to the findings of the Arbitral Tribunal on issues no.1 (jurisdiction) and 2 (delay and price adjustment).

SCOPE OF INTERFERENCE UNDER SECTION 34 OF THE ACT

21. At the outset, it is relevant to note that the challenge in the present petition is in relation to an award arising out of an 'international commercial arbitration' as defined in Section 2(1)(f) of the Act, in view of the fact that the respondent no.1 is an entity incorporated overseas. Consequently, the ground of patent illegality under Section 34(2A) of the Act is not available as a ground of challenge.

22. In the present case, the main ground of challenge is under Section 34(2)(b)(ii) of the Act. Section 34(2)(b)(ii) of the Act, along with the Explanations to the same, is reproduced below:

> *"(2) An arbitral award may be set aside by the Court **only if**—*
> *(a)…*
> *(b) the Court finds that—*
> *(i)…*
> *(ii) the arbitral award is in conflict with the **public policy** of India.*
>
> *Explanation 1.—For the avoidance of any doubt, it is clarified that an 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**.*

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the ***fundamental policy of Indian law*** ***shall not entail a review on the merits of the dispute****.]"*

(emphasis supplied)

23. The scope of interference under Section 34 of the Act came before consideration of the Supreme Court in ***Associate Builders* v. *Delhi Development Authority***[1]**.** The relevant observations with regard to fundamental policy of Indian law, justice and morality are set out below:

*"**Fundamental Policy of Indian Law***
***27.** Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.*
*****
33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus 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 this score *[Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: "General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to*

[1](2015) 3 SCC 49.

hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong".It is very important to bear this in mind when awards of lay arbitrators are challenged.] ***Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts****…*

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Justice

36. *The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law.* ***An award can be said to be against justice only when it shocks the conscience of the court****. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".*

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Morality

39. *This Court has confined morality to sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution.* ***"Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day****.* ***However, interference on this ground would also be only if something shocks the court's conscience****.*

****

42.1. *(a)* ***A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that <u>such illegality must go to the root of the matter and cannot be of a trivial nature</u>****…"*

(emphasis supplied)

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24. The above-said findings in ***Associate Builders*** (supra) were reaffirmed by the Supreme Court in ***Ssangyong Engineering and Construction Company Limited* v. *National Highways Authority of India (NHAI)***[2], wherein the Supreme Court was dealing with the grounds of challenge to an award arising out of an international commercial arbitration. The relevant observations of the Supreme Court in ***Ssanyong*** (supra) are set out below:

> *"**34.** What is clear, therefore, is that **the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders** [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, **as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment.** However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .*
>
> ***35.** It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. **Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice"**. This again would be in line with paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015)*

[2](2019) 15 SCC 131.

3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

***36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders** [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.*
***39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award.** Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.*

…

***69.** We therefore hold, following the aforesaid authorities, **that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above**. **If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act**. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to*

> *arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal"*
>
> (emphasis supplied)

25. The legal position emerging from the aforesaid decisions is that "public policy of India" is to be construed narrowly, in line with the principles laid down in ***Renusagar Power* v. *General Electric***[3]. The Supreme Court has consistently held that the ground of "public policy of Indian law" does not permit a review of the merits of the dispute. Proceedings under Section 34 of the Act do not constitute an appeal against the arbitral award. Consequently, courts cannot reappreciate evidence or substitute their own view for that of an arbitral tribunal. Mere contravention of substantive law of India, an erroneous interpretation of contractual provisions, or even a finding that the tribunal has acted beyond the terms of the contract would not, by themselves, furnish grounds for interference. The award must be shown to be patently illegal to the fundamental policy of Indian law or the public policy of India, or so perverse that it shocks the conscience of the court or is contrary to the most basic notions of justice and morality. Pertinently, if an arbitrator decides issues beyond the scope of the contract, the same amounts to a jurisdictional error that can be challenged on the ground of patent illegality. However, this ground is not available in the case of awards arising from international commercial arbitrations.

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[3] 1994 Supp (1) SCC 644.

26. Next, a reference may also be made to the judgment of the Division Bench of this Court in ***Municipal Corporation of Delhi* v. *IJM Corporation Berhad***[4]. The challenge here was also in the context of an international commercial arbitration. The Division Bench dismissed the petition, making the following observations:

> "*23. **Conflict with the fundamental policy of Indian law does not refer to violation of any statute or misconstruction of any clause of a contract. The fundamental policy of law is a substratal policy on which the edifice of law is founded. It is the basic legal values that instruct laws in India**. Thus, an arbitral award would fall foul of the fundamental policy of India if it offends the basic policy underlying Indian law.*
>
> ***
>
> *27. It is clear that in the present case, MCD's challenge is based on the interpretation of contractual clauses. This is not a ground that falls within Section 34(2)(b)(ii) of the A&C Act.*
>
> *28. It is also relevant to refer to Explanation 2 to Section 34(2)(b) of the A&C Act, which amply clarifies that the test whether there is any contravention to the fundamental policy of Indian law would not entail a review on the merits of the dispute. In the present case, this is precisely what MCD invites the Court to do. It seeks a judicial review of the Arbitral Tribunal's interpretation of terms of the Agreement, on merits.*
>
> ***
>
> *30. A dispute regarding the interpretation of a contract falls within the jurisdiction of the Arbitral Tribunal and unless the interpretation is not a plausible one and amounts to rewriting the bargain between the parties, the same would not warrant any interference under Section 34 of the A&C Act. In Assam SEB v. Buildworth (P.) Ltd., the Supreme Court had observed that "**matters relating to the construction of a contract lie within the province of the Arbitral Tribunal" and are not amenable to review on merits unless, the interpretation is not a possible one**."*

(emphasis supplied)

[4]2024 SCC OnLine Del 3597.

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27. With this background, I shall now proceed to apply the aforesaid principles in the facts and circumstances of the present case to consider the challenges raised in the present petition.

<u>ISSUE NO. 1: DELAY AND PRICE ADJUSTMENT</u>

<u>Submissions on behalf of the petitioner</u>

28. The 10% price discount clause was the result of commercial negotiations between the parties, and in exchange for the same, the respondent consortium had proposed higher consideration and enhancement in the time for completion of the contract, which was agreed to by the petitioner.

29. In terms of Clause 4.5.0.0 of the GCC, the discount provision was not to be construed as a penalty clause under Section 74, Indian Contract Act, 1872 (hereinafter 'ICA'). The Arbitral Tribunal, by holding that the discount clause is not enforceable, has in effect rewritten the contract, resulting in unjust enrichment of Rs.89.05 crores to the respondent consortium without it being bound to perform its reciprocal obligations of price discount. Reliance in this regard is placed on ***IOCL* v. *Fiberfill Engineers***[5] and ***Man Industries* v. *GAIL***[6]**.**

30. The finding of the Arbitral Tribunal that the price discount provision is a penalty under Section 74 ICA, in the absence of any finding that the price discount was unconscionable, extravagant or unfair, in the context of the specific transaction at hand, is contrary to Indian Law.

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[5](2025) 316 DLT 172.

[6]Judgment dated 25th March, 2026, in O.M.P. (COMM) 191/2019.

31. The Arbitral Tribunal failed to adjudicate on each element of delay and whether the same was attributable to the petitioner or the respondent consortium. Despite Issue No. 2.3 having been framed in this regard, no specific finding was given by the Arbitral Tribunal on the said issue. In view of the fact that the delay in achieving MC was the crux of the dispute between the parties, the said non-adjudication goes to the root of the matter.

32. The postponement of the starting date for the calculation of price discount under Clause 4.4.2.1 of the GCC was permissible only where extension of time was granted "*with a view*" to such extension resulting in an equivalent extension in the starting date of price discount. The Arbitral Tribunal erroneously proceeded on the basis that every extension of time would automatically shift the starting date for calculation of discount, despite the extension itself being conditional upon levy of price discount.

33. The effect of the price adjustment clause made it evident that the delay was not for reasons contemplated under Clause 4.3.6.0. Reliance in this regard is placed on the judgment dated 1st June, 2018, passed by a Coordinate Bench of this Court in OMP (COMM) 366/2017 titled "***Indian Oil Corporation Ltd.* v. *Larsen & Toubro Ltd.*"** (hereinafter '***IOCL* v. *L&T***'), which was a petition filed under Section 34 of the Act in respect of an interlinked EPCC contract for PNCP, being EPCC-4. In the said judgment, the Court rejected the interpretation of an identical clause, as is being canvassed by the respondent consortium in the present petition. The Arbitral Tribunal has effectively rewritten the contract and

consequently, the Award is liable to be set aside under Section 34(2)(b)(ii) of the Act read with Explanation (1) (ii) and (iii).

34. There was no delay in the supply of steam from the petitioner to the respondent consortium. The nature of the transaction required the steam header to be put in place by the respondent consortium in order for steam to be provided. Hence, the respondent consortium could not have insisted on the supply of steam until the steam header was in place. Steam was provided to the respondent consortium on 8th August, 2009, shortly after installation of the steam header in the first week of August, and there is material on record to show that the respondent consortium was not ready to receive the steam prior to 7th August, 2009.

<u>Submissions on behalf of the respondent consortium</u>

35. The primary finding of the Arbitral Tribunal was that once extension of time had been granted, and there was no material on record to suggest that such extension was granted for reasons *dehors* Clause 4.3.6.0, *i.e.* for reasons otherwise than the delay being justified, it necessarily followed that EIL and/or the petitioner was satisfied that the delay was justified.

36. In view of the primary finding returned by the Arbitral Tribunal, the Impugned Award cannot be assailed solely on the basis of its secondary finding regarding the applicability of Section 74 ICA to the price discount clause, *i.e.* Clause 4.4.0.0 of the GCC.

37. The issue concerning readiness to receive steam stood subsumed within the larger issue of delay analysis undertaken by the petitioner itself. The petitioner, despite being in possession of the complete delay analysis concerning all interlinked EPCC packages, failed to produce the same before the Arbitral Tribunal. In the absence of such material, the Arbitral Tribunal rightly proceeded on the basis of the petitioner's own decision to grant extension of time up to 28th February 2010. No contemporaneous communication existed demonstrating that the petitioner was ready to supply steam prior to 10th August 2009. In the proceedings concerning EPCC-4, the delay in supply of steam and related infrastructure was held attributable to the petitioner.

Analysis

Extension of Time and Effect on Price Discount

38. As per the terms of the Contract, the period for MC was 36 months, with 2 months grace period, from the effective date of the Contract, *i.e.* 25th May, 2006. The Contract contains two clauses that provide for the extension of time for MC, *i.e.* Clause 4.3.5.0 and Clause 4.3.6.0.

39. Clause 4.3.5.0 of the GCC provides for an extension of time for MC upon the request of the Contractor (respondent consortium herein) at the discretion of the Engineer-in-Charge (EIL herein). Similarly, the date for completion of the contract could also be extended in terms of Clause 4.3.6.0 at the discretion of the Owner (petitioner herein). Clause 4.3.6.0, which is the relevant clause for the purposes of the present adjudication, is set out below:-

"*4.3.6.0 Notwithstanding the provisions of clause 4.3.5.0 hereof,* ***the OWNER may at any time after final completion of the Unit or works in all respects of its own initiative consider a request for extension of time made*** *by the CONTRACTOR to the Engineer-in-Charge under Clause 4.3.5.0or* ***at the request of the CONTRACTOR*** *made by way of appeal either against the decision of the Engineer-in-Charge taken under clause 4.3.5.0 or against the Engineer-in-Charge's failure to take a decision under the said clause*, ***If satisfied of the existence of any ground(s) justifying the delay, extend the date for completion of the work*** *or any item or operation thereof for such period(s) as the OWNER may consider necessary, and the decision of OWNER as to the existence or otherwise of any grounds justifying the extension and as to the period(s) of extension necessary shall be final and binding upon the CONTRACTOR..*"

(emphasis supplied)

40. A reading of Clause 4.3.6.0 reveals that an extension for completion of the work could be granted upon the satisfaction of the Owner (petitioner herein) of grounds justifying the delay. Hence, the sole discretion with regard to grounds justifying the delay was with the petitioner and the decision of the petitioner was to be binding on the Contractor (respondent consortium herein). At this stage, it is also relevant to refer to Clause 4.4.0.0 of the GCC, which provides for price adjustment. The relevant extracts of Clause 4.4.0.0 are set out below:

"*4.4.0.0* ***PRICE ADJUSTMENT FOR SLIPPAGE IN COMPLETION***
4.4.1.0 The Lumpsum Price specified in the Contract is based (i) On the Mechanical Completion of the Unit(s) by the CONTRACTOR; and (in) On Mechanical Completion of the Unit[s) within the time for Mechanical Completion of the Unit(s) specified in the Time Schedule. ***The Lumpsum Price shall be subject to adjustment by way of discount as hereinafter specified, if the Unit(s) is/are not mechanically completed by the CONTRACTOR or if the Unit(s) is/are mechanically completed subsequent to the date of Mechanical Completion specified in the Time Schedule****.*

> *4.4.2.0* ***If Mechanical Completion of the Unit(s) is/are not achieved by thedate of Mechanical Completion of the Unit(s) specified in the Time Schedule*** *or if any works for which a separate Progress Schedule has been established is/are not achieved by the date of completion thereof specified in the relevant Progress Schedule (each of the said date(s) is hereinafter referred to as the "starting dale for discount calculation"),* ***the OWNER shall be entitled to a discount in the Lumpsum Price in a sum equivalent to the Lumpsum Price specified below for each week or part thereof that the work remains incomplete beyond the starting date for discount calculation****, namely….*
>
> *4.4.2.1* ***The starting date for discount calculation shall be subject to variation upon extension of the date for Mechanical Completion of the Unit(s) or final competition of the works as the case may be*** *by the Engineer-in-Charge under Clause 4.3.5.0 or* ***by the OWNER under Clause 4.3.6.0, with a view that upon any such extension there shall be an equivalent extension in the starting date for discount calculation under Clause 4.4.2.0 hereof****"*
>
> (emphasis supplied)

41. Clause 4.4.1.0 provides for price adjustment by way of discount if MC is not achieved in accordance with the specified time schedule. Clause 4.4.2.0 provides for the manner of calculation of price adjustment. Clause 4.4.2.1 is in the nature of an exception to Clauses 4.4.1.0 and 4.4.2.0. Once extension of time is granted under Clause 4.3.5.0 or 4.3.6.0, Clause 4.4.2.1 provides that there will be an equivalent shift in the starting date in terms of which price discount is to be calculated under Clause 4.4.2.0.

42. During the course of execution of the contract, the respondent consortium apprised the petitioner of delays in completion of the works attributable to factors beyond its control and sought extension of time. The petitioner, however, declined to consider the request at that stage, taking the stand that it was not feasible to assess the consequences of the delay until completion of the works

and the request for extension was therefore premature (Ref. communications dated 1st October 2009 and 23rd December 2009).

43. It is not disputed that MC was achieved on 28th February 2010. Almost two years later, EIL *vide* letter dated 2nd April, 2012, informed the respondent consortium that the petitioner has granted extension of time up to 28th February, 2010. However, the extension of time was granted with a condition of price reduction of 10% of the contract value as per Clause 4.4.0.0. The relevant extracts from the said letter are set out below:-

> "*As advised by IOCL, the time extension of EPCC-1 has been granted by competent authority upto 28.02.2010 with price reduction of 10% of contract value as per G.C.C. clause no. 4.4.0.0.*"

44. Placing reliance on Clause 4.4.2.0, read with Clause 4.4.2.1, the Arbitral Tribunal held that on account of extension of time till 20th February, 2010, the starting date for purposes of calculation of discount also stood advanced to 20th February, 2010 and hence, the petitioner was not entitled to any price discount. The relevant findings of the Arbitral Tribunal are set out below:-

> *"92. It is quite clear (we provide some contextual emphasis) that in respect of an application for EOT by the Claimants, what EIL could do was to extend the time for completion and what the Respondent could also do and importantly did do, was to extend the time for completion of the entire works to 28 February 2010.* ***In the absence of evidence or at least a contemporaneous statement of EIL or the Owner, that the EOT was granted for reasons other than set out in Clause 4.3.6.0 (there was no such evidence or statement), the Tribunal has to assume and does assume, that EIL and/or the Owner, was satisfied that the delay was justified.***
> *93. Having concluded that an extension of time was granted, we turn to the effect of that extension upon the Owner's right to a discount for delay under Clause 4.4.2.0 (see paragraph 68.2 hereof). As has been noted, that*

> *paragraph has to be read in accordance with Clause 4.4.2.1 (see paragraph 68.3 hereof). That provides for the starting point for discount calculation to be varied upon the grant of an EOT.*
> *94. In our view, it follows and we find that the starting date for the discount calculation was, by reason of the EOT, advanced to 28 February, 2010.*
> *95.**It follows that as EOT in respect of the entire works was granted up to 28 February 2010 which meant that MC was to be effected by 28 February 2010, and as the Respondent has accepted that MC was achieved on 28 February 2010, the starting date for discount calculation has to be from the day immediately after 28 February 2010.***
> *96. **Accordingly, we have to and conclude, and it is our finding, that as EOT was granted up to 28 February 2010 and MC was achieved on 28 February 2010, in effect there was no delay and accordingly the Owner Respondent was not entitled to any Clause 4.4.2.0 discount, or any other discount, of the lumpsum price.***
> *97.It follows and we hold that the purported imposition of the 10% discount for delay, when in fact in effect there was no delay, was wrong and should be set aside."*
>
> (emphasis supplied)

45. Before this Court, it has been contended on behalf of the petitioner that the Arbitral Tribunal has ignored the second part of the letter dated 2nd April, 2012, to the effect that the petitioner granted extension subject to price reduction. It is contended that Clause 4.4.2.1 of the GCC would be applicable only if the extension of time was given unconditionally, and in the present case, since the extension of time was conditional, *i.e.* coupled with a price discount clause, the benefit of Clause 4.4.2.1 could not be given to the respondent consortium. The petitioner places reliance on the phrase "*with a view*" in Clause 4.4.2.1 to contend that Clause 4.4.2.1 is conditional in nature.

Signature Not Verified
Signed By:VIVEK MISHRA
Signing Date:15.07.2026 13:28:32

46. To be noted, the Arbitral Tribunal has specifically observed that the petitioner did not advance any submissions in respect of Clause 4.4.2.1. In this regard, paragraphs 84 and 85 of the Impugned Award are set out below:

> *"84. Startlingly, the Respondent did not in its Written Closing Submissions, even touch on the Clause 4.4.2.1 G.C.C. aspect of the Claimants' contention in respect of Price Discount and Adjustment, that upon any extension of the date for MC, there shall be an equivalent extension in the starting date for discount calculation.*
> *85. It is also to be noted that in summarizing the various aspects of the Claimants' claim on Price Discount at paragraph 8 of the Respondent's Final Submissions which were drafted and submitted well after the Claimants' Closing Written Submissions, the contention of the Claimants based on invoking Cause 4.4.2.1 was again ignored."*

47. Evidently, this argument is being raised for the first time before this Court in the present proceedings under Section 34 of the Act, which is impermissible. Even otherwise, I am unable to accept this submission. The phrase "*with a view*" used in Clause 4.4.2.1 has been used to highlight the effect of the extension, *i.e.* the time period by which the starting date for discount calculation would be extended. Clause 4.4.2.1 does not provide that extension of time has to be unconditional. Even if the extension is granted by the petitioner subject to price reduction, it would not have any bearing on the shifting of the starting date as stipulated in Clause 4.4.2.1. Therefore, the contention of the petitioner that the extension of time was granted with a condition of price discount and hence not covered under Clause 4.4.2.1, cannot be accepted.

48. On the aspect of delay, the petitioner in its reply to the claim statement before the Arbitral Tribunal, took a stand that amounts towards price discount

were lawfully deducted by the petitioner after a thorough delay analysis. Between 2009 and 2010, there was no allegation of any delay. It is only in the communication sent by EIL to the respondent consortium on 17th April, 2012, two years after the MC was achieved, it was communicated that a 10% price discount for delay has been claimed on account of analysis of the delay by EIL and the petitioner. Pertinently, the delay analysis which the petitioner claims to have conducted was never produced before the Arbitral Tribunal. The relevant observations of the Arbitral Tribunal in this regard are set out below:

> *"67. However, if in fact EIL or the Respondent had carried out a delay analysis, such analysis, according to the Claimants, and without challenge, was not disclosed to the Claimants, and certainly was not disclosed or produced in the arbitration."*

49. In the communication dated 2nd April, 2012, there is no explanation given as to why the extension has been given with price reduction. Even in the subsequent communication of 17th April, 2012, even though the petitioner has alleged that there is a delay of 219 days in achieving MC, no delay analysis has been provided. In the absence of any delay analysis provided by the petitioner, the Arbitral Tribunal has correctly come to the conclusion that once the petitioner has thought it fit to grant extension of time, it has to be taken that the petitioner is satisfied that the delay is justified in terms of Clause 4.3.6.0. There are no other grounds for extension of time provided in Clause 4.3.6.0 other than delay being justified. The petitioner has not drawn the attention of the Court to any other clause in the Contract in terms of which the petitioner could grant extension of time to the respondent consortium.

50. The view taken by the Arbitral Tribunal as set out in the paragraphs hereinabove is clearly a plausible view and cannot be subject matter of interference under Section 34 of the Act.

51. It is a settled position of law that the interpretation placed by the Arbitral Tribunal on various clauses of the contract is final and cannot be interfered with under Section 34 of the Act. Reference in this regard may be made to ***Ssangyong*** (supra) and ***Municipal Corporation of Delhi* v. *IJM Corporation Berhad*** (supra).

52. In support of its contention that the petitioner was entitled to grant an extension of time with price discount, as was communicated *vide* letter dated 2nd April, 2012, the petitioner places reliance on the judgment of this Court in ***IOCL* v. *L&T*** (supra). This judgment was in the context of a petition filed by the petitioner herein (IOCL) under Section 34 of the Act in respect of EPCC-4, a contract also relating to PNCP, challenging an arbitral award wherein the petitioner's claim for price discount on account of delay in completion of the EPCC-4 was held to be unjustified. In the said case also, the petitioner had relied upon a similar communication dated 5th April, 2012, sent by EIL, wherein extension of time for EPCC-4 was granted subject to price reduction of 10%. The EPCC-4 also contained identical Clauses 4.4.0.0 and 4.4.2.1. The relevant observations on which the petitioner places reliance, *i.e.* paragraphs 28 and 29 are set out below:-

> "*28. The Arbitral Tribunal has treated the letter dated 5th April, 2012 as a decision to extend the time for completion of the work and has rejected the arguments of the petitioner that the reference to extension of time in the said letter was merely a misnomer and it was actually a communication of the*

decision to levy price discount. It further held that as the recommendations made by the EIL and the decision taken thereon by the petitioner in its noting dated 26th March, 2012 were not communicated to the respondent, they were ineffective and that once the extension of time was granted, the extended date of completion shall be deemed to be the relative date of completion in the Progress Schedule, and therefore, price discount cannot be applied.

29. In my view, this is a complete mis-reading of the letter dated 5th April, 2012 addressed by EIL to the respondent. The said letter in no ambiguous words states that the competent authority has taken a decision to levy the price discount of 10% on the contract value in terms of clause 4.4.0.0. The said clause is applicable, as noted above, only where the contractor is unable to complete the work within the specified time schedule. Whether the decision to levy price discount on the respondent was justified or not is an issue distinct from stating that the decision of the competent authority was to grant extension of time unconditionally and, therefore, there can be no levy of price discount by the petitioner. Therefore, the finding of the Arbitral Tribunal on this issue cannot be sustained."

53. The Court held the findings of the Arbitral Tribunal to be unsustainable to the extent that once an extension has been granted to the Contractor, the price discount cannot be levied. However, in the same judgment, the Court upheld the view of the Arbitral Tribunal that the respondent therein was entitled to extension of time as the delay was not solely attributable to the respondent. Paragraph 30 of the said judgment is set out below:

*30. **However, the above finding is not sufficient to set aside the Impugned Award as the Impugned Award considers the question whether the respondent would be entitled to an extension of time on its own merit**. Paragraphs 338 and 339 of the Impugned Award record such decision of the Arbitral Tribunal and are reproduced hereinunder:-*

"338. In light of the above discussion, the Tribunal holds that although there was delay on the part of L&T in performance of its

> *obligations under the Contract, IOCL did contribute to the extra time taken in completion of the Project and is responsible for delay in supply of ECS data as well as supply of fuels.* ***The Tribunal further holds that both parties contributed to delay and delay is not solely attributable to the Claimant. L&T entitled for extension of time till the actual dates of commissioning of Modules 1 and 2 and for Mechanical Completion of Module 3.***
>
> *339. In this view of the matter, even if it be assumed (although the Tribunal has recorded its finding on Issue No.1 that L&T was granted extension of time upto the actual date of commissioning Module 1 and Module 2 and Mechanical Completion of Module 3 of the CPP) that there was no extension of time granted by IOCL, the Tribunal holds that L&T is entitled to extension of time till the actual dates of commissioning of Modules 1 and 2 and for Mechanical Completion of Module 3. As a result of this finding, Clause 4.3.9.0 comes into operation."*
>
> (emphasis supplied)

54. The petitioner (IOCL) filed an appeal against the aforesaid judgment, being FAO (OS)(COMM) 171/2018, which was dismissed by a Division Bench of this Court on 25th January, 2023.

55. In fact, at the first hearing of the present petition dated 9th August, 2019, the petitioner had placed reliance on the very same findings in the judgment of the Single Judge in ***IOCL v. L&T*** (supra), and accordingly, this Court directed a partial deposit of the awarded amount. The respondent consortium filed an SLP against the order dated 9th August, 2019, wherein the Supreme Court held the findings of the Single Judge in ***IOCL v. L&T*** (supra) to be irrelevant for the purposes of the present case. Based on the above, the Supreme Court set aside the order dated 9th August, 2019, and directed the petitioner to make a full deposit

of the awarded amount. The relevant observations of the Supreme Court are set out below:-

> "*…As a matter of fact, the very matter referred to in the order dated 09.08.2019 and 06.03.2020, namely, O.M.P. (COMM) No. 366/2017 has resulted in a dismissal of a Section 34 petition in an award that was granted out of one of 17 other contracts arising out the same general transaction. Mr. Sharma was at pains to point that the Section 34 petition was dismissed in that matter on completely different grounds.* ***Be that as it may, O.M.P. (COMM) No 366/2017 at the highest, therefore, would be irrelevant*** *This O.M.P. (COMM) No. 366/2017 appears to be the main plank on which an amount of Rs. 125 Crores alone was ordered to be deposited out of an awarded amount of Rs. 662 Crores. Resultantly, we set aside both the orders and require a 100% deposit of the awarded amount to be made within a period of six weeks from today. The appellants may apply to the High Court to withdraw this amount on securit****y****.*"
>
> (emphasis supplied)

56. The finding of the Arbitral Tribunal on the issue of effect of price discount was based on its findings that upon granting extension of time, the petitioner had accepted that the delay was justified and, consequently, the starting date for discount calculation stood correspondingly shifted in terms of Clauses 4.3.6.0 and 4.4.2.1 of the GCC, rendering the levy of price discount inapplicable. The view adopted by the Arbitral Tribunal is a plausible interpretation of the Contract based on the material on record and does not suffer from any patent illegality or perversity so as to warrant interference under Section 34 of the Act.

Delay in supply of steam

57. On the aspect of delay, counsel for the petitioner submitted that there was no delay by the petitioner in supply of steam to the respondent consortium, and

that the delay was on the part of the respondent consortium as it was not ready to receive the steam.

58. *Per contra*, counsel for the respondent consortium pointed out that this submission has not been raised in the present petition under Section 34 of the Act, nor in the opening submissions, and has only been raised in the rejoinder submissions.

59. As per the terms of the Contract, the petitioner was to supply steam to the respondent consortium by 1st February, 2009, however, the same was provided only on 10th August, 2009. Nothing has been placed on record on behalf of the petitioner to show that the petitioner was ready to supply steam to the respondent consortium prior to the said date.

60. It is an admitted position that various contracts with respect to PNCP were interlinked and that the steam to be produced in EPCC-4 was to be utilised for the purposes of EPCC-1. The witness of the petitioner was cross-examined on this aspect, wherein it was admitted that EPCC-4 had to supply some of the utilities for EPCC-1, including steam. The relevant extracts from the said cross-examination are set out below:

> *"Q. Is it correct that EPCC-1 required utilities to be supplied from other EPCC projects?*
>
> *A. Yes, sir.*
>
> *Q. Is it correct that EPCC-4 had to supply utilities to EPCC-1?*
>
> *A. Yes, some of the utilities.*
>
> *Q. What would those utilities be?*
>
> *A. Steams, all sorts of steams, SHP, HP, MP, LP.*

Q. Is it correct that EPCC-5 was also to supply utilities to EPCC-1?

A. EPCC-5, Cooling water, You can say that, because they constructed the cooling tower."

61. What emerges from the above is that if there was any delay in the completion of EPCC-4, it would result in delay in supply of utilities from EPCC-4 to EPCC-1. The factum of delay in completion of EPCC-4 has already been established in terms of the judgment of this Court in ***IOCL* v. *L&T*** (supra), which has been upheld by the Division Bench of this Court *vide* judgment dated 25th January, 2023 in FAO (OS)(COMM) 171/2018.

62. One of the objections taken by the petitioner is that the Arbitral Tribunal failed to adjudicate on each element of delay and whether the same was attributable to the petitioner or the respondent consortium. It is contended that despite framing a specific issue on the attributability of delay, *i.e.* Issue no. 2.3, no finding was returned by the Arbitral Tribunal on the said issue.

63. In this regard, the relevant observations of the Arbitral Tribunal are extracted below:

"In the light of the decision the Tribunal has arrived at on the grant of EOT coinciding with the date of MC, and particularly as the Parties had contractually agreed by Clause 4.3.6.0 that the decision of the owner in that respect is final, there is no call for the Tribunal to consider each alleged item of delay and/or which party was responsible for such delay and the extent of each item of delay."

64. In the overall context of the contract, price discount would be applicable only upon the failure of the respondent consortium to achieve MC in terms of the specified time schedule and was not dependent on individual elements of delay. Since the Arbitral Tribunal held that the overall delay was accepted by the petitioner as being justified by granting an extension in terms of Clause 4.3.6.0 of the GCC, there was no occasion for the Arbitral Tribunal to go into this issue and give individual findings on various elements of delay.

Applicability of Section 74 ICA

65. Next, I will deal with the finding given by the Arbitral Tribunal that the price reduction clause, *i.e.* Clause 4.4.0.0, read with Clauses 4.4.2.0 and 4.4.2.1 of the GCC, is in the nature of a penalty in terms of Section 74 ICA.

66. The Arbitral Tribunal prefaces the aforesaid finding by noting that the arguments raised by the respondent consortium to the effect that the Clause 4.4.0.0, read with Clauses 4.4.2.0 and 4.4.2.1, falls under Section 74 ICA and is in the nature of a penalty, was an argument in the alternative. The Arbitral Tribunal clearly holds that, in light of the findings given by the Arbitral Tribunal in paragraph 97, the Arbitral Tribunal is not required to give a finding on this aspect and that the Arbitral Tribunal is giving these findings out of deference to the submissions made by the parties. Paragraphs 98.1 and 98.2 of the Award, which set out the context of the aforesaid finding, are set out below:

> *"98.1 As a second string to their bow, as an "in-any-event proposition", the Claimants contend that the imposition of Price Adjustment falls within the scope of Section 74 of the Indian Contract Act, 1872 and that failure to meet the Section 74 requirements, is fatal to the Respondent making the 10% deduction.*
>
> *98.2 Although in the light of our decision set out in paragraph 97 hereof, there is not much point in our considering the further contentions of the Parties, out of*

deference to the submissions and arguments of the Parties in respect thereof, we direct our minds to the Section 74 point."

67. Relying on the judgment of the Supreme Court in ***Fateh Chand* v. *Balakrishnan Dass***[7], the Arbitral Tribunal held that the aforesaid clauses are penal clauses in terms of Section 74 ICA. Paragraphs 110 and 113 of the Award are set out below:

> "*110. Guided by Fateh Chand (supra) and other decisions of the Indian Courts including in Punj Lloyd Ltd vs Hindustan Petroleum Corp, [2015] see online Bom 752, (where the price reduction clause of Rupees 1,000.00 per day was held by the High Court, to be in the nature of a penalty), the Tribunal notes and respectfully accepts that the trend in the Indian Courts is to thwart attempts by parties to a contract, to try, by the use of dexterous language, to get round the Section 74 Contracts Act treatment against penalty clauses, and in the context, using a commonsense approach, the Tribunal is satisfied that on the facts of the instant matter, the price reduction clause, Clause 4.4.0.0 read in particular with Clause 4.4.2.0 and 4.4.2.1, is in the context of Section 74 of the Contracts Act, a "stipulation by way of penalty".*
>
> *113. However applying the Judgment in EIL vs Tema India Ltd, 2016 SCC On Line DEL 86 paragraph 21 and the Judgment of Rohinton Fali Nariman J speaking for the Supreme Court in Kailash Nath Associates [2015] 4 SCC 136 (see paragraphs 43.6 and 44 of the report), **we have to and hold, that Section 74 operates to defeat the Respondent's Price Reduction Claim inter alia because the Respondent has failed to prove damage**.*"
>
> (emphasis supplied)

68. Pertinently, one of the Arbitrators, Justice S.B. Sinha (Retd.), in his partially dissenting award, held that the price adjustment clause is not void, however he agreed with the ultimate finding of the Arbitral Tribunal. The

[7] AIR (1963) SC 1405.

relevant extracts from the partially dissenting award of Justice Sinha are set out below:-

> "*2.* ***<u>ISSUE NO.2 – PRICE ADJUSTMENT</u>***
>
> *2.1 The question as to whether the Price Reduction Clause can be held to be a penal clause, depends upon the facts and circumstances of each case as well as the conduct of the parties.*
>
> *2.2 In India, unlike the English law, penalty and estimated damages have been held to be at part.*
>
> *See Fateh Chand v. Balkishan Dass, AIR (1963) SC 1405 followed in Kailash Nath Associates v. DDA (2015) 4 SCC 136.*
>
> *In Construction and Design Services v. Delhi Developmental Authority (2015) 14 SCC 263 only 50% of the penalty imposed in terms of the Contract has been awarded by the Supreme Court of India.*
>
> *2.3* ***Price Adjustment Clause contained in the contract, in my opinion, is not void.***
>
> *2.4 Validity of a Price Adjustment clause inter alia has been upheld in Cavendish Square Holdings BV v. Tala/ El Makdessi [2016] 2 All E.R. 519 (SC), paras 71 to 74)*
>
> *2.5 In a case of this nature, the Price Adjustment clause cannot be said to be penal in nature as is understood in Common Law as it does not disentitle the contractor of money which otherwise would have been due to him totally. It is merely contemplates a reduction in the amount payable to the Contractor in case of delay.*
>
> *2.6 The Claimants have entered into such a contract with their eyes wide open. They have themselves been asking the Respondent not to invoke the Price reduction Clause.*
>
> *2.7* ***I, however, agree with the ultimate finding that in this case Section 74 of the Indian Contract Act shall be attracted in the peculiar facts and circumstances of the case.***"
>
> (emphasis supplied)

69. As noted above, the finding of the Arbitral Tribunal that, in the facts and circumstances of the case, Clauses 4.4.2.0 and 4.4.2.1 of the GCC are hit by Section 74 ICA, is only a finding given in the alternative. The primary finding

of the Arbitral Tribunal is to the effect that delay on the part of the respondent consortium was justified in terms of Clause 4.3.6.0 and hence, the petitioner could not have imposed a price discount (Ref: Paragraph 97 of the Impugned Award). In view of the aforesaid primary finding returned by the Arbitral Tribunal, the Impugned Award cannot be interfered with under Section 34 of the Act solely on the basis of its secondary finding (finding in the alternative) regarding the applicability of Section 74 ICA to the price discount clause, *i.e.* Clause 4.4.0.0 of the GCC. The aforesaid secondary finding would not affect the ultimate outcome of the award. This view also finds support from the partially dissenting award of Justice Sinha.

70. Counsel for the petitioner contends that Clause 4.4.0.0, read with Clauses 4.4.2.0 and 4.4.2.1, providing for price discount cannot be considered to be a penal clause under Section 74 ICA. In this regard the petitioner places reliance on ***IOCL* v. *Fiberfill Engineers***[8]

71. The decision in ***IOCL* v. *Fiberfill Engineers*** (supra), is in the context of an appeal under Section 37 of the Act with respect to a domestic award dealing with a similar price reduction clause. A Division Bench of this Court dismissed the appeal filed by the IOCL, as IOCL had failed to establish loss. In the present case also, the Arbitral Tribunal has held that the petitioner has failed to prove damages (Ref. Para 113 of the Impugned Award set out above).

72. Counsel for the respondent consortium places reliance on the judgement of the Madras High Court in ***Indian Oil Corporation Limited* v. *Fabtech Works***

[8] 2024 SCC OnLine Del 8133.

and Constructions[9] to submit that there is no infirmity in the finding of the Tribunal that Clause 4.4.2.0 and 4.4.2.1 are penal in nature.

73. In ***Indian Oil Corporation Limited*** **v.** ***Fabtech Works and Constructions*** (supra), the Madras High Court held a similar price adjustment clause to be in the nature of a stipulation for compensation on account of breach and, hence, subject to Section 74 ICA. Accordingly, in the absence of proof of loss, it was held that no amount could be awarded to the petitioner by way of price reduction. The relevant findings of the Court are extracted hereunder:

> *"…As stated earlier, Section 74 of the Contract Act does not refer specifically to liquidated damages. On the other hand, it refers to a stipulation by way of compensation. Therefore, Clause 4.4 of the GCC would qualify as a stipulation by way of compensation.* ***Once it qualifies as a stipulation by way of compensation, it became necessary for the Petitioner to prove that loss was incurred as a result of breach,*** *although it may not be necessary to prove the exact quantum of loss, if it is difficult or impossible to prove the same. These are the settled principles as per the decisions of the Hon'ble Supreme Court in Fateh Chand vs. Balkishan Dass, (1964) 1 SCR 515, Maula Bux vs. Union of India, (1969) 2 SCC 554, Oil & Natural Gas Corporation Ltd vs. Saw Pipes Ltd,(2003) 5 SCC 705 and Kailash Nath vs. DDA(the Kailash Nath case)(2015) 4 SCC 136. .....* ***The Petitioner cannot circumvent the legal regime governing the imposition of liquidated damages merely by using the label, price adjustment. Therefore, in the admitted absence of proof of the factum of loss, it would be an injuria sine damnum scenario and the Petitioner is not entitled to compensation by way of price adjustment****. Therefore, I do not find any reason to interfere with the Arbitral Award."*
>
> (emphasis supplied)

74. Therefore, even the secondary finding given by the Arbitral Tribunal with regard to the interpretation of Clauses 4.4.2.0 and 4.4.2.1 of the GCC being penal in terms of Section 74, ICA cannot be said to be unconscionable in terms

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[9] (2020) 1 Mad LJ 52.

of ***Associate Builders*** (supra) and ***Ssanyong*** (supra) so as to warrant interference under Section 34 (2)(b)(ii) of the Act. To be noted, the present award has been rendered in an international commercial arbitration, where the ground of patent illegality is not available as a ground for interference.

ISSUE NO. 2: JURISDICTION

Submissions on behalf of the petitioner

75. The claims raised by the respondent consortium did not satisfy the mandatory preconditions under Clause 9.1.0.0 of the GCC, inasmuch as the claims were neither duly notified under Clause 6.6.1.0, nor included in the final bill. Consequently, the Arbitral Tribunal lacked jurisdiction to adjudicate the said claims. Reliance in this regard is placed on ***Indian Oil Corporation Ltd.* v. *NCC Limited***[10], wherein, while considering an identical arbitration clause, the Court held that claims neither notified nor included in the final bill would not be arbitrable.

76. The Arbitral Tribunal erroneously relied upon Clause 9.4.1.0 of the GCC to hold that the deductions made by the petitioner constituted claims by the petitioner. The said clause applies only where the contractor is a Public Sector Undertaking (hereinafter 'PSU'), whereas the respondents no.1 and 2 herein are not PSUs.

Submissions on behalf of the respondent consortium

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[10] (2023) 2 SCC 539.

77. The claims referred to the Arbitral Tribunal were arbitrable. The said claims were in respect of deductions made by the petitioner consequential to the amounts claimed by the petitioner from the respondent consortium. Accordingly, they fell within the second category of arbitrable disputes contemplated under Clause 9.1.0.0 of the GCC and did not require notification.

78. The interpretation placed by the Arbitral Tribunal on Clause 9.1.0.0 is a plausible interpretation arising from the terms of the contract and cannot be interfered with in proceedings under Section 34 of the Act.

Analysis

79. At the outset, it may be relevant to refer to Clause 9.1.0.0 of the GCC, which is the arbitration clause. Clause 9.1.0.0 is set out below:

> *"9.1.0.0. Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.1.1.0 hereof,* ***any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof****, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.2.0.0 in respect thereof, and* ***any dispute arising out of an amount claimed by the OWNER against the CONTRACTOR shall be referred to the arbitration by an Arbitral Tribunal*** *comprised of 3 (three) arbitrators selected in accordance with the provisions of the Arbitration & Conciliation Act, 1996. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s). The CONTRACTOR shall not, however, be entitled to raise as a setoff, defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.8.3.0 hereof."*
>
> (emphasis supplied)

80. In terms of the aforesaid clause, there are two types of disputes that can be referred to arbitration:

i. Disputes arising out of a notified claim of the contractor included in the final bill of the contractor in terms of Clause 6.6.3.0, and

ii. Disputes arising out of an amount claimed by the owner against the contractor.

81. The Arbitral Tribunal held that the subject disputes fell within the scope of the second part of the arbitration clause, as the petitioner, towards its claims, deducted amounts from the bills raised by the respondent consortium. The relevant findings of the Arbitral Tribunal in this regard in paragraph 45.3 of the Impugned Award are set out below:

> *"45.3 The Tribunal is satisfied that each of the 4A claims are in effect in respect of deductions made by the Respondent consequential to amounts claimed by the Respondent owner against the Claimants. It is the Tribunal finding that each of the 4A claims is a Clause 9.1.0.0 second category claim by the Owner Respondent. Accordingly, it is the Tribunal's finding that the requirement for "notification" in respect of each of the 4A claims, has no relevance and accordingly was not required*"

82. In the opinion of this Court no fault can be found with the aforesaid finding of the Arbitral Tribunal with regard to interpretation of Clause 9.1.0.0 . Merely because the respondent consortium (Contractor) has invoked the arbitration clause, it would not mean that the claims made in the arbitration cannot fall under the second category of Clause 9.1.0.0.

83. To arrive at the aforesaid finding, the Arbitral Tribunal also relied on Clause 9.4.1.0 of the GCC, which is the arbitration clause applicable in respect

of a contractor which is a PSU. The said clause also uses the words '*amounts claimed by the contractor*', followed by an explanation of the same in parenthesis. Clause 9.4.1.0 is set out below:

> *"9.4.1.0.* ***If the CONTRACTOR is a Public Sector Undertaking or Enterprises or is a Government Department****, any dispute or difference between the parties hereto arising out of any notified claim of the CONTRACTOR in terms hereof and/or arising out of* ***any amount claimed by the OWNER*** *(****<u>whether or not the amount claimed by the OWNER or any part thereof shall have been deducted from the Final Bill of the CONTRACTOR or any amount paid by the OWNER to the CONTRACTOR In respect of the work</u>****) which cannot be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government, shall be referred to arbitration of one of the arbitrators to be nominated by Secretary to the Government of India in charge of the Bureau of Public Enterprises. The Arbitration Act, 1996 (26 of 1996) shall not be applicable to the arbitration under this clause the award of the Arbitrator shall be binding up on the parties to the dispute, provided, however, that any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary or Additional Secretary, as the case may be, whose decision on the appeal shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator."*
>
> (emphasis supplied)

84. The words occurring in the parenthesis in Clause 9.4.1.0 make it unambiguous that arbitration could have been invoked in respect of an amount claimed by the Owner (petitioner herein), whether the same has been deducted from the final bill of the Contractor (respondent consortium herein) or not. The relevant findings of the Arbitral Tribunal in this regard are set out below:

> "*43.4 The Tribunal recognises that it is a trite canon of construction of a contract that in construing a term of a contract, reliance may be placed, or guidance sought, on what is set out in other terms of the contract.*
>
> *44. The Tribunal has to and agrees with the Claimants that the words in parenthesis in Clause 9.4.1.0 evidences a recognition that the amounts deducted by the Respondent is pursuant to a claim by it..*"

85. The respondent consortium has correctly placed reliance on the judgment of this Court in ***Shapoorji Pallonji* v. *Ratan India Power***[11], in support of its submission that words, clauses, or a sentence appearing in a parenthesis are generally inserted as an explanation. Paragraph 52 of the said judgment is set out below:

> *"52. It can be discerned from the aforesaid decisions that words, clauses or a sentence appearing in parenthesis are inserted in a passage as an explanation, which is otherwise also, grammatically complete without it. In other words, the purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition or additional piece of information of any sort in a sentence that is logically and grammatically complete without it."*

86. In ***Bank of India* v. *K. Mohandas and Ors.***[12], the Supreme Court held that a contract must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions.

87. Accordingly, the Arbitral Tribunal held that the explanation given in the parenthesis of Clause 9.4.1.0 can be read into Clause 9.1.0.0 and the two clauses of the contract have to be read in a harmonious manner.

[11] 2021 SCC OnLine Del 3688.
[12] (2009) 5 SCC 313.

88. By contrast, Justice S.B. Sinha (Retd.), in his partially dissenting award, held that the respondent consortium was required to notify its claims. However, he held that the said requirement was satisfied in terms of the notice for arbitration issued by the respondent consortium. Hence, he agreed with the ultimate finding that the Arbitral Tribunal had jurisdiction over the subject disputes. The relevant findings from the partially dissenting opinion of Justice Sinha are set out below:-

> "*1.5. The Claimants had to recover the said amount and, thus, were obligated to raise a dispute with regard thereto.* ***The Claimant, therefore was <u>required to and did notify the said claims</u> by seeking recovery of the deducted amount in its Notice for Arbitration, in terms of Section 21 of the Arbitration and Conciliation Act, 1996****…"*
>
> (emphasis supplied)

89. It is a settled position of law that interpretation of contractual clauses falls squarely within the domain of the Arbitral Tribunal. Reference in this regard may be made to ***Ssangyong*** (supra) and ***Municipal Corporation of Delhi*** **v.** ***IJM Corporation Berhad*** (supra).

90. Counsel for the petitioner has placed reliance on ***Indian Oil Corporation Ltd.*** **v.** ***NCC Limited*** (supra). The said judgment arose out of an appeal against an order of the High Court allowing a petition under Section 11 of the Act. Pertinently, the said judgment was rendered in the context of a clause which expressly required deductions from the contractor's bills to be notified, which is not the requirement under the Clause 6.6.1.0 in the present case. Hence, the reliance placed by the petitioner upon the said judgment is misplaced.

91. The finding of the Arbitral Tribunal that the subject disputes fell within the scope of the arbitration agreement, and were hence arbitrable, is based on its interpretation of the Clause 9.1.0.0 of the GCC and the surrounding contractual framework governing the parties. In the opinion of this Court, , the said finding is a plausible construction of the Contract and no grounds have been made out for interference with the same under Section 34 of the Act.

CONCLUSION

92. In view of the foregoing discussion and upon examination of the Impugned Award in light of the scope of jurisdiction available under Section 34 of the Act, this Court finds no grounds warranting interference with the findings returned by the Arbitral Tribunal. The findings of the Arbitral Tribunal on arbitrability of the disputes and on issues concerning delay, extension of time and price adjustment are based on the interpretation of the relevant contractual provisions and appreciation of the evidence led by parties before the Arbitral Tribunal. The petitioner, by way of the present petition, in effect, seeks a re-appreciation of evidence and an alternative interpretation of clauses the Contract, which is beyond the scope of interference under Section 34 of the Act.

93. Accordingly, the present petition is dismissed.

94. The bank guarantees furnished by the respondents shall stand discharged after a period of four (4) weeks from today.

I.A. 30713/2024 & I.A. 19429/2022

95. I.A. 30713/2024 has been filed by the respondents seeking a direction to the petitioner to deposit further amounts towards the principal and interest as per the Impugned Award.

96. I.A. 19429/2022 has been filed by the respondents, seeking reimbursement of amounts towards the sums incurred by the respondent towards the bank guarantees.

97. In view of the order passed above dismissing the petition under Section 34 of the Act, the present applications are disposed of with liberty to the respondents to agitate these issues in the execution proceedings.

AMIT BANSAL
(JUDGE)

JULY 15, 2026
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